

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C”BENCH: BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.300 & 301/Bang/2019
Assessment Year: 2012 – 13

Ken Consulting Private Ltd. No.46/1, Novel Tech Park Garvebhavi Palya Kudlu Gate, Hosur Road Bangalore 560 068. PAN NO : AABCK5070G	Vs.	Deputy Commissioner of Income-tax Circle-4(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri S. Ramasubramanian, A.R.
Respondent by	:	Smt. R. Premi, D.R.

Date of Hearing	:	25.03.2021
Date of Pronouncement	:	15.06.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals have been filed by the assessee and they are directed against the orders passed by Ld. CIT(A)-4, Bengaluru and they relate to assessment year 2012-13. The appeal numbered as ITA 300/Bang/2019 is directed against the order passed by Ld. CIT(A) u/s 154 of the Income-tax Act,1961 ['the Act' for short]; while the other appeal relates to the order passed against quantum assessment order.

2. The issues contested in both the appeals relate to addition of outstanding service tax liability amount of Rs.55.03 lakhs u/s 43B of the Act.

3. In the appellate order, the Ld. CIT(A) confirmed the addition of service tax payable amount made u/s 43B of the Act. Hence, the assessee filed a rectification application before Ld. CIT(A) submitting that the assessee has not claimed the service tax liability as deduction in the profit & loss account and hence, the provisions of section 43B of the Act would not apply. The same was rejected by Ld. CIT(A) and hence, the assessee has filed an appeal against both original appellate order as well as rectification order.

4. The appeal filed by the assessee against the initial appellate order is barred by limitation by 443 days. The assessee has filed a petition requesting the bench to condone the delay. It is stated that the assessee had filed rectification application before Ld. CIT(A) and hence, the assessee did not file appeal initially. When the rectification application was rejected by the Ld. CIT(A), the assessee was advised that it should file appeal against both initial appellate order as well as against rectification order. Hence, the assessee has filed the appeal against initial appellate order belatedly. The Ld. A.R. submitted that the assessee was not keeping quiet after the receipt of appellate order and it was pursuing the matter by filing rectification application before Ld CIT(A), i.e., it was pursuing an alternative remedy. Hence, there was no wilful or wanton delay in filing the appeal before appellate tribunal. Accordingly, he prayed that the delay may kindly be condoned.

5. We heard Ld. D.R. on this preliminary issue. Having regard to the submissions made by assessee in the petition, we are of the view that there was sufficient cause for not filing the appeal in time.

Accordingly, we condone the delay and admit the appeal for hearing.

6. In the preceding paragraphs, we have condoned the delay in filing appeal against the initial appellate order. We shall be dealing with the issue relating to the addition made u/s 43B of the Act in the above said appeal filed against original appellate order. The appeal filed by the assessee against rectification order also deal with the very same issue and hence, there is no necessity to dispose of the same separately. Accordingly, we dismiss the appeal filed against the rectification order (ITA No.300/Bang/2019) as infructuous.

7. The only issue urged in the appeal relates to disallowance made u/s 43B of the Act. The A.O. noticed that there was an outstanding liability of Rs.55.03 lakhs in respect of service tax payable by the assessee as at the year end. Since the assessee did not disallow the same voluntarily as per the requirement of section 43B of the Act, the A.O. disallowed the same. The Ld. CIT(A) also confirmed the same.

8. The Ld. A.R. submitted that the assessee has maintained the service tax account as a Balance sheet item, i.e, it did not route through the collection and payments of service tax through the profit & loss account. Hence the assessee has not claimed any deduction towards service tax liability. He submitted that the provisions of section 43B of the Act shall apply only if an item is claimed as deduction, which is evident from the reading of initial part of sec.43B. He submitted that the provisions of sec.43B starts with the phrase "Notwithstanding anything contained in any other provisions of this Act, **a deduction otherwise allowable** under this Act" If the assessee has not claimed the service tax liability as

deduction, the question of applying section 43B of the Act does not apply. He submitted that an identical issue was considered by the coordinate bench in the case of N.R. Kumaraswamy (ITA No.1778/Bang/2017 dated 31.5.2018) and the coordinate bench has deleted the addition made u/s 43B of the Act by following the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Knight Frank (India) Pvt. Ltd. (2016) 72 Taxman.com 300 (Bom).

9. The Ld. D.R., on the contrary, submitted that the assessee did not furnish any detail regarding payment of outstanding liability of service tax either before A.O. or before Ld. CIT(A). She further submitted that service tax is a trading receipt. The provisions of sec.43B have been brought into the Act only to ensure prompt payment of various tax liabilities due to Government. Hence the provisions of sec.43B shall squarely apply even if the assessee has not routed the service tax collections and payments through profit & loss account. She submitted that, considering the object behind introduction of sec.43B, the provisions of section 43B of the Act shall be attracted. As per the provisions of sec. 43B, no addition shall be made if the tax liability is paid before the due date for filing return of income. However, the assessee has furnished details of payment till date. Accordingly, she submitted that the Ld. CIT(A) was justified in confirming the addition made by the A.O. u/s 43B of the Act.

10. We heard rival contentions and perused the record. In the instant case, the assessee has not routed the service tax collections and payments through the Profit and Loss account. The Ld D.R submitted that the service tax collection is a trading receipt. Her submissions are supported by the decision rendered by Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (Pvt.) Ltd.

Vs. CIT reported in 87 ITR 542. However, in the instant case, we are concerned with the applicability of the provisions of sec.43B to the issue on hand. There cannot be any dispute that the provisions of Income tax, which impose liability, should be construed strictly. The provisions of sec.43B of the Act use the expression “a deduction otherwise allowable”. Hence the question that arises is whether the provisions of sec.43B is attracted when no deduction was claimed by the assessee.

11. The co-ordinate bench, in the case of N.R Kumaraswamy (supra) has taken the view that the provisions of sec.43B are not attracted, if the tax liability is not claimed as deduction. The co-ordinate bench has taken support of the decision rendered by Hon’ble Bombay High Court in the case of “Knight & Frank (India)(P) Ltd (supra). We also notice that the Ahmedabad bench of Tribunal has taken an identical view in the case of SDCE Projects (P) Ltd (ITA No.2556/Ahd/2017 dated 01-10-2019). The Ahmedabad bench has followed the decision rendered by Hon’ble Delhi High Court in the case of [CIT vs. Noble & Hewitt \(I\)\(P\) Ltd](#) reported in 166 Taxman 48. We notice that the Hon’ble Delhi High Court has considered the decision rendered by Hon’ble Supreme Court in the case of Chowringhee Sales Bureau (Pvt.) Ltd (supra) and then expressed the view that the provisions of sec.43B are not attracted, if the particular item is not claimed as deduction.

12. We notice that the Ahmedabad bench has passed a detailed order in the case of SDCE Projects (P) Ltd (supra). For the sake of convenience, we extract below the relevant discussions made by Ahmedabad bench of Tribunal, in the above cited case:-

“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:

"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 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]

*XX
XXXXXXXXXX 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".

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."

13. The decision rendered by the coordinate Bangalore bench in the case of N R Kumaraswamy (supra) and by the Ahmedabad bench in the case of SDCE Projects (P) Ltd (supra) covers the present issue in favour of the assessee. We have noticed that the Bangalore bench has followed the decision rendered by Hon'ble Bombay High Court in the case of Knight & Frank (India)(P) Ltd (supra) and the Ahmedabad bench has followed the decision rendered by Hon'ble Delhi High Court in the case of [CIT vs. Noble & Hewitt \(I\) \(P\) Ltd](#) (supra). Accordingly, following the above said decisions, we hold that the outstanding service tax liability is not liable to be added u/s 43B of the Act, since the same has not been claimed as deduction. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the impugned addition.

14. In the result, the appeal filed in ITA No.301/Bang/2019 is allowed and the other appeal is dismissed as infructuous.

Order pronounced in the open court on 15th June, 2021

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 15th June, 2021.
VG/SPS

Page 10 of 10

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**