IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.397/Bang/2018 : Asst.Year 2010-2011

Mr.Nanjunda Renuka Aradhya # 81, BDA Shopping Complex 2nd Floor, 6th Main, 14th Sector HSR Layout Bengaluru – 560 102. **PAN : ADDPA2975Q**	v.	The Assistant Commissioner of Income-tax, Circle 7(2)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Nitish Ranjan, CA
Respondent by : Smt.Priyadarshini Basaganni, Addl.CIT-DR

Date of Hearing : 26.05.2022		**Date of Pronouncement : 31.05.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 06.11.2017. The relevant assessment year is 2010-2011.

2. Two issues are raised in this appeal –

(i) whether the CIT(A) is justified in confirming the disallowance of Rs.1,75,91,805 on account of non-deduction of TDS on hire charges paid;

(ii) whether the CIT(A) is justified in confirming the disallowance of service tax amounting to Rs.10,82,023 u/s 43B of the I.T.Act, which was not debited to the profit and loss account while computing the income of the assessee.

We shall adjudicate the above issues as under:

Disallowance of Rs.1,75,91,805 for non-deduction of TDS

3. The assessee is an individual engaged in the business of travel agency and car rental services. For the assessment year 2010-2011, the return of income was filed on 14.10.2010 declaring total income of Rs.8,56,261. The return was selected for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of assessment proceedings, the A.O. noted that the assessee had paid hire charges exceeding Rs.50,000 in each case as many as 89 persons amounting to Rs.1,75,91,805. The A.O. held that the assessee was under the obligation to deduct tax at source as per the provisions of section 194C of the I.T.Act while making payment to these parties and having failed to deduct tax at source, the expenditure claimed is to be disallowed in view of the provisions of section 40(a)(ia) of the I.T.Act. The relevant observation of the A.O. reads as follows:-

> *The hire charges paid by the assessee in excess of Rs.50,000/- to each person during the previous year relevant to A. Y. 2010-11 is amounting 10 Rs. 1,75,91,805/-. The assessee stales that lax of Rs.2,95,713/- has been deducted at source and remitted but does not correlate the said lax deducted to any of the individuals to whom hire charges have been paid. The assessee also confirms that none of these persons have PAN and therefore taxes should have been deducted at source at 20% as provided for under the provisions of section 206AA of the Act. Further even the individual ledger account does not indicate any lax deduction at source and the whole of the amount determined as hire charges payable has finally been paid without deduction of tax at source. The assessee has contravened the provisions of lax deduction at source. The amount of Rs. 1,75,91,805/- is disallowed under the provisions of section 40(a)(ia) of the Act.".*

4. Aggrieved, the assessee raised this issue before the first appellate authority. The CIT(A) confirmed the view taken by the A.O. The relevant finding of the CIT(A) reads as follow:-

> *"The appellant has argued that there was no oral or written contract with any of the vehicle owners or drivers and since there was no element of contract, the provision of section 194C(2) are not applicable. There is no dispute that the TDS was not enforced all the payments made. The argument of the Appellant that there is no contract, not even the oral one. does not stand the test of factual truth considering the amount of payment to these parties which ranges from Rs.6,03,610 to Rs.50,267. The AO has also found from the details filed by the assessee that TDS of Rs 7,12,246 was made from hire charges paid but this amount has not been remitted to the government account. Further, the auditor of the appellant has certified in the audit report Form 3CD that Rs 2,95,713 TDS made in the year 2009-10 has not been paid to the central government account. The appellant vide his letter dated 16-11-2012 submitted to the AO has also admitted that TDS of Rs 2,95,713 made during the year could not be remitted to the bank in the absence of PAN. Therefore, contrary to the argument of the appellant now, it is evident that the appellant was fully aware of its obligation to deduct tax on payment of hire charges. But, despite the knowledge of its responsibility, the appellant has failed to comply with the TDS provisions and consequently attracted the mischief of section 40(a)(ia). In the case of Associated Cement Company Lid 201 ITH. 435, Honorable SC has held that 'any work' occurring in section 194C means any work and not a 'works contract'. The CBDT Vide circular No.715, dated 8.8.1995 has also clarified that Sections 194C and 194J refer to any sum paid. Thus as TDS is to be deducted on 'any sum paid'; hence it does not make any difference as to whether the sum is paid as a reimbursement or as a payment for rendering services for establishing TDS liability. Thus reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source.*
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> *In view of the above discussions, the decision of the AO to disallow payment for hire charges by the appellant without deduction of tax by invoking the provisions of section 40(a)(ia) is found to be in accordance with the law and hence, upheld. The ground of appeal raised by the appellant is dismissed."*

