(2024) 02 ITAT CK 0022

Income Tax Appellate Tribunal (Delhi D Bench)

Case No: Income Tax Appeal No. 2373, 2374/DEL/2023

ACIT Int. Taxation		APPELLANT
	Vs	
Mcdermott International Management		RESPONDENT

Date of Decision: Feb. 9, 2024

Acts Referred:

- Income Tax Act, 1961 - Section 30, 44B, 44BB, 44BB(1), 44BB(2), 44BB(2)(a), 44BB(2)(b), 80HHC, 80HHC(3), 143(3), 144C(3), 194I, 194J

Hon'ble Judges: DR. B.R.R. Kumar, (AM); Astha Chandra, J

Bench: Division Bench

Advocate: Amit Arora, Vishal Misra, Vizay B. Vasanta

Final Decision: Dismissed

Judgement

1. The appeals filed by the Revenue are directed against the two separate orders dated 17.05.2023 and 18.05.2023 of the Ld. Commissioner of Income Tax (Appeals) – 43, New Delhi (“CIT(A)”) pertaining to Assessment Year (“AY”) 2021-22 and 2020-21 respectively. Since common issues are involved in both the appeals, these were heard together and are being disposed of by this common order.

2. The Revenue has taken the following common grounds of appeal:

“1. Whether the Ld. CIT(A) was correct in holding that reimbursement of service tax/GST shall not form part of receipts for the purpose of section 44B of the Income Tax Act, 1961 without appreciating the fact that section 44BB is a code in itself and there is clear distinction between the gross receipts in general and the gross receipts as per the provisions of section 44BB of the Act? 2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in ignoring the

fact that income under sub-section (1) of section 44BB of the Act is computed 10% of the gross receipts/revenue after taking into consideration as if all expenses from section 30 to 43B of the Income Tax Act are deemed to have been allowed?"

3. Briefly stated, the assessee is a non-resident foreign company incorporated under the laws of Republic of Panama. The assessee is engaged in the business of engineering, procurement, fabrication and installation of offshore oil and gas facilities and is serving customers in oil and energy sector across the world. The assessee has a Project Office situated in Chennai, India. During the relevant AYs the assessee had carried on the scope of work awarded by Oil & Natural Gas Corporation of India (ONGC) under the contract No. EOA/MM/SURF-SPS/KO7NL17002 dated

5. 11.2018 for survey (pre-engineering, pre-construction/pre-installation and post installation) design, engineering, procurement, fabrication, load out, tie down sea fastening, tow out/sail out, transportation, installation, hook ups, testing pre commissioning and commissioning of entire facilities of combined (integrated) requirement of Subsea Production system (SPS) and subsea Umbilical Riser and Flow Line (SURF) for cluster II of NELP Block KG-DWN 98/2 development project.

3.1 For the AY 2021-22 the assessee filed its return on 28.01.2022, declaring total income of Rs. 592,960,714/- and for AY 2020-21 on 15.02.2021 declaring total income of Rs. 46,57,67,280/- under the head profits and gains of business and profession in terms of the presumptive tax scheme of section 44BB of the Income Tax Act, 1961 (the " Act").

3.2 The assesssee's case was selected for scrutiny. The Ld. Assessing Officer ("AO") alleged that GST receipts of Rs. 801,753,732/- in AY 2021-22 and Rs. Rs. 69,11,10,275/- in AY 2020-21 should be included in the gross receipts for the purpose of computing income under section 44BB of the Act and completed the assessment under section 143(3) r.w.s. 144C(3) of the Act by making an addition of Rs. 80,175,373/- (being 10% of Rs. 801,753,732/-) and Rs. 6,91,11,027/- (being 10% of Rs. 69,11,10,275/-) to the returned income of the assessee respectively.

3.3. Aggrieved, the assessee filed appeals before the Ld. CIT(A) who decided the impugned issue for both the relevant AYs in favour of the assessee by observing and recording his findings as under:

"5.3 During the course of proceedings in appeal, the appellant among other arguments has submitted that the judgements quoted by the Assessing Officer in the assessment order are not directly applicable to the facts of the case. Judgements quoted pertain to reimbursement of expense and inclusion of the same in the gross receipts of the assessee for the purposes of section 44BB. In the appellants case the matter in question is the inclusion of service tax/GST in the gross receipts for the purposes of 44BB.

5.4 The submissions of the appellant states that the case of the appellant is clearly covered by the judgement of CIT vs Mitchell Drilling International 380 ITR 130 of the honorable Delhi High Court. In this regard the decision of the honorable Delhi High Court has been examined. It has been held in the said order that service tax being a statutory levy would not form a part of the gross receipt for the purposes of section 4488 The relevant extract of the aforesaid judgement CIT versus Mitchell Drilling International Pty. Limited 380 ITR 130 is as under:

"11. It is in this context that the question arises whether the service tax collected by the Assessee and passed on to the Government from the person to whom it has provided the services can legitimately be considered to form part of the gross receipts for the purposes of computation of the Assessee's 'presumptive income' under Section 44BB of the Act?

12. In Chowringhee Sales Bureau (supra) sales tax in the sum of Rs. 32,986 was collected and kept by the Assessee in a separate 'sales tax collection account. The question considered by the Supreme Court was:

'Whether on the facts and in the circumstances of the case the sum of Rs. 32,986 had been validly excluded from the assessee's business income for the relevant assessment year?". However, there the Assessee did not deposit the amount collected by it as sales tax in the ate exchequer since it took the stand that the statutory provision creating that liability Don it was not valid. In the circumstances, the Supreme Court held that the sales tax collected, and not deposited with the treasury, would form part of the Assessee's trading receipt.

13. The decision in George Oakes (P) Ltd. (supra) was concerned with the constitutional validity of the Madras General Sales (Definition of Turnover and Validation of Assessments) 1, 1954 on the ground that the word turnover was defined to include sales tax collected the dealer on Inter- state sales. Upholding the validity of the said statute the Supreme Court held that "the expression 'turnover' means the aggregate amount for which goods are bought or sold, whether for cash or for deferred payment or other valuable consideration, and when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover." Since the tax collected by the selling dealer from the purchaser was part of the price for which the goods were sold, the legislature was not incompetent to enact a statute pursuant to Entry 54 in List II make the tax so paid a part of the turnover of the dealer.

14. In the considered view of the Court, both the aforementioned decisions were rendered in the specific contexts in which the questions arose before the Court. In

other words the Interpretation placed by the Court on the expression trading receipt or turnover in the said decisions was determined by the context. The later decision of the Supreme Court in CIT V. Lakshmi Machine Works (supra) which sought to interpret the expression 'turnover was also in another specific context. There the question before the Supreme Court was whether excise duty and sales tax were includible in the total turnover which was the denominator in the formula contained in Section 80 HHC (3) as it stood in the material time? The Supreme Court considered its earlier decision in Chowringhee Sales Bureau (supra) and answered the question in the negative. The Supreme Court noted that for the purposes of computing the total turnover for the purpose of Section 80 HHC (3) brokerage, commission, interest etc. did not form part of the business profits because they did not involve any element of export turnover. It was observed: Just as commission received by an assessee is relatable to exports and yet it cannot form part of 'turnover, excise duty and sales tax also cannot form part of the turnover." The object of the legislature in enacting Section 80 HHC of the Act was to confer a benefit on profits accruing with reference to export turnover. Therefore, "turnover" was the requirement. "Commission, rent, interest etc. did not involve any turnover." It was concluded that sales tax and excise duty like the aforementioned tools like interest, rent etc. also do not have any element of 'turn over.

15. In CIT v. Lakshmi Machine Works (supra), the Supreme Court approved the decision of the Bombay High Court in CIT v. Sudarshan Chemicals Industries Ltd. (supra) which in turn considered the decision of the Supreme Court in George Oakes (P) Ltd. (supra). In the considered view of the Court, the decision of the Supreme Court in Lakshmi Machines Works (supra) is sufficient to answer the question framed in the present appeal in favour of the Assessee. The service tax collected by the Assessee does not have any element of Income and therefore cannot form part of the gross receipts for the purposes of computing the presumptive income of the Assessee under Section 44BB of the Act.

16. The Court concurs with the decision of the High Court of Uttarakhand in DIT V. Schlumberger Asia Services Ltd (supra) which held that the reimbursement received by the Assessee of the customs duty paid on equipment imported by it for rendering services would not form part of me gross receipts for the purposes of Section 44BB of the Act.

17. The Court accordingly holds that for the purposes of computing the presumptive income of the assessee for the purposes of Section 44 BB of the Act, the service tax collected by the Assessee on the amount paid it for rendering services is not to be included in the gross receipts in terms of Section 44 BB (2) read with Section 44 BB (1). The service tax is not an amount paid or payable, or

received or deemed to be received by the Assessee for the services rendered by it. The Assessee is only collecting the service tax for passing it on to the government.

5.4.1 The appellant also placed reliance on the Full Bench decision of the Hon'ble Uttarakhand High Court in the case of DIT vs Schlumberger Asia Services Ltd. (2019) (414 ITR 1) wherein the judgement of the Division Bench in the case of Halliburton Offshore Services Inc. (supra) has also been considered. In this case, the Court held that service tax paid to assessee (service provider) by ONGC (service recipient) and deposited by assessee with the Government of India shall not be considered an amount paid to assessee on account of provision of services in connection with exploration and production of mineral oil and hence, would not form part of aggregate taxable amount referred to in clauses (a) and (b) of sub- section(2) of section 44BB. Relevant extract of the judgement is as under:

"56. Tax is required to be deducted at source, under Section 194-1 of the Act, with respect to income paid by way of rent. Likewise tax is required to be deducted at source under Section 194-J by the service recipient when fees are paid towards professional or technical services rendered by the service provider. It is only because service tax, on such payment, was not income" has the CBDT, in its Circulars dated 28.04.2008 and 13.01.2014, directed that tax should be deducted at source only on the net amount, paid towards rent or as fees for services rendered by the service provider, Le, the total amount paid less service fox. The Circulars issues by the CBDT reflect is understanding that service tax paid by the assessee is not income". While it is true that, unlike "Income computed in terms of sections 28 to 430 under Chapter IV of the Act, Section 44BB(2) is a special provision and requires ten percent of the gross receipts to be treated as income, the amount so determined is nonetheless the presumptive income of the assessee and should be deemed to be its income in terms of Sections 4, 5 and 9 of the Act. The circulars issued by the CBDT does support the submission. urged on behalf of the assessee, that service tax would not form part of the amounts referred to in clauses (a) and (b) of Section 44BB(2) of the Act"

62. Except to state that the said judgment needs re-consideration, no justifiable cause has been shown as to why this Court should take a view different from that of the Delhi High Court, in Mitchell Drilling International (P.) Ltd. (supra), more so when the Division Bench of the Delhi High Court has taken a view similar to that of a Division Bench of this Court in Schlumberger Asia Services Ltd. (supra). As the revenue has not been able to show just cause for this Court to take a different view, we see no reason to differ with the Division Bench judgment of the Delhi High Court that reimbursement of service tax is not an amount paid to the assessee on account of providing services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India.

5.5 In view of the clear judgement of the Honorable Delhi High court, Honorable Uttarakhand High Court (Special Bench), Honorable Benches of ITAT on the exact same issue of whether service tax/GST being statutory levy is includible in the gross receipts for the purposes of 4488, the appellant's argument succeeds. It is therefore clear that service tax/GST receipts are not includible in the gross receipt for the purposes of section 4488 of the Act. The addition therefore corresponding to INR 80,175,373 (being 10% of service tax amounting to INR 801,753,732)is hereby deleted."

5. Dissatisfied, the Revenue is in appeal before the Tribunal and ground No. 1 and 2 relate thereto.

6. At the outset, the Ld. AR submitted that the impugned issue is covered in favour of the assessee by the orders of various High Courts and Tribunals. He relied on the decision of the Hon'ble Delhi High Court in DIT vs. Mitchell Drilling International Pvt. Ltd. 380 ITR 130 and Full Bench decision of the Hon'ble Uttrakhand High Court in DIT vs. Schlumberger Asia Services Ltd. 414 ITR 1. He also drew our attention to the decision of the Delhi Tribunal in the case of DCIT vs. M/s. Transocean Offshore International Ventures Ltd. in ITA No. 6174 & 6175/Del/2017 which were challenged by the Revenue before the Hon'ble High Court of Uttrakhand in ITA No. 13, 17 of 2022 and the Hon'ble High Court has dismissed the appeal of the Revenue. He further submitted that SLP filed by the Revenue in Transocean Offshore International Ventures Ltd.'s case has also been dismissed by the Hon'ble Supreme Court and hence now the issue stands settled in favour of the assessee.

7. The Ld. DR had no objection to the legal propositions and submissions of the Ld. AR.

8. We have heard the Ld. Representatives of the parties and perused the records. We find that the impugned issue, i.e. whether service tax/ GST being statutory levy is includible in the gross receipts for the purpose of section 44BB of the Act has been considered by various Hon'ble High Courts (including the Hon'ble jurisdictional High Court of Delhi) and Tribunals. The impugned issue stands settled in favour of the assessee. In our view, the Ld. CIT(A) has rightly deleted the addition made by the Ld. AO relying on the decision of the Hon'ble Delhi High Court in DIT vs. Mitchell Drilling International Pvt. Ltd. supra) and Full Bench decision of the Hon'ble Uttrakhand High Court in DIT vs. Schlumberger Asia Services Ltd. 414 ITR

1. For the sake of ready reference, the operative part of the judgement in the case of DIT vs. Mitchell Drilling International Pvt. Ltd. 380 ITR 130 is reproduced below:

"17....that for the purposes of computing the presumptive income of the assessee for the purposes of Section 44BB, the service tax collected by the assessee on the amount paid to it for rendering services was not to be included in

the gross receipts in terms of Section 44BB(2) read with Section 44BB(1). The service tax is not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it. The assessee only collected the service tax for passing it on to the Government."

8.1. We have also perused the decision of Dehradun Bench of the Tribunal dated 25.11.2021 in DCIT vs. M/s. Transocean Offshore International Ventures Ltd. ITA No. 6174 & 6175/Del/2017 wherein the Tribunal relying on the decisions (supra) in Mitchell Drilling International Pvt. Ltd. and Schlumberger Asia Service Ltd. held that the service tax receipts do not form part of receipts for computation of income in section 44BB of the Act. The relevant findings and observations of the Tribunal read as under:

"10. We have heard the rival submissions and have also perused the records. It is seen that the issue of excludability of service tax in the gross receipts is squarely covered by the judgment of the Hon'ble Delhi High Court in the case of Mitchell Drilling International Pty Limited (supra) wherein the Hon'ble Delhi High Court has held that service tax being statutory levy should not form part of gross receipts as per provisions of section 44BB of the Act.

.....

22. Further Hon'ble High Court of Uttarakhand in the case of DIT International Taxation Vs M/s Schlumberger Asia Services Ltd. in ITA No. 40 of 2012 vide order dated 12.04.2019 held that the amount reimbursed to the assessee (service provider) by the ONGC (service recipient), representing the service tax paid earlier by the assessee to the Government of India, would not form part of the aggregate amount referred to in clauses (a) and (b) of sub-section(2) of Section 44BB of the Act. The Hon'ble Court is clearly spelt that even otherwise, it is not every amount paid on account of provision of services and facilities which must be deemed to be the income of the assessee under Section 44BB. It is only such amounts, which are paid to the assessee on account of the services and facilities provided by them, in the prospecting for or extraction or production of mineral oils, which alone must be deemed to be the income of the assessee.

23. Therefore, respectfully following the ratio of the judgment as laid down by the Hon'ble Delhi High Court and Hon'ble Uttarakhand High Court, we hold that the service tax receipts donot form part of receipts for computation of income in the section 44BB of the Income Tax Act."

8.2. The Revenue challenged the order of the Tribunal in ITA No. 6174 & 6175/Del/2017 before the Hon'ble Uttrakhand High Court and the Hon'ble Court dismissed the appeal of the Revenue observing that no fresh question of law arises for consideration in view of the judgement of this Court in Schlumberger Asia Services Ltd's case (supra). SLP of

the Revenue challenging ITA No. 13 of 2022 in Transocean Offshore International Ventures Ltd.'s case has also been dismissed by the Hon'ble Supreme Court.

9. Thus, in light of the decisions (supra) and in the absence of any change in the factual matrix and legal preposition, we decline to interfere with the order of the Ld. CIT(A).

10. In the result, appeal of the Revenue for both the AYs 2020-21 and 2021-22 are dismissed.