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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1023 OF 2013

The Commissioner of Income Tax-8
Aakar Bhavan, M. K. Road,
Churchgate, Mumbai-400020

..Appellant

-Versus-

Ovira Logistics Pvt. Ltd.
Plot No.14, Raheja Vihar,
IL&FS House, Chandivali,
Andheri (E), Mumbai-72.

..Respondent

.....

Mr. Arvind Pinto for the Appellant.

Mr. Percy Pardiwalla, Senior Counsel, a/w Sameer Dalal for the Respondent.

.....

**CORAM: S. C. DHARMADHIKARI AND
A. K. MENON, JJ.**

RESERVED ON : 30TH MARCH, 2015

PRONOUNCED ON : 17th APRIL, 2015.

JUDGMENT(PER A. K. MENON, J.):

The present appeal is filed by the revenue proposing that the following questions are substantial questions of law:

(a) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of unpaid service tax under section 43B of the Act without appreciating that the said liability was clearly disallowable within the provisions of the said section?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the unpaid service tax would not be disallowable under section 43B of the Act as the liability to pay service tax had not arisen without appreciating the fact that the assessee has shown the said amount as a liability in its Balance Sheet?

2] The facts in brief are as follows:-

The Respondent-Assessee filed its returns for assessment year 2007-08 declaring total income of Rs.4,46,46,873/- on verification of the computation of income, it was found that the Assessee had set off entire business income against brought forward losses for earlier years. The Assessing Officer has passed an order on 29th December, 2009 assessing Nil income after set off the brought forward losses. The Book Profit under section 115JB was determined at Rs.8,97,48,777/-. While completing the assessment, the Assessing Officer, inter alia, disallowed service tax amounting to Rs.90,08,661/- under section 43B of the Act.

3] Being aggrieved by the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) who partly allowed the appeal in favour of the assessee deleting the entire disallowance of service tax under section 43B by holding that a sum of Rs.41,97,663/- had

already been paid before due date of filing return and, therefore, could not be disallowed under section 43B of the Act. As far as the remaining amount of Rs.48,10,998/- was concerned, the Commissioner of Income Tax (Appeals) has held that the same could not disallowed under section 43B of the Act since it was not payable as on 31st March, 2007. It was found that the amount on which service tax was payable had not been received from the parties to whom services were rendered. As a result, the provisions of section 43B were not attracted.

4] Being aggrieved by the order of the Commissioner of Income Tax (Appeals), the Revenue filed an appeal before the Tribunal on various grounds including the deletion of disallowance of service tax under section 43B. The ground pertaining to service tax came to be rejected by the Tribunal on 31st October, 2012 while partly allowing the Appeal for statistical purposes. The Revenue being aggrieved by this order has raised the questions of law under section 260A of the Income Tax Act, 1961.

5] Before us, Mr. Pinto, the learned counsel, appearing for the Appellant submitted that the earlier order of the Tribunal in **Pharma Search V/s. Assistant Commissioner of Income Tax-15(3), Mumbai (2012) 53 SOT 1 (Mum)** was followed. According to Mr. Pinto, the

liability to pay service tax had already accrued. He drew our attention to the order of the Tribunal which was passed for the assessment year 2007-08. Mr. Pinto submitted that the Tribunal ought not to have set aside the disallowance on both counts. Mr. Pinto submitted that as far as the balance amount of Rs.48,10,998/- which was unpaid as on 31st March, 2007 there is no case for disallowance, since according to him, the assessee's case was covered by section 43B. He drew our attention to section 43B and contended that the deduction allowable under the Act for any sum payable by the assessee by way of service tax shall be allowed only on the computation of income of the previous year in which the sum is only paid by him.

6] He submitted that the order of the Assessing Officer was in accordance with law and that the Tribunal had erroneously permitted the disallowance by rejecting the ground of Appeal by the Revenue.

7] Mr. Pardiwalla, the learned Senior Counsel, appearing on behalf of the respondent supported the order of the Tribunal and the Commissioner of Income tax (appeals). According to him, the Commissioner of Income Tax(Appeals) had correctly deleted the disallowance of the amount of Rs.48,10,998/- which amount had not become payable by reason that

since the relevant credit had not been received in the Assessee's account. Mr. Pardiwalla relied upon a decision of the Delhi High Court in case of the *Commissioner of Income Tax V/s. Noble and Hewitt (I) P. Ltd. (2008) 305 ITR 324* in which according to him the fact situation was somewhat similar. The Assessing Officer and the Commissioner of Income Tax (Appeals) had taken a view that the assessee had not followed the correct accounting procedure and they disallowed the deduction and added it to income. In the Appeal, the Tribunal observed that since the assessee did not debit the amount to the profit and loss account as an expenditure nor did the assessee claim any deduction in respect of the amount since the assessee was following the mercantile system of accounting, the question of disallowing the deduction not claimed does not arise.

8] Mr. Pardiwalla referred to a decision of the ITAT in the case of *Pharma Search V/s. Assistant Commissioner of Income Tax-15(3), Mumbai (2012) 53 SOT 1 (Mum)* in which the Assessing Officer had concluded that service tax in the sum of Rs.32 lacs being consultation fees should be added to the income. But this was set aside on the basis that the amount of consultation fees has not been received by the assessee. The Assessing Officer in that case took a view that the amount receivable by

the assessee also ought to have been shown as receipts in the profit and loss account. Apparently, the assessee followed the decision of the Hon'ble Supreme Court in a sales tax matter, ***Chowringhee Sales Bureau(P)Ltd. V/s. CIT [1973] 87 ITR 542 (SC)***. In the case of Chowringhee Sales Bureau (supra) it was held that unpaid sales tax liability has to be included as part of receipts of an assessee but at the same time the assessee would be entitled to deduction of the same under mercantile system of accounting even without actual payment. This decision would not now apply by virtue of specific provision of section 43B of the Income Tax Act under which liability to pay service tax is only on receipt of the amount by the assessee. Accordingly in Pharma Search (supra) the Tribunal granted the relief to the assessee. We make a mention of the same in view of the fact that the order of the Tribunal in M/s. Pharma Search (supra) came to be challenged in this Court in Income Tax Appeal No.370/2013 wherein the only question of law that was admitted was relating to the keyman insurance policy. The aspect of liability to pay service tax before the same was actually received by the assessee was not admitted in accordance with law.

9] Having perused the aforesaid decisions, we are clearly of the view that section 43B does not contemplate liability to pay the service tax

before actual receipt of the funds in the account of the assessee. In our view, liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when services are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise.

10] In the facts and circumstances of the case, we are of the view that no substantial question of law arises. Accordingly, the Appeal has no merit and the same is dismissed. There will be no orders as to costs.

(A. K. MENON, J.)

(S. C. DHARMADHIKARI, J.)