5. Aggrieved by the order of the CIT(A), the assessee has raised this issue before the ITAT. The learned AR has filed a paper book comprising of 74 pages enclosing therein the case laws relied on, the financial statement of the assessee for the relevant assessment year, acknowledgement of the Income-tax return filed, etc. The learned AR submitted that on identical facts the Bangalore Bench of the Tribunal in the case of Sri Singonahalli Chikkarevanna Gangadharaiah v. ACIT in ITA No.785/Bang/2018 (order dated 24.02.2020) has restored the matter to the A.O. for *de novo* consideration. It was submitted that a similar view may be taken by the Tribunal in the instant case. Further, the learned AR has filed a petition for admission of additional evidence. The relevant portion of the same reads as follows:-

> *"9. Aggrieved with the same, the Petitioner is now in appeal before the Hon'ble Tribunal and wishes to submit the following documents as additional evidence along with this petition:*
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> *(a) Service Agreements entered between the petitioner and third parties;*
> *(b) Bifurcation of hire charges paid and the Bata charges paid to the drivers;*
> *(c) Vouchers in support of the payments made to the cab drivers.*
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> *10. The Petitioner was unable to produce this evidence before the lower authorities as the petitioner was not advised regarding the submission of evidences before the learned CIT(A).*
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> *11. The petitioner submits that the above documents are crucial for their claim and they were prevented by a reasonable cause from not furnishing the above evidences before the lower authorities.*
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> *Under these circumstances, it is prayed that your learned Bench be pleased to:*

(a) Admit the additional evidence;
(b) Hear and dispose of the appeal in accordance with law and the merits of the case; and
(c) Pass such other order as your learned Bench deems fit and proper."

6. The learned Departmental Representative supported the orders of the Income Tax Authorities.

7. We have heard rival submissions and perused the material on record. The assessee has filed additional evidence, which goes to the root of the issue. For substantial cause and justice, the additional evidence filed is taken on record. Since the additional evidence is taken on record, the matter necessarily needs to be examined by the A.O. Accordingly, the issue is restored to the files of the A.O. The A.O. is directed to examine the additional evidence now produced before the Tribunal and also consider the dictum laid down by the order of the Tribunal in the case of Sri Singonahalli Chikkarevanna Gangadharaiah v. ACIT (supra) and take a decision in accordance with law. It is ordered accordingly.

Disallowance of Rs.10,82,023

8. The Assessing Officer had disallowed a sum of Rs.10,82,023 under the provisions of section 43B of the I.T.Act. The observation of the A.O. while making the disallowance of Rs.10,82,023, reads as follow:-

"In the balance sheet filed for the AY. 2010-11, the assessee has shown Rs.10,82,023 as service tax payable. The AR. of the assessee vide letter dated: 16.11.2012 stated that Service Tax collected is treated as a current liability and does not affect the profit.

The assessee in the balance sheet filed for the AY. 2010-11 has shown Rs.10,82,023 as service tax payable. The

assessee has collected service tax and not remitted to government account. The assessee should have considered service tax collected and not remitted as income for the year under the provisions of section 43B of the Income Tax Act. Hence the service tax payable of Rs.10,82,023 is disallowed under the provisions of section 43B of the Act. Accordingly an amount of Rs.10,82,023 is added to the returned income. Reliance is placed on the following decisions.

