

Controversies

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Sales Tax collected but not paid credited to separate Account in the Balance sheet, whether Section 43B applies?

Issue:

M/s. XYZ collected Sales Tax and credited to a separate account as Sales Tax Payable Account which appears as liability in the balance sheet. The sales tax so collected is not credited to Sales Account and when Sales Tax is paid the same is not debited to P & L Account. The assessee claims that since Sales Tax is credited to Sales Tax Payable Account even if Sales Tax is not paid even before the last date for filing the return of income the provisions of Section 43B is not applicable as no deduction of Sales Tax is claimed.

Proposition:

Let me refer to the provisions of Section 43B of the Income tax Act “Not with standing 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
- (b) Any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or
- (c) Any sum referred to in clause (ii) of sub-section (1) of section 36, or
- (d) Any sum payable by the assessee as interest on any loan or borrowing from any public financial institution (or a state financial corporation or a state industrial investment corporation) in accordance with the terms and

conditions of the agreement governing such loan or borrowing, or

- (e) Any sum payable by the assessee as interest on any (loan or advances) from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan (or advances), or
- (f) Any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, or

Following clause (g) shall be inserted after clause (f) of Section 43B by the Finance Act, 2016, w.e.f. 01/04/2017.

- (g) Any sum payable by the assessee to the Indian Railways for the use of railway assets.

It is proposed where the assessee has neither claimed a deduction nor any charge was made to the P & L Account, no disallowance could be made by taking recourse to the balance sheet of the assessee for taxing the sales tax collection by applying Section 43 B. On the ground of non-payment of Sales Tax.

View against the Proposition:

It is submitted that the Sales Tax collected is always a part of trading receipt irrespective of method of accounting employed by the assessee. Thus, whether assessee credits Sales Tax collected to Sales Account or to Sales Tax Payable Account is not relevant as Sales Tax collected is always a part of trading receipt. This principle is based on the decision of Chowringhee Sales Bureau P. Ltd. v. CIT (1973) 87 ITR 542 (SC). Their lordships of Supreme Court in this case decided that the Sales Tax collection has to be taken as trading receipt chargeable to tax as income by applying the rational

that Sales Tax collected is always a part of trading receipt.

I also refer to the decision of Supreme Court in the case of CIT v. T. Neggi Reddy reported in 202 ITR 253 as well as decision of the same court in the case of Jonnalia Narashimharao and Co. v. CIT (1993) 200 ITR 588 (SC). The decision of Supreme Court is short one but interesting. It was held that Sales Tax collected by the assessee is includible in the income of the assessee as the assessee follows mercantile system of accounting so when Sales Tax is collected but not paid to Government as there was dispute regarding Sales Tax Liability which was pending before Supreme Court and stay has been granted is includible in the income of the assessee.

It is important to refer to the decision of their lordships of Calcutta High Court in the case of Associated Pigments Ltd. vs. CIT 71 Taxman 244, (Cal.). Similarly, their lordships of Madhyapradesh High Court in the case of Dhariwal Sales Enterprises vs. CIT 171 ITR 212 (MP) held Mandi tax collected credited to balance sheet is held to be income.

Let me now refer to the decision of CIT vs. Ideal Sheet Metal Stampings & Pressing (P.) Ltd. reported in 290 ITR 295 (Guj.). Their lordships of Gujarat High Court held as under "Whether where assessee collected excise duty and instead of paying same to Government, it kept separately in excise deposit account in books of account on ground that in dispute between assessee and Government, High Court had stayed its payment, provisions of section 43B were attracted held, yes."

View in favour of the Proposition:

It is submitted that Section 43B can only be invoked when assessee claims deduction of any sum payable by way of tax or duty, under any law for time being in force, and, as such, where neither such deduction is claimed nor charge is made to profit and loss account, there is no question of disallowing Sales Tax.

It is submitted that a reading of Section 43B makes it clear that if tax having become payable is not paid by the assessee then alone Section 43B comes into operation. Section 43B was inserted with effect from 01/04/1984, to discourage taxpayers who did not discharge their statutory liability of payment of sale tax, excise duty, employer's contribution to provident fund, etc. for long periods of time, but claimed deduction in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in relevant previous year. After the insertion of section 43B, even if the assessee had regularly adopted the mercantile system of accounting, the amount of tax payable by the assessee could be deducted only in the year in which the sum was actually paid and not in the year in which the assessee incurred the liability to pay that tax.

Let me refer to the decision of their lordships of Madras High Court CIT vs. Everest Litho Press 285 ITR 297, It was decided in this case that assessee collected certain amount towards sales tax and kept it as contingent deposit. The AO took the view that the sales tax collected as a part of trading receipt hence, when no payment is made disallowance is required to be made u/s. 43B of the I.T. Act 1961. Tribunal however, held that assessee did not claim the amount in question as deduction and hence, Section 43B has no application. The High Court agreed with the ITAT and held that no addition can be made u/s. 43B. It is interesting to note that their lordships of Madras High Court did consider the following decisions:

1. Chowrangee Sales Bureau (P.) Ltd. v. CIT (1973) 87 ITR 542 (SC)
2. Sinclair Murray & Co. (P.) Ltd. v. CIT (1974) 97 ITR 615 (SC)
3. Jonnalla Narashimharao & Co. v. CIT (1993) 200 ITR 588(SC)

The important principle decided is that as per the above referred judgments sales tax collected may be treated as income but disallowance u/s. 43B is applicable only if sales tax is claimed as expenditure

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or it is charged to P & L Account but actual payment is not made.

Summation:

It appears that the law regarding addition u/s. 43B in respect of sales tax collected but not paid which is credited to a separate account and disclosed in the balance sheet as liability cannot be disallowed u/s. 43B.

The Gauhati High Court in the case of India Carbon Ltd. v. IAC (1993) 200 ITR 759 held as under:

“Section 43B declares that taxes and duties shall not be allowed as deduction from the income unless they are actually paid. It removes the doubt as to the meaning of the word “paid” according to the method of accounting regularly employed by an assessee, insofar as deduction claimed in respect of any sum payable by way of tax or duty. The declaration does not, however, place any restriction on the business activities and on the system of accounting. Therefore, section 43B shall only be attracted when the assessee claims deduction for any sum payable by way of tax or duty under any law for the time being in force, and, as such, where no such deduction is claimed nor charge made to the profit or loss account. There was no question of disallowing the amount taken to the balance sheet on the liabilities side as well as of “add back”.

Ahmedabad, Bangalore, Cochin, Cuttack, Poona Benches of this Tribunal in different cases wherein section 43B were invoked in respect of unpaid sales tax liability have taken a similar view that if sales tax is not debited to profit and loss account and no deduction or allowances is made in arriving at the taxable profit/income, then, the provisions of section 43B are not attracted and no addition can be made by the Assessing Officer in respect of such unpaid sales tax liability. The citation of the cases in which different Benches of the Tribunal as mentioned above have taken such a view are as under:

(1) ITO v. Thakersi Babubhai & Co. (1986) 18 ITD 593 (Ahd.)

(2) S. Govindaraja Reddiar v. ITO (1986) 19 ITD 177 (Cochin)

(3) Kapoor Motor Engg. (P.) Ltd. v. ITO (1987) 21 ITD 4 (Cuttack)

(4) Hindustan Commercial Corp. v. 2nd ITO (1999) 32 ITD 295 (Pune)

(5) Fourth ITO v. Sanjay Sales Syndicate (1987) 30 Taxman 100 (Bang.) (Mag.)

(6) ACIT vs. Laxmi Vishnu Silk Mills (1994) 51 ITD 207 (Ahmedabad)

(7) CIT vs. Modi Spg. & Wvg. Mills Co. Ltd. (2002) 123 Taxman 1005 (Delhi)

(8) Dynavision Ltd. vs. ACIT, Central Circle-II(1) (2009) 121 ITD 461 (Chennai)(TM)

Finally, let me refer to the decision of their lordships of Madras High Court in Everest Litho Press once again. Very important analysis is given by their lordships which is reproduced here “In the case on hand, the amount collected as sales tax was never claimed as deduction by the assessee. Section 43B of the Act is not attracted at all when the assessee has not claimed any deduction of the amount collected by it. The Gauhati High Court, in the case of India Carbon Ltd. v. Inspecting Assistant CIT (1993) 200 ITR 759, considered a similar issue and held as follows(headnote)”

The amount of sales tax appeared on the liabilities side of the balance sheet of the petitioner company. The petitioner did not claim the added amount as deduction nor did he charge it to the profit and loss account. The amount of sales tax could not be added back to the income of the assessee u/s. 43B.

Finally, it is submitted that the Sales Tax collected may be treated as a part of Trading Receipt, but if it is credited to a separate account i.e. Sales Tax payable Account and not debited to P & L Account nor it is claimed as deductible expense then Section 43B has no application.
