आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 433/Ind/2023
Assessment Year: 2016-17

Mansa Builders and Developers, 1, C/o Radha Krishna Traders, Bhanpur Square, Bhopal	**बनाम/** Vs.	Income-tax Officer, 5(3), Bhopal
(Assessee/Appellant)		(Revenue/Respondent)
PAN : AATFM5948C		
Assessee by	Shri Ashish Goyal, Adv. & Shri N.D. Patwa, Adv.	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	16.05.2024	
Date of Pronouncement	24.06.2024	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 06.09.2023 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of assessment-order dated 20.12.2018 passed by learned ITO-5(3), Bhopal ["AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2016-17, the assessee has filed this appeal on following grounds:

1. *That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 8,63,235/- out of total addition of Rs. 23,84,993/- made to the total income of the appellant on account of service tax liability u/s 43B of the Act without properly appreciating the facts of the case and submissions filed before him/her.*

2. *That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 8,63,235/- out of total addition of Rs. 23,84,993/- made to the total income of the appellant on account of service tax liability under section 43B of the Act more so when the appellant has not claimed deduction of service tax in profit and loss account and therefore, question of disallowance of service tax u/s 43B of the Act does not arise.*

2. Learned Representatives of both sides have made their submissions and we have heard them peacefully and carefully considered their contentions.

3. The background facts leading to present appeal are such that the assessee-firm filed its return of income of AY 2016-17 declaring a total income of Rs. 71,900/-. The case was selected for scrutiny and while passing assessment-order u/s 143(3), the AO made certain disallowances and assessed total income at Rs. 24,71,046/-. Aggrieved, the assessee carried matter in first-appeal. The CIT(A) made a substantial deletion but, however, confirmed a disallowance of Rs. 8,63,235/- made by AO on account of unpaid service-tax liability u/s 43B. Now, the assessee is aggrieved by CIT(A)'s order for confirming the said disallowance and has come in this appeal before us.

4. Presently, the sole controversy before us is the disallowance of Rs. 8,63,325/- made by AO and upheld by CIT(A) u/s 43B on account of unpaid service-tax liability.

5. The facts giving rise to controversy require a very limited narration. The assessee is engaged in the business of builders and developers. The activity done by assessee was treated as 'service' on which service-tax was attracted. The assessee collected service-tax from customers and showed them as 'liability' in its Balance-Sheet as on 31.03.2016. That liability remained unpaid to the extent of Rs. 8,63,235/- till the due date for filing of return u/s 139(1) for which disallowance has been made/upheld by lower-authorities.

6. Ld. AR for assessee made two-fold contentions to argue that the impugned disallowance made/upheld by lower-authorities is not valid and tenable:

(i) The assessee has adopted 'exclusive method' wherein the service-tax collected from customers is considered as a 'liability' and directly credited to Balance-Sheet without crediting or debiting P&L A/c; therefore the assessee has not claimed any deduction in its P&L A/c and section 43B which disallows a claim of deduction, is not applicable.

(ii) The provisions of section 145A which mandates 'inclusive method' and rejects the 'exclusive method' as adopted by assessee, was applicable only to 'goods' and not to 'services' and since the assessee's activity was falling within 'services', the assessee was not hit by section 145A.

7. To support above contentions, Ld. AR placed a heavy reliance on several decisions of various judicial forums and also filed a summary of those decisions in his Written-Synopsis, the same is re-produced below:

> *"8. Assessee relies on the following judgements, where it has been clearly held that if the tax is not debited to profit and loss account and also has not been claimed by the assessee then same cannot be disallowed u/s 43B to the income:-*

S.No.	*Case Law*	*P.B.*	*Gist*
1.	*CIT vs. Noble & Hewitt (I) (P) Ltd. (2008) 166 Taxman 48 (HC, Delhi)*	*37-39*	*"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 favour. 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 assessee 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 assessee to deduction u/s 10(1) and 10(2)(xv) of the Indian Income tax Act, 1922. The decisions is clearly*