(i) M/s. Bartronics India Ltd., Hyderabad Vs Assistant Commissioner of Income-tax, Circle- 1(3), Hyderabad. (2012-TIOL-412-ITAT-HYO)
(ii) M/s. Euro RSCG Advertising Pvt Ltd., Vs Assistant Commissioner of Income-tax, Circle-6(2), Mumbai. (2012-TIOL-426-ITAT-MUM)."

9. Aggrieved, the assessee raised this issue before the first appellate authority. The CIT(A) confirmed the view taken by the A.O. The relevant finding of the CIT(A) reads as follow:-

"5.4 The judicial decisions cited by the appellant do not help the appellant under facts of the case after the introduction of Point of Taxation Rules 2011 introduced by Finance Act, 2011 with effect from 1.4.2011. As per the said rules, Service Tax is payable from the time/date on which the invoice is issued itself (Notification No.18/2011-ST, dated 1.3.2011 as amended). The appellant is following mercantile system of accounting. Thus, by not declaring the said Service Tax as a part of Turnover in the P&L account and also not making good the dues to the government, in effect, the appellant has claimed an expenditure which is yet to be paid and is liable to section 43B disallowance. On this issue, the ITAT, Bangalore in the case of M/s Jain Christopher and Srikanth VS. DCIT (ITA No.855/Bang/2012) vide order dated 12.4.2013 has made a similar interpretation. In that case, the similarity pointed out by the CIT(A) with regard to the service tax (which is a tax on services offered) when compared with sales tax (which is a tax on goods sold) was brought out clearly with reference to the decision of the Supreme Court in the case of Chowringhe Sales Bureau Pvt. Ltd. v. CIT (87 ITR 542). Accordingly, it is evident that the jurisdictional ITAT has upheld the applicability of the said decision of the Supreme Court (supra) rendered in respect of sales tax in the context of service tax also. In case of Sinclair Murray & Co. (p) Lt d 97 ITR 615 the Apex Court has held that sales tax collected by the assessee company was part of its trading receipt and was

to be included in its total income since money realised from purchaser was employed by assessee for purpose of making profit. In the case of Hindustan Sugar Mills Vs State of Rajasthan 1978 AIR 1496, the Honourable SC has held that" the test is what is the consideration passing from the purchaser to the dealer for the sale of goods. It is immaterial to enquire as to how the amount of consideration is made up, whether it includes excise duty or sales tax or freight".

5.5 Therefore, in this case also, the same principle has to be applied. Once it is held that service tax like sales tax is to be treated as income / turnover, it is immaterial whether the said amount of service tax is received or is still receivable in a case where appellant is following mercantile system of accounting. Section 43B is clearly applicable and the said amount can be allowed as deduction only in the year corresponding to the payment of the said amount. This is more so as the said amount has become payable by the appellant the moment it is billed, as per the introduction of the 'Point of Service' of Taxation Rules introduced by Finance Act, 2011. In this regard the cases relied upon by the appellant (supra) are also differentiated. Besides, in the case of Noble & Hewitt Pvt Lid relied by the appellant (supra), the Honourable HC has taken note of the finding that no deduction had been claimed on the service tax amount while determining the income of the assessee. However, in the present case as mentioned earlier, by not declaring the said Service Tax as a part of Turnover in the P&L account and also by not making payment of the said dues to the government, in effect, the appellant has claimed an expenditure. Therefore, the decision being distinguishable, cannot be made applicable in the case of the appellant. The decisions of Delhi HC in Noble and Hewitt(I) Pvt Ltd relied upon by the assessee, has been discussed and distinguished by the jurisdictional IT AT in the case of M/s.Jain Christopher and Srikanth v. DCIT (ITA No.855/Bang/2012) supra. Hence, the contention of the appellant on the issue is dismissed."

10. The learned AR relied on the order of the Bangalore Bench of the Tribunal in the case of ITO v. M/s.Speed Trans Cargo Private Limited in ITA No.1969/Bang/2019 (order dated 31.03.2021).

11. The learned DR strongly supported the orders of the Income-tax Authorities. Further, the learned DR relied on the

order of the ITAT in the case of Boraiah Shivananjaiah v. ACIT in ITA No.680/Bang/2020 (order dated 11.04.2022).

12. We have heard rival submissions and perused the material on record. It is not clear whether the assessee has collected service tax and has not paid the same within the due date to the Government account. The Bangalore Bench of the Tribunal in the case of Boraiah Shivananjaiah v. ACIT (supra) had held that when assessee collects the service tax from its customers and has not remitted the Government Exchequer, the same has to be disallowed u/s 43B of the I.T.Act. The relevant finding of the Tribunal in the case of Boraiah Shivananjaiah v. ACIT (supra), reads as follow:-

> *"8. We have heard the main argument of Ld.AR that assessee has not collected above service tax and only on collection, it should be payable to the Government exchequer. For this purpose, he relied on various judgments, specifically Hon'ble Bombay High Court in the case of CIT Vs. Ovira Logistics P. Ltd [377 ITR 129] (Bom) and also submitted that the service tax has not been shown as expenditure in the P&L A/c while computing income of the assessee. In our opinion, when the assessee collected the amount, it should not kept it with them and same should be deposited to the Government exchequer within the specified date and time. Further, the Tribunal in ITA No.3417/Bang/2018 in the case of Wyzmindz Solutions Pvt. Ltd., Vs. ITO, dt.30-01-2020, held as under:*
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> "6. I have heard the rival submissions and perused the material on record. In this case, the assessee has collected an amount of Rs.48,82,245 as service tax and not remitted the same to the Government exchequer, before the due date of filing of the return of income. As such, the issue whether the provisions of section 43B of the I.T.Act applies to service tax, which is not paid before the due date of filing of the return. It was considered by the co-ordinate Bench of the ITAT, Hyderabad Benches in the case of M/s.Bartronics India Ltd. v. ACIT [ITA No.2188 and 2189/Hyd/2011 – order dated 31.05.2012] that when the assessee has not paid the service tax as required under the provisions of section 43B, which is also very much covered u/s 43B of the I.T.Act. The provisions of section 43B of the Act is very clear and it states that "any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force". Therefore, even the service tax is liability which covers u/s 43B of the Act and non-payment of the same

within the stipulated time as specified u/s 43B of the Act attracts disallowance. Now the question is that when the assessee has not claimed it as expenditure in the profit and loss account, could it be disallowed u/s 43B of the Act. This was considered by the Hon'ble Apex Court in the case of Chowringhee Sales Bureau P. Ltd. v. CIT [(1973) 87 ITR 542 (SC)], in which it was held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Further, in the case of M/s.Jain Christopher v. DCIT in ITA No.855/Bang/2012 – order dated 12.04.2013, it was held as under:-

