

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.2681/Mum/2023  
(A.Y. 2014-15)**

Platinum Properties Plot No. 6, G-20-24, Taloja, MIDC, Tal Panvel, Taloja Raigad-410208 Maharashtra	Vs.	ITO, Ward-5 Panvel, Thane
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAJFP4159N		
Appellant	..	Respondent

Appellant by :	Prateek Jain
Respondent by :	H.M. Bhatt

Date of Hearing	05.01.2024
Date of Pronouncement	15.01.2024

आदेश / O R D E R

**Per Amarjit Singh (AM):**

This appeal filed by the assessee is directed against the order passed by the Id. CIT(A)-11, Pune, dated 30.05.2023 for A.Y. 2014-15. The assessee has raised the following grounds before us:

- “1. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the action of the Id. AO in disallowing an amount of Rs.77,65,656/- on account of unpaid liability for MVAT and service tax. thereby invoking the provisions of section 43B of the Income Tax Act, 1961, for reasons mentioned in the impugned order or otherwise*
- 2 On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the action of the Id. AO in disallowing an amount of Rs.44,28,868/- being the brought forward loss of Rs. 8,91,768 and Rs. 35,37,100/- for AY 2011-12 and AY 2013-14 respectively, for reasons mentioned in the impugned order or otherwise.*
- 3. The appellant craves leaves to alter, amend, withdraw or substitute any ground or grounds or to add any new ground or grounds of appeal on or before the hearing.*

*The appellant prays this Hon'ble Tribunal to delete the additions/disallowance made by the Id.AO, and confirmed by the Id. CIT(A)."*

2. Fact in brief is that return of income declaring total income of Rs.1,14,800/- was filed on 30.09.2014. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 10.09.2015. During the course of assessment the assessing officer noticed that assessee has shown MVAT and service tax payable as on 31.03.2014 to the extent of Rs.78,46,511/- and Rs.25,87,960/- respectively. The AO further noticed that the aforesaid taxes have not been paid before filing of the return of income u/s 139(1) of the Act. Therefore, assessee was asked to show cause as to why the same should not be disallowed u/s 43B of the Act. The assessee explained in their submission that said amount has not been routed through profit and loss account, therefore, the same should not be disallowed. The assessee also explained that amount of Rs.51,77,696/- as MVAT and Rs.23,15,276/- as service tax balances was out of previous years. The AO has not agreed with the explanation of the assessee and disallowed the amount of Rs.51,77,696/- and Rs.258,796/- received during the year on account of MVAT and service tax totalling to Rs.77,65,656/- u/s 43B of the Income Tax Act.

3. During the course of assessment the AO further noticed that assessee has claimed set-off of brought forward loss of Rs.8,91,768/- of assessment year 2011-12 and Rs.35,37,100/- of assessment year 2013-14 totalling to Rs.44,28,868/- against the income of the year under consideration. The assessing officer has disallowed the claim of set-off of brought forward loss on the ground that loss declared by the assessee in the return of income was converted into taxable income u/s 143(3) of the Act.

4. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

5. During the course of appellate proceedings before us the ld. Counsel submitted that assessee has not debited any amount of MVAT and service tax in the profit and loss account, therefore, the ld. CIT(A) is not justified in sustaining the disallowance made u/s 43B of the Act. The ld. Counsel has placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT-2, Mumbai Vs. Knight Frank (I) Pvt. Ltd. (2016) 72 taxmann.com 300 (Bom) and in the case of CIT-8, Mumbai Vs. Ovira Logistics (P) Ltd. (2015) 58 taxman.com 206 (Bom) and in the case of ITAT Hyderabad vide ITA No. 315/Hyd/2016 Envision Enterprises Solutions P. Ltd. Vs. ITO-2(1) and ITAT Mumbai in the case of Vijay Associates Wadhava Vs. ACIT, Range-9(3) vide ITA No .5460/Mum/2015 dated 16.01.2018 and in the case of DCIT Vs. Sandeep Surendran Nair (2023) 157 taxman.com 257 (Raipur Trib) and in the case of ACIT, Bhilai, District Durg (C.G.) Vs. M/s Ganpati Motors G.E. Road, vide ITA No. 8 of 2017 7 30 of 2016 dated 25.04.2017.

6. On the other hand, the ld. D.R supported the order of assessing officer and ld. CIT(A). He also placed reliance on the decision of ITAT, Delhi in the case of Howkunt Infrastructure (P) Ltd. Vs. DCIT, Gurgaon Circle-2 (2018) 93 taxman.com 13 (Delhi Trib) and the ITAT Pune in the case of Munaf Ibrahim Momon Vs. ITO, Ward 3, Dhule (2017) 85 taxman.com 236 (Pune Trib).

7. Heard both the sides and perused the material on record. During the course of assessment proceedings the assessing officer noticed that assessee had shown MVAT and service tax payable as on 31.03.2014 to the extent of Rs.78,46,511/- and Rs.25,87,960/- respectively and the same was not paid by the assessee before the time allowed u/s 139(1) of the Act. The assessee claimed that said amount was neither debited

to the profit and loss account nor claimed as deduction u/s 43B of the Act. We have perused the copy of profit and loss account filed by the assessee demonstrating that assessee has not routed the aforesaid two component of amount in the profit and loss account and also not claimed any deduction u/s 43B of the Act. We have also perused the copies of assessment orders filed by the assessee for the assessment year 2013-14 and 2015-16 u/s 143(3) of the Act showing that on similar fact and issue no disallowance was made by the assessing officer in the case of the assessee.

7(1). We have also perused the judicial pronouncements referred by the ld. Counsel. In the case of ACIT, Bhilai, District Durg (C.G.) Vs. M/s Ganpati Motors G.E. Road, vide ITA No. 8 of 2017 7 30 of 2016 dated 25.04.2017 Hon'ble High Court of Chhatisgarh categorically held in respect of value added tax VAT which was not routed through the profit and loss account is not to be disallowed u/s 43B of the Act. The relevant operating part of the decision is reproduced as under:

*“3. The Assessing Authority, on the instant issue, noticed that the assessee's claim regarding the treatment of VAT in the Books of Accounts has been verified from the Books and that has been found to be in order. The Assessing Authority also found that VAT has been found separately accounted for in the Books of Accounts. The only ground on which the Assessing Authority refused to exclude the VAT collected by the dealer from the profit of business is on the basis that the VAT component was not paid off on or before the due date for furnishing the return in relation to the previous year under Section 139(1) of the Income Tax Act. The First Appellate Authority also noticed that it is an undisputed fact that the Appellant did not charge VAT to the Profit and Loss account. It was therefore noted by the First Appellate Authority that in such circumstances, the liability may still be unpaid, but it cannot be disallowed being not claimed as deduction in the Books of Accounts.*

*4. With the aforesaid fact situation, we are unable to hold that the Tribunal was in error in law in dismissing the revenue's appeal making a reference to the decisions referred to by it.*

*5. The decision of the Apex Court in Chowringhee Sales Bureau (P) Ltd. Vs. CIT, AIR 1973 SC 376 = (1973) 87 ITR 542, dealt with a case where the contents of the Profit and Loss account apparently showed that though the assessee had attempted to show that there is a separate account for tax collected, the collection would have been only of a composite amount. The transaction dealt with in Chowringhee's case (supra) related to auction and the nature of the*

*income derived by an auctioneer in the process of auction. In contradistinction thereto, are the decisions of the High Court of Delhi in Commissioner of Income Tax v. Noble & Hewitt (India) (P) Ltd., 2008 305 ITR 0324, which make a nice distinction between Chouringhee's case and instances where Profit and Loss accounts and Service Tax accounts are maintained separately following mercantile system of accounting. As rightly noticed therein, it is not for the Income Tax department to make out a case relating to the correctness or otherwise of the mercantile system of accounting, resorted to and maintained by an assessee. The acceptability or otherwise of the accounts in a mercantile system would obviously be a matter of concern for other taxation authorities.*

*6. In the case in hand, as already noted, the fact situation that 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 43-B of the Income Tax is to be relied on by the assessee to claim any deduction.*

*7. For the aforesaid reasons, on the facts and circumstances of the case in hand, we answer to the question formulated in these appeals in the negative, that is to say, against the revenue and in favour of the assessee.”*

7(2). We have also perused the decision of ITAT Raipur in the case of DCIT Vs. Sandeep Sandeep Surendran Nair (2023) 157 taxmann.com 251 (Raipur Trib) where service tax payable was not debited to profit and loss account as an expenditure nor any deduction claimed by assessee in respect of said amount, therefore held that impugned disallowance under Sec. 43B was not sustainable.

7(3). We have also considered the decision of ITAT Delhi in the case of ACIT Vs. M/s S. & A. Finman Ltd. vide ITA No. 2220/Delhi/2012 dated 14.12.2022 holding that when service tax has not been routed through profit and loss account the provision of Sec. 43B are not applicable.

7(4). We have also perused the decision of Vijay Associates Wadhwa ITAT, Mumbai, wherein after referring the decision of Hon'ble jurisdictional High Court in the case of Knight Frank (India) (P) Ltd. Vs. CIT-2 (2016) 72 taxmann.com 300 (Bombay) held that in respect of service tax payable provision of Sec. 43B is not applicable since assessee had not claimed any deduction in its profit and loss account.

7(5). We have also perused the decision of Hon'ble High Court of Bombay in the case of Ovira Logistics (P) Ltd. (2015) 58 taxmann.com 206 (Bombay). Further, we have also perused the decision of Hon'ble Bombay High Court in the case of Knight Frank (India) (P) Ltd. Vs. CIT-2 (2016) 72 taxmann.com 300 (Bombay) wherein on similar issue on identical facts it is held that since assessee had not claimed any deduction on account of service tax payable in order to determine its taxable income, therefore, provision of Sec. 43B is not required to be invoked. The relevant part of the decision of Hon'ble High Court is reproduced as under:

*“4. In appeals for both the assessment years, the Commissioner of Income Tax (Appeals) [CIT(A)] held that Section 145A(a)(ii) of the Act would apply as it is not restricted only to manufacturing and trading companies. It was concluded that the service tax stands on the same footing as excise duties, sales tax and other taxes, which are collected to be paid over to the Government. Similarly, the order of the Assessing Officer with regard to Section 43B of the Act was also upheld.*

*5. On further appeal, the Tribunal by the impugned order held that Section 145A(a)(ii) of the Act would have no application in respect of the service tax billed on rendering of services This for the reason the Section 145A(a)(ii) deals with goods and not services. It also held that Section 43B of the Act would have no application in the present facts as no liability to pay the same to the Government arose before the last date of filing of the Returns. Besides, it held that no deduction had been claimed on the aforesaid amounts while determining its income Accordingly, the appeal of the respondent assessee was allowed.*

6. Regarding question (i):-

*(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 of services would also include the service tax. This service tax is 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 Section 145A(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. Shanaz Ali [2010] 9 SCC 280). The main part of the Section specifically restrict 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 than 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 1st 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 Biharv. SK. Roy AIR 1966 SC 1995-*

*"It is well recognized principle in dealing with construction that a 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 than 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 than once interpretation, the interpretation sought to be canvassed by the Revenue, is not sustainable. Therefore, Section 145A of the Act would have no application cases where service is provided by the Assessee.*

*(f) In view of the above, the question (1) as proposed does not give rise to any substantial question of law. Thus, not entertained.*

#### *7. Regarding question (he)-*

*(a) It is an admitted position before us that the respondent assessee had not claimed any deduction on account of the service tax payable in order to determine its taxable income in the above view, there can be no occasion to invoke Section 43B of the Act.*

*(b) Mr. Suresh Kumar, learned Counsel for the Revenue fairly states that the issue stands concluded against the Revenue by the decisions of this Court in CT v. Ovir Logistics (P.) Ltd. [2015] 377 ITR 129/232 Taxman 240/58 taxmann.com 206 (Bom.) and CIT v. Calibre Personnel Services (P.) Ltd. (IT Appeal No. 158 of 2013) rendered on 2nd February, 2015*

*(c) In view of the above, the question (ii) as proposed is covered by the decision of this Court. Therefore, it does not give rise to any substantial question of law. Thus, not entertained.*

*8. Accordingly, both the appeals are dismissed. No order as to costs."*

7(6). On the similar fact and identical issue we have also perused the recent decision of ITAT Mumbai in the case of Envision Enterprises Solutions P. Ltd. The relevant operating part of the decision is reproduced as under:

*"10. Considered the submissions of both the counsels and perused the material facts on record. It is observed that the assessee is following the method of accounting consistently that statutory dues are collected from the customers and the collection of statutory dues are treated as statutory liability and shown*

*as liability in the balance sheet without charging into P&L A/c. This method is being followed consistently and acceptable method of accounting. Provisions of section 43B will be applicable only when the assessee claimed those payments of statutory dues as expenditure.*

*10.1 In the case of CIT Vs. Noble and Hewitt (I) P. Ltd., [2008] 305 ITR 324 (Del.), on which reliance placed by the assessee, the Hon'ble Delhi High Court has held as under:*

*“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. Ld. Counsel for the revenue submits that the assessee has sought to evade tax under the mercantile system of account. We are of the view that it is not for the revenue authorities to tell the assessee how to maintain its accounts.*

*10.2 In the case of CIT Vs. Everest Litho Press, [2006] 285 ITR 297 (Mad.), on which reliance placed by the assessee, the Hon'ble Madras High Court has held as under:*

*“6. In the case on hand, the amount collected as sales tax was never claimed as deduction by the assessee. Section. 43B of the Act is not attracted at all when the assessee has not claimed any deduction of the amount collected by it. The Gauhati High Court, in the case of India Carbon Ltd. v. Inspecting Assistant CIT [1993] 200 ITR 759, considered a similar issue and held as follows (headnote) :*

*“ ... the amount of sales tax appeared on the liabilities side of the balance-sheet of the petitioner-company. The petitioner did not claim the added amount as deduction nor did he charge it to the profit and loss account. The amount of sales tax could not' be 'added back to the income of the assessee under section' 43B. In the present case, the question was whether section 43B applied and not whether sales tax collected formed part of the trading receipts.”*

*7 In the instant case, the amount had been added by the Assessing Officer under section 43B of the Act. All the authorities below had given a factual finding that the assessee never claimed deduction under section 43B of the Act and therefore section 43B of the Act is not applicable.”*

*10.3 Respectfully following the ratios laid down in the aforesaid decisions, we are not in agreement with the CIT(A) as the assessee has not claimed statutory liability as business expenditure as laid down in the above decisions that the business expenditure are not claimed in the P&L account, provisions of section 43B will not be applicable. Accordingly, we set aside the order of the CIT(A) and direct the AO to delete the disallowance made u/s 43B of the Act.”*

7(7). We have considered the facts of the case of the assessee and findings of the various courts and tribunals on the identical issues dealt in the above referred judicial pronouncements.

7(8). We consider that issue on hand being squarely covered by the decision of jurisdictional High Court and ITAT, Mumbai as referred supra in this order, therefore, following the principle of consistency we find merit in the submission of the assessee and allow this ground of appeal of the assessee.

8. Regarding the ground of appeal of the assessee pertaining to set-off of the brought forward losses of Rs.44,28,868/- we find that ld. CIT(A) stated that appeal for assessment year 2013-14 still pending and the assessing officer has been directed to allow the set-off of brought forward loss as per law if same is available after the appeal for assessment year 2013-14 is decided. We don't find any error in the direction of the ld. CIT(A), therefore, we direct the assessing officer to follow the direction of the ld. CIT(A) and allow the set-off of brought forward loss as per law if same is available after the appeal for assessment year 2013-14 is decided. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

9. In the result, the ground no. 1 is allowed and ground no. 2 is allowed for statistical purposes.

Order pronounced in the open court on 15.01.2023

Sd/-  
(Aby T Varkey)  
Judicial Member

Sd/-  
(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 15.01.2024

Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,  
Mumbai
5. गार्ड फाईल / Guard file.

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण/ ITAT, Bench,  
Mumbai.