IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.341/Bang/2023
Assessment Year: 2010-11

Hubli Electricity Supply 0, PB Road, Navanagar Hubli 580 025 **PAN NO : AABCH3176J**	**Vs.**	DCIT Circle-1(1) Hubli
APPELLANT		**RESPONDENT**

Appellant by	:	Smt. Prathibha R., A.R.
Respondent by	:	Shri G. Manoj Kumar, D.R.

Date of Hearing	:	30.11.2023
Date of Pronouncement	:	01.12.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of NFAC passed u/s 250 of the Income-tax Act,1961 ['the Act' for short] for the assessment year 2010-11 vide order dated 28.2.2023.

2. The first ground for our consideration is too general, which do not require any adjudication.

3. Ground Nos.2 & 3 of the assessee's appeal, which reads as under:

> *"2. The learned CIT(A)erred in confirming Rs. 8,30,87,466/- that the services availed by appellant are in the nature of professional and technical services within the meaning of provisions of Sec. 194J of the Act and also refrained from holding that the corresponding payment were disallowed in accordance with provisions of Sec.40(a)(ia) of the Act.*
>
> *3. The learned CIT(A) ought to have appreciated that the issue of deducting of TDS in respect of Bill Management Services paid to the Service Providers namely BITS, Bellary, M/s. New Horizon Cyber Soft Ltd and found that the services rendered by*

these service providers have to render the following services, as per the terms of agreement like computerized data processing at Sub-Divisions by providing computers systems, operating of systems and maintenance of the computer software etc, accordingly, the Appellant made payment as per the provision of section 194J of the Act and same ought to be allowed."

3.1 Facts of the case are that the assessee expended certain expenditure towards Managerial and Technical services. However, from the details furnished with regard to TDS deducted and remitted that in some cases no TDS has been made and in respect of some cases, grant of TDS deducted has not been remitted before the specified due date stipulated and in respect of payments made against bill management services TDS has been made u/s 194C instead of deducting the rate applicable for such managerial and technical services u/s 194J of the Act. As the assessee has failed to deduct tax and remitted the same before the specified due date, the ld. AO disallowed the corresponding payments to the tune of Rs.8,30,87,468/-. The NFAC has confirmed the same. Against this assessee is in appeal before us.

4. The contention of the ld. A.R. is that the impugned amount of Rs.8,30,87,468/- even liable for deduction of TDS u/s 194J of the Act. The assessee has deducted the TDS u/s 194C of the Act. There was only short deduction of TDS if so and not liable for disallowance of entire amount by invoking the provisions of section 40(a)(ia) of the Act. For this purpose, he relied on the judgement of Delhi High Court in the case of PCIT Vs. Future First Info Services Pvt. Ltd. (447 ITR 299) (Delhi). According to her, the assesse is not liable to deduct TDS u/s 194J of the Act. According to her, there is nothing in the said section, inter-alia tax payer as a defaulter where there is a short fall in deduction of TDS. With regard to short fall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act. Section 40(a)(ia) of the Act refers to only deduction of TDS and pay to the Government. If there is any short

fall due to any difference of opinion as to the liability of any item or nature of payments falling under various TDS provisions, the tax payer can be declared to be an "assessee in default" u/s 201 of the Act. Further, it was submitted that the recipient of these impugned payments has filed the return of income by taking into account the said impugned amount while computing the income of that assessee and paid tax due on the income declared by that assessee in its return of income as provided in first proviso to sub-section (1) of section 201 of the Act. Being so, as per second proviso to section 40(a)(ia) of the Act, the said impugned amount cannot be disallowed in the hands of the present assessee. She relied on the decision of coordinate bench of this Tribunal in the case of DCIT Vs. M/s. Shiv Build India, Bhavnagar in ITA No.73/Ahd/2018 dated 16.6.2023.

5. The ld. D.R. relied on the order of lower authorities.

6. We have heard the rival submissions and perused the materials available on record. In this case, the ld. AO disallowed an amount of Rs.8,30,87,468/- by invoking provisions of section 40(a)(ia) of the Act and this amount includes following:-

a) TDS not deducted/TDS deducted but not remitted to government account before the specified date:

Sl.No.	Description	TDS not deducted/TDS deducted but not remitted to govt. account before the specified date (As per Annexure A)
1	Payment made to contract agencies for billing and collection (includes Rs.6070275 on account of no deduction of tax)	15636216
2	Rent payments	3195021
3	Paid to contract agencies and security agencies	1796582
4	Remuneration paid to CAs for auditing	28781
5	Remuneration to contractors	663500
6	Legal charges	441800
7	Payment to contractors	2619832
	Total	24381732

6.1 Short deduction of tax which ought to have been done u/s 194J of the Act deducted u/s 194C of the Act.

Sl.No.	Description	Amount
1	Aggregate amount of payment made towards bill management services	91615206
2	Amount of TDS required to be deducted u/s 194J Less: Amount of TDS deducted Amount of short deduction of tax	10380002 3040880 73,39,122
3	Proportionate payments relating to short deduction of tax Less: Amount disallowed separately on account of no deduction of tax (included in the amount disallowed at Rs.15636216)	64776011 6070275
4	Amount to be disallowed u/s 40(a)(ia) for short deduction of tax u/s 194J	58705736

6.2 In our opinion, as per provisions of section 40(a)(ia) of the Act, disallowance cannot be made if the tax is short deducted at sources. In other words, if the assessee is liable to deduct tax, and failed to deduct tax then only the section 40(a)(ia) of the Act to be applied, not for short deduction. In the present case, the claim of the assessee is that the assessee is liable to deduct TDS u/s 194J of the Act only and same has been deducted.

6.3 On the other hand, the contention of the ld. D.R. is that the assessee is required to deduct TDS u/s 194C of the Act, however, the same has been deducted u/s 194J of the Act. In our opinion, if there is shortfall of deduction of TDS by applying wrong provisions i.e. section 194J of the Act instead of 194C of the Act, then the disallowance u/s 40(a)(ia) of the Act cannot be made. This view of ours is fortified by the judgement of Hon'ble Delhi High Court in the case of PCIT Vs. Future First Info Services Pvt. Ltd. reported in 447 ITR 299 wherein held that "where there was short deduction of tax at source, disallowance could not be made u/s 40(a)(ia) of the Act and

correct course of action would have been to invoke the provisions of section 201 of the Act". Hence, to the expenditure of Rs.5,87,05,736/- wherein assessee deducted the TDS, however, there was a short deduction of TDS to that extent, the disallowance u/s 40(a)(ia) of the Act cannot be made.

6.4 The other amount of Rs.2,43,81,732/-, wherein TDS has not been deducted or not remitted to the government account before the specified date. With regard to this, we are of the opinion that if the TDS is deducted but not remitted to the government account before the specified date, and the recipient of that income, furnished the return of income u/s 139 of the Act after taking into account that income for computing the income of the assessee for that assessment year and paid tax due thereon, the income declared by that recipient in its return of income, then second proviso to section 40(a)(ia) of the Act is applicable and which is required to be examined at the end of ld. AO. Hence, this issue is remitted to the file of ld. AO to examine the same afresh in the light of above observations. Ground Nos.2 & 3 are partly allowed for statistical purposes.

7. Ground Nos.4 & 5 of the assessee's appeal, which reads as under:

> *"4. The learned CIT(A) erred in confirming the disallowance u/s 43B of the Act of Rs.73,13,171/-on the ground that payments not made to government within due date.*
>
> *5. The Learned CIT(A) ought to have appreciated the submission of the Appellant that the expenses can only be claimed in the year of payment. Section 43B provisions disallow the sum not paid in the financial year or before the due date of filing tax returns, thus, the disallowance made has to be deleted."*

8. Facts of the issue are that the assessee did not pay full amount outstanding as on 31.3.2010 before the specified date as provided u/s 43B of the Act in respect of following payments:

Sl.No.	Particulars	Amount
1	Royalty payable to government	1,08,564
2	Inspection charges payable to government	11,725
3	Rates and rates	6,28,072
4	Sales tax (TDS payable)	65,64,810
	Total	**73,13,171**

8.1 The NFAC dismissed the grounds on the reason that the assessee has admitted this addition. Against this, assessee is in appeal before us. Before us, ld. A.R. submitted that the above impugned amount is not charged to P&L account and also not claimed any expenditure on this count. This amount cannot be disallowed by invoking provisions of section 43B of the Act. He relied on the order of the Tribunal in the case of ACIT Vs. M/s. S&A Finman Ltd. in ITA No.2220/Del/2017 dated 14.12.2022 wherein held as under:

8. "Upon careful consideration, we note that ITAT in the case of Planet Advertising Pvt. Ltd. vs. ACIT (supra) adjudicated the identical issue as under :-

" Ld. Counsel of the assessee submitted that issue involved is squarely covered in favour of the assessee by the following decisions.