"7.2 During the course of assessment proceedings, the AO observed that a sum of Rs.29 lakhs representing service tax collected by the assessee had not been paid, but, was shown as 'outstanding liability'. Being queried, it was explained that it had not preferred any claim for deduction and, thus, it was argued, the question of disallowance u/s 43B of the Act does not arise. The AO took a view that even though the assessee had not claimed the same in its P & L account as an expenditure and, therefore, section 43B has no application. However, he was of the view that the fact remains that service tax collected by the assessee but not paid to the Government account up-to the end of the financial year or even up-to the date of filing of the return of income and, thus, by not including this amount in its service, it had clearly made a claim indirectly. As rightly highlighted by the CIT(A), the assessee's plea that salestax was different from service tax cannot be accepted in the present circumstance as what the assessee was a firm of Chartered Accountants is selling is services and not goods, so the tax applicable is service tax which stands on the same bracket as sales tax in terms of services rendered as sales tax holds for goods sold. We have also observed that the AO had pointed out that the said amount has been included as business receipts in its TDS Certificates and as such, the same should have been included in its receipts. This has not been precisely done by the assessee. The case laws relied on by the assessee is dealt with as under: (i) ACIT v. Real Image Media Technologies (P) Ltd. (ITAT Chennai): 7.2.1 The assessee was running a recording and dubbing studio, production of advertisement, films and television serials etc., as well as in software development. The amount of service tax included in bills issued but not received. Accordingly, the Hon'ble Tribunal had recorded its findings that 'As per s. 68 of Finance Act, 1994 read with rule 6 of Service Tax Rules, 1994, the service tax becomes payable only on receipt of service tax from the client. Therefore, the amount of service tax included in bills but not received could not be disallowed under s. 43B'. After analysing the relevant provisions of Income tax Act as well as Service Tax Act, the Tribunal had, further, recorded its findings as under:

"12……From a plain reading of the above provision it becomes clear that the rigour of this provision would be attracted only in a case where an item is allowable as deduction but because of the failure to make payment such deduction will not be allowed. It can be argued that in the case of ST also the assessee does not claim deduction since it has been held that non-payment of Sales-tax would attract provisions of section 43B, but that is being done on the

basis of the principles laid down by the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. V CIT 110 ITR 385 that Sales-tax is part of the trading receipt. Further, section 145A clearly provides that for the purpose of determining income under the head profits and gains of business or profession, the amount of purchase and sales i.e. turnover would include any tax, duty cess or fee. Therefore, the rigour of section 43B may be applicable in the case of Sales-tax or Excise Duty but the same cannot be said to be the position in case of Service-tax because of two reasons. Firstly, the assessee is never allowed deduction on account of service tax which is collected on behalf of the Govt. and paid to the Govt. accordingly. Therefore, a service provider is merely acting as an agent of the Govt. and is not entitled to claim deduction on account of service tax. Hence, on this account alone addition u/s 43B could not be made and the same has been correctly deleted by the CIT(Appeals)".

However, in the instant case, as admitted by the assessee, service tax has been collected but not paid to the Government account either up-to the end of the financial year or even up-to the date of filing of the return of income. Thus, the case law relied on by the assessee is distinguishable and cannot come to the rescue of the assessee. (ii) CIT v. Noble and Hewitt India (P) Ltd (Del) 7.2.2 The Hon'ble Delhi High Court was predominantly concerned with the disallowance of deduction by invoking the provisions of section 43B of the Act. The Hon'ble Delhi High Court was not considering the issue whether the service tax collected and the remaining unpaid till the due date of furnishing of the return forms the part of the total income for the current year. (iii) DCIT v Manish M Chheda 29SOT 138 – Mumbai ITAT 7.2.3 In the above case, the Hon'ble Mumbai Tribunal was considering the applicability of section 28(iv) of the I T Act. In the instant case, it is an admitted fact that during the course of assessee's profession, a sum of Rs.29,60,000/- was realised/collected as service tax payable and the same is not capital receipt. The moment the service tax is realised, it becomes payable to the Govt. account and if it is not paid, it partakes the character of income of the assessee, since the assessee could utilise this amount in any manner whatsoever, there is no restriction placed on its utilisation. This is amply clear from the TDS certificate furnished by the assessee and also the credit appearing in the assessee's bank account. Therefore, to arrive at the professional income, the service tax realised should have been included in the gross receipts unless paid to Government exchequer within the due date of filing of return. Since service tax realised is included in the total income, the same is to be allowed as a deduction in the year it is paid to the Government account. In the instant case, this is what has been done by the learned CIT(A). The CIT(A) had allowed the alternative plea of the assessee and had directed the Assessing Officer to deduct the service tax when the payment is made to the Govt. account in the subsequent year. Therefore, we find there is no merit in the contention raised on behalf of the assessee and this issue is decided against the assessee. It is ordered accordingly."

6.1 Further, in the case of M/s.Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/Del/2017 – order dated 23.03.2018], the Delhi Benches of the Tribunal held as under:- "6. After hearing both the sides and perusing the

entire material available on record, we observe that there is a credit balance of Rs.1,16,09,924/- at the end of the year towards expenses payable. The assessee submitted that it is service tax liability, which arose due to crediting the service tax received from the service recipients. The assessee has challenged before us, the disallowance ofRs.85,26,467/- disallowed u/s. 43B of the Act. We observe that the assessee has recorded his turnover after deducting the service tax received and the service tax has been credited separately. In section 145, of the Act for determining the income chargeable under the head profits and gains of business or profession or income from other sources, the same is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The said provisions were substituted by the Finance Act, 1995 w.e.f. 01.04.1997. Under section 145A of the Act, it is provided that notwithstanding anything to the contrary contained in clause(a) to section 145, the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession, shall be (i) in accordance with method of accounting regularly employed by the assessee; and (ii) further adjusted to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee, to bring the goods to the place of its location and condition, as on the date of valuation. As per the explanation under the said clause, it is pointed out that for the purpose of this section, any tax, duties, cess or fees, by whatever name called, under any law for the time being in force, shall include all such payments, notwithstanding any right arising as a consequence to such payments. Sub-clause (b) talks of interest received by the assessee on compensation or enhanced compensation, which is not relatable to the issue before us. The aforesaid provisions of section 145A of the Act have been substituted by the Finance (No.2) Act, 2009 w.e.f. 01.04.2010. Prior to its substitution, which was inserted by the Finance (No.2) Act, 1998 w.e.f. 01.04.1999, the section provided the provision relatable to the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession and no clause (b) was provided i.e. in respect of income received by the assessee on compensation or on enhanced compensation. In view of the amended provisions of the Act, which came into effect from 01.04.1999 for valuing the purchases and sales of goods and also for valuing the inventory, while determining the income chargeable under the head profits and gains of business or profession, it has been provided that the said valuation would be in accordance with the method of accounting regularly employed by the assessee i.e. either mercantile or cash. Further, adjustment is to be made to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee to bring the goods to the place of its location and condition, as on the valuation date. In other words, where any expenditure is actually paid or incurred by the assessee by way of any tax, duties, cess or fees, by whatever name called, then adjustment is to be made both in the valuation of purchase and sale of goods and also in the valuation of inventory to include the aforesaid amounts while determining the income chargeable under head profits and gains of business or profession. The assessee has separately accounted for

the service tax collected is also the indirect part of turnover because it is received along with turnover. The assessee has not shown any invoice raised by him before us as per service tax Rules, which is mandatory for the service provider to issue invoice to the service recipient. He has also not produced any evidence regarding payment received from service recipients as to how they have paid - separately or inclusive of service Tax. He has also not produced any evidence regarding whether the TDS has been remitted on payment after excluding the service tax. After going through the paper book filed by the assessee, we observe that the assessee has utilized service tax credit towards payment of duty on capital goods and as per Reverse Charge Mechanism. Therefore, it is necessary to discuss the relevant provisions of the Cenvat Credit Rules, 2004 as well as section 43B of the IT Act. 7. Section 43B(a) is as under :

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of— (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or 8. Rule 4 of the CENVAT Credit Rules, 2004 reads as under : Rule 4. Conditions for allowing CENVAT credit.- (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service: Provided that in respect of final products, namely, articles of jewellery falling under heading 7113 of the First Schedule to the Excise Tariff Act, the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the person who get such final products manufactured on his behalf, on job work basis, subject to the condition that the inputs are used in the manufacture of such final product by the job worker.

(2) (a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year: Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year. Provided further that the CENVAT credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer. Provided also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

Explanation.- For the removal of doubts, it is hereby clarified that an assessee shall be "eligible" if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year computed in the manner specified in the said notification did not exceed

rupees four hundred lakhs. (b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years.

Illustration.- A manufacturer received machinery on the 16th day of April, 2002 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit upto a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years. The CENVAT credit in respect of the capital goods shall be allowed to a manufacturer, provider of output service even if the capital goods are acquired by him on lease, hire purchase or loan agreement, from a financing company. (4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961(43 of 1961). (5) (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose, and it is established from the records, challans or memos or any other document produced by the manufacturer or provider of output service taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service. (b) The CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to,- (i) another manufacturer for the production of goods; or (ii)a job worker for the production of goods on his behalf, according to his specifications. (6) The Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer of the final products who has sent the input or partially processed inputs outside his factory to a job-worker may, by an order, which shall be valid for a financial year, in respect of removal of such input or partially processed input, and subject to such conditions as he may impose in the interest of revenue including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job-worker. (7) The CENVAT credit in respect of input

service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

9. As per Rule 6(1) of the Service Tax Rules, 1994, in case of company, service tax is to be paid on a monthly basis by 5th of the following month (in case of e-payment, by 6th of the month immediately following the respective month). However, the payment for the month of March is required to be made by 31st of March itself. As per Rule 6(4) of the Service Tax Rules, 1994, the assessee can pay for provisional payment of service tax in case he is not able to correctly estimate the tax liability. In such a situation, he may request in writing to the jurisdictional Assistant/Dy. Commissioner for the same.

10. As per section 73A of the Finance Act, 1994, any person who has collected any sum on account of Service Tax, is under obligation to pay the same to the Government. He cannot retain the sum so collected with him by contending that the service tax is not payable.

11. As per section 173A of the Service Tax Act, in case, the service tax is collected, the provision is as under :

173A. Service Tax collected from any person to be deposited with Central Government:- (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government. (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government. (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government. (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined. (5) The amount paid to the credit of the Central Government under subsection (1) or subsection (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1). (6) Where any surplus amount is left after the adjustment under subsection (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has

borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.] 12. We further observe that the point of taxation as per Rule 3 of Point of Taxation Rules, 2011 is as under : RULE 3. Determination of point of taxation. - (Notification No. 18/2011- ST dt. 01.03.2011 as amended). For the purposes of these rules, unless otherwise provided, point of taxation shall be,- (a) the time when the invoice for the service provided or agreed to be provided is issued : Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service. (b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment : Provided that for the purposes of clauses (a) and (b), - (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service; (ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a). Explanation - For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance."

13. After considering the above provisions, it is clear that the assessee has to pay service tax within due date as set out under the above provisions either by way of cash/cheque or by way of availing CENVAT credit as per Rules as stated above, but the assessee did not do so. The liability of service tax had also arisen as per the point of Taxation Rules, as stated above.

14. Now, we have to examine the case of the assessee in the light of the above provisions. During the impugned year, the assessee has credit balance of service tax payable as on 31.03.2013 of Rs.1,16,09,924/- which was to be paid upto 31.03.2013 by the assessee, but he did not pay. Further, the assessee had paid a sum of Rs.30,83,457/- before filing of IT return. As per section 43B(a), the above outstanding payment was to be paid upto the date of filing of return of income. As per method of accounting, the assessee has also not included the service tax received by him in the turnover. In fact, the assessee was legally obliged to declare its turnover inclusive of service tax received. The assessee cannot be exonerated from its liability by saying that he accounted for the service tax received separately. Since the assessee did not pay service tax as contemplated u/s. 43B(a) and as per above provisions of Service Tax Act within the stipulated time, therefore, the ld. CIT(A) has rightly disallowed

