

**BEFORE THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-3', NEW DELHI**

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

**ITA No. 5768/Del/2015
A.Y 2009-10**

ITO, Ward 30(1)
New Delhi

vs. Sh. Mahesh Kumar Sharma
365, Chirag Delhi
New Delhi 110 017

PAN: ARJPS 7478 N

(Appellant)

(Respondent)

Appellant by : Sh. Rajesh Kumar, Sr.D.R.

Respondent by : Sh. Varun Malik, C.A.

ORDER

This is an appeal filed by the revenue directed against the order of the Commissioner of Income Tax (Appeals)-10, New Delhi dated 30/07/2015 for the assessment year 2009-10 on the following grounds.

“1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 32,54,9371- made u/s 438 of the Income Tax Act, 1961 by ignoring the provisions of section 438(a), which uses the expression 'any sum payable by way of tax' and service tax, therefore, qualify the term "tax" used in the sub section.

2. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition without appreciating the fact that assessee has opted voluntary compliance Encouragement Scheme 2013 (VCES) and deposited the 50% of the amount of service tax pertaining to the asstt. year under

consideration, later on 31.12.2013, whereas the due date of payment was 30.9.2009.

3. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition without appreciating the fact that assessee has failed to produce any documentary evidence from the concerned parties that service tax has not been paid by these parties to the assessee.

4. The appellant craves leave to add, alter or amend any of the grounds of appeal before or during the course of hearing of the appeal.”

2. I have heard Sh. Rajesh Kumar, the Ld.Sr.D.R. on behalf of the revenue and Mr. Varun Malik, the Ld. counsel for the assessee.

3. On a careful consideration of rival submissions I find that the Ld.CIT (Appeals) has recorded at paragraph 4.2.2 of his order that the assessee has not debited the amount of service tax to its profit and loss account nor it was payable as the same was not collected.

3.1. This factual position could not be controverted by the Ld.DR. When an assessee does not claim an expenditure, the question of disallowing the same under section 43B of the Income Tax Act, 1961 (the Act) does not arise. The Hon'ble Delhi High Court in the case of Commissioner of income tax vs. Noble & Hewitt(i) (p) Ltd (2008) 166 taxman 48 (Delhi) has held as follows at para 6:

“6. In our opinion since the assessee did not debited them out to the profit and loss account as an expenditure nor did the assessee claimed 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 and not claimed would not arise.”

3.2. Respectfully following the same I have to uphold the order of the First appellate authority. The Ld. DR submitted that the figures required to be

verified and that the issue may be remitted back to the file of the assessing officer for verification. The Ld. counsel for the assessee had no objection. In view of the above, I set aside the matter to the file of the AO for the purpose of verification of the figures of the assessee. The AO shall apply the decision of the Hon'ble Delhi High Court cited above.

4. In the result the appeal of the revenue is allowed for statistical purposes.

Order pronounced in the open court on 25th January, 2017.

Sd/-

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 25th January, 2017

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Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar