आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

आयकर अपील सं. / ITA No.1806/PN/2013

निर्धारण वर्ष / Assessment Year : 2009-10

Munaf Ibrahim Memon,
Surat Dhule Highway,
Navapur,
Dist. Nandurbar - 425418 .... अपीलार्थी/Appellant

PAN: AKKPM2310H

Vs.

The Income Tax Officer,
Ward 3(3), Dhule .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Sunil Ganoo
प्रत्यर्थी की ओर से / Respondent by : Shri Dheeraj Kumar Jain

सुनवाई की तारीख / **Date of Hearing : 08.09.2015**		घोषणा की तारीख / **Date of Pronouncement: 30.10.2015**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This appeal filed by the assessee is against the order of CIT(A)-I, Nashik, dated 08.08.2013 relating to assessment year 2009-10 against order passed under section 143(3) of the Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1) The disallowance u/s 43B of Rs.14,47,211/- of VAT collected but not claimed as expenditure, should be deleted from the appellants total income assessed by following the ratio of 1) A.W. Figgis & Co Vs. CIT

(2002) 256 ITR 268 (Cal), 2) CIT Vs. India Carbon Ltd. (1993) 200 ITR 759 (Gauhati), 3) CIT Vs. Noble & Hewitt (India)(P) Ltd. (2008) 305 ITR 324 (Del).

2) It may please be held that the ratio of the decision of Supreme Court in the case of Chowringhee Sales Bureau (P) Ltd. Vs. CIT (1973) 87 ITR 842 (SC) which was given in the context of the Income Tax Act, 1922, is not applicable in the context of section 43B disallowances, under the Income Tax Act, 1961.

3) The appellant craves leave to add/alter/amend/delete any of the grounds of appeal.

3. The issue raised in the present appeal is against the disallowance of Rs.14,47,211/- made under section 43B of the Act on account of VAT collected but not claimed as expenditure.

4. Briefly, in the facts of the present case, the assessee was dealing in food products i.e. Balaji Wafers and Farsan. The assessee was carrying on the business as sole proprietor of M/s. Kheradiya Marketing, Near Maharana Pratap Chowk, Nandurbar. During the year under consideration, the gross turnover of the assessee was Rs.8.43 crores, on which gross profit of Rs.26,55,364/- was declared by the assessee. From the perusal of audit report in Form No.3CD submitted by the statutory auditor, the Assessing Officer noted that as per column 21(b) of the audit report, the assessee had paid sum of Rs.8,21,505/- out of the total dues of VAT tax of Rs. 22,68,716/-. The VAT tax re mained to be paid into government account till the date of report was Rs.14,47,211/-. On query, it was explained by the assessee that the VAT was collected separately on each sale transaction from the customer. The Assessing Officer held that the same were government dues and mandatorily to be deposited into government account before the due date. Sum of Rs.14,47,211/-, which was collected by the assessee from its customers, had remained to be deposited before the due date, hence, the same was added as income in the hands of the assessee.

5. In appeal, the claim of the assessee was that the VAT collected on each sale transaction was credited in the VAT collection account, which was not routed through Profit & Loss Account and hence, the same was not disallowable under section 43B of the Act. The CIT(A) noted that the appellant had not debited Rs.14,47,211/- as VAT in Profit & Loss Account and had directly shown the liability in the Balance Sheet. The claim of the assessee that the addition was not justified in view of the ratio laid down by the Hon'ble Gauhati High Court in CIT Vs. India Carbon Ltd. reported in 262 ITR 327 (Gau), was not accepted by the CIT(A) in view of the decision of Hon'ble Supreme Court in Chowringhee Sales Bureau (P) Ltd. Vs. CIT reported in 87 ITR 842 (SC). The addition of Rs.14,47,211 was upheld in the hands of assessee.

6. The assessee is in appeal against the order of CIT(A).

7. The learned Authorized Representative for the assessee before us stressed that the liability of VAT was payable. However, the assessee had never routed the same through Profit & Loss Account as the sales were declared without declaring VAT. It was further pointed out by the learned Authorized Representative for the assessee that under Maharashtra VAT Act, the sale price was not to include the VAT. It was further stressed by him that in view of Circular No.372 issued by the CBDT, the profit as per method of accounting followed by the assessee is to be applied. Further, reference was made to Circular No.772 issued by the CBDT. The learned Authorized Representative for the assessee further placed reliance on the following decisions:-

1. *India Carbon Ltd. Vs. ACIT & Anr. (1993) 200 ITR 759 (Gau)*
2. *CIT Vs. Noble and Hewitt (I) P. Ltd. (2008) 305 ITR 324 (Del)*
3. *Hindustan Commercial Corp. Vs. ITO (1990) 32 ITD 295 (Pune)*

8. It was further pointed out by the learned Authorized Representative for the assessee that the ratio laid down by Hon'ble Supreme Court in Chowringhee Sales Bureau (P) Ltd. Vs. CIT (supra) was not applicable.

9. The learned Departmental Representative for the Revenue in reply, pointed out that in view of the provisions of section 145A of the Act and the Circular No.772 of CBDT, any tax, duties, cess or fees, that has been paid is to be included in the valuation of goods. It was further pointed out by the learned Departmental Representative for the Revenue that all the decisions relied upon by the learned Authorized Representative for the assessee were before the amendment which was w.e.f. 01.04.1999. Further the learned Departmental Representative for the Revenue pointed out that the judgment of the Hon'ble Delhi High Court in CIT Vs. Noble and Hewitt (I) P. Ltd. (supra) is in relation to collection of service tax, which is not includable in the valuation of goods. However, VAT has to be routed through Profit & Loss Account since the assessee has charged VAT of Rs.22,00,000/-, against which the payment of Rs.8,00,000/- only, provisions of section 145A r.w.s. 43B of the Act were squarely applicable.

10. The learned Authorized Representative for the assessee pointed out that the provisions of section 43B of the Act were not recovery agency and hence, no merit in the addition.

11. We have heard the rival contentions and perused the record. Under 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.

12. 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.

13. In the facts of the present case, the assessee was dealing in food products and had purchased goods on which VAT tax was applicable. The VAT is value added tax to be paid on a transaction of purchase and sale of goods. The assessee for the year under consideration was due to pay VAT of Rs.22,68,716/-, against which it had paid sum of Rs.8,21,505/- and the balance of Rs.14,47,211/- was remained to be paid into the government account, till the date of audit report. The Auditor in Form No.3CD in column 21(b) had reported that sum of Rs.14,47,211/- had remained to be paid into government account.

14. Under the provisions of clause (a) to section 43B of the Act, it is provided that certain deductions are to be made only on actual payments i.e. where any sum is payable by the assessee by way of tax, duties, cess or fees, by whatever name called, under any law for the time being in force, or any other sums which are covered by clauses (b) to (f), the same shall be allowed as a deduction in the hands of assessee, irrespective of the previous year, in which the liability to pay such sum was incurred by the assessee, according to the method of accounting regularly employed by him. Proviso further provides

that the provisions of the said section shall not apply in relation to any sum, which is actually paid by the assessee on or before the due date of filing the return of income. The case of the assessee before us is that the amount to be paid on account of VAT was not routed through Profit & Loss Account, hence no deduction had been claimed and in case no amount has been paid by the assessee till the close of the year, no amount is to be disallowed by invoking the provisions of section 43B of the Act. The learned Authorized Representative for the assessee has time and again stressed that the VAT payable account has shown in its Balance Sheet in the liabilities side and the same was not charged to the Profit & Loss Account and was not claimed as a deduction, hence, the same cannot be added back under the provisions of section 43B of the Act.

15. The first contention of the learned Authorized Representative for the assessee in this regard was that under the Maharashtra Value Added Tax Act, 2002, the sale price shall not include the tax paid or payable to a seller in respect of such sale and hence, there was no requirement for the assessee to recognize the VAT account in its Profit & Loss Account. Another point raised by the learned Authorized Representative for the assessee was with reference to the Circular No.372 issued on 08.12.1983, under which the Explanatory Notes on the provisions of Finance Act, 1983 were elaborated upon with special reference to section 43B of the Act. The intention of introduction of provisions of section 43B of the Act was to curb the practice of claiming the deduction on account of statutory liabilities on the ground that they were maintaining the accounts on mercantile or accrual basis. However, the liability was not discharged and in order to curb excessive claim of the statutory liabilities, section 43B of the Act was introduced. Further, reference was made to the Circular No.772 dated 23.12.1998 issued by CBDT, wherein, it was

clarified that whether the value of closing of inputs, work-in-progress and finished goods must necessarily include the element for which MVAT credit was available. The CBDT referred to the new section 145A of the Act, which was inserted by the Finance (No.2) Act, 1998 and it was pointed out that the said section provides the valuation of purchases, sale and inventory to be made in accordance with method of accounting regularly employed by the assessee and further adjustment 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, on the date of valuation. The said amendment was to take effect from 01.04.1999 and was to apply in relation to assessment year 1999-2000 and subsequent years.

16. In respect of first aspect of the issue that whether the assessee is correct in not recognizing the VAT relatable to its sales as part of the sale consideration in view of the Maharashtra Value Added Tax Act, 2002, we are of the view that the Centre by way of Finance (No.2) Act, 1998 had proposed the introduction of a new section 145A of the Act. Under the said provision, it is provided that valuation of purchase, sale and inventory shall be made in accordance with method of accounting regularly employed by the assessee and such valuation shall further be increased to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee, in the valuation of the goods. In view of the provisions of the Act i.e. section 145A of the Act, we find no merit in the plea of the assessee in not recognizing the VAT attributable to its sales as part of the sale consideration of the goods while computing its Profit & Loss Account. The mandatory provisions of Central Act i.e. section 145A of the Act supersedes the provisions of any State Act i.e. Maharashtra Value Added Tax Act, 2002. Once the assessee recognized the VAT amount as part of the sale consideration, it tantamount to the said entry being routed through the Profit &

Loss Account, especially in the cases where the assessee is following mercantile system of accounting. Admittedly, in the facts of the present case, the assessee was following mercantile system of accounting.

17. Now, coming to second aspect of the issue that, where the assessee had not recognized the amount of VAT payable / paid in its Profit & Loss Account and had only made entries in the Balance Sheet, are the provisions of section 43B of the Act attracted in the case? The said section was introduced in order to provide the deduction on account of statutory liabilities to be allowed only on payment basis, irrespective of the year to which it relates. The said section starts with a non-obstacle clause that notwithstanding anything contained in the Act, where the deduction which is otherwise allowable under the Act in respect of any amount payable by an assessee, by way of tax, duties, cess or fees, by whatever name called, under any law for the time being in force, shall be allowed as a deduction in the year of payment, irrespective of previous year to which the said liability relates and this is also irrespective of method of accounting regularly employed by the assessee. In view of the cumulative provisions of sections 145A and 43B of the Act, the assessee is entitled to claim the deduction on account of such tax, duties, cess or fees, by whatever name called and the same is to be allowed only on payments and once the payment has not been made in the year to which the said liability relates, then the said amount is to be added back as income of the assessee for the relevant year.

18. The Hon'ble Delhi High Court in CIT Vs. Noble and Hewitt (I) P. Ltd. (supra) while deciding the issue of question of service tax had observed that where the assessee was maintaining its accounts on mercantile system of accounting and had collected service tax during the assessment year 1999-2000, out of which part of the amount was deposited but the balance was not

deposited with the concerned authorities, where the assessee had not claimed any deduction in respect of the said amount or where the assessee had not debited the amount to the Profit & Loss Account as an expenditure, then even where the assessee was following mercantile system of account, the question of disallowing the deduction not claimed would not arise. The Hon'ble Delhi High Court was of the view that where the assessee had not debited amount to the Profit & Loss Account as expenditure nor the assessee claimed any deduction in respect of amount and considering that the assessee was following mercantile system of accounting, the question of disallowing the deduction not claimed, does not arise.

19. The said ratio laid down by the Hon'ble Delhi High Court in CIT Vs. Noble and Hewitt (I) P. Ltd. (supra) is not applicable to the facts of the present case before us since the said ratio was in respect of service tax collected during the previous year, which in no way has any connection with the sale proceeds of the trade items dealt in by the assessee. However, in the present case before us the VAT collected by the assessee was in respect of traded goods dealt in by the assessee and in view of the provisions of section 145A of the Act, the value of the VAT was to be included as part of sale consideration of the traded goods and once the same is to be included as part of the sale goods, the same has to be routed through Profit & Loss Account. In case, the assessee pays the VAT amount within accounting period or before the due date of filing the return of income, no addition is to be made in the hands of the assessee as the amount collected on one hand is paid on the other hand and hence, Nil deduction to be allowed to the assessee. However, where the assessee collects the amount on account of VAT, but does not deposit the same within the accounting period or before due date of filing the return of income, as requisitioned under section 43B of the Act, the liability to

pay arises and once that liability has not been discharged, even if the amount has not routed through the Profit & Loss Account, the same is to be disallowed in the hands of assessee, as the provisions of section 145A of the Act come into play and the consequences thereto follow. However, in respect of the issue before the Hon'ble Delhi High Court, the only issue was with regard to collection of service tax, which is not covered by the provisions of section 145A of the Act, which deals with the value of purchases, sales and closing stock to be adopted in the accounting period.

20. The learned Authorized Representative for the assessee has further placed reliance on the decisions of Hon'ble Gauhati High Court and the Pune Bench of Tribunal in India Carbon Ltd. Vs. ACIT & Anr. (supra) and Hindustan Commercial Corp. Vs. ITO (supra), respectively, which relate to assessment years prior to assessment year 1999-2000. Hence, the said ratios are not applicable to the facts of the present case, in view of the amended provisions of section 145A of the Act. In the facts of the present case, admittedly, the assessee had collected VAT amount of Rs.22,68,716/- and had paid Rs.Rs.8,21,505/- against the said amount due during the accounting period, the balance amount of Rs.14,47,211/- was not paid by the assessee before the close of year or before the date of audit report. However, under the provisions of section 43B of the Act, in case the said amount is paid by the assessee before the due date of filing the return of income as prescribed under section 139(1) of the Act, the assessee is entitled to the claim of deduction under section 43B of the Act. The necessary details in this regard are not available on record. Accordingly, we direct the Assessing Officer to verify whether the assessee has deposited the said amount before the due date of filing the return of income under section 139(1) of the Act and allow the

claim in accordance with law. The grounds of appeal raised by the assessee are decided as indicated above.

21. In the result, the appeal of the assessee is decided as indicated above.

Order pronounced on this 30th day of October, 2015.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 30th October, 2015.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-I, Nashik;
4. आयकर आयुक्त / The CIT-I, Nashik;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune