

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “B” DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.1280/DEL/2020
Assessment Year 2016-17

Fulcrum ALM Solutions Pvt. Ltd. 5 th Floor, HUDA City Centre Metro Station, Sector-29 Gurgaon, Haryana.	Vs.	ACIT Circle-1(1) Gurgaon.
TAN/PAN: AACCF5782B		
(Appellant)		(Respondent)

Appellant by:	Shri Gagan Kumar, Adv Shri Vivek Kumar, CA		
Respondent by:	Shri Sanjay Kumar Yadav, Sr.DR		
Date of hearing:	10	05	2023
Date of pronouncement:	08	08	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-I, Gurgaon ('CIT(A)' in short) dated 05.03.2020 arising from the assessment order dated 22.12.2018 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2016-17.

2. The grounds of appeal raised by the assessee read as under:

“1. That the Ld. CIT(A) grossly erred in law and on the facts and circumstances of the case in confirming an addition of Rs 67,21,029/- in the income of the Appellant.

2. That the Ld. CIT(A) grossly erred in law and on the facts and circumstances of the case in confirming the disallowance of service tax payable (under reverse charge) under section 43B of the Act without appreciating that the same was never claimed as expense by the Appellant.

3. The Ld. AO has erred in levying interest under section 234A/B/C and D of the Act.

4. That on facts and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1) (c) of the Income Tax Act, 1961.

5. The Appellant craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.”

3. Briefly stated, the assessee is wholly owned subsidiary of Fulcrum Technologies Inc (Fulcrum US). The assessee is engaged in providing implementation and configuration services of CATS (Cellular Asset Tracking System) software to its clients in India.

4. During the year under consideration, the assessee provided such implementation services to Airtel. For this purpose, the assessee availed certain technical services support by Fulcrum US. The invoices amounting to Rs. 4,66,27,790/- in aggregate were raised by Fulcrum US towards such services rendered to assessee. In terms of provisions of Finance Act, 1994 dealing with service tax laws, the assessee was liable to deposit service tax amounting to Rs.65,27,891/- under reverse charge mechanism on import of such support services from Fulcrum US. The assessee has paid consideration to Fulcrum US towards transaction of procurement of services and the service tax was deposited by the assessee in addition to the service fees due to Fulcrum US. The assessee thus claimed the service tax liability under question, which had arisen under reverse charge

mechanism on import of services by the assessee, is assessee's own liability. Such amount was never to be received and reimbursed from the overseas service provider and therefore was not included in the P&L account. The liabilities towards service tax were borne by Assessee over and above the payments for seeking technical service. The service tax liability was thus routed through the balance-sheet and not routed through the P&L account as per accounting practices. The Assessing Officer however made adjustment in the return of income on account of service tax liability shown as outstanding in the balance-sheet. The service tax liability was reported as outstanding under Section 43B of the Act in the Tax Audit Report as per requirement of law. The Assessing Officer made disallowance towards unpaid service tax liability based on such reporting.

5. The CIT(A) confirmed the aforesaid action and hence this appeal.

6. We have carefully considered the rival submissions. We find that the issue is squarely covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Noble and Hewitt Pvt. Ltd.*, 305 ITR 324 (Del) wherein it was held that no disallowance of unpaid amount of Service Tax under Section 43B is warranted when the assessee has not claimed such Service Tax amount as expenses in its P&L account. This apart, the service tax liability has arisen under reverse charge mechanism and therefore, also the action of the assessee is justified. Such service tax liability thus will not fall within the sweep of Section 43B of the Act in the absence of

corresponding reduction of taxable income.

7. We thus find merit in the plea of the assessee. The action of the CIT(A) is thus set aside and the Assessing Officer is directed to reverse the disallowance under Section 43B to the extent of Rs.65,27,891/- as the assessee has not disputed Swachh Bharat Cess amounting to Rs.2,33,139/-.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 08/08/2023

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: /08/2023

Prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**