आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No. 5460/Mum/2015

(**निर्धारण वर्ष /** Assessment Year: 2011-12)

Vijay Associates Wadhwa Construction Pvt. Limited (Merged with Wadhwa Group Holdings Pvt. Ltd.) 301, 3rd Floor, Platina, Plot C-59, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051	**बनाम/** Vs.	Addl. CIT, Range 9(3), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCV 3657 P		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Mahesh O. Rajora
प्रत्यर्थी की ओर से/**Respondent by**	:	Ms. Pooja Swaroop

सुनवाई की तारीख / **Date of Hearing**	:	07.11.2017
घोषणा की तारीख / **Date of Pronouncement**	:	16.01.2018

आदेश / O R D E R

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Commissioner of Income Tax (Appeals) dated 03.09.2015 and pertains to the assessment year 2011-12.

2. The grounds of appeal read as under:

1. The Commissioner of Income Tax (Appeals)-21, Mumbai [CIT(A)] erred in confirming the disallowance of Service Tax of Rs.60,57,445/- u/s. 43B of the I. T. Act made by the AO on the ground that the service tax was paid after the due date of filling of return of income and added to the total income of the Appellant.

Your Appellant submits that the service tax collected by the Appellant did not constitute its income of the year.

Your appellant further submits that section 43-B of the I. T. Act is not applicable as the service tax is neither debited to profit & loss account nor claimed as deductible expenditure while computing the taxable income.

3. Brief facts of the case are as under:

The Assessing Officer noted that the assessee had shown service tax payable amounting to Rs.60,57,445/- under the head "Other Liabilities". From the details called the Assessing Officer noted that service tax had been charged and collected from the customers but the same was not paid to the government account. He held that the service tax charged is a trading receipt, since it was charged along with the sale consideration from its customers. Further, since it was not paid to the government account, as per section 43B the same was to be disallowed. He did not accept the contention of the assessee that section 43B is not applicable since the assessee had not claimed any deduction in its profit & loss account.

4. Against the above order, the assessee appealed before the ld. Commissioner of Income Tax (Appeals).

5. The ld. Commissioner of Income Tax (Appeals) confirmed the action of the assessing officer by holding as under:

6.15 The AR also relied uon the decision in the case of CIT 8 vs. M/s. Calibre Personnel Services Pvt. Ltd. by the Hon'ble Bombay High Court in ITA 158 and 160 of 2013 for A.Y. 2007-08 and 2008-09. In this case the grounds raised by the department was "whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of unpaid service tax u/s 43B of the Act without appreciating that the said liability was clearly disallowable within the provisions of the section"

The Hon'ble Bombay High Court dismissed the department appeal thereby upholding that the Hon'ble ITAT was correct in following the decision of the Delhi High Court in the case of Noble & Hewitt Pvt. Ltd., as per which if the liability is not debited in P & L account, there is no application of section 43B.

6.16 With respect, it is pointed out that the grounds raised before the Hon'ble High Court was not whether the service tax collected is trading receipt or not? The question of disallowance u/s 43B would arise only when it is claimed by the assessee. It must also be pointed out that if the approach of excluding taxes, duty, fees, cess, are treated as separately accounted in the Balance Sheet is accepted, it will be tantamount to implicitly approving the circumventing of section 43B and rendering it ineffective.

6.17 I am of the view that the service tax is a trading receipt and therefore part of income for AY 2011-12 and therefore addition to income to the extent of Rs 60,57,445/- is upheld. Reliance is placed on the Apex Court decisions in the case of

Chowringhee Sales Bureau (P) Ltd. Vs CIT 87 ITR 542 (SC)
ACIT Vs T. Naggi Reddy 202 ITR 253 (SC)
Mcdowell & Co. Ltd. Vs CTO 154 ITR 148 (SC).

Much like in the case of sales tax, the levy of service tax is on the service provider which in this case is the appellant. Even if the Rules of Payment is considered, since the appellant had collected the amount towards the service tax, it was liable to pay the service. The service tax payable cannot be allowed as a deduction as per section 43B. Though, the appellant has claimed that section 43B does not apply, to be fair, once the receipts are held to be trading receipts, in view of the claim that the same was paid in A.Y. 12-13, the appellant will be at liberty to claim the same on payment basis, if it claims its allowance u/s. 43B.

6. Against the above order, the assessee is in appeal before us.

7. We have heard both the counsel and perused the records. The learned counsel of the assessee submitted that the issue is squarely covered in favour of the assessee

by several decisions including that from honourable jurisdictional High Court as under:

Sr. No.	Particulars	Pg. no.
1	CIT Vs. Knight Frank (India) (P) Ltd. [143 DTR 32](Bombay)	1- 7
2	CIT Vs. Noble & Hewitt (India) (P) Ltd [305 ITR 324](Delhi)	8- 10
3	Calibre Personnel Services Pvt. Ltd Vs. ACIT [ITA No. 8188/M/2010 & 3407/M/2011] (ITAT Mumbai)	11- 21
4	CIT Vs. Calibre Personnel Services Pvt. Ltd [ITA No. 158 & 160 of 2013](Bombay)	22- 25
5	Pharma Search Vs. ACIT [82 DTR 303](Mumbai)	26- 39
6	ACIT Vs. Real Image Media Technologies P. Ltd. [306 ITR(AT) 106] (Chennai)	40- 50
7	Shri Kalu Karman Budhelia Vs. ACIT [ITA No.7305/Mum/2010](ITAT Mumbai)	51- 56
8	Elcom Surveys Private Limited Vs. ACITflTA No. 2924/Mum/2010] (ITAT Mumbai)	57- 59
9	Planet Advertising Pvt. Ltd, Vs. ACIT [ITA No.l500/Del/2011](ITAT Delhi)	60- 63

8. Upon careful consideration we find that the issue is squarely covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court referred as above. In this regard, we may gainfully refer to the decision of Hon’ble High Court in the case of *Knight Frank (India) (P) Ltd.* (supra) 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 *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.

9. From the above it is evident that the issue is covered in favour of the assessee by the decision of jurisdictional High Court as above. We take note that the decision of honourable jurisdictional High Court was also referred before the learned CIT-A. However the learned CIT-A in his wisdom has chosen to not follow the same and has referred to old decisions of honourable apex court rendered on different facts of the case. In our considered opinion, by ignoring the decision of Hon'ble High Court which was clearly applicable on the facts and circumstances of the case, proper judicial discipline has not been followed.

10. Be as it may, since the issue is squarely covered in favour of the assessee, we set aside the order's of authorities below and decide the issue in favour of assessee.

11. In the result, this appeal filed by the assessee stands allowed

Order pronounced in the open court on 16.01.2018

Sd/-	Sd/-
(Amarjit Singh)	(Shamim Yahya)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :16.01.2018

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**