Sdce Projects Pvt. Ltd.,, ... vs The Dy. Cit, Circle-2(1)(1),, ... on 1 October, 2019

आयकर अपील य अ धकरण, अहमदाबाद यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,

''A'' BENCH, AHMEDABAD

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

AND

SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 2556/AHD/2017

नधारण वष/Asstt. Year: 2013-2014

SDCE Projects Pvt. Ltd., 2nd Floor Tower A, Darshnam Oxy Park, Nr. Neelkamal Farm House, Vasna-Bhauli Road, Vadodara-390020. PAN: AALCS7588K	D.C.I.T, Vs. Circle-2(1)(1) Baroda.
(Applicant)	(Respondent)
Assessee by :	Smt Kinjal Shah, A.R
Revenue by :	Shri S.K. Dev, Sr. D.R

सुन वाई क तार ख/ Da te of Hearing : 27/08/2019

घोषणा क तार ख / Date of Pro nouncement: 01/10/2019

आदेश /O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-2, Vadodara dated 10/08/2017 (in short "Ld. CIT(A)") arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here- in-after referred to as "the Act") dt. 22/03/2016 relevant to the Assessment Year 2013-2014.

ITA no.2556/AHD/2017 Asstt. Year 2013-14 The assessee has raised the following grounds of appeal.

1 . (a) The Ld. CIT(A) has erred both in Law and in fact in confirming applicability u/s.43B as well as upholding the disallowance of Rs.25,40,376/- made by the Assessing Officer being delayed per payment of Service Tax.

(b) It is submitted by your Appellant that Sec.43B does not apply to the facts of the case particularly because the said am amount was neither debited to P & L Account nor claimed in computing Total Income and therefore the same was not liable to be disallowed.

(c) Without prejudice and in the alternative the CIT(A) ought to have directed the AO to allow the Service Tax on the basis of payment i.e. in A.Y.2014-15.

2. The CIT(A) has also erred in confirming disallowance of Rs.1,61,905/- being Interest on late payment of Service Tax and since Sec.43B does not apply the said amount was not liable to be disallowed.

It is also submitted by your Appellant that Interest for payment of Service Tax not being in nature of Penalty, the same ought to have been allowed as expenditure u/s.37 of the Act.

It is therefore submitted that relief claimed above be allowed and the order of the Assessing Officer be modified accordingly.

Your Appellant reserves right to add, alter, amend to withdraw any or all Ground of Appeal.

The 1st issue raised by the assessee in ground No. 1 is that the learned CIT (A) erred in upholding the addition made by the AO for Rs. 25,40,376/- on account of delayed payment of service tax under the provisions of section 43B of the Act.

2. The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of providing civil construction services on contract basis. The assessee in the year under consideration has shown service tax liability as on 31 March 2013 amounting to Rs. 52,58,086/-

ITA no.2556/AHD/2017 Asstt. Year 2013-14 only in its financial statements. Out of such liability, an amount of Rs. 25,40,376/- was paid/deposited by the assessee to the service tax department after the due date of filing of income tax return under section 139(1) of the Act.

2.1 The assessee during the assessment proceedings claimed that it has collected the service tax from the customers on behalf of the government and the same was paid subsequently to the Government Exchequer. Accordingly, the assessee on the collection of such service tax amount has shown liability in its books of accounts which was subsequently paid to the Government along with the interest in case of delayed payment. Accordingly, the assessee further submitted that it has not claimed any deduction on account of such service tax amount in its profit and loss account. Thus the assessee claimed that the provisions of section 43B of the Act cannot be attracted to it on account of service tax payment beyond the specified date as discussed above.

2.2 However, the AO was of the view that the provisions of section 43B of the Act require to make the payment of the tax, duty and cess etc within the due date of filing of the income tax return for the year under consideration. As the assessee, failed to comply the provisions of section 43B of the Act, therefore the AO treated the same as income of the assessee. Accordingly the AO added the sum of Rs. 25,40,376/- to the total income of the assessee.

Aggrieved assessee preferred an appeal to the learned CIT (A).

3. The assessee before the learned CIT (A) submitted that it has not claimed any deduction on account of service tax liability in the profit and loss account. Therefore the same cannot be added to the income by virtue of the ITA no.2556/AHD/2017 Asstt. Year 2013-14 provisions of section 43B of the Act. The assessee in support of its claim relied on several orders placed before the learned CIT (A).

3.1 However the learned CIT (A) did not make any reference to the case laws referred by the assessee in his order, by holding that the facts of the cases are different from the facts of the present case.

3.2 The learned CIT (A) treated the amount collected by the assessee on account of service tax which was not paid within the due date as trading receipt and therefore the same is liable to be included the total income of the assessee. The learned CIT (A) in support of his view relied on the following orders/judgments.

(i) Madhya Gujarat Vij Co. Ltd. Vs ITO , ITA No. 2583/Ahd/2010 and CO No. 145/Ahd/2013(A.Y. 2006-07) vide order dated 09.11.2016

(ii) CIT v Sunder Printing Press (2005) 143 taxman 49 (ALL)

(iii) CIT v Ideal Sheet Metal Stamping and Pressing (P) Ltd (2007) 290 ITR 295

4. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us. The learned AR before us reiterated the submissions as made before the authorities below after having reliance on the orders/judgments as cited before them.

5. On the other hand the learned DR vehemently supported the order of the authorities below.

6. We have heard the rival contentions of both the parties and perused the materials available on record. The major thrust of the learned CIT (A) was that the impugned amount of service tax, not deposited within the due date of filing return, has to be treated as trading receipts in view of the judgment of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (Pvt.) Ltd. Vs. CIT reported in 87 ITR 542 which reads as under:

> The amount realised on sales tax by the assessee in his character as an auctioneer formed part of its trading or business receipts. The Supreme Court further held that the fact that assessee credited the amount received as sales tax under the head "sales tax collection account" did not make any material difference. The liability to pay sales tax arises the moment sale or purchase is effected. The fact that that liability has not been quantified for payment, which the law enjoins an assessee to do, is not relevant in determining accrual of legal liability. If that is the position, in order to determine that liability where the assessee had not paid the amount, it must be, according to the scheme of the Sales Tax Act, an estimate of the assessee.
>
> In the instant case, it was never suggested that the estimate made by the assessee or the estimate for the relevant years was either excessive or inaccurate. Therefore, for an assessee who was maintaining accounts under the mercantile system of accounting the liability had arisen and if the assessee had estimated his liability, that liability the assessee was entitled to deduction. But, if in subsequent years it was found out that the estimate was either excessive or wrong and the amount of sales tax payable would be less, then to that extent there would be a cesser of liability in terms of section 41, and the assessee would be liable to pay tax to the department for that amount.

Therefore, in the instant case, the sales tax amount realised by the assessee formed part of its trading receipts. However, the assessee was entitled to deduction inasmuch as the liability had arisen for payment of sales tax for the relevant years, even though these amounts had not been paid to the sales-tax authorities 6.1 The aforesaid judgment was rendered by the Hon'ble court in the year 1973 whereas the provision of section 43B was brought under the statute with effect from 01-04-1983. Thus it is clear that the aforesaid judgment was not rendered in the context of the provision of section 43B of the Act. In holding so we find support and guidance from the judgment of Hon'ble Delhi High Court in the case of CIT vs. Noble & Hewitt (I)(P) Ltd reported in 166 Taxman 48 wherein it was held as under:

ITA no.2556/AHD/2017 Asstt. Year 2013-14 "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 under sections 10(1) and 10(2)(xv) of the Indian Income-tax Act, 1922. The decision 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."

6.2 We further note that the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (Pvt.) Ltd. (supra) has also observed that the assessee shall be entitled for the deduction on account of sales tax liability as and when it will be incurred irrespective of the actual payment. The relevant finding of the Hon'ble Apex court stands under:

"the sales tax amount realised by the assessee formed part of its trading receipts. However, the assessee was entitled to deduction inasmuch as the liability had arisen for payment of sales tax for the relevant years, even though these amounts had not been paid to the sales-tax authorities".

6.3 Thus from the above, there remains no ambiguity to the fact that there was no dispute in connection with the deduction of certain expenses on actual payment basis. In view of the above, we are not inclined to rely on the judgment of Hon'ble Apex Court in the case of Chowringhee Sales Bureau (Pvt.) Ltd. being distinguishable from the present facts of the case.

6.4 Similarly, we further note that the other case laws as relied by the learned CIT (A) namely Sunder Printing Press (supra) and Ideal Sheet Metal Stampings & Pressing Pvt. Ltd. (supra) are distinguishable from the facts of the case on hand in so far these are related to sales tax and excise duty liability. As such, the provision of section 145A of the Act mandates to ITA no.2556/AHD/2017 Asstt. Year 2013-14 include the amount of sales tax and excise duty as part of the turnover/sale price. The provision of section 145A of the Act reads as under:

> "Notwithstanding anything to the contrary contained in section 145,-- 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--
>
> a. in accordance with the method of accounting regularly employed by the assessee; and b. 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"

6.5 A plain reading of the above provision reveals that it is confined to the purchase and sale of goods and the determination of the inventories. As such the provision of section 145A of the Act requires the assessee to include the amount of any tax, duty, cess or fee in the value of the purchases, sales and inventories. The provision of section 145A of the Act does not require the assessee to include the amount of service tax either in the purchases or sales. Therefore, we are not inclined to place our reliance on the case laws as referred by the learned CIT-A in his order.

6.6 Now, the controversy arises whether the impugned amount of service tax for Rs. 25,40,376/- paid after the due date of filing of income tax return, is liable to be added to the total income of the assessee under the provisions of section 43B of the Act. At this juncture, we are inclined to refer the relevant provisions of section 43B of the Act which reads as under:

> 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] ITA no.2556/AHD/2017 Asstt. Year 2013-
14 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXX 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 6.7 The above provisions deals with certain deduction allowable under the Act from the total income of the assessee but such deductions will not be allowed until and unless the actual payment is made by the assessee. In the case on hand, the assessee was neither showing any income on account of service tax collected from the assessee nor it was claiming any expenditure on account of such service tax. As such the assessee was showing the amount of service tax collected from the customers as liability without crediting the same in the profit and loss account and similarly it was making the payment of the service tax amount without debiting the profit and loss account. Moreover, there is no mandate under the Act to route the amount of service tax collected and paid through the profit and loss account. Therefore, in our considered view, there is no question of making the addition of the service tax amount to the total income of the assessee in the event it is not paid within the due date of filing income tax return as specified under section 139(1) of the Act.

6.8 In holding so we draw support from the judgment of Hon'ble Delhi High Court in the case of Noble & Hewitt (I)(P) Ltd. (supra) wherein it was held as under:

> "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".

ITA no.2556/AHD/2017 Asstt. Year 2013-14 6.9 The principles laid down by the Hon'ble Delhi High Court in the above case, are squarely applicable to the case on hand. Therefore, we are not inclined to uphold the finding of the authorities below.

6.10 Before parting, we are also conscious to the fact that this tribunal in the case of Madhya Gujarat Vij. Co. Ltd. vs. ITO in ITA No. 2583/Ahd/2010 and CO No. 145/Ahd/2013 has decided the issue against the assessee involving identical facts and circumstances. The relevant extract of the order is reproduced as under:

We have heard the rival contentions and perused the record. The crux of the issue raised in this Cross Objection is whether provisions of section 43B of the Act apply to the service ta payable at the end of the year. In the case of assessee amount of Rs.13.56 lacs was added to the net profit as profit and loss account towards inadmissible items at the time of filing return of income. Post assessment, assessee preferred appeal before ld. CIT(A) raising the ground that service tax payable was not wrongly added to the net profit by applying the provisions of section 43B of the Act because service tax payable was not reflected in the profit and loss account With CO No.145/Ahd/2013 Asst. Year 2006-07 and it was a mere liability in the balance sheet for tracking the tax payable because in this case assessee is a mere collecting agent. This ground of the assessee was allowed by ld. CIT(A). In order to further examine the issue that whether service tax payable is covered under the provisions of section 43B sub-section(a) of the Act, we find that section 43B sub-sec.(a) of the Act refers to any sum payable by the assessee by way of tax, duty, cess or fees. Now taking example of service tax there can be two possibility firstly an assessee has taken some services and has paid service tax on such services taken from other persons. In this case service tax is a mere expenditure which the assessee has booked in the profit and loss account and there is no liability in the name of service tax in the balance sheet. Second situation is where assessee has charged service tax on the services rendered and tax so charged has not been paid to the credit of government and the remaining balance stands at the close of the year in the balance sheet. Taking both the situations we find that situation second is relevant to the assessee as in situation one there cannot be any liability to pay specific tax amount rather it can be only be a creditor in the books. Interpreting the provisions of section 43B sub-sec.(a) of the Act, which in our view contemplates that this clause has been enacted with regard to taxes charged by the assessee from its customers and if the taxes so charged are payable at the end of the year and are not paid to the credit of the government even before due date of filing return then such amount needs to be added back to the income of assessee and can be claimed as expenditure in the following year in which such tax or due is paid. In our view section With CO No.145/Ahd/2013 Asst. Year 2006-07 43B sub-sec.(a) of the Act does not have a direct link of the amount of tax to be passed through profit and loss account. Rather it is in the nature of "check" by the statute to ensure that the assessee makes payment of the ITA no.2556/AHD/2017 Asstt. Year 2013-14 tax collected to the concerned department and if he is unable to do so the amount is added to its income.

6.11 However, we express, with utmost respect to the decision of the ITAT as stated above, that the ITAT has not considered the judgment of Hon'ble Delhi High Court in the case of Noble & Hetwitt (I) (P) Ltd. (supra) despite the fact that the same judgment was noted by the learned CIT (A) in his order and on the basis of which the learned CIT (A) deleted the addition made by the AO. The relevant finding of the learned CIT (A) as recorded in the order of the ITAT in the case of Madhya Gujarat Vij. Co. Ltd. (Supra) stands as under.

"Ld. CIT(A) allowed the claim of assessee by following the judgment of Hon. Delhi High Court in the case of CIT Vs. Noble & Hewitt (I)(P) Ltd. [305 ITR 324 (Del.)]."

6.12 We also bring to the notice that the Finance Act 2018, w.r.e.f. 01-04- 2017, has amended the provisions of section 145A of the Act requiring the assessee to include the

amount of service tax in the value of the purchases and sales. But such amendment is applicable with effect from 1 April 2017. The relevant extract of the section reads as under:

> "For the purpose 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) ***

(iv) *** Provided *** Provided further *** Explanation 1.--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.

ITA no.2556/AHD/2017 Asstt. Year 2013-14 6.13 From the above, it is also clear that there was no obligation on the part of the assessee to show the amount of service tax collected from the customers as part of the turnover. Accordingly, the assessee has not included the amount of service tax in its turnover which has been shown as current liability. Therefore there was no deduction claimed by the assessee in its profit and loss account at the time of actual payment.

In view of the above and after considering all the facts in totality, we are not inclined to uphold the finding of the authorities below for the reasons as discussed in the preceding paragraph. Hence the ground of appeal of the assessee is allowed.

The next issue raised by the assessee is that the learner CIT (A) erred in confirming the addition of Rs. 1,61,905/- on account of interest on delayed payment of service tax after the due date of filing the income tax return.

7. At the outset we note that there was a delay in the payment of service tax amount on the part of the assessee. As such, the assessee paid the service tax amount along with the interest in the financial year 2014-15 as evident from the order of the authorities below. The assessee before the learned CIT (A) has bifurcated the amount of Rs. 1,61,905/- as detailed under:

> Interest Expenses Rs. 1,30,371/-

Excess payment Rs. 31,534/-

7.1 The assessee before the authorities below has submitted that it has not claimed any deduction on account of such payment of interest expenses of Rs 1,61,905/- in the year under consideration. The submission of the assessee has ITA no.2556/AHD/2017 Asstt. Year 2013-14 not been controverted by the authorities below. Therefore, we can presume that the submission of the assessee is correct in the given facts and circumstances. Thus the

question arises whether such interest expenses can be added to the total income of the assessee under the provision of section 43B of the Act. In our considered view, the answer is in negative. It is because, the assessee has not claimed the deduction of the amount as discussed above. Thus, we are of the view that there cannot be any addition to the extent of the interest amount as claimed by the assessee on account of delayed payment of service tax to the total income of the assessee.

7.2 Moreover, we also note that the impugned amount of interest expenses has already been included in the amount of service tax as discussed in ground No. 1 of the assessee in the preceding paragraph which we have already deleted. Therefore, no further separate deletion is required from the total income of the assessee. As such, the ground of appeal of the assessee in the given facts circumstances becomes infructuous and accordingly we dismiss the same. Hence, the ground of appeal of the assessee is dismissed.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 01/10/2019 at Ahmedabad.

-Sd- -Sd-

(KUL BHARAT) (WASEEM AHMED)

JUDICIAL MEMBER ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 01/10/2019

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