6. (I) ACIT V. Real Image Media Technologies (P) Ltd. 114 ITD 573 (Mad.) (II) CIT V. Noble & Hewitt India Pvt. Ltd. 166 Taxman 48 (DELHI).

7. Ld. Departmental representative on the other hand could not rebut the submissions of the Ld. Counsel of the assessee.

8. We have carefully considered the submissions. We find that in the case of ACIT V. Real Image Media Technologies Pvt. Ltd. (Supra) the tribunal had as under :-

> *"(1) S. 43B starts with the non-obstante clause and specifies that the education "otherwise allowable" under the Act shall not be allowed unless it is actually paid. The rigour of S. 43B might be applicable to excise or sales tax, but the same could not be applicable in the case of service tax due to two reasons.*

(i) *The assessee merely acts as an agent of the Government in collection of service tax, and is not entitled to claim deduction on account of service tax.*

(ii) *S. 43B (c) uses the expression "any sum payable". For making any disallowance, it has to be established that such sum is payable. A reading of Rule 6 of the Service Tax Rules states that the liability to pay such service tax arises on receipt of payments towards the value of taxable service. If there is no liability to make the payment to the Government, because of non-receipt of payments from the receiver of services, then it cannot be said that such service tax had become payable in terms of S. 43B(a).*

(2) *145 A includes sales tax, excise duty, etc. in the turnover of purchases and sales of goods, but it does not apply to services and hence service tax cannot be included in the turnover.*

(3) *In the given case, the assessee had not preferred a claim for the amount of service tax. Further, there was no liability on the assessee to make payments to the credit of Central Government because of non-receipt of payments from the receiver of services. Therefore, the rigor of S. 43 B is not attached and the CIT (A) was right in deleting the additions made on account of disallowance u/s 43B."*

9 *We further find that in the case of CIT Vs. Noble and Hewitt India Pvt. Ltd. (Supra) Hon'ble Delhi High Court has held as under :-*

"In our opinion since the assessee did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessee claim any deduction in respect of the amount and considering that the assessee is following the mercantile system of accounting, the question of disallowing the deduction not claimed would not arise.

Ld. Counsel for the revenue submits that the assessee has sought to evade tax under the mercantile system of accounting. We are of the view that it is not for the revenue authorities to tell the assessee how to maintain its accounts.

We cannot find any fault in the view taken by the Tribunal and find no merit in this appeal."

10. *From the above case lodge it is clearly evident that provisions of section 43B are not applicable to the service tax liability. Accordingly, respectfully following the decisions as above the set aside orders of authorities below, and decide the issue in favour of assessee."*

9. *Considering the above, we find that the above said issue is squarely covered. The amount of service tax has not been routed through P&L account. Hence, ratio of the above said decision that the provisions of section 43B are not applicable to the service tax liability, is applicable.*

Accordingly, we uphold the order of the ld. CIT (A)."

9. The ld. D.R. submitted that the assessee had not paid impugned amount within due date specified u/s 43B of the Act. Hence, this was disallowed. More so, before ld. AO, assessee admitted this addition ought not cannot have challenged this before NFAC.

10. We have heard the rival submissions and perused the materials available on record. The ld. A.R. made a plea that the above impugned amount has not been charged to P&L account and as such provisions of section 43B of the Act cannot be applied and he relied on the order of the coordinate bench of Delhi Tribunal in the case of S&A Finman Ltd. in ITA No.2220/Del/2017 dated 14.12.2022 and also order of the Hyderabad Bench of Tribunal in the case of Envision Enterprises Solutions Pvt. Ltd. in ITA No.315/Hyd/2016 dated 12.8.2016.

