

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 535 & 536/Kol/2022
Assessment Year: 2017-18

M/s. Trishan Exports Pvt. Ltd. 41A, 5 th Floor Room No. 507 AJC Bose Road Kolkata - 700017 [PAN: AABCT1797K]	Vs	ACIT, Circle-11(1), Kolkata
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Sunil Surana, FCA
Revenue by :	Smt. Ranu Biswas, Addl. CIT Sr. D/R

सुनवाई की तारीख/Date of Hearing : 27/06/2023
घोषणा की तारीख /Date of Pronouncement: 25/07/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The captioned appeals have been preferred by the assessee against the separate orders of National Faceless Appeal Centre, Delhi (hereinafter referred to as "the Id. CIT(A)"), even dated 02/08/2022 & 05/08/2022, for Assessment Year 2017-18. Since the issues involved are common in both these appeals, they were heard together and are being disposed off by way of this common order.

2. On the basis of the observation of the auditor in the tax audit report, the CPC has made *prima facie* adjustments disallowing luxury tax and service tax not paid before the due date of filing of return of income. Against the said order the assessee has filed an application u/s 154 of the Act but failed to succeed. In the appeal before the Id.

CIT(A) against the order u/s 143(1)(a) of the Act and u/s 154 of the Act, assessee failed to succeed and is now in appeal before this Tribunal. In both these appeals similar issue has been raised, therefore, we will decide the issue raised in appeal filed against the order under section 143(1)(a) of the Act and as a result of which the appeal in ITA No. 536/Kol/2022, filed against the order under section 154 of the Act will be infructuous and is thus dismissed.

2.1. So far as ITA No. 535/Kol/2022 is concerned, the sole grievance of the assessee is that the Id. CIT(A) erred in confirming the action of the CPC by adding the amount of luxury tax and service tax of Rs.35,55,063/- disregarding the fact that the said amounts were never claimed as deduction in the return of income.

3. At the outset, the Id. Counsel for the assessee referring to the judgement of the Hon'ble Delhi High Court in the case of *CIT vs. Noble and Hewitt (I) (P) Ltd. (2008) 305 ITR 324 (Del.)*, submitted that the issue is squarely covered in favour of assessee by the said judgement wherein it has been held that if the assessee does not debit the amount to the profit and loss account in order to claim any deduction in respect of any amount and considering the assessee is following mercantile system of accounting, the question of disallowing the deduction not claimed would not arise.

3.1. On the other hand, the Id. D/R, vehemently argued supporting the orders of the lower authorities relying on the intimation under section 143(1)(a) of the Act.

4. We have heard rival contentions and perused the material placed before us. We notice that the assessee is a private limited company and filed its return on 26/02/2018 for the Assessment Year 2017-18. It's audit report was also filed along with the return. In the Form 3CD annexed to Form 3CA under Colum 26(i)(B)(b), the tax auditor has stated that luxury tax of Rs.16,18,375/- and service tax of Rs.23,49,365/- has not been deposited before the due date of furnishing of the return of income and, therefore, disallowable under section 43B of the Act. However, just below this column where it is asked that whether the sales tax, customs duty, excise duty or any other indirect tax is passed to the profit and loss account, the reply is "No". It means that the assessee has not routed the luxury tax and service tax through its profit and loss account. In other words, the alleged sum is only appearing on the liability side of the balance sheet and the same was not paid before the due date of filing of return of income. Now, under these given facts and circumstances whether the provisions of section 43B of the Act can be invoked or not, needs to be examined. The Hon'ble Delhi High Court in the case of *Noble and Hewitt (I) (P) Ltd. (2008) 305 ITR 324 (Del.)*, dealing with the similar issue where service tax was not deposited with the concerned authority before the due date of filing of return of income and the same was disallowed applying the provisions of section 43B of the Act, decided against the revenue observing as follows:-

"2. The assessee maintains a mercantile system of accounting. It had collected service tax during the previous year relevant to the assessment year in question. Out of the service tax so collected the assessee had deposited part of the amount

but an amount of Rs. 14.40 lakhs was not deposited by the assessee with the concerned authorities. The assessee did not claim any deduction in this regard nor did it debit the amount as an expenditure in the Profit & Loss Account. The Assessing Officer as well as the Commissioner of Income-tax (Appeals) ['CIT(A)'] nevertheless disallowed the amount and added it back to the income of the assessee.

3. The CIT(A) was of the view that the assessee had not followed the correct accounting procedure. If it had done so, the amount would have had to be debited to Profit & Loss Account and thereafter the assessee could claim a deduction thereon. The Commissioner relied upon decision of the Calcutta High Court in *Chowringhee Sales Bureau (P.) Ltd. v. CIT* [\[1977\] 110 ITR 385](#).

4. In appeal, the Tribunal was of the opinion that in view of the provisions of section 43B of the Income-tax Act, 1961 ('Act'), since the assessee had not claimed a deduction there was no question of disallowing the deduction which was not even claimed. The relevant extract of section 43B of the Act reads as follows :

"Certain deductions to be only on actual payment. – 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,

(b) to (f) **

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shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him."

5. Learned counsel for the revenue urges that the decision of the Calcutta High Court in *Chowringhee Sales Bureau (P.) Ltd.*'s case (*supra*) covers the point in its favour. We are unable to agree. In that case it was held that the liability to pay sales tax arose the moment a sale or purchase was effected and if an assessee was maintaining accounts on the mercantile system it would be entitled to deduction of the estimated liability of sales tax, even though such sales tax had not been paid to the sales tax authorities. The question there concerned was the entitlement of the assessee to deduction under sections 10(1) and 10(2)(xv) of the Indian Income-tax Act, 1922. The decision is clearly distinguishable in its application to the present case. Here we are concerned with an assessee who has not even claimed any deduction on the ground of service tax and has not debited the amount to its Profit & Loss Account. Moreover the provisions of section 43B of the Act are quite clear in this regard. The decision of the Calcutta High Court

in Chowringhee Sales Bureau (P.) Ltd.'s case (supra) was not in the context of the applicability of section 43B of the Act.

6. In our opinion since the assessee did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessee claim any deduction in respect of the amount and considering that the assessee is following the mercantile system of accounting, the question of disallowing the deduction not claimed would not arise.

7. Learned counsel for the revenue submits that the assessee has sought to evade tax under the mercantile system of accounting. We are of the view that it is not for the revenue authorities to tell the assessee how to maintain its accounts.

8. We cannot find any fault in the view taken by the Tribunal and find no merit in this appeal.

9. No substantial question of law arises.

10. The appeal is dismissed."

6. Now examining the facts of the instant case in the light of the above judgement, we find that the same is squarely applicable to the case of the assessee who has been following mercantile system of accounting. The alleged sum is not routed through the profit and loss account and, therefore, the expenditure in the form of luxury tax or service tax has not been claimed. Further section 43B of the Act, comes into operation only if certain deductions have been claimed against the gross revenue for the year but actual payment of such expenses as provided under section 43B of the Act are not made before the due date of filing of return of income under section 139(1) of the Act. Therefore, in order to invoke section 43B of the Act, first requirement is that the assessee should have made the claim of expenditure in its

profit and loss account during the year and if this condition is not fulfilled then section 43B of the Act cannot be invoked.

7. Thus, respectfully following the judgement of the Hon'ble Delhi High Court in the case of *Noble and Hewitt (I) (P) Ltd. (supra)*, we find merit in the contention of the Id. Counsel for the assessee that section 43B of the Act can be moved only for the deductions which are claimed in the profit and loss account. However, the assessee has not placed the copy of the audited balance sheet and only reference is made to the Column 26(i)(B)(b), wherein it has been mentioned that no luxury or service tax has been routed through the profit and loss account. Since, this fact needs to be examined we restore this issue to the Id. CIT(A) and direct the assessee to file copy of the audited balance sheet and profit and loss account so as to demonstrate that the luxury tax and service tax has not been routed through the profit and loss account and if the same is found in order then no disallowance under section 43B of the Act will be called for. Accordingly, this appeal of the assessee is allowed for statistical purposes.

8. **In the result, ITA No. 535/Kol/2022 is allowed for statistical purposes and ITA No. 536/Kol/2022 is dismissed as infructuous.**

Order pronounced in the Court on 25th July, 2023 at Kolkata.

Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

Sd/-

(DR. MANISH BORAD)
ACCOUNTANT MEMBER

Kolkata, Dated 25/07/2023

*SC SrPs

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata