IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT 'SMC' BENCH, VARANASI

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER

ITA No.3/VNS/2022
Assessment Year: 2019-2020

Smt. Husna Parveen, N-12/224, Bajardiha, Varanasi PAN-CSEPP4360A	v.	Commissioner of Income Tax (Appeal), National Faceless Appeal Centre (NFAC), Delhi
(Appellant)		(Respondent)

Appellant by:	None
Respondent by:	Sh. A.K. Singh, Sr. DR
Date of hearing:	23.08.2022
Date of pronouncement:	25.08.2022

O R D E R

SHRI VIJAY PAL RAO, JUDICIAL MEMBER:

This appeal by the assessee is directed against the order dated 26.11.2021 of CIT(A) (National Faceless Appeal Centre), Delhi for the assessment year 2019-2020. The assessee has raised the following grounds of appeal:-

> *"1. Because the "CIT(A)" was not correct either on facts or in law in holding that "the applicant has not deposited the GST liability within the due date under section 139(1) and liable to tax u/s 43B, whereas the aforesaid GST Tax had already been deposited by the assessee in the subsequent year.*
>
> *2. Because the CIT(A) was not correct in making the addition on account of GST payable in the books of the assessee, ignoring the facts that the GST was not routed through profit and loss account.*
>
> *3. Because as the GST is neither debited in profit and loss account nor the assessee had made any claim against her income on account of non-deposit of GST, hence it should not be disallowed u/s 43B of the I.T. Act, 1961.*
>
> *4. Because the sale proceeds of the invoice against which GST was payable, are not received during the year under consideration, hence the assessee was unable to pay the GST within the stipulated time prescribed under statute. Though in the subsequent year on account of the realization the GST had already been paid to the department.*

5. Because the case law relied upon by "CIT(A)" is on the peculiar set of facts of that case and the same is not applicable to the case of the assessee.

6. Because the order appealed against is contrary to the facts, law and principles of natural justice.

7. Because in any view of the matter the appellant put craves leave to furnish any grounds of appeal at the time of hearing."

2. None has appeared on behalf of the assessee when this appeal was called for hearing. It transpires from the record that the assessee has been seeking adjournment of hearing on one pretext or the other. Earlier, the counsel of the assessee sought the adjournment as time was required for collection of papers and records for preparing the submissions. The hearing was adjourned on three occasions on the same ground. Now again the learned counsel for the assessee sought adjournment on the ground that he needs more time to prepare the case as he has returned from Haj tour.

3. Having considered the past conduct of the assessee seeking adjournment of hearing, one more opportunity was granted to the assessee and the appeal was again fixed for today i.e. 23.08.2022. Nobody has appeared on behalf of the assessee and therefore, the Bench proposes to hear and dispose of this appeal *ex parte.*

4. The solitary issue arises in this appeal of the assessee is regarding disallowance made by the Assessing Officer under section 43B on account of non deposit of GST before the due date of filing of return of income under section 139(1) of the Act. The assessee has contended before the authorities below that the assessee has not claimed the deduction of GST in the profit and loss account and therefore, no disallowance can be made under section 43B of the Act.

5. On the other hand, learned DR has submitted that the assessee has bye-passed the profit and loss account and directly taken the GST amount to the

balance-sheet which is not permissible. He has further submitted that the GST is a part and partial of the sale and therefore, it is inseparable part of the turnover as well as the closing stock and therefore, the non deposit of the GST within the time prescribed under section 43B would attract the provisions of section 43B. The learned DR has also referred the tax Audit report and submitted that the Auditor has specifically reported this amount of GST as disallowable under section 43B of the Act. He has referred to para 16 of the Audit report wherein the Auditor has specifically reported about the non-payment of GST of Rs. 22,21,501/-. The learned DR has relied upon the order of the CIT(A) and submitted that the CIT(A) has considered all the contentions of the assessee including the decision of Hon'ble Supreme Court in the case of ***Chowranghee Sales Bureau P. Ltd. vs. CIT 87 ITR 542.***

6. I have considered the submissions of the assessee made before the authorities below as well as the submissions of the learned Sr. DR. There is no dispute that the assessee has not paid the GST within the time limit as prescribed under section 43B and shown in the Balance-Sheet as outstanding. This fact is also evident from the Audit report in Form No. 3CB, balance-sheet as on 31.03.2019 wherein this amount of Rs. 22,21,501/- is shown as outstanding being GST payable. The Auditor has also reported this amount in para 26 in respect of the sum which is referred under section 43B. Even otherwise, the assessee has not disputed this fact that it has not paid the GST. The only contention of the assessee is that it has not debited this amount in the profit and loss account but directly taken to the balance-sheet. This *modus operandi* of the assessee is not acceptable as the GST is part and partial of the sales and turnover of the assessee and it has to be shown as part of the inventory / closing stock. The assessee is required to maintain the books of accounts as per the accounting standards which are notified in the official gazette from time to time as per

section 145 of the Act. The method of accounting is required to be regularly followed by the assessee. Even as per the provisions of section 145A, the valuation of the purchase and sales of goods and services and sale of inventory shall be adjusted to include the amount of duty, cess or fee actually paid or incurred by the assessee. Hence, the contention of the assessee that it has not claimed any deduction on account of GST by taking the same directly to the balance-sheet and not taking through the profit and loss account is not acceptable. The assessee cannot be permitted to adopt a *modus operandi* and giving an accounting treatment to the GST without passing through the profit and loss account to circumvent the provisions of section 43B. The CIT(A) has considered this issue in para 5 to 6.3 as under:-

> *"5. FINDINGS AND DETERMINATION:*
> *I have carefully gone through the Grounds of appeal, the findings of AO on each such Grounds of appeal raised by the assessee and the written submissions uploaded by the assessee in support of the Grounds of appeal.*
> *6. All the Grounds involve only one solitary issue, that is AO's action of disallowing u/s 43B, the unpaid GST liability of Rs. 22,21,501/- to the credit of Central Govt, the said liability not being paid to the credit of Central Govt. before the due date of filing ITR u/s 139(1) of I.T. Act.*
> *6.1. The issue involved is that as on the closing day of F.Y. under consideration, there was an unpaid GST liability existing in the balance sheet of the assessee, amounting to Rs. 2221.501/-. The said GST liability remained unpaid even till the due date of filing ITR for the A.Y. under consideration. The auditor reported the same in column 26(1)(b) of tax audit report in form No.3CD. The AO, CPC, invoked the provisions of s.43B and disallowed the said unpaid GST liability and added to the total income of the assessee.*
> *6.2. In the written submissions, the assessee has objected to the disallowances made by AO, CPC and has submitted that AO has incorrectly invoked provisions of s.43B. The main argument of the assessee has been that the GST liability was not routed through profit and loss account, ie was not debited in profit and loss account, therefore it should not be disallowed as it was never claimed as an allowable expenditure. In this regard, the assessee has explained the manner in which GST collected by him from the customers, which is finally required to be credited/paid to the Central Govt, is accounted for. The assessee has submitted that assessee is maintaining a separate GST account in his ledger book without debiting the amount of the said GST in profit and loss account. As and when the assessee makes any sale of the goods to the customers, the sale amount and GST amount is credited in the ledger*

account as sales account and GST account respectively. Subsequently, the sale amount net of GST is credited to P & L A/c, while the GST component of the sale, as collected from the customers, is directly taken to balance sheet on the liability side, without first crediting to P & L A/c. Similarly, as and when the said GST collected from the customers is deposited to Govt A/c, the outstanding GST liability existing in the balance sheet is reduced by that amount, but the P & L A/c remains unaffected as no debit entries are passed in the P & L A/c. In this manner, the amount of GST is neither credited in profit and loss account at time of making collection from the customers, nor the amount of GST is debited in profit and loss account at time of depositing the GST to the Central Govt A/c. According to the assessee, since no debit entries on account of GST are at all passed in the P & L A/c, this means that the assessee has not claimed any GST expenses allowable to it consequently no disallowance u/s 43(b) should be made. In support of these arguments, the assessee has placed its reliance in the case of CIT Vs. Associated Pigments Ltd. (1973) 71 Taxman 244 (Cal), wherein according to the assessee. it was decided that where the assessee had credited sales tax collection and debited sale tax payment in a separate sales tax account that would not rendered the provision of section 43(b), hence the aforesaid section is inapplicable. The assessee has also relied on the judgements in the case of S.Govind Raja Reddiar Vs ITO (1986) 19 TTD (Coch) 177 and also Sri Kakollu subba Rao & Co. Vs. Union of India (1988) 71 CTR (AP) 34.

6.3. DECISION:

(I) On identical facts, as are involved in the present appeal, Hon'ble ITAT, COCHIN BENCH, COCHIN, in the case of "M/s. Kunnel Engineers & Contractors (P) Ltd." decided in I.T.A. No. 653/Coch/2019 & 04/Coch/2020 vide its judgement dated 19.05.2020, has decided the issue in favour of revenue and against the assessee. The only difference in that, in that case the issue was of "SERVICE-TAX" while in the present case of the assessee the issue is of "GST".

The decision granted by Hon'ble ITAT is reproduced as under:

4. We have heard the rival submissions and perused the record. In this case, the assessee has collected an amount of Rs. Rs.3,52,69,463/- for the assessment year 2012-13 and Rs.2,42,72,852/- for the assessment year 2014-15 as service tax and not remitted the same to the Government exchequer, before the due date of filing of the return of income. As such, the issue whether the provisions of section 43B of the I. T. Act applies to service tax, which is not paid before the due date of filing of the return. It was considered by the co-ordinate Bench of the ITAT, Hyderabad Benches in the case of M/s. Bartronics India Ltd. v. ACIT [ITA No.2188 and 2189/Hyd/2011 vide order dated 31.05.2012 that when the assessee has not paid the service tax as required under the provisions of section. 43B, which is also very much covered u/s 43B of the I. T. Act. The provisions of section 438 of the Act is very clear and it states that "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". Therefore, even the service

tax is liability which covers u/s 43B of the Act and non-payment of the same within the stipulated time as specified u/s 43B of the Act attracts disallowance. Now the question is that when the assessee has not claimed it as expenditure in the profit and loss account, could it be disallowed u/s 43B of the Act. This was considered by the 1-Hon'ble Apex Court in the case of Chowranghee Sales Bureau P. Ltd. v. CIT [(1973) 871TR 542 (Sc,)], in which it was held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Further, in the case of M/s. Jain Christopher v. DC1T in ITA No.855/Bang/2012-order dated 12.04.2013., it was held as under: -

"7.2 During the course of assessment proceedings, the Assessing Officer observed that a sum of Rs.29 lakhs representing service tax collected by the assessee had not been paid, but, was shown as 'outstanding liability'. Being queried, it was explained that it had not preferred any claim for deduction and, thus, it was argued, the question of disallowance tr/s 43B of the Act does not arise. The AO took a view that even though the assessee had not claimed the same in its P & L account as an expenditure and, therefore, section 43B has no application. However, he was of the view that the fact remains that service tax collected by the assessee but not paid to the Government account up-to the end of the financial year or even up-to the date of filing of the return of income and, thus, by not including this amount in its service, it had clearly made a claim indirectly. As rightly highlighted by the CIT(A), the assessee's plea that sales-tax was different from service tax cannot be accepted in the present circumstance as what the assessee was a firm of Chartered Accountants is selling is services and not goods, so the tax applicable is service tax which stands on the same bracket as sales tax in terms of services rendered as sales tax holds for goods sold. We have also observed that the AO had pointed out that the said amount has been included as business receipts in its TDS Certificates and as such, the same should have been included in its receipts. This has not been precisely done by the assessee. The case laws relied on by the assessee is dealt with as under:

(1) ACIT v. Real Image Media Technologies (P) Ltd. (ITAT Chennai):

7.2.1 The assessee was running a recording and dubbing studio, production of advertisement, films and television serials etc., as well as in software development. The amount of service tax included in bills issued but not received. Accordingly, the Hon'ble Tribunal had recorded its findings that As per s. 68 of Finance Act, 1994 read with rule 6 of Service Tax Rules, 1994, the service tax becomes payable only on receipt of service tax from the client. Therefore, the amount of service tax included in bills but not received could not be disallowed under s. 43B'. After analysing the relevant provisions of Income tax Act as well as Service Tax Act, the Tribunal had, further, recorded its findings as under:

"12 From a plain reading of the above provision it becomes clear that the rigour of this provision would be attracted only in a case where an item is allowable as

deduction but because of the failure to make payment such deduction will not be allowed. It can be argued that in the case of ST also the assessee does not claim deduction since it has been held that non-payment of Sales-tax would attract provisions of section 43B, but that is being done on the basis of the principles laid down by the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. V CIT110ITR 385 that Sales-tax is part of the trading receipt. Further, section 145A clearly provides that for the purpose of determining income under the head profits and gains of business or profession, the amount of purchase and sales i.e. turnover would include any tax, duty cess or fee. Therefore, the rigour of section 43B may be applicable in the case of Sales-tax or Excise Duty but the same cannot be said to be the position in case of Service-tax because of two reasons. Firstly, the assessee is never allowed deduction on account of service tax which is collected on behalf of the Govt. and paid to the Govt. accordingly. Therefore, a service provider is merely acting as an agent of the Govt. and is not entitled to claim deduction on account of service tax. Hence, on this account alone addition u/s 43B could not be made and the same has been correctly deleted by the CIT(Appeals)".

However, in the instant case, as admitted by the assessee, service tax has been collected but not paid to the Government account either up-to the end of the financial year or even up-to the date of filing of the return of income. Thus, the case law relied on by the assessee is distinguishable and cannot come to the rescue of the assessee.

(ii) CIT v. Noble and Hewitt India (P) Ltd (Del)

7.2.2 The Hon'ble Delhi High Court was predominantly concerned with the disallowance of deduction by invoking the provisions of section 43B of the Act. The Hon'ble Delhi High Court was not considering the issue whether the service tax collected and the remaining unpaid till the due date of furnishing of the return forms the part of the total income for the current year.

(iii) DCIT v Manish M Chheda 29 SOT 138 - Mumbai ITAT

7.2.3 In the above case, the Hon'ble Mumbai Tribunal was considering the applicability of section 28(iv) of the 1 T Act. In the instant case, it is an admitted fact that during the course of assessee's profession, a sum of Rs.29,60,000/- was realised/collected as service tax payable and the same is not capital receipt. The moment the service tax is realised, it becomes payable to the Govt. account and if it is not paid, it partakes the character of income of the assessee, since the assessee could utilise this amount in any manner whatsoever, there is no restriction placed on its utilisation. This is amply clear from the TDS certificate furnished by the assessee and also the credit appearing in the assessee's bank account. Therefore, to arrive at the professional income, the service tax realized should have been included in the gross receipts unless paid to Government exchequer within the due date of filing of return. Since service tax realised is included in the total income, the same is to be allowed as a deduction in the year it is paid to the Government account. In the instant case, this

is what has been done by the learned CIT(A). The CIT(A) had allowed the alternative plea of the assessee and had directed the Assessing Officer to deduct the service tax when the payment is made to the Govt. account in the subsequent year. Therefore, we find there is no merit in the contention raised on behalf of the assessee and this issue is decided against the assessee. It is ordered accordingly."

4.1 Further, in the case of M/s. Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/De1/2017 - order dated 23.03.2018, the Delhi Benches of the Tribunal held as under: -

"6. After hearing both the sides and perusing the entire material available on record, we observe that there is a credit balance of Rs.1,16,09,924/- at the end of the year towards expenses payable. The assessee submitted that it is service tax liability, which arose due to crediting the service tax received from the service recipients. The assessee has challenged before us, the disallowance of Rs. 85,26,467/- disallowed u/s. 43B of the Act. We observe that the assessee has recorded his turnover after deducting the service tax received and the service tax has been credited separately. In section 145, of the Act for determining the income chargeable under the head profits and gains of business or profession or income from other sources, the same is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The said provisions were substituted by the Finance Act, 1995 w.e.f. 01.04.1997. Under section 145A of the Act, it is provided that notwithstanding anything to the contrary contained in clause(a) to section 145, the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession, shall be (i) in accordance with method of accounting regularly employed by the assessee; and (ii) further adjusted to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee, to bring the goods to the place of its location and condition, as on the date of valuation. As per the explanation under the said clause, it is pointed out that for the purpose of this section, any tax, duties, cess or fees, by whatever name called, under any law for the time being in force, shall include all such payments, notwithstanding any right arising as a consequence to such payments. Sub-clause (b) talks of interest received by the assessee on compensation or enhanced compensation, which is not relatable to the issue before us. The aforesaid provisions of section 145A of the Act have been substituted by the Finance (No.2) Act, 2009 w.e.f. 01.04.2010. Prior to its substitution, which was inserted by the Finance (No.2) Act, 1998 w.e.f. 01.04.1999, the section provided the provision relatable to the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession and no clause '(b) was provided i.e. in respect of income received by the assessee on compensation or on enhanced compensation. In view of the amended provisions of the Act, which came into effect from 01.04.1999 for valuing the purchases and sales of goods and also for valuing the inventory, while determining the income chargeable under the head profits and gains of business or profession, it has been provided that the said valuation would be in

accordance with the method of accounting regularly employed by the assessee i.e. either mercantile or cash. Further, adjustment is to be made to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee to bring the goods to the place of its location and condition, as on the valuation date. In other words, where any expenditure is actually paid or incurred by the assessee by way of any tax, duties, cess or fees, by whatever name called, then adjustment is to be made both in the valuation of purchase and sale of goods and also in the valuation of inventory to include the aforesaid amounts while determining the income chargeable under head profits and gains of business or .profession. The assessee has separately accounted for the service tax collected is also the indirect part of turnover because it is received along with turnover. The assessee has not shown any invoice raised by him before us as per service tax Rules, which is mandatory for the service provider to issue invoice to the service recipient. He has also not produced any evidence regarding payment received from service recipients as to how they have paid-separately or inclusive of service Tax. He has also not produced any evidence regarding whether the TDS has been remitted on payment after excluding the service tax. After going through the paper book filed by the assessee, we observe that the assessee has utilized service tax credit towards payment of duty on capital goods and as per Reverse Charge Mechanism. Therefore, it is necessary to discuss the relevant provisions of the Cenvat Credit Rules, 2004 as well as section 43B of the IT Act.

7. Section 43B(a) is as under:

43B. 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 8. Rule 4 of the CENVAT Credit Rules, 2004 reads as under:

Rule 4. Conditions for allowing CENVAT credit.-

(1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service:

Provided that in respect of final products, namely, articles of jewellery falling under heading 7113 of the First Schedule to the Excise Tariff Act, the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the person who get such final products manufactured on his behalf, on job work basis, subject to the condition that the inputs are used in the manufacture of such final product by the job worker.

(2) (a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial

year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year:

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year.

Provided further that the CENVAT credit of the additional duty leviable under subsection (5) of section 3 of the Customs Tariff Act, in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer.

Provided also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

Explanation. - For the removal of doubts, it is hereby clarified that an assessee shall be "eligible" if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year computed in the manner specified in the said notification did not exceed rupees four hundred lakhs. (b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years.

Illustration. - A manufacturer received machinery on the 16th day of April, 2002 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit upto a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years.

(3) The CENVAT credit in respect of the capital goods shall be allowed to a manufacturer, provider of output service even if the capital goods are acquired by him on lease, hire purchase or loan agreement, from a financing company.

(4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961(43 of 1961).

(5) (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose, and it is established from the records, challans or memos or any other document produced by the manufacturer or provider of output service taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service.
(b) The CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to,-

(i) another manufacturer for the production of goods; or (ii)a job worker for the production of goods on his behalf, according to his specifications.

(6) The Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer of the final products who has sent the input or partially processed inputs outside his factory to a job-worker may, by an order, which shall be valid for a financial year, in respect of removal of such input or partially processed input, and subject to such conditions as he may impose in the interest of revenue including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job-worker.

(7) The CENVAT credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

9. As per Rule 6(1) of the Service Tax Rules, 1994, in case of company, service tax is to be paid on a monthly basis by 5th of the following month (in case of e- payment, by 6th of the month immediately following the respective month). However, the payment for the month of March is required to be made by 31st of March itself. As per Rule 6(4) of the Service Tax Rules, 1994, the assessee can pay for provisional payment of service tax in case he is not able to correctly estimate the tax liability. In such a situation, he may request in writing to the jurisdictional Assistant/Dy. Commissioner for the same.

10. As per section 73A of the Finance Act, 1994, any person who has collected any sum on account of Service Tax, is under obligation to pay the same to the Government. He cannot retain the sum so collected with him by contending that the

service tax is not payable. 11. As per section 173A of the Service Tax Act, in case, the service tax is collected, the provision is as under:

173A. Service Tax collected from any person to be deposited with Central Government: -
(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

(5) The amount paid to the credit of the Central Government under subsection (1) or subsection (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

(6) Where any surplus amount is left after the adjustment under subsection (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 118 of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount]

12. We further observe that the point of taxation as per Rule 3 of Point of Taxation Rules, 2011 is as under:

RULE 3. Determination of point of taxation. - (Notification No. 18/2011-ST dt. 1.03.2011 as amended).

For the purposes of these rules, unless otherwise provided, point of taxation shall be, -
(a) the time when the invoice for the service provided or agreed to be provided is issued:
Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment:

Provided that for the purposes of clauses (a) and (b), -
(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service. provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).

Explanation - For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance."

13. After considering the above provisions, it is clear that the assessee has to pay service tax within due date as set out under the above provisions either by way of cash/cheque or by way of availing CENVAT credit as per Rules as stated above, but the assessee did not do so. The liability of service tax had also arisen as per the point of Taxation Rules, as stated above.

14. Now, we have to examine the case of the assessee in the light of the above provisions. During the impugned year, the assessee has credit balance of service tax payable as on 31.03.2013 of Rs. 1, 16,09,924/- which was to be paid up to 31.03.2013 by the assessee, but he did not pay. Further, the assessee had paid a sum of Rs.30,83,457/- before filing of IT return. As per section 43B(a), the above outstanding payment was to be paid up to the date of filing of return of income. As per method of accounting, the assessee has also not included the service tax received by him in the turnover. In fact, the assessee was legally obliged to declare its turnover inclusive of service tax received. The assessee cannot be exonerated from its liability by saying that he accounted for the service tax received separately. Since the assessee did not pay service tax as contemplated u/s. 43B(a) and as per above provisions of Service Tax Act within the stipulated time, therefore, the Id. CIT(A) has rightly disallowed the

same u/s. 43B of the IT Act. The case laws relied by the assessee are based on different footings as in all the decisions it was held that Service Tax was not at all payable because the service Tax was not received from the customer. The 'aw prevailing at that particular time was that Service Tax was to be paid to the L3overnrnent only when Service Tax is received from the service receiver to the service provider. Subsequently, there is change in the law which provides that Service Tax is to be deposited by the service provider even if service tax is not paid by the service receiver to the service provider. Therefore, in all those decisions it was held that service tax outstanding is hit by the provisions of Section 43B of the Income Tax Act. 1961. Due to the change in the law now those decisions do not help to the assessee. Moreover, the assessee has filed the service tax returns belatedly, i.e., for April to June on 16.04.2015, for July to September and half yearly from October to March, 2013 on 08.07.2015. In view of all these facts, the Id. CIT(A) has rightly dealt with the issue in question by giving elaborate findings in the impugned order regarding confirmation of addition u/s. 43B of the Act, which we do not find fit to be interfered with. Accordingly, the appeal of the assessee deserves to be dismissed."

4.2 In view of the above binding precedents, we are of the view that the service tax collected by the assessee and not paid to the Government exchequer before the due date of filing of return, is to be disallowed, though it was not charged to the profit and loss account and it attracts the provisions of section 438 of the Act and the present provisions of section 145A of the Act cannot be applied in view of non obstante clause in section 438 of the Act. Thus, this ground of appeals of the Revenue for both the assessment years is allowed.

(ii) In the above referred decision of Hon'ble ITAT, Cochin Bench, Cochin, in the case of "M/s. Kunnel Engineers & Contractors (P) Ltd, the assessee has collected an amount of Rs. Rs.3.52,69,463/- for the assessment year 2012-13 and Rs.2.42,72,852/- for the assessment year 2014-15 as service tax and not remitted the same to the Government exchequer, before the due date of filing of the return of income. Hon'ble ITAT first examined the applicability of provisions of s.43B on service tax and observed that the said issue was considered by the co-ordinate Bench of the ITAT, Hyderabad Benches in the case of M/s. Bartronics India Ltd. v. ACIT [ITA No.2188 and 2189/Hyd/2011 vide order dated 31.05.2012 where it was held that the provisions of section 43B, are very much covered u/s 43B of the I.T. Act. It was held that the provisions of section 43B of the Act is very clear and it states that "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", therefore, even the service tax is liability which covers u/s 43B of the Act and non-payment of the same within the stipulated time as specified u/s 43B of the Act attracts disallowance. Afterwards, Hon'ble ITAT considered the second issue, that when the assessee has not claimed it as expenditure in the profit and loss account, could it be disallowed u/s 43B of the Act. Hon'ble ITAT observed that this issue was considered by the Hon'ble Apex Court in the case of Chowranghee Sales Bureau P. Ltd. v. CIT [(1973) 87 ITR 542 (SC)]. in which it was

held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive.

Thereafter, Hon'ble ITAT relied upon the comprehensive judgement delivered by Hon'ble ITAT, Bangalore in the case of M/s. Jain Christopher v. DCIT in ITA No.855/Bang/2012 - order dated 12.04.2013, where various previous judgments were considered and distinguished by Hon'ble ITAT, Bangalore. These were:

(i) ACIT v. Real Image Media Technologies (P) Ltd. (ITAT Chennai):
(ii) CIT v. Noble and Hewitt India (P) Ltd (Del)
(iii) DCIT v Manish M Chheda 29 SOT 138 - Mumbai ITAT

Thereafter, Hon'ble ITAT relied upon the judgement delivered by Hon'ble ITAT, Delhi in the case of M/s. Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/Del/2017 - order dated 23.03.2018.

(iii) In the present case of the assessee, the issue is of "GST". As held by Hon'ble Apex Court in the case of Chowranghee Sales Bureau P. Ltd. v. CIT [(1973) 87 ITR 542 (SC)], the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Accordingly, not only the provisions of s.43B are applicable in the case of assessee as GST is a "tax", but also GST collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive.

Consequently, in view of judgement of Hon'ble ITAT, Cochin Bench, Cochin in the case of "M/s. Kunnel Engineers & Contractors (P) Ltd as referred above, the non-payment of GST liability into the Govt A/c on or before the due date of filing ITR u/s 139(1) clearly attracted disallowances u/s 43B, irrespective whether the GST component of the sales was credited/debited or not credited/debited to the P&L A/c.

In the case laws relied on by the assessee in the written submissions, none of the judgments are of jurisdictional ITAT or High Court (Assessee being resident of Uttar Pradesh). Besides, the judgment relied upon by the assessee, delivered by ITAT, Cochin Bench, in the case of S.Govind Raja Reddiar Vs ITO, reported in 19 TTD (Coch) 177, the said judgment was delivered in 1986. Besides the copy of any of the judgements have also not been provided by the assessee. As against it, judgment of Hon'ble ITAT, Cochin Bench, Cochin in the case of "M/s. Kunnel Engineers & Contractors (P) Ltd as referred above, was delivered only very recently in year 2020 (judgment dated 19.05.2020). The said view of Hon'ble ITAT, Cochin Bench, Cochin is supported by several other judicial authorities, including the judgment delivered by Hon'ble ITAT. Bangalore in the case of M/s. Jain Christopher v DCIT in ITA No.855/Bang/2012 - order dated 12.04.2013, as well as the judgment delivered by

Hon'ble ITAT, Delhi in the case of M/s. Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/DeI/2017 - order dated 23.03.2018."

7. The CIT(A) has followed and referred various decisions of this Tribunal as well as decision of Hon'ble Supreme Court. No contrary decisions have been brought by the assessee either to the record of the authorities below or to the record of the Tribunal. Accordingly, I do not find any error or illegality in the impugned order of the CIT(A) and the same is upheld.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 25.08.2022 at Varanasi, U.P.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED:25/08/2022
Varanasi
Sh
Copy forwarded to:
1. Appellant-
2. Respondent-
3. CIT(A),Varanasi
4. CIT
5. DR

By order
Sr. P.S.