			distinguishable in its application to the present case. ***Here we are concerned with an assessee 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"* ***(Emphasis*** *supplied)* *"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.*** *" (****Emphasis*** *supplied)*
2.	India Carbon Ltd. Vs Inspecting ACIT [1993] 200 ITR 759 (HC, Gauhati)	40-43	*"Section 43B declares that taxes and duties shall not be allowed as deduction from the income unless they are actually paid. It removes the doubt as to the meaning of the word "paid" according to the method of accounting regularly employed by an assessee, in so far as deduction claimed in respect of any sum payable by way of tax or duty. The declaration does not, however, place any restriction on the business activities and on the system of accounting.* ***Therefore, section 43B shall only be attracted when the assessee claims deduction for any sum payable by way of tax or duty under any law for the time being in force, and, as such, where no such deduction is claimed nor charge made to the profit or loss account, there was no question of disallowing the amount taken to the balance-sheet on the liabilities side as well as of "add back"." (Emphasis*** *supplied)*
3.	DCIT vs Sandeep Surendran Nair [2023] 157 taxmann.com 251 (Raipur - Trib.)	44-52	Where service tax payable was not debited to profit and loss account as an expenditure nor any deduction was claimed by assessee in respect of said amount, impugned disallowance under section 43B was not sustainable
4.	CIT vs S.B. Foundry [1990] 185 ITR 555 (HC, ALL.)	53-54	*"On this factual position, the Tribunal held that there was no question of disallowing the amount taken to the balance-sheet on the liabilities side and, in these*

			circumstances, the question of any "add back" from the profit and loss account did not arise. The Tribunal, therefore, refused to interfere with the order of the Appellate Assistant Commissioner. No error in the approach taken by the Tribunal was pointed out to us. Accordingly, the application under section 256(2) is rejected"
5.	Asst. CIT v. Ganpati Motors ITA 30 of 2016	-	Hon'ble 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.
6.	Kerala State Electricity Board vs DCIT [2011] 196 Taxman 1 (Kerala) SLP Dismissed	55-71 72-78	The amount was collected on behalf of the State of Kerala pursuant to the statutory obligation to collect such an amount and the assessee is only an agent of the Government of Kerala holding the said amount and liable to account for and pay the said amount to the State of Kerala as an agent, but not as the assessee who has a primary liability to pay tax under the Kerala Electricity Duty Act, 1963 is not accepted. Therefore, opinion was formed that section 43B cannot be invoked in making the assessment of the liability of the appellant under the Income-tax Act with regard to the amounts collected by the appellant pursuant to the obligation cast on the appellant under section 5 of the Electricity Duty Act, 1963.
7.	CIT vs Knight Frank (India) (P.) Ltd. [2016] 72 taxmann.com 300 (HC, Bombay) Discussed 145A also	79-84	Section 145A(a) restricts its ambit only to valuation of purchase and sale of goods and inventory and would not apply to service tax billed on rendering of service as service tax billed has no relation to any goods nor does it have anything to do with bringing goods to a particular location

It is therefore prayed to delete the addition which has been never claimed by the assessee.

Submitted.

[Ashish Goyal]
Advocate

8. Per contra, Ld. DR for revenue relied heavily upon the orders of lower-authorities and claimed that the assessee has not paid service-tax upto due date for filing of return u/s 139(1). Therefore, section 43B r.w.s. 145A were very much applicable to assessee and the lower-authorities are very correct in making/upholding disallowance. Ld. DR submitted that the disallowance made by lower-authorities is in order and does not require any interference.

9. We have considered rival contentions of both sides and perused the orders of lower-authorities as well as the material held on record to which our attention has been drawn. The controversy before us is whether the unpaid service-tax liability attracts disallowance in terms of section 43B r.w.s. 145A or not? Therefore, at the outset, it is worthwhile to refer these sections which read as under:

> Section 43B:
>
> *"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) to (f).....*
>
> *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 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."*
>
> Section 145A:
>
> ***Originally this section prescribed thus (upto AY 2016-17):***

"145A. Method of accounting in certain cases –

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."

Subsquently, it was substituted by a newer provision from AY 2017-18 reading thus:

"145A. Method of accounting in certain cases –

For the purposes of determining the income chargeable under the head "Profits and gains of business or profession", -

(i) .....

*(ii) the valuation of purchase and sale of goods **or services** and of inventory shall be 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 **or services** to the place of its location and condition as on the date of valuation.*

(iii) to (iv) ……"

[Emphasis supplied]

10. An identical controversy as involved in present case has already been decided by Hon'ble Mumbai High Court in ***CIT Vs. Knight Frank (India) (P) Ltd. (2016) 72 taxmann.com 300 (Bombay)*** for AY 2007-08 & 2008-09, prior to amendment in section 145A, wherein the Hon'ble High Court held as under:-

"*1. These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common impugned order dated 10th July, 2013*

passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order relates to Assessment Years 2007-08 and 2008-09.

2. *Revenue urges the following questions of law for our consideration:-*

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in deleting the addition u/s 145A of the Income Tax Act, 1961 due to inclusion of service tax as part of trading receipts, by holding that the provisions of Section 145A of the Act are applicable to manufacturing segment of business and not to a service provider company.*
>
> *(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in consequently deleting the addition u/s 43B of the Income Tax Act, 1961 being unpaid service tax liability disallowed without appreciating the fact that service tax stands on the same footing as excise duty or sales tax vis-a-vis the phrase 'any tax, duty, cess or fee (by whatever name called)' used in Section 43B of the Income Tax Act, 1961 and allowable only on actual payment basis."*

3. *The respondent assessee engaged in the business of real estate consultancy/ agency and property management services. During the course of the assessment proceedings, the Assessing Officer sought to include the service tax billed by it for rendering services to the service receivers as trading receipts on invocation of Section 145A(ii) of the Act. Besides, the Assessing Officer also sought to invoke Section 43B of the Act on the ground that the billed amount of service tax had not been paid over to the Government till the due date of filing the return of income. The Assessing Officer also sought to recast the respondent's profit and loss account so as to reflect the receivable service tax as a part of the consideration for the services rendered. The respondent assessee contended that Section 145A(a)(ii) of the Act would have no application to the present facts as service tax is not mentioned therein. Further, it was submitted that as the respondent has claimed no deduction on account of service tax which is payable to the Government, therefore, Section 43B of the Act would have no application. However, the same was not accepted by the Assessing Officer and he added the service tax billed by the respondent to its service receivers as a part of its turnover/ consideration received for services rendered. Further Section 43B of the Act was invoked to add the service tax billed, which has not been paid over to the Government.*

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 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. 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 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. 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 Bihar v. S.K. 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 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.

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

7. Regarding question (ii) :—

(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 CIT v. Ovira 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."

11. The ITAT, Raipur Bench has passed a detailed order settling identical controversy in ***Shri Ranvir Singh Vidhuri Vs. DCIT-2(1), ITA NO. 304/RPR/2016 order dated 18.07.2012.*** This case also relates to AY 2012-13, prior to amendment in section 145A. Further, in this case, the ITAT has vehemently considered the provisions of section 43B, pre-amended section 145A existing upto AY 2016-17, post-amended section 145A applicable w.e.f. from 01.04.2017 as well as the decision of Hon'ble Bombay High Court in ***Knight Frank (India) (P) Ltd. (supra)*** and held that no

disallowance was attracted in respect of unpaid service-tax liability in the pre-amended regime of section 145A. The relevant paras of the order of ITAT are re-produced below:

> *"9. We shall now deal with the grievance of the assessee that both the lower authorities had erred in law and on the facts of the case in sustaining an addition of Rs. 54,65,666/- on account of service- tax that was collected but not paid by treating the same as his business income under Sec. 28 r.w.s 5 of the Act. Succinctly stated, it was observed by the AO that the balance sheet of the assessee revealed "Service Tax Payable" of Rs. 1,53,78,341/-. It was gathered by the AO from a perusal of the service-tax register that the assessee qua the services provided by him as a labour contractor had during the year under consideration received service-tax amounting to Rs. 54,65,666/-. Although the assessee produced before the AO challans evidencing deposit of service tax of Rs. 9,25,972/-, but the period for which the same were deposited was not found mentioned on the same. Backed by the aforesaid facts the AO called upon the assessee to explain that now when the service-tax had not been deposited prior to the 'due date' of filing of his return of income, then, why the same may not be disallowed and added to his returned income. In reply, it was submitted by the assessee that as he had not claimed any deduction for the amount of service-tax in his return of income, therefore, no disallowance of the same was called for in his hands. However, the AO was not persuaded to subscribe to the aforesaid explanation of the assessee. Observing that the assessee had though received the amount of service-tax from his customers by virtue of contract work but had not made the payment of the same to the Government account before the 'due date' of filing of his return of income as contemplated in Sec. 139(1) of the Act, the AO held the unpaid amount of service-tax of Rs. 54,65,666/- (as was collected by the assessee during the year under consideration) as his business income under Sec. 28 r.w.s 5 of the Act. In so far the contention of the assessee that now when he had not claimed any deduction of the amount of service-tax, therefore, no disallowance of the same was called for in his hands, the same did not find favour with the AO. On appeal, the CIT(Appeals) held a conviction that the amount of service-tax ought to have formed a part of the assessee's contract receipts and there was no justification on his part to have excluded it from the receipts and shown the same as a liability in the 'balance sheet'. Backed by his aforesaid conviction the CIT(Appeals) was of the view that if the assessee would had credited the amount of service-tax in his contract receipts, then, the same would have increased his income, as in the absence of deposit of the same in the government account a corresponding debit of the said amount would not have been allowed to him. Accordingly, the CIT(Appeals) not finding favour with*

the exclusive method of accounting of contract receipts (i.e net of service-tax) that was adopted by the assessee upheld the addition /disallowance made by the AO.

10. Aggrieved, the assessee has assailed before us the sustaining of the addition of the amount of unpaid service-tax of Rs. 54,65,666/- (supra) by the CIT(Appeals). It is the claim of the ld. AR that as the assessee had consistently been following the exclusive method of accounting of his contract receipts (i.e net of service-tax), therefore, having not claimed any deduction for the amount of service-tax that was collected during the year under consideration no disallowance of the same could have validly been made. In sum and substance, it was the claim of the assessee that as he had not claimed any deduction of the amount of service-tax, therefore, the disallowance of the same was beyond comprehension. On the contrary it was the claim of the ld. DR that as the assessee upto the 'due date' of filing of his return of income had failed to deposit the amount of service-tax collected during the year in the government exchequer, therefore, the same had rightly been disallowed by the AO.

11. We have given a thoughtful consideration to the aforesaid issue in hand in the backdrop of the contentions advanced by the ld. Authorised representatives of both the parties. As observed by us hereinabove, both the lower authorities had drawn adverse inferences in the hands of the assessee for the reason that he had upto the 'due date' of filing of his return of income as contemplated in sub-section (1) of Sec. 139 of the Act failed to deposit the amount of service-tax. Before proceeding any further we deem it fit to cull out Sec. 43B(a) (relevant extract) which had as a matter of fact been triggered by the lower authorities for making an addition/disallowance of the amount of service-tax of Rs. 54,65,666/- (supra) that was though collected by the assessee from his customers during the year but had not been deposited with the government exchequer upto the 'due date' of filing of his return of income, as under :

> *"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 whatevername called, under any law for the time being in force, or*
>
> *(b) to (f).....*
>
> *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 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."*

Now, as claimed by the ld. AR, and rightly so, the disallowance, inter alia, of any amount of tax would be called for within the meaning of Sec. 43B only where the same had been claimed as a deduction by the assessee. Admittedly, it is a matter of fact borne from record that the assessee who is consistently following the exclusive method for accounting his contract receipts (i.e net of service-tax) had not claimed any deduction of the amount of service-tax of Rs. 54,65,666/- (supra), pursuant whereto the failure on his part to pay/deposit the same upto the 'due date' of filing of his return of income as contemplated in sub-section (1) of Sec. 139 would not entail any disallowance in his hands. In sum and substance, now when the assessee had not claimed any deduction of the amount of service-tax of Rs. 54,65,666/- (supra) in question, therefore, the same could not have been disallowed by triggering the provisions of Sec. 43B of the Act. But then, it is the exclusive method of accounting of contract receipts (i.e net of service tax) that is consistently being followed by the assessee that has been challenged by the CIT(Appeals). In fact, the CIT(Appeals) finding fault with the exclusive method of accounting of contract receipts (i.e net of service-tax) that was being followed by the assessee had re-casted his Profit & loss a/c. After including the amount of service-tax in the amount of contract receipts, the CIT(Appeals) was of the view that as the assessee had failed to deposit the aforesaid amount of tax by the 'due date' for filing of his return of income as provided in sub-section (1) of Sec. 139 of the Act, thus, a corresponding claim for debit of the same was not be allowed to him as per the mandate of Sec. 43B of the Act.

12. We shall now deal with the sustainability of the observation of the CIT(Appeals) that the assessee was not justified in following the exclusive method for accounting his contract receipts (i.e net of service-tax) and was obligated to follow the inclusive method and include the amount of service-tax in the contract receipts credited in his profit & loss a/c. Before proceeding any further we would herein cull out the observations of the CIT(Appeals) qua the aforesaid aspect, as under :

> *"3.3 Facts being as above. I have perused the assessment order and gone through the submission of the assessee. I find that service tax received as part of sale proceeds has to be credited in Profit & loss account and then a claim has to be made on debit side as and when the tax is paid to government. Appellant cannot exclude it from the receipts and keep the amount in balance sheet as liability. Had the appellant credited amount of service tax in sales, his income would increase as he will not get debit as service tax was not paid during the*

year. Instead, he did accounting flat and shown it as liability without crediting to P & L account. Such a course of accounting cannot be allowed."

After having given a thoughtful consideration to the aforesaid observations of the CIT(Appeals) we are unable to persuade ourselves to subscribe to his view that the assessee was to be held at fault for accounting his contract receipts by following exclusive method (i.e net of service-tax) which he had consistently been following for the last many years. For answering the aforesaid issue we shall look into the provisions of Sec. 145A of the Act (as were available on the statute during the year under consideration i.e AY 2012-3) and had impliedly been brought into play by the CIT(Appeals), as under :

"Method of accounting in certain cases.

145A. Notwithstanding anything to the contrary contained in section 145, -

(a). The valuation of purchase and sale of goods and inventory for the purpose 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 purpose 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."

As is clearly discernible from a perusal of the aforesaid statutory provision i.e Sec. 145A of the Act, it transpires beyond doubt that Section 145A(a)(ii) during the year under consideration i.e AY 2012-13 contemplated only the valuation of purchase and sale of goods and inventory and had no bearing on valuation of services. Our aforesaid view is supported by the judgment of the Hon'ble High Court of Bombay in the case of The Commissioner of Income-tax-2 vs. Knight Frank (India) Pvt. Ltd., ITA No. 247 & 255 of 2014, dated 16.08.2016. Before the Hon'ble High Court the following question of law was, inter-alia, raised:

"(i). Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in deleting the addition u/s 145A of the Income Tax Act, 1961 due to inclusion of service tax as part of trading

receipts, by holding that the provisions of Section 145A of the Act are applicable to manufacturing segment of business and not to a service provider company?"

Answering the aforesaid question, it was observed by the Hon'ble High Court that a perusal of Sec. 145A(a)(ii) of the Act, revealed, that the same would only cover 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. Notably as the assessee before them was rendering services and had admittedly not paid or incurred any liability for the purpose of bringing any goods to the place of its location, it was observed by the Hon'ble High Court that as the service-tax billed neither has relation to any goods nor does it have anything to do with bringing the goods to a particular location, therefore, the provisions of Sec. 145A(a)(ii) of the Act would not be applicable to service-tax billed on rendering of services. For the sake of clarity the relevant observations of the Hon'ble High Court are culled out as under:

"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 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 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 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. 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 Bihar v/s. S. K. 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 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.

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

(emphasis supplied by us)

Further, referring to the fact that Service tax was first introduced in India by the Finance Act, 1994, but the legislature neither at the time of insertion of Sec. 145A of the Act on the statute, i.e, vide the Finance (No.2) Act, 1998 w.e.f. 1st April, 1999 nor at the time of its subsequent amendment vide the Finance (No.2) Act, 2009 had on either of the occasions deemed it fit to bring the valuation of services within the sweep of Sec. 145A of the Act, it was observed by the Hon'ble High Court that the said purposive omission by the legislature clearly revealed its intention to restrict the applicability of Sec. 145A only to goods and not to extend it to services. Accordingly, it was observed by the Hon'ble High Court that Sec. 145A would have no application in cases where services were being provided by the assessee.

13. Before proceeding any further, we may herein observe that it is only through a subsequent amendment made available on the statute vide the Finance Act, 2018 (13 of 2018) w.r.e.f. 01.04.2017 that the valuation of purchase and sale of services shall also be 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 services to the place of its location and condition as on the date of valuation. For the sake of clarity Sec. 145A, i.e, post amended vide the Finance Act 2018 (13 of 2018) w.e.f. 01.04.2017is culled out as under (relevant extract):

> ***"S. 145A Method of accounting in certain cases – For the purposes of determining the income chargeable under the head "Profits and gains of business or profession", -***
>
> ***(i) .....***
>
> ***(ii). the valuation of purchase and sale of goods or services and of inventory shall be 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 or services to the place of its location and condition as on the date of valuation.***
>
> ***(iii) to (iv).....***

On the basis of our aforesaid observations, we are of the considered view that as during the year consideration i.e AY

2012-13 Sec. 145A(a)(ii) only contemplated valuation of purchase and sale of goods and inventory and thus covered cases where the amount of tax, duty, cess or fee was 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 and had no bearing to rendering of services, therefore, no infirmity emerges from the accounting of the contract receipts by the assessee on the basis of exclusion method (i.e. net of service-tax), which as observed by us hereinabove had consistently been followed by it since last many years. We, thus, in terms of our aforesaid observations set-aside the order of the CIT(Appeals) who had held that the accounting of the contract receipts by the assessee by adopting the exclusion method (i.e net of service-tax) was not proper.

