

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI
BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER & SHRI
PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2189/Mum/2022
(A.Y: 2017-18)

Tarun Kumar Ratan Singh Rathi 503, Badrinath Tower, Sanjeev Enclave, Seven Bungalow, Andheri (W) Mumbai – 400053.	Vs.	CIT(A) / NFAC, Delhi
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADHPR3169F		
Appellant	..	Respondent

Appellant by :	Mr.Satish Modi.AR
Respondent by :	Ms.Rajni Rani Roy.DR

Date of Hearing	03.11.2022
Date of Pronouncement	17.11.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of National Faceless Appeal Centre (NFAC) / CIT(A), New Delhi passed u/s 154 and 250 of the Act. The assessee has raised the following grounds of appeal:

1. *On the facts and in the circumstances of the case and in law the Ld. CIT has erred in disallowing a sum of Rs. 9,42,000/- on account of serve tax payable u/s 43B of the Act.*

2. *The appellant craves leave to add/alter/delete any or all the grounds of appeal.*

2. The brief facts of the case are that the assessee has filed the return of income for the A.Y 2017-18 on 31.10.2017 disclosing a total income of Rs. 76,76,060/-, subsequently the return of income was processed u/s 143(1) of the Act on 25.10.2018 determining a total income of Rs.86,18,060/-by the CPC. The assessee after receipt of intimation has filed online rectification with CPC for the incorrect addition and order u/s 154 of the Act determining the same income as computed u/s 143(1) of the Act was passed on 04.02.2020. The issue was that the CPC has made the disallowance of service tax payable of Rs.9,42,000/- without considering the fact that the service tax payments are outside the scope of section 43B of the Act and the assessee has not claimed the service tax payable in the profit and loss account.

3. Aggrieved by the order the assessee has filed an appeal with the CIT(A). Whereas the CIT(A) considered the grounds of appeal, submissions of the assessee and findings of the AO but confirmed the action of the CPC and dismissed the assessee appeal. Aggrieved by the order of the CIT(A), the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing the Ld.AR submitted that the CIT(A) has erred in sustaining the addition made by the AO/CPC in respect of service tax payable which was not claimed in the profit and loss account but it was treated as

balance sheet disclosure. The Ld. AR submitted that there is no provision under the Act under 143(1) of the Act to make the disallowance which is not forming part of the profit and loss account. The CPC has made the addition based on the audit report, where the auditor has made the disclosure in Tax Audit report. The Ld. AR contentions are two folds one being that there cannot be any disallowance u/s 143(1) of the Act. Further the Ld.AR contentions are that the service tax payable was not routed through the profit and loss account and disallowance cannot be made and relied on the judicial decisions and prayed for allowing the appeal. Contra, the Ld. DR submitted that the CIT(A) has correctly confirmed the disallowance, As the auditor has mentioned that the service tax amount was not paid on or before the due date in the tax audit report and supported the order of the CIT(A).

5. We heard the rival submissions and perused the material on record. The sole matrix of the disputed issue as envisaged by the Ld.AR that the CIT(A) has erred in confirming the disallowance of service tax payable of Rs. 9,42,000/- u/s 43B of the Act though the assessee has not claimed in the profit and loss account but has made a disclosure in the balance sheet. The contentions of the Ld. AR that there is no scope of disallowance of assessee claim in the provisions of Sec. 143(1) of the Act. Further on the merits of the case, the Ld.AR has demonstrated the judicial decisions on similar issue were the Hon'ble Tribunal have considered the factual aspects and allowed the claim. We find the

Coordinate Bench of this Honble Tribunal in the case of Chetas Gulabbhai Desai Vs. DCIT in ITA No. 1934/Mum/2021 dated 04.03.2022 has dealt on the scope of provisions of Sec. 143(1) of the Act and observed at Page 2 Para 4 to 6 of the order read as under:

4. We have heard the submissions made by ld. Departmental Representative and have examined the orders of authorities below. The assessee during the period relevant to the assessment year under appeal had incurred expenditure of Rs.35.00 lakhs towards club membership, entrance fee and subscription fee. The aforesaid expenditure was claimed as business expenditure on the ground of commercial expediency. The said expenditure was also reflected in the Tax Audit Report under clause 21 of Form 3CD. The return of income was processed u/s. 143(1) of the Act and the aforesaid expenditure was disallowed. The assessee filed rectification petition u/s. 154 of the Act, the same was also rejected by the CPC. It is a well settled law that before disallowing any expenditure/making any addition, an opportunity of hearing has to be given to the assessee. In the instant case since return of the assessee was processed u/s. 143(1) of the Act, no opportunity was granted to the assessee to put forth his stand before disallowing the expenditure. In the First Appellate proceedings, the CIT(A) dismissed the appeal of assessee against the order passed u/s. 154 of the Act on the ground that the issue raised is debatable. If that be so, the CPC has erred in disallowing the assessee's claim of expenditure while processing the return of income u/s. 143(1) of the Act. The Revenue cannot in unilateral proceedings disallow expenditure without affording an opportunity to the assessee. What cannot be done u/s.

