

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH 'DB', JABALPUR**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 27/JAB/2020 : Asstt. Year: 2017-18

The ACIT Circle-Katni, Jhinhri (MP) 483501	Vs	M/s Gajraj Mining P. Ltd., Behind Telephone Exchange, Nehru Nagar, Singrauli (MP) 486889
(APPELLANT)		(RESPONDENT)
PAN No. AADCG9684 L		

**CO No. 5/JAB/2020 : Asstt. Year: 2017-18
(Arising out of ITA 27/JAB/2020)**

M/s Gajraj Mining P. Ltd., Behind Telephone Exchange, Nehru Nagar, Singrauli (MP) 486889	Vs	The ACIT Circle-Katni, Jhinhri (MP) 483501
(APPELLANT)		(RESPONDENT)
PAN No. AADCG9684 L		

Assessee by : Sh. Sapan Usrethe, Adv.

Revenue by : Sh. Shravan Kumar Gotru, CIT(DR)

Date of Hearing: 29.11.2023

Date of Pronouncement: 30.11.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by Revenue and cross objection filed by the assessee against the orders of Id. CIT(A)-1, Jabalpur dated 03.07.2020.

2. The Revenue has raised the following grounds of appeal are as under:-

(i) Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in deleting the addition of Rs. 19,92,400/- made by the Assessing Officer being disallowance out of interest under sec.

36(1) (iii) on account of diversion of borrowed capital for non-business purpose by the assessee company.

(ii) Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in restricting the disallowance made by the Assessing Officer of Rs. 20,00,000/- to Rs. 2,00,000/- and thereby allowing relief of 18,00,000/- on account of unverifiable and unvouched expenses without appreciating the facts on the basis of which the addition was made.

(iii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 26,03,10,369/- being disallowance u/s 43B of the I. T. Act, 1961 on account of unpaid service-tax, surcharge and Income Tax deducted at source without appreciating the facts on the basis of which the addition was made by admitting additional evidence without affording adequate opportunity to the Assessing Officer for verification.

(iv) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the various addition/ disallowances admitting additional evidence without affording opportunity to Assessing Officer in violation of Rule 46A of I. T. Rules.

(v) Whether on the facts and in the circumstances of the case, the order of the Ld. CIT(A) is contrary to facts and law, and the same deserves to be set aside.

3. The cross objection has not been pressed and hence dismissed as infructuous.

Disallowance u/s. 36(1)(iii):

4. The AO found that the assessee has not charged interest on the loans /advances which are not related to business purpose and determined interest disallowance @12% on the amounts lent.

5. The Id. CIT(A) found that the assessee has advanced monies of Rs. 2.27 crores specifically for the business purpose and hence held that no disallowance is called for. The Id. CIT(A) also held that the share capital, the reserves and surplus of the assessee stands at Rs. 14.73 crores and hence

held that the advances given were out of own funds and hence no disallowances called for.

6. Having gone through the issue, we find that no borrowed funds have been utilized for advancing the loans and even otherwise also such loans were given for the purpose of business. Hence, keeping in view the judgment of Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities & Power Ltd. (2009) 313 ITR 340 (Bom.) and Hon'ble Gujarat High Court decision in the case of CIT vs. Suzlon Energy Ltd. 354 ITR 630 (Guj.) & CIT vs. Torrent Power Ltd. (2014) 363 ITR 474 (Guj.), keeping in view we hold that no disallowance on account of interest is called for. Order of the Id. CIT(A) on this grounds is affirmed.

Disallowance of Expenses:

7. The Assessing Officer during the course of assessment proceedings observed that assessee has claimed local shifting charges of Rs. 23,49,624/-, local conveyance expenses of Rs. 36,71,838/-, printing & stationary expenses of Rs. 77,81,743/-, travelling expenses of Rs. 50,80,623/- and business promotion expenses of Rs. 2,82,229/-. The entire expense were to the tune of Rs. 2,05,82,834/-. Therefore, the AO on ad-hoc basis disallowed sum of Rs. 20,00,000/- and added back to the income of the appellant holding that these expenses are not verifiable. The Id. CIT(A) restricted the addition to Rs. 2,00,000/- on adhoc basis. Since the disallowance by the AO and the restriction of disallowance by the CIT(A) on adhoc basis, in the absence of any evidence of bogus nature of the

expenses claimed bought by the Revenue before us, we decline to interfere with the order of Id. CIT(A).

Disallowance u/s. 43B:

8. The AO disallowed the following payments u/s. 43B

- a) Service Tax Collected Rs.22,65,73,334/-
- b) Swatch Bharat Cess Rs. 1,06,68,102/-
- c) Kisan Kalyan Cess Rs. 42,52,993/-
- d) Tax deducted at source Rs.1,88,16,240/-

9. The appellant has also stated that opening balance in TDS payable account as on 01.04.2016 is at Rs. 1,18,42,573/- and closing balance at Rs. 1,88,16,240/-. There are total credits of Rs. 3,04,07,965/- and debits at Rs. 1,15,91,725/- during the financial year. During the financial year 2017-18, the assessee company had deposited total TDS of Rs. 1,88,40,392/- upto 07.11.2017. The appellant in their support has filed copies of challan of TDS deposit.

10. Hence we hold that the Id. CIT(A) rightly deleted the addition on account of the TDS.

11. Before us the Id. DR supported the order of the Assessing Officer and the Id. AR relied the order of the Id. CIT(A).

12. Heard the arguments of both the parties and perused the material available on record.

13. Section 43B of the Act which is as under: -

Certain deductions to be only on actual payment.

43B. 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, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(c) any sum referred to in clause (ii) of sub-section (1) of section 36, or

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or

(e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank "[or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank] in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, or

(g) any sum payable by the assessee to the Indian Railways for the use of railway assets, 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:

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

Explanation 1.-For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year being a previous year

relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2

-For the purposes of clause (a), as in force at all material times, any sum payable" means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

Explanation 3.-For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3A.—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (e) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1996, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3B.—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (of this section is allowed in computing the income, referred to in section 28, of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 2001, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3C.-For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid.

Explanation 3D.-For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (e)

of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or advance shall not be deemed to have been actually paid.

Explanation 4.— For the purposes of this section, —

(a) "public financial institutions" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956); (aa) "scheduled bank" shall have the meaning assigned to it in the Explanation to clause (iii) of sub-section (5) of section 11;

(b) "State financial corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) "State industrial investment corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and eligible for deduction under clause (viii) of sub-section (1) of section 36; 54[(d) "co-operative bank", "primary agricultural credit society" and "primary co-operative agricultural and rural development bank" shall have the meanings respectively assigned to them in the Explanation to sub-section (4) of section 80P.]

14. We find that, the Id. CIT(A) held that, Section 43B are applicable in the case where any sum as liability was payable by the assessee and was not paid on or before due date of filing of return for the relevant previous year.

15. In other words, any deduction otherwise allowable under the act shall not be allowed unless it is actually paid. In the instant case, the AO found appellant guilty for not discharging its liabilities before the end of relevant financial year and disallowed following sum placing reliance on provisions of section 43B of the Act;

16. The Id. CIT(A) has also gone through the rules for payment of Service Taxed. The rules for payment of service tax

has been provided in section 68 of Finance Act, 1994 as well as in Rule 6 of Service Tax Rules which read as under: -

68. Payment of service tax

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the official Gazette/ the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service."

Rule 6 of Service Tax Rules:

"6. Payment of Service Tax [(1) The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable service.

PROVIDED that where the Assessee is an individual or proprietary firm or partnership firm/ the service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the quarter in which the payments are received., towards the value of taxable services:

PROVIDED FURTHER that notwithstanding the time of receipt of Payment towards the value of services, no service tax shall be payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable:

PROVIDED also that the service tax on the value of taxable services received during the month of March, or the quarter ending in March as the case may be, shall be paid to the credit of the Central Government by the 31st day of March of the calendar year.

17. The Id. CIT(A) held that, from the above sec.68, it becomes clear that service tax has to be paid in the manner which may be prescribed and this has been prescribed in Rule 6 of Service Tax Rules. A plain reading of Rule 6 would show that service provider becomes liable to make the payment of service tax by the 5th of the month immediately following the calendar month in which the payments are received towards the value of taxable service. The first proviso gives an exception in case of individual or proprietary firms or partnership firms, and in such cases, service tax has to be paid to the credit of Central Government by the 5th of the month immediately following the quarter in which the payments are received. The only difference is that in case of individual or proprietary or partnership firm, payment has to be made on 5th of the following month after the following the quarter whereas in the case of other organisations it has to be paid on the 5th of the month immediately following the calendar month. But in both the cases, the liability arises to make the payment only after the service provider has received the payments. If there is no liability to make the payment to the credit of Central Government because of non receipt of payments from the receiver of the services, then it cannot be said that such service tax has become payable in terms of clause (a) of sec.43B because that clause specifically mentions "sum payable by the Assessee". Service tax and cess are government

receipts collected by appellant as an agent and paid to government. The appellant has not claimed any deduction w.r.t service tax payable in return of income, therefore, provisions of section 43B are not invoked. From plain reading of provisions of section 43B it is clear that the rigour of this provision would be attracted only in a case where an item is allowable as deduction but because of the failure to make payment such deduction will not be allowed. The provisions of section 43B are not applicable for payment of Service Tax because of two reasons. Firstly, the appellant is never allowed deduction on account of Service Tax which is collected on behalf of the Govt., and paid to the Govt. accordingly. Therefore, a service provider is merely acting as an agent of the Govt., and is not entitled to claim deduction on account of service tax. Hence, on this account alone addition under sec.43B could not be made. The second aspect of this issue is also important. Sec.43B(c) uses the expression 'any sum payable'. For making any disallowance, first of all it has to be established that such sum is payable. The Dictionary meaning of the word 'payable/in Concise Oxford English Dictionary is,

1. required to be paid;
2. able to be paid; and
3. debts owned by a business

The Chambers Dictionary (New Edition) defines the word 'payable' as "that may or should be paid; due or profitable"

Black's Law Dictionary, Sixth Edition defines the term 'payable' as under :-

"Capable of being paid; suitable to be paid; admitting or demanding payment justly due; legally enforceable. A sum of money is said to be payable when a person is under obligation to pay it. Payable signifies an obligation to pay at a future time, but when used without qualification, term normally means that the debt is payable at once, as opposed to 'owing'".

The above definition would show that the word 'payable' is used in sec. 43B, to my understanding, would mean that there is a kind of obligation on the part of payee to make the payment which is already due which is best applicable in Sales Tax. For an instance, whenever a Chartered Accountant raises a bill for professional services which are subjected to service tax, it is not necessary that the client will accept the bill as such and make payment accordingly. In that situation, the Chartered Accountant cannot be fastened with the liability to pay the service-tax. But, in any case the Sales-tax situation is different. For example, sec. 6(1) of Central Sales Tax Act, 1956 provides that :-

"6. liability to tax on inter-State sales. - [(1)] Subject to the other provisions contained in this Act, every dealer shall, with effect from such date as the Central Government may by notification in the Official Gazette appoint not being earlier than thirty days from the date of such notification be liable to pay tax under this Act on all sales of goods other than electrical energy] effected by him in the course of inter-State trade or commerce during any year on and from the date so notified:

[Provided that a dealer shall not be liable to pay tax under this Act on any sale of goods which in accordance with the provisions of sub-section (3) of section ~ is a sale in the course of export of those goods out of the territory of India.]

The above provision clearly shows that the dealer would become liable to make Sales-tax payment the moment he effects the sales in the course of an inter-State trade or commerce. This shows that the liability to make payment of Sales-tax is not depending on the fact whether such dealer has received the payment from the customer of the goods or not. The liability is fastened to the transaction in sales and once such sale is effected, the dealer becomes liable to pay. However, the service tax is payable when the services are rendered and the proceeds are received against service provided. Hon'ble High Court of Bombay in the case of PCIT vs Tops Security Ltd (2018) 258 Taxman 161 (Bom) has held as under:-

Section 43B does not contemplate liability to pay service tax before actual receipt of the funds in the account of the assessee. Hence, the liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise.

A SLP filed by department against the order of Hon'ble High Court of Bombay has been dismissed by Hon'ble Supreme Court in the case of CIT vs Ovira Logistics Pvt Ltd 2015 377 ITR 129 (Bom HC) where in Hon'ble High Court has held as under:-

Certain deduction to be allowed only on actual payment (Service tax) - Assessment year 2007-08 - Whether when services were rendered liability to pay service tax in respect of consideration would arise only upon receipt of such consideration and not otherwise - Held. yes - Whether where it was found that before end of year, amount on which service tax was payable had not been received from parties to whom services were rendered. claim of service tax paid could not be disallowed - Held, yes

In the case of appellant, the opening balance of service tax payable as on 01.04.2016 was at Rs. 18,21,68,209/-. The total credits during the year were at Rs. 20,15,71,294/- and total debits were at Rs. 16,01,66,115/- and the closing balance as on 31.03.2017 was at Rs. 22,35,73,388/-. Further, the total credits upto 07.11.2017 (which is due date for filing of return) were at Rs. 10,43,61,908/- and appellant till 07.11.2017 has paid sum of Rs. 13,98,19,009/-. In support appellant has filed copies of proof of payment of service tax. Also, against the outstanding liability of service tax and cess at Rs. 22,35,73,388/- there were bills receivable from parties amounting to Rs. 66,19,03,707/-. Therefore, there arise no liability on appellant to pay service tax on un-collected bills/amount. Last but not the least, the appellant has brought to my knowledge that all the disputes relating to outstanding liabilities of service tax under different heads for the period 01.04.2015 to 01.06.2017 were settled under SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME 2019 and balance amount of Rs. 18,09,331.50 was deposited vide challan dated 18.03.2020. The scheme was introduced in Union Budget 2019.

18. In view of the above discussion, provisions of the Act, ratio of the Id. CIT(A) and keeping in view the fact that the assessee has paid entire service tax & cess received before due date of filing of return we decline to interfere with the decision of the Id. CIT(A) but no disallowance is called for on account of payment of Service tax, Swatch Bharat Cess, Kisan Kalyan Cess.

19. In the result, the appeal of the Revenue as well as assessee is dismissed.

Order Pronounced in the Open Court on 30/11/2023.

Sd/-
(Yogesh Kumar U.S)
Judicial Member

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Jabalpur Dated: 30/11/2023

NV, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT JABALPUR