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Tax

Direct Tax Alert

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Provisions of section 43B of the Income-tax Act, 1961 (ITA) held as not applicable to service tax

Facts

Real Image Media Technologies Pvt Ltd (the Assessee), in their books of account, did not route the service tax dues through the profit and loss account. However, the liability towards service tax was reported in the Balance Sheet.

During the course of assessment proceedings, the assessing officer (AO) requested the assessee to furnish proof in support of the payment of service tax dues on or before the statutory date for filing the return of income. The service tax amount which was not paid before the due date for filing the return of income was added to the income of the assessee.

Contentions of Assessee

- In terms of the Service Tax Legislation, the duty of paying the service tax is on the person providing the service. Service tax is required to be paid only on the value of taxable services received in a particular month/quarter and not on the gross amount charged or invoiced.

- The assessee company maintains books of accounts on accrual basis. Therefore, the service tax payable account shows the tax payable on the gross amount billed and not the amount payable as per the amount received by the assessee company.

- The company has paid the service tax on amounts realized hence no disallowance was warranted.

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Revenue's Contentions

- Service tax payable account on the liability side of the Balance Sheet itself indicates that the service tax has been collected but not paid as at the Balance Sheet date.

- There would not be disallowance under section 43B of the Act since the service tax has not been routed through the profit and loss account. However, the service tax collected and not paid to the Government Treasury is revenue receipt and is accordingly assessable to income-tax. The amount disallowed can be claimed on payment basis.

- The service tax was disallowed since the said amount was not paid before the due date for filing the return of income.

Ruling of the Chennai Tribunal

The Chennai Tribunal observed that the provisions of section 43B may be applicable to sales-tax or excise duty but the same analogy cannot be extended to service tax in view of the following:

- The provisions of section 43B would be attracted only in a case where an item is allowable as a deduction but because of failure to make the payment the deduction shall not be allowed.

- The assessee is never allowed a deduction on account of service tax which is collected on behalf of the Government and paid to the Government accordingly. The assessee acts as an agent on behalf of the Government and is not entitled to claim deduction on account of service tax.

- The relevant provisions of ITA use the expression 'any sum payable'. For making any disallowance, it has to be established that the assessee should have an obligation to discharge the liability. Since the service tax liability was not payable by the assessee, as per the service-tax law, the provisions of section 43B are not attracted.

- If there is no liability to make the payment to the Government Treasury because of non receipt of payments from the receiver of the services, then it cannot be said that such service tax has become payable in terms of section 43B of the Act.

Conclusion

The Chennai Tribunal based on above facts held that provisions of section 43B would not apply to service tax.

Note:- Effective May 2008 service tax on services rendered to an associated enterprise is payable at the time of making entry in the books irrespective of when the consideration is received. This amendment being a recent one has not been commented upon in the ruling.

Source: The Asstt. Commissioner of Income-tax v. M/s Real Image Media Technologies Pvt Ltd

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