154 of the Act on the ground of debatability ,cannot be done u/s. 143(1) of the Act to the assessee's claim on which two views are possible A debatable issue cannot be a subject matter of adjustment u/s. 143(1) of the Act.

5. The Hon'ble Jurisdictional High Court in the case of Bajaj Auto Finance Ltd. vs. CIT reported as 404 ITR 564(Bom) has held that debatable claim cannot be disallowed by way of an intimation u/s.143(1) of the Act. The relevant extract of the observations made by Hon'ble High Court in this regard are reproduced herein under:

“10. In the present facts, it is undisputed that the decision of Gujarat High Court was referred to in the computation of income. Thus, the Assessing Officer could not have disallowed the claim on a prima facie view that the same is inadmissible. In fact, there can be no dispute that even according to the Assessing Officer, the issue was debatable. This is evident from the fact when the applicant assessee had filed an application under section 154 of the Act for deletion of the adjustment made of provision of bad debts by intimation under Section 143(1)(a) of the Act, it was disallowed on the ground that it is a debatable issue. This itself would indicate that whether the claim of a provision for bad debts is deductible under Section 36(1)(vii) of the Act or not is debatable. Further, the above claim for deductions as made by the applicant was by following the decision of the Gujarat High Court in Vithaldas Dhanjibhai (supra). Thus, a debatable issue. Therefore, the same could not have been disallowed by way of an intimation under section 143(1)(a) of the Act.”.

6. In view of the undisputed facts and the decision of Hon'ble Bombay High Court, referred above, we find that the authorities below have erred in disallowing

assessee's claim of expenditure in proceedings u/s. 143(1) of the Act and thereafter, rejecting assessee's application u/s. 154 of the Act. Ergo, the impugned order is set-aside and appeal by the assessee is allowed.

6. On the merits of the case, we find the Hon'ble Tribunal in the similar issue where the service tax payable is not debited to profit and loss account and disallowance was deleted and has held in the case of Shri. N R Kumaraswamy Vs. ACIT ITA 1778/Bang/2017 dated 31.05.2018 has observed at Page 4 Para 6 to 7 of the order read as under:

6. We have heard the rival contentions and perused the material on record. In the present case, where the service tax calculated but had not paid to the central government account can be disallowed under the provisions of Section 43B of the Act. Admittedly, the service tax account is not routed through the profit and loss account but through suspense account which means that there was no debit to the profit and loss account on account of liability of service tax account or there is no claim by the assessee for deduction of service tax payable. This issue was considered by the Hon'ble Bombay high court in the case of CIT Vs. Knight Frank (India) Pvt. Ltd. in ITA No.247 of 2014 & ITA No.255 of 2014 Dt.16.8.2016 (Bom) in para 7 held as follows :

"7. Regarding question (ii) :-

(a) It is an admitted position before us that the respondent assessee had not claimed any deduction on account of the service tax payable in order to determine its taxable income. In the above view, there can be no occasion to invoke Section 43B of the Act.

(b) Mr. Suresh Kumar, learned Counsel for the Revenue fairly states that the issue stands concluded against the Revenue by the decision of this Court in CIT Vs. Ovir Logistics P. Ltd. 377 ITR 129 and CIT V. Calibre Personnel Services Pvt. Ltd. (Income Tax Appeal No.158 of 2013) rendered on 2nd February, 2015

(c) In view of the above, the question (ii) as proposed is covered by the decision of this Court. Therefore, it does not give rise to any substantial question of law. Thus, not entertained.”

Respectfully following the decision of the Hon'ble Bombay High Court (supra), we allow the grounds of appeal raised by the assessee.

7. In the result, the appeal filed by the assessee is allowed.

7. We considering the ratio of the judicial decisions and the factual aspects are of the opinion that the order of the CIT(A) cannot be sustained, accordingly we direct the Assessing officer to delete the addition and allow the grounds of appeal in favor of the assessee.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 17.11.2022.

Sd/-

Sd/-

(M BALAGANESH)
ACCOUNTANT MEMBER

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 17.11.2022