14. We shall now deal with the grievance of the assessee that as he had not claimed any deduction of the amount of service-tax, therefore, there could be no justification for disallowance of the same by triggering the provisions of Sec. 43B of the Act. Before proceeding any further, we may herein observe, that as we have approved the exclusion method (i.e net of service-tax) of accounting of contract receipts by the assessee, therefore, the adjudication of the present issue, i.e, disallowance of the unpaid amount of service-tax would rest on the edifice of our said observation. As observed by us hereinabove the disallowance under Sec. 43B pre-supposes a claim of deduction by the assessee. However, as in the present case before us, as averred by the ld. AR, and rightly so, now when the assessee had not claimed any deduction for the amount of the service-tax, thus, the failure on his part to deposit the same in the government account within the stipulated time period would not entail or lead to any disallowance of the said amount. In fact, the said issue too had came up for adjudication before the Hon'ble High Court of Bombay in the case of Knight Frank (supra), wherein the following question of law was raised:

> *"(ii). Whether on the fats and in the circumstances of the case and in law, the Tribunal was correct in consequently deleting the addition u/s 43B of the Income tax Act, 1961, being unpaid service tax liability disallowed without appreciating the fact that service tax stands on the same footing as excise duty or sales tax vis-a-vis the phrase 'any tax, duty, cess or fee (by whatever name called)' used in Section 43B of the Income-tax Act, 1961 and allowable only on an actual payment basis."*

Answering the aforesaid question, it was, inter alia, observed by the Hon'ble High Court that now when the assessee admittedly had not claimed any deduction on account of the service-tax payable in order to determine its taxable income, therefore, there could be no occasion to invoke Sec. 43B of the Act. For the sake of clarity the relevant observations of the High Court qua the aforesaid issue in hand are culled out as under:

"7. Regarding question (ii):-

(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 Commissioner of Income Tax Vs.Ovira Logistics P. Ltd. 377 ITR 129 and Commissioner of Income Tax Vs. Calibre Personnel Services Pvt. Ltd. (Income Tax 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."

(emphasis supplied by us)

We, thus, in terms of our aforesaid observations taking cognizance of the fact that the assessee had not claimed any deduction for the amount of service-tax while determining his taxable income, vacate the disallowance of the same u/s 43B of the Act by the lower authorities.

15. Accordingly, in terms of our aforesaid deliberations we herein set-aside the order of the CIT(Appeals) and vacate the addition/disallowance of the unpaid amount of service-tax of Rs. 54,65,666/- (supra) so made by the AO."

[Emphasis supplied]

12. The present case of assessee relates to AY 2016-17 which was prior to amendment in section 145A. Therefore, the assessee's case is very much covered by the decisions of ***Hon'ble Mumbai High Court and ITAT, Raipur*** quoted above holding that unpaid service-tax liability not debited to P&L A/c was not disallowable u/s 43B r.w.s. 145A. There are some more favourable decisions as submitted by Ld. AR in the Written-Submission re-produced by us in earlier paragraph but we need not discuss those decisions. We may also note that the Ld. DR for revenue has not brought any contrary decision holding against assessee. Further, neither side has pointed out any binding

decision of ITAT, Indore Bench, jurisdictional High Court or Apex Court. Therefore, even if there is any decision of non-jurisdictional High Court or other bench of ITAT against assessee, the assessee shall be getting benefit of Hon'ble Supreme Court decision in **Vegetable Products Ltd. 88 ITR 192** wherein it was categorically held that if two reasonable constructions of a taxing provision are possible then the construction which favours assessee, must be adopted. Therefore, we are inclined to conclude that in present case, the assessee is correct in contending that the disallowance made by AO is not tenable in the light of decisions of Hon'ble Bombay High Court and ITAT, Raipur. We therefore direct the AO to delete the impugned disallowance. The assessee succeeds in this appeal.

13. Resultantly, this appeal is allowed.

Order pronounced in open court on 24.06.2024.

Sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 24.06.2024.
CPU/Sr. PS
Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore