IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH, AHMEDABAD

BEFORE Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER AND Ms. MADHUMITA ROY, JUDICIAL MEMBER

(Conducted through Virtual Court)

ITA No.579/Ahd/2015
Assessment Year: 2006-07

Income Tax Officer, **Ward – 2(1)(3), Baroda.**	**vs.**	**Super Hospitality Services Pvt. Limited,** **303, Vraj Square,** **Manisha Circle,** **Old Padra Road,** **Vadodara – 390020 (Gujarat)** **[PAN – AAJCS 7483 D]**

ITA No.526/Ahd/2015
Assessment Year: 2010-11

Super Hospitality Services Pvt. Limited, **303, Vraj Square,** **Manisha Circle,** **Old Padra Road,** **Vadodara – 390020 (Gujarat** **[PAN – AAJCS 7483 D]** **(Appellants)**	**Vs.**	**Assistant Commissioner of Income Tax, Circle-4, Vadodara.** **(Respondents)**

Revenue by	**:**	**Shri Purushottam Kumar, Sr. D.R.**
Assessee by	**:**	**None**
Date of hearing	**:**	**15.12.2021**
Date of pronouncement	**:**	**31.01.2022**

ORDER

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER :

Both the appeals pertain to the same assessee and relate to different proceedings for different assessment years. While the appeal in ITA No.579/Ahd/2015 has been filed by the Revenue against the order passed by the Learned Commissioner of Income Tax (Appeals)-2, Vadodara (hereinafter referred to as "CIT(A))" in quantum proceedings under Section 250(6) of the Income Tax Act,

1961 (hereinafter referred to as "Act") for Assessment Year 2006-07, the appeal in ITA No.526/Ahd/2015 relates to Assessment Year 2010-11 and has been filed by the assessee against the order passed by Ld. CIT(A)-III, Baroda confirming the levy of penalty under Section 271(1)(c) of the Act.

2. None appeared on behalf of the assessee nor any application seeking adjournment was filed before us. We have noted that despite several opportunities granted to the assessee, the assessee has either remained unrepresented on several occasions or sought adjournments. Considering the same, it was considered fit to proceed with adjudicating the appeals ex-parte.

3. We shall first be dealing with the appeal of the Revenue in ITA No.579/Ahd/2015 relating to Assessment Year 2006-07. The grounds raised by the Revenue are as under:-

> **"1. On the facts and in the circumstances of the case the learned CIT(A) has erred in facts and in law in deleting the addition of Rs.1,38,07,344/- on account of suppression of income without appreciating that A.O. after discussing the issues related to information received from Central Excise and Service Tax Dept., and evidences gathered, during the course of assessment proceedings, correctly worked out the profit element of Rs.1,38,07,344/- being 25% of the service charges of Rs.5,52,29,376/-.**
>
> **2. On the facts and in the circumstances of the case, learned CIT(A) has erred in facts and in law in deleting the addition of Rs.1,38,07,344/- on account of suppression of income without appreciating that the contention of the assessee Company that it came into existence on 19-12-2005, is contradictory to the admission made by Shri Keshav Alwa, director of the assessee company to the concerned authorities of Central Excise and Service Tax Dept, that the Company came into existence in the year 2002 and since then they were engaged in business of providing the service of outdoor catering and house keeping services.**
>
> **3. On the facts and in the circumstances of the case, learned CIT(A) has erred in facts and in law in deleting the disallowance u/s. 43-B of the Act of Rs.30,29,240/-, without appreciating that demand cum show cause notice dated 20-11-2009, issued by the Commissioner of Central Excise Customs and Service Tax, Baroda-1, revealed that the assessee company had not paid service tax for the year 2005-06.**
>
> **4. The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.**

Relief claimed in appeal.

It is, therefore, prayed that the order of the CIT(A) on the issues raised in the aforesaid grounds be set aside and that of the Assessing Officer be restored."

4. The facts relating to the case, as emanate from the orders of the authorities below, is that the assessee is engaged in the business of catering and hospitality/house keeping service etc. For the impugned assessment year return of income was filed by the assessee declaring Nil income. Thereafter reassessment proceedings, under Section 147 of the Act , were initiated on the assessee on the basis of information received from the Office of the Commissioner, Central Excise, Customs and Service Tax, Baroda-1 that the assessee had provided services and received an amount of Rs.5,10,61,886/- during the year. The assessee denied having received any such amount and asserted that no business had been carried out in the impugned year, since it was the first year of coming into existence. The Assessing Officer, however, was not convinced with the explanation of the assessee and accordingly he held that the sum reflected undisclosed sales of the assessee. Applying an N.P. rate of 25% thereon, he calculated the income earned from the same at Rs.1,38,07,344/- and added the same to the income of the assessee. The Assessing Officer also made addition of Rs.30,29,240/- on account of unpaid Service Tax liability. Accordingly the total income of the assessee was assessed at Rs.1,68,36,584/- as against Nil returned by the assessee.

5. Before the Ld. CIT(A) the assessee reiterated its contentions and furnished additional evidences in support. The assessee pleaded that the said income did not relate to it since it had come into existence in the impugned year only and had not commenced any business. That in fact it related to the proprietary concern of the Director of the assessee Company, Shri Keshav Alwa, which went by the same name as the assessee Company. Additional evidences in support of the contention was filed before the Ld. CIT(A). The Ld CIT(A), after perusing the same, found merit in the contention of the assessee and deleted both the additions so made holding as under :-

"4.5 I have considered the appellant's submission and AO's observations, remand report and documents submitted during the course of the appellate proceedings. From the copy of Memorandum of Association and Article of

Association of the appellant company, it is seen that the company was formed on 19/12/2005 on which date the certificate of incorporation was issued by the Assistant Registrar of companies, Gujarat. There were two share holders of the company namely Mr. Keshav Alwa, having 10000 shares and Kavita Alwa having 2000 shares. Thus, during the major part of financial year 2005-06, the appellant company was not in existence at all.

4.5.1 Besides it is also seen that the appellant company has obtained service tax registration from the Central Excise and Custom Commissionarate, Baroda-1 on 15/05/2006 i.e. after the end of the financial year 2005-06. Under such circumstances, it cannot be held that the appellant company was carrying on business from 2005-06 and also that it was liable for payment of service tax. It is also seen that the Central Excise and Customs and Service Tax Department had issued notices dated 07/05/2006, 23/08/2006 and 17/09/2007 in the name of M/s. Super Hospitality Service (Proprietor Keshav Alwa). Registration no. issued in these notices was also that of the proprietorship concern and not of the appellant company. These notices have been issued for non-filing of yearly returns in prescribed form ST-3 and also for short payment of service tax. All these documents have been examined by the AO also. The Director of the appellant company Mr. Keshav Alwa has also confirmed these facts and stated that for the financial year 2005-06, the turnover of his proprietorship concern was Rs.5.76 crores and during the financial year 2005-06 there was no such turnover in the appellant company.

4.5.2 The only reason for the AO of assuming the turnover of the appellant company at Rs.5,55,29,376/- for the AY 2006-07 and unpaid liability of service tax of Rs.29,15,555/- is the showcause notice issued by the Central Excise, Customs and Service Tax Department dated 20/11/2009. This showcause notice has been issued to the appellant company as well as Mr. Keshav Alwa, Director of the appellant company. The show cause notice in Para 4.3 states that the service tax paid during 2005-06 was Rs.1,13,685/-. The appellant has submitted copies of form no.36 for payment of this amount as service tax for the financial year 2005-06, which has the name of Super Hospitality Service on it. This also establishes that this service tax has been paid by the proprietorship concern only and not by the appellant company. This also shows that the turnover determined by the service tax department for the financial year 2005-06 was in fact belonging to M/s. Super Hospitality Services, which is the proprietorship concern of Mr. Keshav Alwa. Accordingly, the service tax liability determined by the service tax department was also of Mr. Keshav Aiwa only. Hence, it is held that the income of Rs.1,38,07,344/- determined by the AO in the current assessment order is in fact the income of Mr. Keshav Aiwa. Similarly, the unpaid service tax liability of Rs.30,29,240/- determined by the AO in the current assessment order is to be taxed as the income of Mr. Keshav Alwa as per the provisions of section 43B. Hence, as per the provisions of explanation 3 to Section 153 these amounts are to be taxed as the income of the Keshav Alwa for the A.Y. 2005-06.

4.5.3 Accordingly a letter dated 18.12.2014 was written to Mr. Keshav Alwa as follows:-

"During the course of the appellate proceedings for AY 2006-07 in the case of M/s. Super Hospitality Services Pvt. Ltd., you have accepted in the capacity of Director of this company that the turnover determined by the AO in the assessment order as well as the service tax liability determined for this AY, belong to your proprietorship concerned namely M/s. Super Hospitality Services.

Hence, you are showcaused as per the provisions of explanation 3 to section 153 as to why incomes on account of these transactions should not be assessed in your hand for AY 2006-07.

You are requested to furnish your reply within 01 week from the receipt of this letter"

4.5.4 Mr. Aiwa has submitted following reply:-

"I, Keshav Alwa, proprietor of Super Hospitality Services, confirm that for the F.Y 2005-06, the turnover of Super Hospitality Services is Rs.5.76 Crore. The proprietary business was continued in the name of Super Hospitality Services in past for many years, regular tax audit/financial transactions also used to take place and I used to submit the report also with the department. So, whatever issues come up relating to any pending liability or etc. in the service tax matter, for this FY 2005-06, are wholly and only related to this proprietary business named Super Hospitality Services and not to the company.

I have given all the documents at the Ld. AO level dated 07.01.2014 and many times before also stating the facts that turnover of Rs.5.76 Crore is already shown in the books of accounts of Super Hospitality Services and the IT return was made accordingly only. Also, a mention has been made regarding service tax amounting Rs.29,15,155/-. In this case also I have already replied that I have submitted my balance and no service tax liability is reflected in it. Further as per section 43B, disallowance in respect of unpaid liability with reference to any tax. And thus there is again no question of addition of Service tax amount as I do not have any liability outstanding. So, a question of disallowing the service tax as per section 43B does not arise.

To conclude, I would just like to plead to your honor that, from all the above facts, it is seen that in the F.Y 2005-06, the turnover is already reflected in the books of accounts of Prop. Keshav Alwa's Super Hospitality Services and the service tax is not reflected in balance sheet.

Attaching herewith the balance sheets and Profit & Loss account of Super Hospitality Services (whose proprietor is I, Keshav Aiwa) and Super Hospitality Services Pvt. Ltd. and the acknowledgement of the return filed in case of the company also for your ready reference.

Further, I would like to personally request to your honor to please include the words in your good self's order that "the turnover Rs.5.76 Crore is

reflected in the balance sheet of Super Hospitality Services after verification of all supporting documents." So, it is requested to your that kindly consider the above facts and delete the said additions in case of Super Hospitality Services Pvt. Ltd. Further, on the basis of all the documents, submitted herewith and before, please delete the demand in case of Super Hospitality Services (Prop. Keshav Aiwa) also."

4.5.5 The AO is directed to reopen the assessment of Mr. Keshav Alwa for this purpose as per the provisions of Explanation 3 to section 153 of the IT Act, 1961 in order to assess the unpaid service tax liability of Rs.29,15,155/- as on 31.03.2005 and profit on account of turnover determined by the Service Tax Department in his hands. The AO shall also examine the claim of Mr. Keshav Alwa that the turnover determined in the showcause notice issued by the Service Tax Department has been shown in the books of accounts of his proprietorship concern, M/s. Super Hospitality Services. Accordingly, the additions made in the hands of the appellant company are directed to be deleted."

6. We have gone through the order of the Ld. CIT(A) and do not find any infirmity in the same. The acceptance of the explanation of the assessee that the turnover did not belong to it but to the proprietary concern of the Director of the assessee Company Shri Keshav Alwa, going by the same name as the assessee Company, we find is based on appreciation of several evidences which were there before the Ld. CIT(A).

7. There were evidences before the Ld.CIT(A) demonstrating that the assessee company came into existence only in the later part of the year and could have commenced its activities of providing services only from the subsequent year onwards when it was registered with the Central Excise and Customs, Baroda, thus ruling out the possibility of any activity being carried out in the impugned year by the assessee company. The aforesaid facts were established by the Memorandum of Association and Article of Association of the assessee Company showing the date of formation of the Company as 19.12.2005 i.e. during later part of the impugned year and the Service Tax registration of the assessee company, from the Central Excise and Customs, Baroda, being found to be obtained in the subsequent year i.e. 15.05.2006.

8. There were evidences with the Ld.CIT(A) establishing existence of the proprietorship

Concern of the director of the assessee company, Sh.Keshav Alwa, going by the same name as the assessee company , by way of several notices issued in its name by the Central Excise and Customs and Service Tax Department in 2006 and 2007 for non filing of annual yearly returns and for shortfall of service tax.

9. Further the Ld. CIT(A) noted that the notice issued in the name of the assessee company by the Central Excise and Customs and Service Tax Department dt.20/11/2009 , which was the basis of reopening the case and making the impugned additions was also issued to Mr. Keshav Alwa, director of the assessee company and proprietor of the concern going by the same name as the assessee. He also noted from the same that the amount of service tax stated to be paid therein by the assessee company, was actually paid in the proprietorship concern. Copies of Form No.36, reflecting the said payment in the proprietorship concern, were filed before and perused by the Ld.CIT(A). Also the proprietor, Sh Keshav Alwa, had confirmed on oath to the Ld.CIT(A) the fact that the turnover of Rs.5.55 crores, mentioned in the notice issued to the assessee company, pertained to his concern and stood reflected in the books also.

10. On the basis of the aforestated facts, the Ld. CIT(A) concluded that there was no suppression of sale on the part of the assessee Company and that it actually related to the proprietorship concern and accordingly directed that the issue of addition on account of suppressed sales alongwith that of unpaid service tax liability be examined in the case of the proprietorship concern.

11. None of the findings of fact by the Ld. CIT(A) have been controverted by the Ld. Departmental Representative before us. In view of the same, we see no reason to interfere in the order of the Ld. CIT(A) deleting the addition made of profits from suppressed of sales ,amounting to Rs.1,38,07,344/- and that on account of unpaid service tax liability u/s 43B of the Act of Rs.30,29,240/-

12. Grounds raised by the Revenue are therefore dismissed.

13. In effect appeal of the Revenue is dismissed.

14. We now take up appeal of the assessee in ITA No.526/Ahd/2015, pertaining to A.Y 2010-11 against the order of the Ld. CIT(A) confirming levy of penalty u/s 271(1)(c) of the Act.

15. The grounds raised by the assessee are as under :-

"In the facts and circumstances of the case the Learned CIT has erred in

a) The assessee company collects government tax from the public and pays to the account of the government. Such duties and taxes are collected from the parties and are shown in a separate account. This is not an actual income of the assessee, but it only acts as a mediator for collection of the taxes. The assessee during the year under consideration did not have sound financial conditions and hence failed to pay the taxes to the government account till the due date of such payment. This same fact was disclosed in the tax audit report of the assessee also. It is not an actual income of the assessee, it still paid income tax on that quantum of taxes as it had not paid the taxes to the government account before due date. It is a sort of penalty that was charged on a notional income of the assessee. Also, the assessee disclosed the unpaid government dues in its tax audit report.

(b) Thus, the assessee pays income tax on an amount which is not an actual income, it is a type of penalty charged to the assessee. Also, the assessee did not have any malafide intention of concealing the income since it had disclosed the unpaid liabilities in its tax audit report. To attract the provisions of Section 271(1)(c), the assessee should have malafide intentions or criminal intent or mens rea, which is not true in the case of the assessee since it had disclosed in the tax audit report. Thus, this case does not attract penalty u/s 271(1)(c) of the Act."

16. As transpires from the orders of authorities below, penalty u/s 271(1)(c) of the Act, for concealing/furnishing inaccurate particulars of income, has been levied on account of addition made to the income of the assessee u/s 43B of the Act of unpaid Service Tax and VAT liability of Rs.89,29,352 and Rs,7,34,181/- respectively. The assessee, it has been noted in the order of the Ld. CIT(A), did not file any appeal in quantum proceedings against these additions. The Ld. CIT(A) upheld the penalty stating that it was a fit case for levy of penalty since the assessee appeared to have deliberately not added the said amounts to its income despite their disclosure made in the tax audit report and no plausible reason given for not adding back the same. The relevant findings of the Ld. CIT(A) at para 4.3 of his order are as under :-

4.3. I have considered the facts of the case, the AO's observations and submissions made by the AR of the appellant. The appellant's claim before the AO as well as during the course of the appellate proceedings is that there was no concealment of facts as the amount of service tax and VAT payable as on the last day of the financial year was disclosed. In the Tax Audit Report; based upon which the AO has made the disallowance. It has been further submitted that the disallowance made in the current year will be allowed in the subsequent year as per the provisions of section 43B and therefore, there was no evasion of tax. In this regard, the appellant has placed reliance upon the decisions of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. (supra and decision of ITAT, Ahmedabad Bench in the case of Volga Airtechnic Ltd. (supra). But, on analysis of these decisions, it is seen that the facts of the present appeal are not identical to these cases. In the case of Price Waterhouse Coopers Pvt. Ltd., the Hon'ble Supreme Court had enquired into the reasons leading to non disallowance of amounts disallowable as per section 43B of the Act in the return of income filed by the assessee. On the basis of the explanation filed by the assessee in respect of such query, it was held by the Hon'ble Supreme Court that giving the clear facts of that case, the imposing of penalty on the assessee was not justified as the assessee had committed an inadvertent and bonafide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars. In the case of Volga Airtechnic Ltd., the assessee which was a "Sick Industrial Company" registered under BIFR, had carried forward losses and the taxable profits determined after making the additions and brought forward losses were nil. The assessee was not liable to pay any tax on the income determined by the AO. The disallowance had been made on account of 43B and 40A(7) of the Act. Under such circumstances, the ITAT held that penalty u/s 271(1)(c) was not leviable in this case.

4.3.1 In the present appeal, neither before the AO nor during the current appellate proceedings, the appellant has explained the circumstances and reasons due to which the amounts disallowable u/s 43B of the Act were not added back while filing the return of income. The appellant had declared total income of Rs.50,84,700/- in its return of income and hence, the amounts disallowable u/s 43B of the Act would have been increased the tax liability of the appellant. It is also seen that the date of Tax Audit Report was 4th September, 2010, whereas, the return of income has been filed on 15.10.2010. The Tax Audit Report has reported non payment of service tax and VAT till the date of preparation of Audit Report only. Hence, the appellant was bound to determine at the time of filing of return of income as to whether these liabilities has been paid before that date or not and accordingly make disallowance u/s 43B of the Act. But the appellant failed to do so. Moreover, a scrutiny of records shows that similar action has been committed by the appellant in the return of income for AY 2011-12 also, due to which additions of Rs.90,25,697/-consisting of service tax of Rs.79,91,928/-, professional tax of Rs.1,08,130/-and VAT of Rs.9,25,639/- has been made u/s 43B of the Act in the order u/s 143(3) passed on 27.03.2014 for this assessment year. Under these circumstances, the ratio laid down by the Hon'ble Supreme Court of India in the case of Price Waterhouse Coopers Pvt. Ltd. (supra) is not applicable to the present appeal. Rather the ratios laid down in the decisions in the cases of

Gujarat State Financial Services Ltd. 039 SOT 570 (AHD) and Zoom Communication (P) Ltd., 191 Taxman 179 (Del), involving imposition of penalty u/s 271(1)(c) on account of claim made of legally unjustifiable deduction regarding which no debate or controversy was involved, are applicable. Hence, the penalty levied by the AO is upheld."

17. We have gone through the orders of the authorities below and have heard the Ld. DR who has supported the order of the Ld.CIT(A).

18. It is a fact on record the both the unpaid liabilities had been reflected in the respective columns of the tax audit report. In fact the AO had picked them up from the tax audit report itself for making addition in quantum proceedings, which fact finds mention in the assessment order. Further on going through the assessment order ,which is reproduced at para 4.1 of the CIT(A)'s order in the impugned penalty proceedings ,we find that the assessee had stated that the outstanding demand related to a contested liability the appeal against which was pending at higher level. The assessee had stated that the liability had been fixed on the assessee by the Service tax department holding that it was not entitled to 50% abatement on tea and snacks, which the assessee was contesting in appeal. The assessee clearly had a bonafide explanation for not adding the unpaid tax liabilities to its income since it was contesting the very levy of the same before the concerned department. It may be a fit case of making addition of the unpaid liabilities to the income of the assessee. But as far as the levy of penalty is concerned the explanation for not adding back the unpaid liabilities to its income cannot be outrightly rejected as not being bonafide.

19. What emerges therefore is that all particulars relating to income were disclosed by the assessee, as is evident, in the tax audit report itself reflecting the impugned unpaid tax liabilities. Further Explanation 1 to section 271(1)(c) of the Act deems concealment of income when ,with respect to a fact material to the computation of income, the explanation of the assessee is either false or not bonafide and unsubstantiated. In the present case, we find, the explanation of the assessee for not adding back the unpaid liabilities to its income as bonafide, since they were stated to be contested with the concerned departments.

20. Considering the above facts and circumstances we are of the view therefore that the assessee cannot be said to have concealed/furnished any particulars of income so as to attract the levy of penalty u/s 271(1)(c) of the Act.

21. In view of the same, we delete the penalty so levied amounting to Rs.32,82,000/-.

22. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on this 31st day of January, 2022.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(ANNAPURNA GUPTA)**
Judicial Member True Copy	**Accountant Member**

Ahmedabad, the 31st day of January, 2022

PBN/*

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad