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

INCOME TAX APPEAL NO. 158 OF 2013
WITH
INCOME TAX APPEAL NO. 160 OF 2013

Commissioner of Income Tax-8. ..Appellant

Vs.

M/s Calibre Personnel Services Pvt. Ltd., Mumbai ..Respondent

....

Mr. Arvind Pinto, Advocate for Appellant.
Mr. Mihir Naniwadekar, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 2nd FEBRUARY 2015

P.C.:

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') challenge a common order dated 8th July 2012 passed by the Income Tax Appellant Tribunal (the 'Tribunal) in respect of the Assessment Year 2007-08 and 2008-09.

2. The revenue has pressed the following question of law for our consideration:

> *"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 said Section?"*

3. The Counsel are agreed that the issues arising in both the appeals are identical. Therefore for the sake of convenience, we refer to the facts as set out in Income Tax Appeal No. 158/2013.

4. The respondent-assessee filed its return of income for the Assessment Year 2007-08 showing its total income at Rs.62.18 Lakhs. In its Balance Sheet filed along with the return of income, the respondent had made a provision for service tax amounting to Rs.3.14 Crores as a liability. Since the amount of service tax is not been paid, the Assessing Officer called upon the respondent to explain why the aforesaid amount should not be added to income under Section 43B of the Act. The respondent-assessee pointed out that the amount of service tax payable is not taken to the profit and loss account and but credited directly to the Service Tax Payable under the head Current Liabilities in the Balance Sheet. This was as per the guidelines issued by the Institute of Chartered Accountant of India. Further it was also pointed out that in the absence of respondent claiming any deduction on account of the unpaid service tax to arrive at its income the question of application of Section 43B would not arise. The Assessing Officer did not accept the contention and added service tax payable of Rs.1.34 Crores to the income of respondent-assessee in his Assessment Order dated 23 October 2009.

5. On appeal, the CIT(A) in principle upheld the order dated 23 October 2009 of the Assessing Officer brining to tax the service tax payable in view of Section 43B of the Act. However the addition was restricted only to Rs.82 Lakhs on account of the fact that this was the aggregate amount of service tax payable on the date of filing of the return of Income.

6. In appeal, the Tribunal by the impugned order allowed the respondent-assessee's appeal by following decision of Delhi High Court in the case of ***CIT Vs. Noble & Hewitt Pvt. Ltd.*** reported in ***305 ITR 324.*** In the above case, it was held that as the amounts of service tax payable were not debited to the Profit and Loss Account, the occasion to apply Section 43B of the Act would not arise. It is only when an amount of tax payable is claimed as a deduction, the same would be allowed, only if actually paid. Further the impugned order restored the issue to the Assessing Officer so as to examine on facts whether or not the respondent-assessee has debited the service tax payable to its Profit and Loss Account or had claimed any deduction in respect thereof before applying the decision of Delhi High Court in Noble & Hewitt Pvt. Ltd. (supra).

7. The grievence of the revenue is that the decision of Delhi High Court in Noble & Hewitt Pvt. Ltd. (supra) not applicable to the present

facts. Mr. Pinto submitted that the above decision did not considered Section 43B of the Act nor considered the mercantile system of accounting.

8. We are unable to appreciate the grievence of the Revenue as the Delhi High Court in Noble & Hewitt Pvt. Ltd. (supra) has considered both Section 43B of the Act and also the issue of mercantile system of accounting followed by the assessee before it. The revenue is not able to point out why the decision of Delhi High Court requires reconsideration. In our view, the Delhi High Court's decision in Noble & Hewitt Pvt. Ltd. (supra) has correctly held that Section 43B of the Act is a provision for allowing deduction of tax on payment but this can only be triggered if deduction with regard to taxes payable is claimed for arriving at taxable income.

9. According to us, the issue raised in this appeal is conclusively covered by the order of Delhi High Court in the decision of Noble & Hewitt Pvt. Ltd. (supra) and we respectfully concur with the view of the Delhi High Court.

10. Accordingly, no substantial question of law arises. Hence **appeal** is **dismissed**. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**