

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

INCOME TAX APPEAL NO.733 OF 2015
WITH
INCOME TAX APPEAL NO.734 OF 2015
WITH
INCOME TAX APPEAL NO.879 OF 2015
WITH
INCOME TAX APPEAL NO.70 OF 2016
WITH
INCOME TAX APPEAL NO.125 OF 2016

Principal Commissioner of Income Tax-11,
Mumbai

.... Appellant

Vs.

Tops Security Limited

.... Respondent

Mr. Arvind Pinto for the Appellant.

Mr. Atul K. Jasani for the Respondent.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : SEPTEMBER 10, 2018

P.C:

1. The Revenue's appeals challenge the orders of the
Income Tax Appellate Tribunal, Bench at Mumbai.

2. In all these appeals, the Revenue proposes a

common question and terms it to be a substantial question of law. The common question reads as under:-

"Whether, in law and on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in holding that the service tax though debited to the profit and loss account but not credited to the Central Government cannot be disallowed under Section 43B of the Income Tax Act, 1961?"

3. The facts and circumstances in Income Tax Appeal No.733 of 2015 are sufficient for the purposes of the final order that we propose to pass in these appeals.

4. This appeal is for the Assessment Year 2006-07.

5. The respondent/assessee before this Court filed a return of income for Assessment Year 2006-07 on 29-3-2007 declaring income of Rs.6,48,57,187/-. The assessee claimed that it is engaged in the business of providing detection and security services to its clients. During the examination of the Balance Sheet, the Assessing Officer, *inter alia*, noted that the Company had claimed Rs.5,12,22,734/- being unpaid service tax as its liability. Additionally, a sum of Rs.3,47,03,462/- was also shown

under the same head, but the respondent had disallowed a sum of Rs.95,94,128/-. It is stated that the gross receipts include the service tax but whenever it is due and payable, namely, when the amount for the services is realised, it would be remitted. That is how the above sum was shown as liability in the Balance Sheet.

6. The Assessing Officer was of the view that by virtue of Section 43B of the Income Tax Act, 1961, service tax can be allowed only when paid and therefore the amount is not liable as deduction. Further, certain details of the clients were also not provided. Hence, the same was added as income.

7. Being aggrieved by this order, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) and he held in favour of the assessee.

8. Then, the matter was carried in appeal to the Tribunal and the Tribunal, relying upon its finding in the earlier assessment years, came to the conclusion that though the service tax was included in the bill raised on the customers but it was

not actually collected from them. The First Appellate Authority held that, tax becomes payable only when it is collected from the customer. It is in these circumstances that following its earlier view, the Tribunal agreed with the First Appellate Authority and dismissed the Revenue's appeal.

9. When these appeals were argued before us, our attention was invited by Mr. Jasani to a Division Bench Judgment of this Court reported in [2015] 377 ITR 129 (Bom.) {**Commissioner of Income-Tax v. Ovira Logistics P. Ltd.**}. Mr. Jasani submits that earlier this very controversy was dealt with and the Revenue's appeal was dismissed.

10. With the assistance of both sides, we have perused this Judgment and we find that it dealt with an identical issue. This Court held that Section 43B does not contemplate liability to pay service tax before actual receipt of the funds in the account of the assessee. Hence the liability to pay service tax into the Treasury will arise only upon the assessee receiving the funds and not otherwise. Thus the consideration has to be

actually received and thereupon the liability will arise.

11. No conclusion contravening the above has been brought to our notice by the Revenue.

12. In fact, Mr. Pinto was fair enough to bring to our notice this Judgment.

13. In the circumstances, each of these appeals raise no substantial question of law. They are dismissed accordingly. The issue being covered by a Division Bench and to which one of us (Shri S.C. Dharmadhikari, J.) was a party, the appeals are disposed of but without any order as to costs.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)

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