

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCHES : NAGPUR

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER

AND

DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

ITA.Nos.61 & 62/Nag./2017
Assessment Years 2010-11 and 2011-12

M/s. Vijay Engineering Enterprises Pvt. Ltd., Nagpur. PAN AACCV5560H	vs.,	The ACIT, CPC, Bangalore.
(Appellant)		(Respondent)

For Assessee :	Shri Abhay N Agarwal, Advocate
For Revenue :	Shri Kailash Kanojiya, D.R.

Date of Hearing :	14.11.2022
Date of Pronouncement :	17.11.2022

ORDER

PER SATBEER SINGH GODARA, J.M.

These assessee's in appeals for A.Ys. 2010-11 and 2011-12, arise against the common order of the CIT(A)-1, Nagpur dated 27.08.2014 passed in Case No.CIT(A)-1/340/2013-14 and Case No.CIT(A)-1/341/2013-14; respectively, in proceedings under section 143(1) of the Income Tax Act, 1961 ["In short Act"].

2. Heard both the parties. Case files perused.

3. It emerges during the course of hearing that both these assessee's appeals suffer from an identical delay of 828 days which is stated to be attributable to various communication gaps as well as death of its counsel who is

alleged to have been furnished the entire case records. The same is found neither intentional nor deliberate. The assessee's solemn averments have gone unrebutted from the Revenue side. We, thus, quote the Collector vs., Mst Katiji [1987] 167 ITR 471 (SC) wherein the hon'ble Apex court held that all such technical aspects must make way for the cause of substantial justice and condone the impugned delay. We take-up both these appeals for adjudication on merits therefore.

4. Learned counsel invited our attention to assessee's identical pleadings in both these appeals as under :

1. *"The learned CIT(A) erred on facts and in law in making addition of Rs.32,05,203/- and Rs.1,11,69,559/- for A.Y. 2010-11 and 2011-12 respectively, u/s 43B of Income Tax Act, 1961, in respect of service tax payable.*
2. *The authorities below ought to have seen that, Appellant, who is service provider, the Service Tax collected does not form part of receipt, therefore the same has not been claimed as expenditure in the profit & loss account, and thus provisions of Sec. 43B are not attracted at all. The impugned Order passed is therefore ex-facie bad and illegal and deserves to be quashed and set aside by allowing Appeal in favour of appellant.*
3. *The Ld. CIT(A) ought to have seen that, if the Service Tax is paid belatedly particularly when Appellant is merely Service Provider the provisions of Sec. 43B are not attracted and the same cannot be termed as apparent/incorrect claim so as to*

make addition u/s 143 (1) of the I. T. Act, as it being debatable issue.

4. *Any other ground that may be taken up at the time of hearing.”*

5. Suffice to say, the assessee's stand throughout is that it had never claimed the impugned service tax payments as expenses in the relevant assessment years which could attract the disallowance for actual payment thereof u/s. 43B of the Act.

6. The Revenue vehemently relied on the Ld. CIT(A) detailed discussion rejecting the assessee's contention as follows :

“ 6.0. I have carefully considered the order of the AO and the submissions of the AR of the appellant. On careful examination of the facts, it is seen that there exists no ambiguity as regards to the fact, that the amount of Service Tax collected by the appellant were included in the gross receipts in the return filed by the appellant. It is also undisputed that the appellant admittedly has failed to make the payment of service tax collected by it by the end of the relevant financial year. As per the provisions of Section 43B of the Act, any statutory payment which is debited to the Profit & Loss Account but not paid or is payable, is liable to be disallowed. Therefore, the provisions of Section 43B are attracted in the cases of the

appellant. The contention of the appellant that the Service Tax does not form the part of the turnover is true in the sense that the corresponding equivalent, amount is also claimed as expenditure and debited to the Profit & Loss Account which ultimately nullifies the impact of inclusion of such service tax amount in the turnover. But the fact remains that such debit in the Profit & Loss account as an expenditure can be claimed, only if such statutory payment has been made by the assessee, failing which the amount of service tax which remains unpaid/payable is liable to be added to the total income of the assessee as per the provisions of Section. 43B of the Act irrespective of the fact whether or not the assessee had included the amount of such statutory payment being service tax in the gross receipts of its return of income filed. In other words,, there is nothing which prevented the appellant to claim the amount as debit in the Profit & Loss Account as an expenditure which would have nullified the effect of inclusion of such receipts in the gross receipts in the return filed. However, still by virtue of provisions of Section 43B such amount of service tax even if debited, was liable to be added back to the total income as the same being the statutory payment remained unpaid at the end of the financial year, hence provisions of Section 43B are clearly attracted. Therefore, the contentions of the appellant that it

has maintained a separate account for service tax and also that service tax does not form part of the total income does not hold good.

6.1. *Besides the above, it is also significant to mention that such statutory payment which is disallowed in any previous Assessment Year u/s 43B for the reason of not having been paid can be claimed as deduction in any subsequent assessment year on actual payment basis. It is seen from the computation of income for AY 2010-11 that the appellant has been allowed the deduction of Rs.3,00,000/- being Service Tax, on actual payment basis, though the same pertained to the FY 2008-09. Therefore, the contentions of the appellant as regards to its method of accounting being followed do not carry any substance. The appellant has suo-moto declared the receipt in the return filed, hence waived his right to appeal.*

6.2. *The ratio-decidenti of the decisions relied upon by the AP of the appellant are not applicable to the facts of the present cases. Therefore, I decline to interfere with the order of the AO and the ground is dismissed for AY 2010-11 & 2011-12.*

7. We have given our thoughtful consideration to the vehement rival stands and are of the opinion that the factual

position is very much clear regarding the assessee having not actually debited and claimed the impugned service tax charges as an allowable deduction which could form subject matter of section 43B disallowance for want of its actual payment in these twin assessment years. Faced with the situation, we deem it proper to restore this sole substantive issue back to Assessing Officer for his afresh proper adjudication as per law. Ordered accordingly.

8. No other ground or arguments has been pressed before us.

9. These assessee's twin appeals are allowed for statistical purposes. A copy of this order shall be placed in respective files.

Order pronounced in the open Court on 17.11.2022.

Sd/-
[DR. DIPAK P. RIPTOE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated 17th November, 2022

VBP/-
Copy to

1.	The appellant
2.	The respondent
3.	The Ld. CIT(A) concerned.
4.	The CIT concerned
5.	D.R. ITAT, Nagpur Bench, Nagpur
6.	Guard File.

//By Order//

Assistant Registrar, ITAT, Pune Benches,
Pune.