the same u/s. 43B of the IT Act. The case laws relied by the assessee are based on different footings as in all the decisions it was held that Service Tax was not at all payable because the service Tax was not received from the customer. The law prevailing at that particular time was that Service Tax was to be paid to the Government only when Service Tax is received from the service receiver to the service provider. Subsequently, there is change in the law which provides that Service Tax is to be deposited by the service provider even if service tax is not paid by the service receiver to the service provider. Therefore, in all those decisions it was held that service tax outstanding is hit by the provisions of Section 43B of the Income Tax Act. 1961. Due to the change in the law now those decisions does not help to the assessee. Moreover, the assessee has filed the service tax returns belatedly, i.e., for April to June on 16.04.2015, for July to September and half yearly from October to March, 2013 on 08.07.2015. In view of all these facts, the ld. CIT(A) has rightly dealt with the issue in question by giving elaborate findings in the impugned order regarding confirmation of addition u/s. 43B of the Act, which we do not find fit to be interfered with. Accordingly, the appeal of the assessee deserves to be dismissed."

6.2 In view of the above binding precedents, I am of the opinion that the service tax collected by the assessee and not paid to the Government exchequer before the due date of filing of return, is to be disallowed, though it was not charged to the profit and loss account and it attracts the provisions of section 43B of the Act and the present provisions of section 145A of the Act cannot be applied in view of non obstante clause in section 43B of the Act".

8.1. Contrary to this, the Tribunal in the case of ITO Vs. Speed Trans Cargo Pvt. Ltd. in ITA No.1969/Bang/2019, dt.31-03-2021, held as under:

"7. We have heard rival submissions and perused the material on record. The learned DR contended that the amount of unpaid service tax amounting to Rs.4,35,91,191 whether it has claimed as deduction in the profit and loss account was never examined by the A.O. and the CIT(A) without giving an opportunity to the A.O. by placing reliance on the additional evidence allowed the appeal of the assessee. The learned AR does not have any grievance for remitting the issue to the A.O. to examine whether the unpaid service tax has been claimed as a deduction in the profit and loss account. Therefore, this issue is restored to the files of the A.O. The A.O. is directed to examine whether the assessee had claimed the unpaid service tax as an expenditure / deduction in the profit and loss account. In the event the same is not claimed as a deduction / expenditure, the A.O. shall not invoke the provisions of section 43B of the I.T.Act in view of the judgment of the Hon'ble Bombay High Court in the case of CIT v. Knight Frank (India) Pvt. Ltd. (supra). It is ordered accordingly".

8.2. At this point of time, we have to see whether the assessee has actually collected service tax and kept it with him, without remitting the same to the Government exchequer. The AO recorded the finding that the assessee has actually collected the service tax from it customer and not remitted to

the Government exchequer. Contrary to this, the Ld.AR made a plea that it has not been actually verified by the AO and without examining, the AO took a decision that it has been collected and same was confirmed by the CIT(A) in the ex-parte order. In our opinion, it has to be verified in the light of judgement of Hon'ble Bombay High Court in the case of CIT Vs. Ovira Logistics P. Ltd [377 ITR 129] (Bom), cited supra.

8.3. Accordingly, we remit this issue to the file of AO to examine whether the assessee actually collected and received the amount and kept with him without depositing to Government exchequer. If the assessee actually received from its customers and kept it without depositing the same within due date of filing of return of income u/s.139(1) of the Act, then only the AO has to invoke the provisions of Section 43B and bring that amount to tax. Ordered accordingly.

9. In the result, appeal of the assessee is treated as partly allowed for statistical purposes."

12.1 In view of the above order of the Tribunal, we restore the issue to the A.O. The A.O. is directed to examine whether the assessee has actually collected the service tax from its customers and not remitted to the Government Exchequer. In such an event, the disallowance u/s 43B of the I.T.Act will have to be upheld. On the contrary, if the assessee has not collected the service tax from its customers, then the same would not be subjected to disallowance u/s 43B of the I.T.Act. It is ordered accordingly.

13. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on this 31st day of May, 2022.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 31st May, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-7, Bangalore.
4. The Pr.CIT-7 , Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore