आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।

IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH: RAIPUR

श्री रवीश सूद **,** न्यायिक सदस्य**,** एवं
श्री **अरुण खोडपिया,** लेखा सदस्य के समक्ष

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.100/RPR/2018**
निर्धारण वर्ष **/Assessment Year: 2013-14**

The DCIT-1(1) Bhilai	**v.**	Shri Sandeep Surendran Nair, Prop. M/s. Vasava Engineering Construction, 113-Friends Arcade, Shastri Nagar, Supela, Bhilai
[**PAN:** ACZPN 2865 M]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Shri Makarand M. Joshi & Shri Aniruddha Kavimandan, CAs
प्रत्यर्थी की ओर से /Respondent by	:	Shri Satya Prakash Sharma, Sr. D.R.
सुनवाई की तारीख/Date of Hearing	:	22.08.2023
घोषणा की तारीख /Date of Pronouncement	:	14.09.2023

आदेश **/ O R D E R**

PER ARUN KHODPIA, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals)-II, Raipur, dated 23.03.2018, and pertains to assessment year 2013-14, decided in appeal instituted against the order by Dy. Commissioner of Income Tax-1(1), Bhilai, u/s 143(3) of the IT Act, 1961 dated 31.03.2016.

2. The assessee has raised the following grounds of appeal:

> *"1. Whether in law and on facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.2,02,96,683/- made by the AO on account of non-payment of 'unpaid service tax liability' u/s. 43B of the Act.*
>
> *2. Whether in law and on facts and circumstances of the case, the Ld. CIT(A) was justified in considering unpaid Service Tax as allowable in contravention of section 43B of the IT Act, 1961?*
>
> *3. The order of the Ld. CIT(A) is erroneous both in law and on facts.*
>
> *4. Any other ground that may be adduced at the time of hearing."*

3. The brief facts of the case are that the assessee is engaged in the business of mechanical maintenance job, who had filed his return of income on 29.09.2013 showing the total income of Rs.1,04,32,090/-. The case of the assessee was selected for scrutiny through manual selection as per clause 1(a) of instruction No. 6/2014 dated 02.09.2014 and accordingly, notice under Section 143(2) of the Act was issued on 12.09.2014. The return submissions towards the notices issued by the assessee examined by Learned AO. The case was discussed and the assessment order was framed with certain additions determining the total assessed income at Rs.3,12,78,780/-.

4. Aggrieved by the order of Learned AO, assessee preferred an appeal before Learned CIT(A) wherein the only issue pertaining to disallowance of

Rs.2,02,96,683/- made in terms of violation of provisions of Section 43B of the Income-tax Act was assailed by the assessee on which Learned CIT(A) after relying on various judicial pronouncements have decided that the unpaid liability of Service Tax of Rs.2,02,96,683/- pertaining is not liable to be added to the income of the assessee by disallowing the same invoking the provisions of section 43B, therefore, the addition made by Learned AO was vacated. Since, the addition was vacated and relief was granted to the assessee by Learned CIT(A), which was not considered as justified, thus, dissatisfied with the same, the Revenue is in appeal before us.

5. At the outset, Learned Sr. D.R. reiterated the facts from the assessment order and submitted that the assessee was required to pay the service tax liability within the due date prescribed under the respective statute or before the date of filing of return u/s 139 of Act, however the assessee had made certain payment aggregating to Rs. 2,02,96,683/- beyond the date of filing of return, thus, Ld AO observed that the same considered to be allowable for deduction according to the provisions of section 43B of the ACT. It was also the observation of the Ld AO that the assessee was unable to furnish any breakup of the amount actually paid pertains to the relevant year or earlier years. Therefore, disallowance made under Section 43B of the Act was justified and

should be sustained. Learned Sr. D.R. further draw our attention to the written submissions made by the Sr. D.R. of the Department dated 30.03.2023, the same is extracted as under:

"Before,
The Hon'ble Member(s),
ITAT Bench, Raipur (C.G.).

Sub: Appeal filed under section 253 by the Revenue in the case of ***Sandeep Surendra Nair*** *for the A.Y. 2013-14, request regarding:*

1. Procedural facts on records

Reference No.		*ITA 100/RPR/2018*
Appellant	*The assessee*	*Adverse CIT appeal order*
Return filed on	*29.09.2013*	*1,04,32,090/-*
A.Y.	*2015-16*	
Status and nature of trade		*Contractor mechanical work*
Order under Section	*143(3)*	*Income assessed at Rs.3,12,78,773/-*
Quantum of addition		*Rs.2,08,46,883/-*
Tax effect	*87,42,646/-*	
Reasons for addition		*• Ad hoc disallowances of Rs.4,00,000/- On account of traveling and vehicle expenses. (Para-3 Page-2)* *Ad hoc disallowances on bed debt of Rs.1,50,000/-(Para-4 page-2)* ** Disallowed Rs.2,02,96,683 on account of service tax payable in view of section 438 of the Act.(Para-5 page-3)*
CIT appeal		**Only ground of appeal is disallowances us 43B, hence, other issues are not adjudicated.* *(Para-1 page-2)* **The CIT deleted disallowances u/s 438 as it is covered decision held by the ITAT,Raipur in ITA 174/BPR/2012 A.Y 2009-10.*

ITAT Form No.36		*No delay*
Revenue relied on case law		*The decision held by the Honble Supreme court in civil appeal no 2833 in the case of Checkmate Services (P) Ltd Vs Commissioner of Income tax pronounced on Oct 12, 2022, it was held that the deduction shall be admissible only if the amount is paid within the due date as prescribed under those respective Act and not before the filing of ITR. Relevant part of the Act is as under:* *"For assessment years prior to 2021-22, non obstante clause under section 438 could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee- employer as per section 2(24)(x), thus, said clause would not absolve assessee employer from its liability to deposit employee's contribution on or before due date as a condition for deduction Section 36(1)(va), read with sections 2(24)(x) and 438, of the Income-tax Act, 1961 Employee's contributions (PF/ESI) - Whether there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 438-Held, yes-* *Whether non obstante clause under section 438 could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part assessee-employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction - Held, yes*

		[Paras 53 and 54] [In favour of revenue] is read as under:- *54. In the opinion of this Court, the reasoning in the impugned judgment that the non obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.*

6. Contravening the submissions of Learned Sr. D.R., Learned AR of the assessee submitted that the issue in the present appeal has already been dealt with by the Co-ordinate Bench of ITAT, Raipur in ITA No.174/RPR/2012 for A.Y. 2009-10 dated 12-02-2016, wherein the issue is decided in favour of the assessee by rejecting the grounds of appeal of the Revenue. The relevant portion from the order of ITAT is extracted as under:

> *"5. With this brief background, we have heard both the sides. At the outset, it is worth to mention that this issue had already been considered by us in the case of ITO vs. Sri Tapan Das, Prop. M/s. Amkey Construction in ITA No.150/BLPR/2012 order dated 4.12.2015, wherein, we have discussed the law pronounced on it and thereafter held as under:*
>
> > *"4. Hence, after referring to the case laws namely S. B. Foundry (1990) 185 ITR 555 (All.) and India Carbon Ltd. Vs IAC & Anr. (1993) 200 ITR 759 (Gau) it was held that the admitted factual position was that the assessee had not claimed any amount by way of service tax as a deduction, therefore, there was no question of disallowance of any tax or dues u/s 43B of the IT Act. Against the relief, as granted by the learned CIT (A), now, the Revenue is in appeal before us.*
> >
> > *5. On the date of hearing, no one was present from the side of the respondent assessee. From the side of the Revenue, learned DR Smt. Shital S. Verma appeared and supported the order of the AO.*
> >
> > *6. After considering the submissions of the learned DR, we are of the considered opinion that no interference is required in the decision given by the learned CIT (A). The issue of disallowance of unpaid statutory liability as prescribed u/s 43B of the IT ACT now stood resolved by several decisions. The impact of Circular No.372 dated 8th*

December, 1981 has also been considered. As per the said circular it is specifically mentioned that several cases have come to the notice where tax payers did not discharge their liability in respect of excise duties or other taxes although claimed, the said liability as deduction on the ground that the accounts have been maintained on mercantile basis. The CBDT has observed that on one hand the tax payers have claimed the deduction merely on the basis of accrual of liability but on the other hand, disputed the liability and did not discharge the obligation of payment of the tax. For some reasons or the other, the liability is disputed and not paid. This aspect has been considered by several Courts and came to the conclusion that in a situation when deduction has not been claimed and a separate account has been maintained, then disallowance u/s 43B of the IT Act should not be made. In the case of CIT Vs Noble & Hewitt (India) (P) Ltd. (2008) 305 ITR 324 (Del.), the case of Chowringhee Sales Bureau P. Ltd. Vs CIT (1977) 110 ITR 385 (Cal.) has been distinguished and ***it was held that when the amount of tax has not been debited to profit & loss account as an expenditure nor claimed any deduction in respect of the said amount then, the question of disallowance u/s 43B of the IT Act does not arise.*** *Respectfully, following this decision, we hereby hold that there was no fallacy in the view taken by the learned CIT (A). The same is hereby confirmed and ground No.1 of the appeal of the Revenue is, therefore, dismissed. "*

6. In the light of above precedent, the issue as raked up by the revenue department now stood covered in favour of the assessee. Hence, we find no force in this ground of the revenue. Accordingly, we reject the same."

7. It was the further submission of Learned AR that the order pressed into the service of ITAT in the present appeal in assessee's own case as extracted hereinabove was duly considered by Learned CIT(A) and therefore, the addition was deleted. It was, thus, the prayer that the order of Learned CIT(A) deserves to be upheld.

8. With regard to the contention of the department that after the order of Hon'ble Supreme Court in Civil Appeal No.2833/2016 in the case of Checkmate Services Pvt. Ltd. Vs. CIT dated 12.10.2022, the position of Section 43B of the Act has been interpreted therefore, the payment of service tax made after the due date under the respective statute or not paid should be disallowed in terms of Section 43B of the Act. Learned AR of the assessee submitted that such contention of the Department cannot be acceded to since the decision of Hon'ble Apex Court was pertaining to employee's contribution towards PF/ESI and the same ratio cannot be applied in case of service tax liability.

9. Learned AR also relied upon the judgment of Hon'ble Bombay High Court in the case of CIT vs. Knight Frank (India) Pvt. Ltd., ITA Nos. 247 & 255 of 2014 dated 16.08.2016 wherein Hon'ble Bombay High Court has held, extracted as under:

> *6.* ***Regarding question (1):***
>
> *(a) For the better appreciation of the controversy to be examined, it is necessary to reproduce Section 145A of the Act, which at the relevant time read as under :-*
>
> *"145A - Notwithstanding anything to the contrary contained in Section 145-*

(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be-

(i) in accordance with the method of accounting regularly employed by the assessee; and

(ii) further adjusted to include the amount of any tax, duty.. cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation. Explanation For the purposes of this section, any tax, duty. cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment."

(b) The grievance of the Revenue to the impugned order of the Tribunal is that Section 145A(a)(ii) of the Act would apply as the amount receivable on rendering service tax. This service services would also include the similar to excise duty, sales tax and other taxes, which have to be collected to be paid over to the Government.

(c) It is very clear from the reading of Section 145A(a) (ii) of the Act that it only covers cases where the amount of tax, duty, cess or fee is actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

(d) In this case, the respondent-assessee has admittedly not paid or incurred any liability for the purposes of bringing any goods to the place of its location. In this case, the respondent-assessee is rendering services. Thus, on the plain reading of Section145A(a)(ii) of the Act, it is self evident that the same would not apply to the service tax billed on rendering of services. This is so as the service tax billed has no relation to any goods nor does it have anything to do with bringing the goods to a particular location.

(e) The Explanation to Section 145A(a) of the Act does not expand its scope. An Explanation normally does not widen the scope of the main section. It merely helps clarifying an ambiguity. (See Zakiyr Begam v/s. Shanaz Ali & Ors., 2010 (9) SCC 280). The main part of the Section specifically restricts its ambit only to valuation of purchase and sale of goods and inventory. Rendering of service is not goods or inventory. Goods would mean movables

and inventory would mean stock of goods. Therefore, the Explanation would only apply for valuation of sales and purchase of goods and stock of goods as provided in the main part. The Explanation in this case clarifies/ explains that any tax, duty, cess or fee paid or incurred will have to be taken into account for valuation of goods even if such payment results in any benefit/ right to the person making the payment. This Explanation was necessary as otherwise in terms of Accounting Standard - (AS-2) issued by the Institute of Chartered Accountants of India provides that cost of goods would include the duties and taxes paid, other then the duties and taxes which give a right to recover the same from the taxing authorities to illustrate duty draw back etc. Thus, the Explanation only seeks to clarify the fact that notwithstanding any right acquired on payment of taxes to recover the same from the government, for the purpose of Section 145A of the Act, the same cannot be excluded even though the AS-2 provides otherwise. It does not even remotely deal with the issue of service tax.

(f) Further, it is to be noted that Service Tax was first introduced in India by Finance Act, 1994. Section 145A of the Act was first introduced into the Act only by Finance (No.2) Act, 1998 w.e.f. 1" April, 1999. It was thereafter substituted by Finance (No.2) Act, 2009 which is identical, except for addition of clause (b), dealing with interest. However, the Parliament did not while substituting it, deem it fit to explicitly include the valuation of Services therein. Thus, it is clear that the legislature never intended to restrict the applicability of Section 145A of the Act only to goods and not extend it to Services. As observed by the Apex Court in State of Bihar v/s. S. K. Roy AIR 1966 (SC) 1995 :-

> *"It is well recognized principle in dealing with construction that a om subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon an earlier Act where the earlier Act is obscure or capable of more then one interpretation."*

We must make it clear that we do not find any ambiguity in Section 145A of the Act as arising for our consideration. However, even if one were to assume the main part of Section 145A of the Act, is capable of more then one interpretation, the interpretation sought to be canvassed by the Revenue, is not sustainable. Therefore, Section 145A of the Act would have no application in cases where service is provided by the Assessee.

(f) In view of the above, the question (i) as proposed does not give rise to any substantial question of law. Thus, not entertained."

10. Learned AR further place reliance upon the judgment by the Jurisdictional High Court of Chhattisgarh in the case of ACIT vs. M/s. Ganpati Motors dated 25.04.2017 in ITA No.30 of 2016, wherein Hon'ble Jurisdictional High Court has observed that since the VAT is not charged to Profit and Loss Account. Therefore, the liability even if still unpaid, the same cannot be disallowed being not claimed as deduction in the Books of Accounts. It was the submissions that the ratio of law pertaining to VAT is squarely applicable to service tax also.

11. We have heard the rival contentions and perused the material available on record and judicial pronouncements for consideration. Admittedly, the issue raised in the present appeal is already dealt with and decided by the Co-ordinate Bench of ITAT, Raipur in ITA No.174/BPR/2012 in A.Y. 2009-10 on 12.02.2016, therefore, the issue is squarely covered and accordingly we do not have any second opinion in absence of any deviating view, fact or decision that the revenue could have brought to our knowledge to distinguish. With regard to the

contention of the department, that the issue in hand is covered by order of Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. (supra), we are unable to comprehend with such contention of the Department, wherein Hon'ble Apex Court has decided the issue pertaining to the applicability of Section 43B of the Act on delayed payment of employees' contributions to PF/ESI, therefore, we reject this contention of the Department devide of any merit for issue in hand. Furthermore, since the issue pertaining to VAT has been deliberated and decided by the Hon'ble Jurisdictional High Court of Chhattisgarh in the case of Ganpati Motors (supra), wherein it was categorically noted by the Hon'ble Jurisdictional High Court, that in the situation where the Assessing Authority and the First Appellate Authority did not doubt the modality of the accounting system adopted by the assessee, is an outstanding phenomenon which goes in favour of the assessee. Under such circumstances, it is not necessary for the authorities to consider, whether Section 43B of the Act is to be relied on by the assessee to claim any deduction.

12. In background of aforesaid facts and circumstances and respectfully following the judicial principles laid down by the Hon'ble Jurisdictional High Court and since the matter is squarely

covered by the decision of co-ordinate Bench of ITAT, Raipur in assessee's own case, we do not find any infirmity in the order of Learned CIT(A) and therefore, there is no reason to interfere with the same. In the result, grounds of appeal raised by Revenue in the present appeal found to be squarely covered in favour of the assessee and thus the same are rejected.

13. In the result, appeal of Revenue is dismissed.

Order pronounced on the 14th day of September 2023, in Raipur.

Sd/-	Sd/-
(**रवीश सूद**)	**(अरुण खोडपिया)**
(RAVISH SOOD)	**(ARUN KHODPIA)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

रायपुर/Raipur,
दिनांक/Dated: 14th September, 2023.
Priti Yadav, Sr.PS (on Tour)

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त (अपील) / The CIT(A)-1, Raipur (C.G)
4. The Pr.CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर / The DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फाईल/Guard File

आदेशानुसार / By Order

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur