

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.251/PUN/2024
निर्धारण वर्ष / Assessment Year: 2018-19

Bhanupratap Singh, Pandharkar Dnayneshwar Parbhani- 431401. PAN : AWGPS7884J	Santprasad Niwas, Nagar,	Vs.	ITO, Ward- Parbhani.	Hingoli,
Appellant			Respondent	

Assessee by : Shri Darshan R Gattani
Revenue by : Shri Keyur Patel

Date of hearing : 07.08.2024
Date of pronouncement : 23.10.2024

आदेश / ORDER

PER VINAY BHAMORE, JM:

This appeal filed by the assessee is directed against the order dated 14.12.2023 passed by LD. Addl./JCIT(A)-3, Bengaluru for the assessment year 2018-19

2. The appellant has raised the following grounds of appeal :-

"1. On the facts and in the circumstances of the case, the CIT(Appeals) has erred in upholding the addition of Rs.30,46,456/- made by the Centralized Processing Centre (CPC) on account of disallowance u/s 43B for non-payment of Service Tax, even though neither the tax amount was received from the customer nor was the service tax amount debited to profit and loss account.

Therefore, the same may be deleted.

2. *On the facts and in the circumstances of the case, the CIT(Appeals) has erred in upholding the addition of Rs.1,77,17,182/- made by the Centralized Processing Centre (CPC) on account of disallowance u/s 43B for non-payment of Goods and Service Tax even though neither the tax amount was received from the customer nor was the tax amount debited to profit and loss account.*

Therefore, the same may be deleted.

3. *The appellant craves leave to add, amend, and alter any or withdraw any grounds of appeal at or before the time of Appeal hearing.”*

3. The facts of the case, in brief, are, that the assessee is an individual engaged in the business of construction activity, major work is executed for BSNL. Income tax return was filed on 31.12.2018 declaring total income of Rs.92,46,110/-, which was processed by CPC and an intimation u/s 143(1) dated 06.03.2020 was issued. The CPC has disallowed the amount of Rs.2,07,63,638/- & also Rs.27,216/- u/s 43B of the IT Act and added back to the income of the assessee. This amount represents service tax of Rs.30,46,456/- and Goods & Service Tax of Rs.1,77,17,182/- not paid before filing return of income u/s 139(1) of the IT Act. The CPC also disallowed an amount of Rs.27,216/- as the payment of ESI/PF was not paid on or before due date mentioned u/s 36(1)(va) of the IT Act,

4. Aggrieved with the above adjustments/ disallowances made by the CPC, the assessee preferred first appeal before the Id. Addl./JCIT(A)-3, Bengaluru. After considering the reply of the

assessee and various case laws, the ld. Addl./JCIT(A)-3, Bengaluru dismissed the appeal of the assessee and confirmed the disallowance made by the CPC vide order dated 14.12.2023. It is this order against which the assessee is in appeal before this Tribunal, however the assessee has accepted the order of ld. Addl./JCIT(A)-3, Bengaluru with regard to addition of Rs.27,216/- & no ground is raised before the bench in this regard.

5. The ld. AR submitted before us that the order passed by the ld. Addl./JCIT(A)-3, Bengaluru is not correct. It was submitted that the assessee is a work contractor doing the contract work for BSNL. Due to cash crunch, BSNL has not paid the amount of service tax and Goods & Service Tax to the assessee. It was submitted that the assessee has to receive almost Rs.12 crores as dues from BSNL. BSNL is a Government company and not paying the dues of the assessee since last 3 years. The assessee has filed the case against BSNL in MSME Samadhan and also wrote letter to the Finance Minister and the same were also produced before the ld. Addl./JCIT(A)-3, Bengaluru. It was submitted by ld. AR that the assessee has not included the amount of taxes not received from the BSNL in the turnover and also not claimed the same from Profit & Loss Account. It was the contention of the

counsel of the assessee that if the assessee has not claimed any deduction of Service Tax & Goods & Service Tax through Profit & Loss Account then there is no question of making any disallowance u/s 43B(a) on account of non-payment of taxes before the due date of furnishing of return of income. In this regard, the ld. AR relied on the following judgments/decisions in support of the grounds raised by the assessee :-

- (i) CIT vs. Noble & Hewitt (I) Pvt. Ltd., (2008) 305 ITR 324 (Delhi);
- (ii) ACIT vs. S & A Finman Ltd., ITA No.2220/Del/2017, ITAT Delhi;
- (iii) Srikakollu Subba Rao & Co. & Ors. vs. UOI & Ors. (1988) 173 ITR 708 (AP HC);
- (iv) India Carbon Ltd. vs. Inspecting Assistant Commissioner of Income-tax (1993) 200 ITR 759 (Gau HC);
- (v) CIT vs. Everest Litho Press (2006) 285 ITR 297 (Mad HC);
- (vi) ACIT vs. Biotec Consortium India Ltd. ITA No.2841/Del/12 dated 09.08.2012, ITAT Delhi Bench;
- (vii) ACIT vs. Real Image Media Technologies (2008) 114 ITD 573, ITAT Chennai Bench;
- (viii) Wadhwa Residency (P) Ltd. vs. ACIT (2018) 95 taxmann.com 294, Mumbai Bench;
- (ix) DCIT vs. M/s M.C. Retail Pvt. Ltd., ITA No.419/Mum/2017 dated 28.09.2018, ITAT Mumbai Bench;

- (x) Envision Enterprise Solutions Pvt. Ltd. vs. ITO, ITA No.315/Hyd/2016, dated 12.08.2016, ITAT Hyderabad Bench;
- (xi) Vijay Associates Wadhwa Construction Pvt. Ltd. vs. Addl. CIT, ITA No.5460/Mum/2015 dated 16.01.2018, ITAT Mumbai Bench; and,
- (xii) Planet Advertising Pvt. Ltd. vs. ACIT, ITA No.1500/Del/2011 dated 05.07.2013, ITAT, Delhi Bench.

6. The ld. Counsel of the assessee submitted that the ld. Addl./JCIT(A)-3, Bengaluru has dismissed the appeal of the assessee on the basis of following two decisions :-

- (i) Mr. Ashraf Nafisa Althaf vs. ITO, ITA No.614/Bang/2023.
- (ii) CIT vs. Ovira Logistics P. Ltd., 377 ITR 129 (Mum.).

7. With regard to the above two decisions relied on by ld. Addl./JCIT(A)-3, Bengaluru, it was contended by LD Counsel of the assessee that the facts of the above cases are different with that of the case in hands at present. It was submitted that in the above two cases referred by ld. Addl./JCIT(A)-3, Bengaluru, the payment including amount of taxes was received by the assessee and not paid to the Govt Exchequer, but in the case in hand the contract amount as well as amount of tax was not received by the assessee. Accordingly, the cases relied on by the assessee are relevant

wherein under identical situation the disallowance made u/s 43B was deleted. Accordingly, ld. Counsel of the assessee requested before the Bench to delete the addition made by CPC and sustained by ld. Addl./JCIT(A)-3, Bengaluru.

8. LD DR relied on orders passed by the subordinate authorities and requested before the Bench to confirm the same.

9. We have heard the ld. Counsels from both the sides and perused the material available on record including various case laws relied on by both the parties. We find that the assessee is a works contractor mainly doing contract work for BSNL. It is the contention of the ld. Counsel of the assessee that due to cash crunch BSNL was unable to make payment to various contractors including the assessee. It is his submission that the assessee has not received service tax and Goods & Service Tax amount for the period under consideration and other contract amount was also not received by him since last 3 years. The assessee is said to have filed case against the BSNL under MSME Samadhan and also wrote various letters to Finance Minister of Government of India for early settlement of his dues. The case of the assessee is that he has not received payment of service tax and Goods & Service Tax for the period under consideration and in the cases relied on by ld.

Addl./JCIT(A)-3, Bengaluru the amount of service tax was already received by the parties and not paid to the Government Exchequer. Accordingly, in our considered opinion, the case laws relied on by Id. Addl./JCIT(A)-3, Bengaluru do not apply in the present case. In this regard, we find that Hon'ble Bombay High Court in the case of CIT vs. Ovira Logistics Pvt. Ltd., (2015) 377 ITR 129 (Bombay) dismissed the departmental appeal and confirmed the order passed by ITAT wherein disallowance made u/s 43B was deleted by observing as under :-

“Having perused the aforesaid decisions, we are clearly of the view that section 43B does not contemplate liability to pay the service tax 7 judgm.itxa1023.13.doc before actual receipt of the funds in the account of the assessee. In our view, liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when services are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise.

10] In the facts and circumstances of the case, we are of the view that no substantial question of law arises. Accordingly, the Appeal has no merit and the same is dismissed. There will be no orders as to costs.”

10. It is worthwhile to mention here that the above judgement was again followed by the Hon'ble Bombay High Court in the case of PCIT-11, Mumbai vs. Tops Security Ltd. order dated 10.09.2018 by observing as under :-

“When these appeals were argued before us, our attention was invited by Mr. Jasani to a Division Bench Judgment of this Court reported in [2015] 377 ITR 129 (Bom.) {Commissioner of Income-Tax v. Ovira Logistics P. Ltd.}. Mr. Jasani submits that

earlier this very controversy was dealt with and the Revenue's appeal was dismissed.

10. With the assistance of both sides, we have perused this Judgment and we find that it dealt with an identical issue. This Court held that 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. Thus the consideration has to be actually received and thereupon the liability will arise.

11. No conclusion contravening the above has been brought to our notice by the Revenue.

12. In fact, Mr. Pinto was fair enough to bring to our notice this Judgment.

13. In the circumstances, each of these appeals raise no substantial question of law. They are dismissed accordingly. The issue being covered by a Division Bench and to which one of us (Shri S.C. Dharmadhikari, J.) was a party, the appeals are disposed of but without any order as to costs.”

11. So far as the decisions relied on by the Id. Addl./JCIT(A)-3, Bengaluru are concerned the same are distinguishable and not applicable to the facts of the present case since in those cases the service tax/ Goods & Service Tax were received by the parties but not deposited. However, in the present case it is the case of the assessee that it has not at all received the service tax and Goods & Service Tax from the contractee. Since it is the contention of the Id. Counsel for the assessee that it has not at all received the service tax and Goods & Service Tax, therefore, we deem it proper to restore the matter back to the file of the Id. Addl./JCIT(A)-3, Bengaluru with a direction to verify as to whether the assessee has actually received the services tax and Goods & Service Tax from

the contractee and decide the issue in the light of judgements passed by the Hon'ble Bombay High Court. Needless to say, the ld. Addl./JCIT(A)-3, Bengaluru shall provide due opportunity of hearing to the assessee. The assessee is hereby also directed to respond to the notices issued by the ld. Addl./JCIT(A)-3, Bengaluru and furnish requisite documents and evidences in support of his claim that it has not received the amounts in question. Thus, the grounds of appeal raised by the assessee are allowed for statistical purposes.

12. In the result, the appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced on this 23rd day of October, 2024.

Sd/-
(R. K. PANDA)
VICE PRESIDENT

Sd/-
(VINAY BHAMORE)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 23rd October, 2024.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Addl./JCIT(A)-3, Bengaluru.
4. The Pr. CIT/CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.