10.1 Now the question before us is whether above payment is liable for disallowance u/s 43B of the Act or not, which is not paid before the due date of filing the return of income. As per the provisions of section 43B of the Act, any sum payable by assessee by way of tax, duty, cess or fee by whatever name called, no in law for the time being in force not paid within due date of filing return of income to be disallowed computing the income of the assessee. Now the question is that when the assessee is not claimed it as an expenditure in the P&L account, could it be disallowed u/s 43B of the Act. This was considered by the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau Pvt. Ltd. 1973) 87 ITR 542 (SC) in which was held that sales tax collected by assessee is revenue receipt even if it is shown

by the assessee not non-revenue head and such treatment by the assessee is not decisive.

10.2 Further, in the case of M/s. Jain Christopher v. DCIT 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 AO 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 u/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:*
>
> *(i) <u>ACIT v. Real Image Media Technologies (P) Ltd. (ITATChennai):</u>*
>
> *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 Incometax 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 CIT 110 ITR 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) *<u>CIT v. Noble and Hewitt India (P) Ltd (Del)</u>*

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) *<u>DCIT v Manish M Chheda 29SOT 138 – Mumbai ITAT</u>*

7.2.3 In the above case, the Hon'ble Mumbai Tribunal was considering the applicability of section 28(iv) of the I 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 realised 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."

10.3 Further, in the case of M/s.Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/Del/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 ofRs.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 sub-section (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 sub- section (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 11B 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. 01.03.2011 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 upto 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 upto 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 ld. 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 law prevailing at that particular time was that Service Tax was to be paid to the Government 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 does 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 ld. 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."*

10.4 In view of the above, we have no hesitation to hold that non-payment of above amount to government account before the due date of filing the return is to be disallowed, though it was not charged to the P&L account and it attracts the provisions of section 43B of the Act and the provisions of section 145A of the Act cannot

be applied in view of the non-obstante clause in section 43B of the Act. Same view has been taken by Cochin Bench of Tribunal in the case of ACIT Vs. Kunnel Engineers & Contractors Pvt. Ltd. in ITA No.653/Coch/2019 & 4/Coch/2020 dated 19.5.2020 and by the coordinate bench of Bangalore in the case of Mr. Asrah Nafisa Althaf in ITA No.614/Bang/2023 dated 9.11.2023. In view of this, we dismiss these grounds taken by the assessee.

11. Next ground No.6 of the assessee's appeal, which reads as follows:

> *6. The learned CIT(A) erred in disallowing a sum of Rs.46,51,037/- towards the expenditure incurred in decommissioning the dismantling is towards capital assets and such expenditure is capital in nature.*

11.1 Facts of the issue are that the assessee has incurred expenditure in de-commissioning and dismantling and the same has been claimed as revenue expenditure. However, the lower authorities treated it as a capital expenditure and disallowed the same.

12. The ld. A.R. submitted that the asset de-commissioned cost incurred towards the labour charges for dismantling of old/faulty asset. This expenditure purely revenue in nature as it the dismantling and decommissioning cost cannot add in value or life to the fixed assets. Therefore, as per the accounting norms, this cost was treated as revenue expenditure, which was incurred in the relevant year.

13. On the other hand, ld. D.R. submitted that all the above expenditure go with the installation of asset, it is to be capitalized and that expenditure resulted in bringing enduring benefit to the assessee and to be treated as capital expenditure.

14. We have heard the rival submissions and perused the materials available on record. This expenditure incurred towards labour charges for dismantling of old and faulty assets ad by incurring this expenditure, no new asset has been created and the

expenditure incurred to remove the non-useful assets from the gross block. It is nothing but expenditure incurred for maintaining the existing asset. Being so, in our opinion, it is just like repairs & maintenance incurred for dismantling of old assets. Accordingly, we are of the opinion that it is to be allowed as revenue expenditure only and this ground of assessee is allowed.

15. Next ground Nos.7 & 8 of the assessee's appeal, which reads as follows:

> *"7. The learned CIT(A) was not justified in treating the appellant as 'assessee in default' and demanding tax on the basis that the appellant ought to have deducted the TDS in respect of payment made to KPTCL as Transmission charges & SLDC charges.*
>
> *8. The learned CIT(A) grossly erred in ignoring the decision of ITAT, Bangalore Bench, Bangalore in appellant's own case in ITA Nos.896 to 903/B/11 for A.Yr: 2007-08 to 2010-11 dt. 31.7.12 while concluding assessment."*

15.1 Facts of the issue are that the assessee-Company has expended certain expenditure towards managerial and technical services. However, from the details furnished in respect of TDS deducted and remitted, it was found that in respect of some cases no TDS has been made and in respect of some cases amount of TDS deducted has not been remitted before the specified due date and in respect of payments made against Bill Management Services TDS has been made u/s 194C instead of deducting at the rate applicable for such managerial and technical services u/s 194J of the Act. As the assessee has failed to deduct tax and remit the same before the specified due date, it was proposed to disallow the corresponding payments (of Rs. 2,43,81,732/- + Rs. 5,87,05,736 = 8,30,87,468/-) as mentioned below in accordance with the provisions of section 40(a)(ia) of the Act. The AO has observed vis-à-vis payment with respect to professional (Technical fee). A sum of Rs. 1,69,34,25,237/- is debited towards Transmission charges and Rs.

26,73,57,259/- is debited towards SLDC Charges (UI Charges to SPPCC). As no TDS has been deducted in respect of the said payments as required under the provisions of the Act, it is proposed to disallow the said payments in accordance with the provisions of section 40a(ia) of the Act. The assessee was asked to submit the details of the said payments.

15.2 The assessee's explanation that no TDS is required to be deducted under the provisions of the Income-tax Act

15.3 According to ld. D.R., as per the terms, the functions of the Karnataka Power Transmission Corporation Ltd (KPTCL) are:

(a) to undertake transmission of electricity through Intra-State transmission system;

(b) discharge all functions of planning and co-ordination relating to intra-state transmission system;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-state transmission lines for smooth flow of electricity from generating station to the load centers;

(d) and to provide non-discriminatory open access to its transmission system for use by generating company and to consumer.

15.4 The functions of SLDC are to provide optimum scheduling and dispatch of electricity within a State in accordance with the contract; to monitor grid operations, keeping accounts of the quantity of electricity transmitted through the state grid; to exercise supervision and control over the intra-state transmission systems; and to carry out real time operations for grid control and dispatch of electricity within the State. Hence considering the functions and services rendered by KPTCL and SLDC in transmission of electricity are in the nature of 'technical services and hence the payments made to KPTCL and SLDC are in the nature of fees for professional and technical services within the meaning of the provisions of section 194J. Further, keeping in view the provisions of section 194C of the Act,

transmission of power from generation point to the point of customers amounts to carrying out of work in pursuance of the contract. Hence the assessee was required to deduct tax against payments made to KPTCL and SLDC towards transmission of power under the provisions of the Act. The order of the ITAT, which relied upon by the assessee, are not accepted by the department and the appeals are filed by the department before the High Court.

16. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case before Hon'ble High Court in the case of CIT Vs. Hubli Electricity Company Ltd. reported in 386 ITR 271 wherein held as under:

> *"Held:*
>
> *High Court have carefully perused the contents of. the power transmission agreement. There is no mention of any offer with regard to any "technical services" by the KPTCL Plain and simple intention of the parties to the agreement as discernable from the power transmission agreement is that the assessee was desirous of using the transmission network belonging to the KPTCL in accordance with the provisions of the Electricity Act subject to payment of charges applicable and determined by KERC. KPTCL was willing to provide its transmission network for the purpose of carrying electricity to its users subject to payment of transmission and other charges as determined by KERC. There is neither an offer nor an acceptance of any "technical service" inter se between the parties. Admittedly, KPTCL is a State owned Company and the only power transmitting agency. It has installed and developed its own infrastructure. Assessee is also a State owned electricity distribution company. The only service which the assessee has availed from the KPTCL is "transmission of power" on payment of charges fixed by KERC. No material is placed by the Revenue before High Court to substantiate its contention that assessee had availed of any technical services. In High Court considered view, assessee has done nothing more than transmitting certain quantum of power from one place to the other for a price fixed by KERC. Assessee was oblivious to the technical expertise which the KPTCL may possess. There was neither transfer of any technology nor any service attributable to a technical service offered by the KPTCL and accepted by the assessee. Therefore, application of Section 194J of the Act to the facts of this case by the Revenue is misconceived.*
>
> ***(Para l2)***

It is not in dispute that the payee KPTCL has offered the income to tax and paid the same. In the circumstances, there is no loss of Revenue. Although the question of loss of Revenue is not subject matter of these appeals, High Court have adverted to the same as payment of tax by the payee has the effect of rendering these appeals purely academic.

(Para 13)"

16.1 In view of the above binding decision in assessee's own case relating to assessment year 2007-08, we allow this ground of appeal filed by assessee.

17. Next ground No.9 of the assessee's appeal, which reads as follows:

"9. The learned CIT(A) ought to have allowed the claim of the appellant that the depreciation on small and low value items which are less than Rs.500/- in full."

17.1 As seen from the order of NFAC, this ground was not pressed before NFAC and the NFAC made an observation as follows:

"Ground No.7 not pressed in the written submissions filed by the appellant. Hence, the ground of appeal no.7 is dismissed."

17.2 Before us, ld. A.R. not able to point out any change of circumstances to raise this ground before us. Hence, this ground is dismissed.

18. Ground No.10 of the assessee's appeal, which reads as follows:

"10. The learned CIT(A) failed to appreciate that the appellant has rightly reduced Rs.34,36,15,915/- from the Grants and Contributions received during the year, to arrive at the cost of assets for the purpose of allowance of depreciation. The Assessing Officer failed to appreciate that though the grants have been received during the year, there are no assets created and capitalized during the year from out of the grants received Rs.34,36,15,915/-. The Assessing Officer ought to allow the depreciation as claimed without reducing the amount from the cost of assets."

18.1 Facts of the case are that as per the details furnished during the discussion, it is observed that aggregate amount of Grants and Contributions from Consumers received during the year towards cost of capital assets works out under:

1.	Consumers Contributions	Rs.79,00,29,790
2.	Grants received	Rs. 6,08,00,000
3.	Grants received	Rs. 8,29,66,446
	Total	Rs. 93,37,96,236

18.2 As against the aggregate amount of Rs.93,37,96,236/-, only a sum of Rs.59,01,80,321/- is deducted from the cost of additions made to Plant and Machinery during the year at Rs.278,52,08,882/-. The explanation submitted during the discussion that a reversal entry to the extent of Rs, 34,36,15,915/- was made relating to earlier years found to be not acceptable. As the above mentioned consumers grants and also government grants were received during the year to meet the cost of assets, it was proposed to reduce the said aggregate amount of Rs.93,37,96,236/-. It was therefore proposed to reduce the said amount from the cost of plant and machinery for determining depreciation u/s 32 for which the assessee vide its letter dated 11.2.2013 stated that there is error in reducing the amount of consumer contribution from the gross assets occurred due to the rectification entry passed. Since the omission in deducting Rs. 19,98,49,469/- from the cost of assets inadvertently happened, assessee company agreed for deducting the same from the cost of fixed assets for determining the depreciation u/s 32 of the Act. Considering the aggregate amount of grants and contributions received during the year and considering the assessee's explanation, excess depreciation claimed against the said difference grants of Rs.34,36,15,915/-, which works out to Rs. 2,57,71,194/- (being 50% of 15% as per depreciation chart), is added back to the income returned.

18.3 Against this assessee went in appeal before ld. CIT(A). Ld. CIT(A) observed that the assessee has accepted the above addition

before the ld. AO. The assessee has failed to substantiate the claim. Hence, the addition has been sustained. Against this assessee is in appeal before us.

18.4 Ld. A.R. submitted that the payable amount received from the consumers towards the cost of assets during the year is Rs.79,00,29,790/-. However, the amount is reduced by Rs.19,98,49,469/- is the grants received for RGGVY Scheme from the government has not been fully utilized. Hence, no asset has been created and capitalized from out of that fund. During the year ended 31.3.2009, the amount received for RGGVY Scheme is Rs.34,36,00,000/- has been inadvertently reduced in the cost of assets for the purpose of calculation of depreciation. Hence, the same is rectified by reduction in current year to reflect the correct assets of the Corporation for the purpose of calculation of depreciation.

19. The ld. D.R. relied on the order of NFAC.

20. We have heard the rival submissions and perused the materials available on record. In this assessment year, assessee has received total grant of contribution to the tune of Rs.93,37,96,236/-. However, assessee deducted only an amount of Rs.59,01,80,321/- from the gross block of plant & machinery. The contention of the assessee is that an amount of Rs.34,36,15,915/- was the grant received by the assessee not relating to the assessment year under consideration and it was relating to earlier assessment year and restricted to deduction of grant to the tune of Rs.59,01,80,321/- instead of Rs.93,37,96,326/-. However, the ld. AO has deducted entire amount of grant received of Rs.93,37,96,236/- so as to calculate the correct depreciation to be allowed to the assessee.

20.1 Thus, there was disallowance of Rs.2,57,71,191/- on account of excess claim of depreciation. In our opinion, the assessee has received the total grant in the assessment year at Rs.93,37,96,236/-, which is the gross amount and that to be deducted from the gross block of plant & machinery and not the only amount of Rs.59,01,80,321/- as the balance amount of Rs.34,36,15,915/- which has not gone into the computation of income and resulted in excess allowance of depreciation at Rs.2,57,71,194/-. The error crept in the computation of the gross block of assets has been correctly rectified by the ld. AO while framing assessment and we do not find any infirmity in the order of the lower authorities on this count and the same is confirmed in computing the actual cost of assets to be arrived by deducting the grant-in-aid received by the assessee as per section 43(1) of the Act. More so, this ground was not pressed before ld. AO, now it cannot press the same. This ground of appeal of the assessee is dismissed.

21. Next ground No.11 of the assessee's appeal, which reads as follows:

> "11. *The learned CIT (A) failed to appreciate that the appellant had rightly claimed the depreciation on assets not in use. The Assessing Officer ought to have appreciated that once the asset is put to use the depreciation is allowable till such time the asset continues to be in the block of assets till the same is disposed off and as such continue to be eligible for allowance of depreciation."*

21.1 Facts of the case are that in the balance sheet in Schedule 7 the current assets include the Assets Not in Use aggregating to Rs. 19,88,37,529/- [WDV of obsolete / scrapped assets (A/c code 16.1) Rs. 4,80,03,875 and WDV of faulty / dismantled assets (A/c code 16.2) of Rs. 15,08,33,654/-]. As the said assets were not in use, assessee is not eligible for depreciation on such assets. Therefore, it was proposed to disallow the depreciation on the said assets. The assessee vide its letter dated17.1.2013

stated that the assets not in use shown in schedule 7 pertains to the WDV value of assets dismantled and returned to stores, the WDV of such assets will be computed with reference to the depreciation based on the date of commission and date of dismantle by removing the original value from the fixed assets. Thus, these assets are already excluded from the fixed assets schedule. The explanation of the assessee is not convincing and the details furnished by the assessee are not matching either with Schedule 7 or with Depreciation Chart filed with Form No.3CD. Hence depreciation relating to the said Assets Not In Use, which works out @ 15% at Rs. 2,98,25,629/-, is added to the income returned.

22. The ld. A.R. submitted that assessee company discarded the assets, which are no longer usable and reduced the cost of assets from the gross block. Even assets are subsequently sold and after the sale is effected the proceeds of the sale is reduced from the written down value of the assets. According to him, the lower authorities failed to appreciate that assessee had rightly claimed the depreciation on assets not in use. The ld. AO ought to have appreciated that once the asset is put to use, the depreciation allowable till such time the asset continues to be in the block of assets.

23. The ld. D.R. relied on the order of lower authorities.

24. We have heard the rival submissions and perused the materials available on record. According to the depreciation u/s 32 of the Act, the assets to be owned by the assessee and should be used for the purpose of business of the assessee. In the present case, it is an admitted fact that these assets are not in use. As such, the depreciation was denied by the ld. AO. Same has been confirmed by the ld. CIT(A). We do not find any infirmity in the order of the lower authorities and the same is confirmed. This ground of assessee is dismissed.

25. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 1st Dec, 2023

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 1st Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.