

**IN THE INCOME TAX APPELLATE TRIBUNAL ALLAHABAD “SMC”**  
**BENCH, ALLAHABAD**

**BEFORE SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.18/Alld/2023  
(निर्धारण वर्ष / Assessment Year: 2013-14)

Anil Kumar Gupta House No.452P, Sector-25, Panchkula-134109.	<b>बनाम/</b> Vs.	DCIT, Circle-1 Income Tax Office, 38, M. G. Marg, Civil Lines, Allahabad, Uttar Pradesh- 211001.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AATPG1541K</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Asit Hajela
Revenue by:	Shri A. K. Singh (Sr. DR)

सुनवाई की तारीख / Date of Hearing: 06/09/2023  
घोषणा की तारीख /Date of Pronouncement: 12/09/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 21.12.2022 for AY. 2013-14.

2. Ground no. 1 to 3 are against the action of the Ld. CIT(A) confirming the disallowance of unpaid service tax liability of Rs.10,92,548/- u/s 43B of the Income Tax Act, 1961 (hereinafter “the Act”).

3. The assessee is an individual and is running a concern of providing security guard and manpower. The assessee has been consistently following mercantile system of accounting for earlier as well as subsequent years. And assessee from inception is registered under the service tax and regularly depositing service tax in the relevant Government Account. In the year under consideration, the AO noted from perusal of the balance-sheet that Rs.10,92,548/- pertaining



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to service tax was payable; and noticing that the assessee has not deposited the same in the relevant account of the Government before the filing of the Income Tax Return, disallowed the same u/s 43B of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of the AO by referring to the decision of this Tribunal (Cochin Bench in the case of M/s. Kunnel Engineers & Contractors (P) Ltd. [ITA. No.653/Coch/2019 & ITA. No. 04/Coch/2020 vide order dated 19.05.2020]. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before this Tribunal.

**4.** At the outset, the Ld. AR assailing the action of the Ld. CIT(A) brought to my notice that the Ld. CIT(A) erred in following the order of the Cochin Bench of this Tribunal in the case of M/s. Kunnel Engineers & Contractors (P) Ltd. (supra), because it has been set aside by the Hon'ble Kerala High Court, and drew my attention to the order of the Hon'ble Kerala High Court in the case of M/s. Kunnel Engineers and Contractors (P.) Ltd. Vs. ACIT, Corporate Circle-1(2), Kochi (ITA. No.62 of 2020) wherein the Hon'ble High Court was pleased to set aside the order of the Tribunal and restore it back to the file of the Tribunal with certain observations. Therefore, according to the Ld. AR, the foundation on the basis of which the Ld. CIT(A) has confirmed the action of the AO has been removed. Therefore, according to him, the order of the Ld. CIT(A) on this issue is erroneous. Further, he drew my attention to a chart placed at page no. 22 of PB which is reproduced as under: -



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SN	Particulars	Opening Balance	Service Tax Received	Service Tax Deposited	Closing Balance
1	Service Tax Rec/Dep.-12.36% Baddi	0.00	1,118,449.00	1,118,449.00	0.00
2	Service Tax Rec/Dep. - 3.09% Baddi	0.00	544,235.00	544,235.00	0.00
3	Service Tax Rec/Dep- @ 12.36% Alld	0.00	405,722.00	405,722.00	0.00
4	Services Tax Rec/Dep- @ 3.09% Alld	0.00	277,829.00	277,829.00	0.00
	Total (A)	0.00	2,346,235.00	2,346,235.00	0.00
5	Service Rec/Deposit- Alld	772,509.94	0.00	84,152.00	688,357.94
6	Service Tax Rec/Deposit-Baddi Branch	925,466.44	0.00	521,279.00	404,187.44
	Total (B)	1,697,976.38	0.00	605,431.00	1,092,545.38
	Total (A+B)	1,697,976.38	2,346,235.00	2,951,666.00	1,092,545.38

5. And drawing my attention to the chart, the Ld. AR contented that in this assessment year the assessee had received from customers service tax of Rs.23,46,235/-; and deposited in the Central Government Account Rs.29,51,666/- which means in the current year (AY 2013-14) assessee had deposited excess amount of more than Rs.6,00,000/-. According to him, the amount of service tax collected in this assessment year had been deposited i.e. Rs.23,46,235/-; and the balance amount shown in the chart of Rs.10,92,543/- is the amount of service tax which has not been received by assessee from the earlier years; and is not part of the service tax of the current year. Therefore, according to him, assessee has shown the same in the balance sheet, which is placed at, page no. 53 of PB. And drew my attention to Schedule-7 wherein service tax is shown as Rs.10,92,543/-. Further, according to the Ld. AR, since the assessee has not claimed any deduction of Rs.10,92,545/-, the AO ought not to have disallowed the same u/s 43B of the Act, and for such preposition cited the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Noble And Hewitt (I) Pvt Ltd reported in 305 ITR 324 (Del) wherein the Hon'ble Delhi High Court has held as under: -



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“1. The revenue is aggrieved by an order dated 17-11-2006 passed by the Income Tax Appellate Tribunal ('Tribunal'), Delhi Bench "D", New Delhi in ITA No. 2910/Delhi/2004 relevant for the assessment year 1999-2000.

2. The assessed 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 assessed had deposited part of the amount but an amount of Rs. 14.40 lakhs was not deposited by the assessed with the concerned authorities. The assessed 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 (Appeals) ('Commissioner (Appeals)') nevertheless disallowed the amount and added it back to the income of the assessed.

3. The Commissioner (Appeals) was of the view that the assessed 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 assessed could claim a deduction thereon. The Commissioner relied upon decision of the Calcutta High Court in Chowringhee Sales Bureau (P) Ltd. v. CIT .

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 assessed 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:

“43B. 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



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(a) any sum payable by the assessed by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force,

(b) to (f) \*\* \*\* \* shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessed 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 favor. 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 assessed 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 assessed 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 assessed 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 assessed did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessed claim any deduction in respect of the amount and considering that the



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assessed 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 assessed 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 assessed 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.** In the light of the aforesaid decision of the Hon’ble Delhi High Court, the assessee pleads that disallowance made by the AO of Rs.10,92,548/- be deleted.

**7.** Per contra, the Ld. DR submitted that the assessee did not properly explained before the AO the issue regarding Rs.10,92,548/- shown in the balance-sheet and did not bring to the notice of the AO that this amount was pertaining to earlier years, and not that of current year. According to him, in such circumstances, the AO has made the disallowance which has been upheld by the Ld. CIT(A) and therefore, he does not want me to interfere with the impugned action of Ld CIT(A). However, the Ld DR could not controvert the fact that the service tax amounting to Rs.10,92,548/- was not pertaining to current year, but was that of the earlier years; and also could not controvert the fact that the assessee has not made any claim of this amount as deduction for the current year.



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8. I have heard both the parties and perused the records. The assessee is an individual running a concern in the name and style 'Mercury Security Services' which provides security guards and manpower to various customers. From inception, the assessee had been registered with service tax authorities and depositing service tax in the relevant Government Account; and following consistently mercantile system of accounting. In the year under consideration, the assessee has billed Rs.23,46,235/- as service tax in the invoices issued to his customers and the same was duly deposited in the Central Government Account i.e. Rs.23,46,235/- as well as Rs.6,05,431/- of the earlier years and thus deposited total amount of service tax to the tune of Rs.29,51,666/- in the relevant assessment year in the Central Government Account of service tax. Thus, assessee has paid the service tax collected during the current year. However, AO taking note of the service tax shown in balance-sheet (Schedule-7) amounting to Rs.10,92,548/- has disallowed it u/s 43B of the Act which action of AO has been confirmed by the Ld. CIT(A). I cannot countenance the impugned action of Ld. CIT(A)/AO *inter-alia* for the simple reason that the assessee has not claimed deduction regarding the balance-sheet item of Rs.10,92,548/-. Therefore, the AO/Ld. CIT(A) could not have applied section 43B of the Act to disallow Rs.10,92,548/- because neither the assessee debited the amount (Rs.10.92 Lakhs) in the profit and loss account as an expenditure nor did he claim any deduction in respect of this amount; and considering that assessee has been following mercantile system of accounting the judicial precedent cited by Ld. AR of Hon'ble Delhi High Court in the case of Noble and Hewitt (I) Pvt, Ltd (supra) is squarely applicable to the facts and



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circumstances of the present case, and therefore I direct the AO to delete disallowance made on this issue.

**9.** Coming to the next ground of appeal of the assessee which is regarding disallowance of Rs.6,490/- for the purchase of mobile phone. This ground of appeal, during the hearing, the assessee does not press. So it is dismissed.

**10.** Coming to the next ground of appeal of the assessee which is regarding disallowance of Rs.26,265/- incurred under “*Business Promotion Expenses*”.

**11.** On the issue the Ld. CIT(A) has held as under: -

“Ground of appeal no. 8 is related to disallowance of Rs.26,265/- under business promotion expenses as relevant bills and vouchers are not produced. The appellant has submitted that these are petty expenses for which only handmade bills/vouchers are available and cash memo/bills/invoices are not available. The AO in his order has mentioned that no bills and vouchers of these expenses are produced by the appellant. The details of bills are mentioned in para 3 of assessment order. As per the order of AO even the handmade bills/vouchers are not produced. All the bills are not petty expenses, there is also one bill of Rs.16,500/-. Accordingly, appellant does not get any relief on this issue and the ground of appeal is rejected.”

**12.** Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before this Tribunal.



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**13.** I have heard both the parties and perused the records. It is noted that the assessee claimed as *business promotion expenses* an amount of Rs.2,27,207/-; and AO has disallowed Rs.26,265/- out of the aforesaid claim on account of non-production of supporting evidence like cash memo, bills and vouchers. The Ld. CIT(A) has noted that the expenses disallowed by AO of Rs.26,265/- are not petty expenses and one of such expense itself is to the tune of Rs.16,500/- and the other two expenses [i.e. balance expenses] were also disallowed, since assessee failed to produce any supporting evidence. Before this Tribunal also assessee failed to produce supporting evidence of the three expenses which has been disallowed to the tune of Rs.26,265/-. Therefore, AO/Ld. CIT(A) has rightly disallowed Rs.26,265/- which action of the Ld. CIT(A) does not require any interference. And therefore, action of Ld CIT(A) stands confirmed.

**14.** Ground no. 6 of the assessee is against the action of the Ld. CIT(A) confirming the disallowance of Rs.42,223/- incurred under “*Conveyance Expenses*”.

**15.** Brief facts as noted by the Ld. CIT(A) is as under: -

“Ground of appeal no. 9 is related to disallowance of Rs.42,223/- under the head disallowance of expenses. The appellant has submitted that these expenses were incurred by the site supervisors for which monthly reimbursements were made by the assessee. These were petty expenses incurred by the assessee for which only hand-made bills/vouchers were available on the record of the assessee. The reply of the appellant is considered, it is observed from the order of AO that no bills/vouchers has been produced in



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respect of expenditure of Rs.14,976/-, Rs.11,780/- and Rs.15,467/-.

These are not petty expenses and no bills/vouchers are produced before AO accordingly, appellant does not get any relief on this issue and the ground of appeal is rejected.”

**16.** Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before this Tribunal.

**17.** I have heard both the parties and perused the records. It is noted that the assessee has incurred Rs.3,55,885/- as conveyance expenses and out of which AO has disallowed Rs.42,223/- on account of non-production of supporting cash memos, bills and vouchers. Even though, the assessee claimed that these expenses were incurred by the site supervisors for which monthly reimbursements were made by the assessee, but, since assessee failed to provide any supporting documents like cash memo/bills/invoices, the AO disallowed specific three (3) expenses i.e. Rs.14,976/-, Rs.11,780/- and Rs.15,467/-. The Ld. CIT(A) while confirming the action of AO observed that these expenses cannot be termed as petty expenses and since the assessee failed to produce any evidence to substantiate the incurrence of such expenses he confirmed the action of the AO. Before this Tribunal, the assessee failed to produce any material to support the expenses to the tune of Rs.42,223/-, therefore, the action of the Ld. CIT(A) is confirmed.



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**18.** Ground no. 7 of the assessee is against the action of the Ld. CIT(A) partly allowing the addition made under the “*Travelling Expenses*”.

**19.** The Ld. CIT(A) has partly allowed this issue by holding as under: -

“9. Ground of appeal no. 10 is related to disallowance of 1,15,492/- under the head travelling and conveyance expenses. The appellant has submitted that appellant has admitted in the written reply dated 29.01.2016 that some of vouchers could not be produced for verification during the scrutiny assessment proceedings is incorrect and erroneous. The explanation offered by the assessee at point no. 3 of the reply dated 29.01.2016 does not appear to have been considered by the AO. The specific instances of expenditure mentioned by the AO aggregated to only Rs.18,111/-. I have seen the order of AO has clearly mentioned that all bills/vouchers of expense under this head are not produced. Since the appellant is disputing the same, the appellant is directed to produce all the bills/vouchers before the AO. The AO shall limit the disallowance to the specific bills/vouchers which are not produced or which are found to be personal in nature. The ground of appeal is partly allowed.”

**20.** In this regard, it noted that the assessee has claimed to have incurred of “*Travelling Expenses*” to the tune of Rs.5,77,476/- out of which the AO noted that expenses to the tune of Rs.18,111/- was personal in nature. Further, AO noted that since the assessee did not produce some vouchers for incurring such expenses to the tune of Rs.5,77,476/-, he was of the view that expenses claimed couldn't be completely verified, therefore, he disallowed 20% of the claim i.e.



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Rs.1,15,492/-. On appeal, the Ld. CIT(A) has partly allowed the claim of the assessee by directing the AO to limit the disallowance to the extent assessee produces bills/vouchers and which are not personal in nature. Still not satisfied, the assessee is before this Tribunal.

**21.** On this issue, it is noted that the assessee has claimed an expenditure of Rs.5,77,476/- on account of travelling expenses. And since the assessee could not produce some vouchers for the verification of the AO, he disallowed 20% of the claim and thus disallowed Rs.1,15,492/-. According to the Ld. AR, the accounts of the assessee are audited and since the AO has not rejected the books of the account of the assessee, the adhoc disallowance of 20% is arbitrary and not sanctioned by law. And therefore, should be deleted.

**22.** Per contra, the Ld. DR on the strength of the decision of the Hon'ble Allahabad High Court in the case of PCIT Vs. Rimjhim Ispat Ltd. (2016) (382 ITR 152) contended that similar issue came up before the Hon'ble High Court wherein similar action of the Tribunal deleting 5% of the disallowance regarding manufacturing expenses was examined by the Hon'ble High Court and upheld 50% disallowance by holding as under: -

“7. Having heard the learned counsel for the parties, we find that there is an express finding given by the Assessing Authority as well as by the Ist Appellate Authority with regard to non-production of bills and vouchers and for not maintaining the stock register. In the absence of non-production of bills and vouchers, the Assessing Officer was justified in disallowing certain



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expenditure by 10%, which was reduced by the Ist Appellate Authority to 5%. This aspect had not at all been considered by the Tribunal and the same had only been allowed on the ground that the turnover has increased by 5% and the expenditure has reduced. The Tribunal has lost sight of the fact that the expenditure claimed under the head manufacturing expenses, which forms part of the "profit and loss account", showing expenses made by the assessee are required to be proved by production of bills and vouchers. In the absence of production of bills and vouchers, an inference can be drawn by the Assessing Authority that such expenses shown under this head were inflated or were not supported by any bills, vouchers or any other documentary evidence, which would justify the Assessing Officer in disallowing certain portion of such expenses.

**8.** In the light of the aforesaid, we are of the opinion that the Tribunal committed an error in allowing the appeal of the assessee and by totally deleting the disallowance of 5%. We, accordingly, allow the Ist question of law as stated aforesaid, in favour of the appellant, i.e., the Department and against the assessee and set aside that part of the order of the Tribunal on this aspect and restore the order of the Ist Appellate Authority. In our opinion, the disallowance of 5% in the facts of the case is justified.”

**23.** Therefore, according to the Ld. DR, the disallowance made by the AO on account of assessee’s failure to produce the bills and vouchers in respect of expenditure should not be interfered with.

**24.** It is noted that the assessee has claimed to have incurred an expenditure of Rs.5,77,476/- on account of travelling expenses which AO disallowed 20% of it i.e Rs.1,15,492/- since the assessee failed to produce some vouchers/bills to support the expenditure, and also taken



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note of the fact that out of this expenditure, the assessee has claimed personal expenditure to the tune of Rs.18,111/-. On appeal, the Ld. CIT(A) has directed AO to allow expenditure in the event assessee is able to bring supporting evidence and which are not of personal nature. Assessee before me, also could not produce the vouchers/bills which he couldn't produce before the AO. But I note that the assessee's accounts are audited and the AO has not rejected the books of assessee. Therefore, in the interest of justice and fair play, I am inclined to partly allow the assessee's claim by restricting the disallowance to 5% of the claim made by the assessee. This ground of assessee is partly allowed.

**25.** In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 12/09/2023.

**Sd/-**  
**(ABY T. VARKEY)**  
**JUDICIAL MEMBER**

Allahabad दिनांक Dated : 12/09/2023.  
Vijay Pal Singh, (Sr. PS)

Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT(A) , Allahabad
4. CIT
5. DR -

By order  
Assistant Registrar