

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “SMC”, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

आयकर अपील सं. / ITA No.501/PUN/2020

निर्धारण वर्ष / Assessment Year : 2014-15

M/s. Shirode Automobiles Pvt. Ltd., 112/2A, Ashirwad Nagar, Manmad Road, Kopergaon, Dist. Ahmednagar, Maharashtra – 423 601 PAN : AAEC9093E	Vs.	ACIT, Ahmednagar Circle, Ahmednagar
(Appellant)		(Respondent)

Appellant by

Shri Sanket M.Joshi

Respondent by

Shri S.P. Walimbe

Date of hearing

17-11-2021

Date of pronouncement

18-11-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the order passed by the Id. CIT(A) on 16.4.2018 upholding disallowance of Rs.12,25,998/- made by the Assessing Officer (AO) as a Prior period expenditure not deductible in relation to the assessment year 2014-15.

2. This appeal is time barred by 729 days. The assessee has filed a condonation application with affidavit giving the reasons for the delay. I am satisfied with the same. The delay is condoned and the appeal is admitted for disposal on merits.

3. Tersely stated, the factual matrix of the case is that the assessee is engaged in the business of sales and service of two wheelers and tractors. A return was filed declaring total income of Rs.30,48,700/-. During the course of assessment proceedings, the AO observed that a sum of Rs.12,25,998/- was claimed as deduction by merging it with the expenses booked under the head “Rates and Taxes”. On examination of the details, it transpired that the sum of Rs.12,25,998/- was towards payment of service tax under the Service Tax Voluntary Compliance Encouragement Scheme, 2013 (VCES). After going through the break-up of the amount, the AO observed that the said sum was paid for the financial years 2007-08 to 2012-13. Holding such an amount as a Prior period expenditure and the further fact that the assessee itself opted the VCES for paying liability of earlier years, the AO made disallowance of the same. The Id. CIT(A) countenanced the disallowance after noticing that the amount did not pertain to the year under consideration and further that there was no documentary evidence to prove that it was a simple service tax and not a penal payment. The assessee has come up in appeal before the Tribunal.

4. I have heard both the sides and scanned through the relevant material on record. It is seen that the assessee was regularly paying Service tax, filing respective returns for the same. The instant amount of Rs.12.25 lakh pertains to service tax on *Incentives* received by the assessee from its principals, namely, Bajaj Auto Ltd. and Mahindra and Mahindra Ltd. in earlier years. These Incentives were given by way of credit notes to the assessee in relation to certain targets, which the assessee originally failed to include in the chargeable amounts requiring payment of service tax for the concerned years. The Government came out with the VCES. This Scheme provides through clause 106 of the Service Tax Voluntary Compliance Encouragement Scheme, 2013 that: 'Any person may declare his tax dues in respect of which no notice or order of determination u/s.72 or 73 or 73A of the Chapter has been issued or made before 1st day of March, 2013'. Clause 108 provides immunity from penalty, interest and other proceeding. The assessee availed benefit of the Scheme in relation to the Incentives received by it from its principal companies for the financial years 2007-08 to 2012-13 and paid the service tax thereon in the year under consideration. Detail of such liability under the VCES, 2013 has been placed at

page 8 of the paper book. Obviously, there is no penalty component involved in the amount paid by the assessee, which the Scheme also does not provide for. Thus, it is apparent that the amount paid by the assessee is only towards Service tax and Education cess etc. thereon.

5. The conundrum is on deductibility of the amount of service tax paid under VCES, 2013. The contention of the assessee is that the amount paid was a discharge of liability which got crystallized during the year and hence was an expenditure deductible for the year. This view has been premised on the bedrock of the VCES kick starting during the year under consideration; the assessee availing its benefit; and *ex consequenti* becoming liable to pay the amount of service tax in question. I am not convinced with this argument. The liability to pay service tax on the amount of Incentives was magnetized in the respective relevant financial years when these were received notwithstanding the fact that the assessee had a different understanding on its taxability at that time. The fact that the assessee availed benefit of the VCES during the year in respect of such Incentives would not bombard against the crystallization of liability in the respective earlier years so as to have the effect of

shifting the liability from earlier years to the year under consideration. The liability to pay service tax arose on receiving the amounts consequent to rendering the service during such earlier years. In such circumstances, it is held that the amount of Rs.12.25 lakh paid by the assessee is not an expenditure for which the liability got crystallized in the year under consideration.

6. The Id. AR raised an alternative argument that the amount of service tax should be allowed in terms of section 43B of the Income-tax Act, 1961 (hereinafter also called 'the Act'). Section 43B of the Act, with the caption 'Certain deductions to be only on actual payment', insofar as it is material for the extant appeal, 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

.....

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 :'

7. A careful circumspection of the above provision indicates that it opens with a non obstante clause; deals with a situation when a deduction is otherwise allowable under this Act; in respect of any sum payable by the assessee by way of tax etc., under any law for the time being in force; provides for allowing deduction in the year in which such tax etc. is actually paid; and such year of allowing deduction on payment basis is irrespective of the year in which the liability to pay it was incurred.

8. Reverting to the factual panorama of the case, there is no dispute that sum of Rs.12.25 lakh is the sum payable by the assessee in the nature of tax (service tax). The amount of service tax is otherwise deductible. The crucial point is the timing of deduction. The non obstante clause in the provision provides that deduction has to be allowed only in computing the income of the previous year in which the same is actually paid irrespective of the previous year in which liability to pay such sum was incurred. Proviso to section 43B states that: `nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay

such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return'. A cumulative reading of the main part of the provision along with its proviso deciphers that if any tax, duty, cess or fee etc. is received, say, on 31st March of the financial year X, but is actually deposited on 5th of April of the financial year X +1, then going with the main provision, the deduction should be allowed in the year of payment that is X+1, but the proviso intervenes to provide for deduction of such an amount in the financial year X. Confining to the main provision without the proviso, I find that there is a clear cut mandate that incurring of liability to pay tax, duty, cess or fee etc. in a particular previous year is not a relevant criterion for granting deduction. Rather it is only when the amount of such tax etc. is actually paid by the assessee that the deduction follows.

9. A necessary ingredient of section 43B is that a "*deduction is otherwise allowable*" under this Act in respect of such tax. Insofar as the timing aspect of service tax deduction is concerned, it would be apposite to take note of rule 6 of the Service Tax Rules, which deals with the 'Payment of service-tax'. Sub-rule (1) provides that: 'The service-tax shall be paid to the credit of the

Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable service'. Then there are certain provisos, which are not relevant for the purpose. The point worth highlighting is that section 43B triggers to make deduction of 'any sum *payable* by the assessee by way of tax'. If the tax is not payable, then the section ceases to apply and deduction comes to be governed by the normal method of accounting consistently followed by an assessee. It has been noted above that the liability to pay service-tax arises after its receipt and not before that. This is reason that when the assessee in *CIT Vs. Ovira Logistics (P.) Ltd. (2015) 377 ITR 129 (Bom)* had shown the amount of service tax payable at the end of the year which was not paid, the AO disallowed the same u/s 43B on the ground that it was not paid. However, the Hon'ble jurisdictional High Court deleted the disallowance by holding that: 'In our view, *liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise.*' This view has been reiterated in *Pr. CIT VS. Tops Security Ltd. (2019) 415 ITR 212 (Bom)* holding that section 43B does not contemplate liability to pay service tax before actual receipt of the funds in the account of the assessee.

The SLP of the Department against this judgment has since been dismissed in (2019) 412 ITR (St) 30. A fall out of the above discussion is that liability to pay service tax does not arise before it is actually received.

10. The language of the rule 6 has left a lacuna in so far as the question of disallowance of service tax on non-payment u/s 43B of the Act is concerned, which can be understood with the help of an example. Suppose an assessee renders service for Rs.200 and raises invoice with service tax of Rs. 24. If the invoice is realized during the financial year itself, the assessee will become liable to deposit service tax within the stipulated time from its receipt. Deduction of service tax will be allowed u/s 43B on its payment. Take another case, in which the invoice is not realized within the financial year. This case will also facilitate deduction of service tax in the same financial year even though it was not paid on the *raison d'être* of the service tax becoming payable only on receipt, which event did not take place in the relevant financial year. Suppose the invoice is realized in the next year and the assessee then deposits the amount of service tax, there will not be any separate deduction in the later year on payment because the deduction stood allowed in the earlier year itself. Now

contemplate that an assessee does not deposit the amount of service tax after receipt in such later year. It is in this scenario that the amount of service tax will not get disallowed even though not paid because once the amount was allowed as deduction in the preceding year on the ground that it had not become payable without receipt, the same cannot be disallowed in the later year on non-payment because the deduction had already been allowed in the preceding year and there is no claim for deduction in such later year. The foregoing discussion boils down that non-payment of service tax can be disallowed u/s 43B of the Act only in one scenario, that is, when it is recovered in the same financial year but not deposited. *Au contraire*, if service tax is recovered in a later financial year it will not suffer any disallowance, even if not deposited.

11. The position which ergo emerges is that an assessee is otherwise eligible for claiming deduction, in law, in the financial year of raising the invoice, even if the service tax is neither received nor deposited in such a year. If however, the assessee *suo motu* does not claim deduction of service tax in the financial year of raising invoice for not having received and deposited the amount of service tax, he can validly claim deduction u/s 43B of

the Act in the later year on realizing the amount and paying the service tax. Reverting to the facts of the case, it is seen that the amount of service tax has actually been paid in the year under consideration but no deduction was claimed by the assessee in the earlier financial years when Incentives, impliedly including the amount of service tax, were received. As such, the same has to be allowed as deduction in the year in question in terms of the main provision of section 43B granting deduction at the time of actual payment.

12. Another significant ingredient of section 43B is that the deduction should be otherwise allowable under this Act. Service tax is an indirect levy, which is otherwise deductible under the Act. Turning to the facts of the case, it is seen that the assessee paid it during the year for which the liability to pay arose in earlier financial years. It is not a case of the assessee paying any advance service tax which is otherwise not deductible as per law.

13. To sum up, when the assessee incurred liability in respect of service tax in earlier years for which deduction was otherwise allowable under this Act, the deduction will be allowed in computing the income of the year in which the amount is actually

paid which is the year under consideration as no such deduction was claimed in earlier years.

14. A case has been set up on behalf of the Revenue that section 43B of the Act is *per se* inapplicable to the facts of the case because the component of service tax, included in the amount of Incentives, does not constitute 'Income' at the first instance when received and hence there can be no deduction on subsequent payment of service tax either in that year itself or any later year. To bolster such a proposition, reliance has been placed on behalf of the Revenue on Circular No.4/2008 dated 28-04-2008 as per which service tax paid by a tenant is not in the nature of income of landlord who simply acts as a collecting agency for collection of service tax thereby providing that tax withholding at source u/s.194I is required to be made on the amount of rent exclusive of service tax.

15. I am disinclined to accept the version presented on behalf of the Revenue on this score. No doubt, Circular 04/2008 unequivocally provides that no deduction of tax at source should be made u/s.194I on the amount of service tax paid by the tenant, but it should be kept in mind that this circular has been issued in the context of TDS provisions only. Section 194I provides for

deduction of tax at source on any income by way of rent. The mere fact that tax is not required to be deducted at source on the service tax component paid by the tenant along with the amount of rent, does not otherwise disqualify the inclusion of the amount of service tax in the total income of the landlord. Here, it is relevant to note that the CBDT, vide Circular No. F.No.275/73/2007-IT(B), dated 30-06-2008, after taking note of its earlier Circular No.04/2008 dated 28-04-2008 providing for non deduction of tax at source on the component of service tax along with rent payment, has clarified that tax should be deducted at source on payments covered u/s.194J inclusive of service tax. Service tax is includible in the total income can be better comprehended from the language of section 145A(ii) of the Act, which provides, for the purposes of determining the income chargeable under the head “Profits and gains from the business or profession” that: ‘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’. On going through the prescription of section 145A(ii), it gets

overt that the value of sale of services is to be adjusted to include the amount of tax etc. actually paid or incurred by the assessee. Once section 145A(ii) of the Act provides for the inclusion of any tax, which naturally covers service tax also, in the value of sale of services, the sequitur is that the amount of service tax is includible in the total income of the assessee accordingly for that year. Further, section 43B(a) also uses somewhat similar language by including: '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'. On a relative reading of section 43B(a) in juxtaposition to section 145A(ii), it becomes explicitly unambiguous that any sum payable by way of tax, under any law for the time being in force, which essentially includes service tax also, is required to be considered for the purposes of section 43B. The fortiori is that the amount of service tax is includible in the total income in the first instance, which then qualifies for deduction or non-deduction u/s 43B of the Act. Thus, the contention of the Revenue that the amount of service tax is not includible in the total income at the time of collection is devoid of merits and hence jettisoned. Once it is held that the amount of service tax is includible in the total income of the assessee, the

inevitable conclusion which follows is that its deduction will also result, which may be otherwise allowable or disallowable as per the facts and circumstances of a case.

16. The issue can be approached on an elementary and a simplistic approach. If all the layers of technicalities are unadorned, it can be seen that in the initial years when the assessee received incentive, inclusive of the amount of service tax, it offered the amount of service tax also for taxation. It is during the year under consideration that the assessee paid the amount of service tax. Such payment during the year is nothing but, in a way, reversal of the original entry of receipt passed in the earlier years. Once receipt of the amount of service tax was included in the total income in earlier years, the obvious corollary is that its payment in the year in question will also qualify for deduction from the total income.

17. In view of the foregoing discussion, I hold that the sum of Rs.12.25 lakh paid by the assessee during the year as service tax relatable to earlier years should be allowed as deduction in the year under consideration. The impugned order is, therefore, overturned on this score.

18. In the result, the appeal is allowed

Order pronounced in the Open Court on 18th November,
2021.

Sd/-
(R.S.SYAL)
उपाध्यक्ष/ VICE PRESIDENT

पुणे Pune; दिनांक Dated : 18th November, 2021
Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
The CIT (Appeals)-2, Pune
4. The Pr. CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे “SMC” /
DR ‘SMC’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	17-11-2021	Sr.PS
2.	Draft placed before author	18-11-2021	Sr.PS
3.	Draft proposed & placed before the second member	--	JM
4.	Draft discussed/approved by Second Member.	--	JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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