IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 555/MUM/2014
(Assessment Year : 2010-11)

M/s.China Shipping Container Lines
(Hong Kong) Co. Ltd.,
C/o. China Shipping India Pvt. Ltd.
Unit Nos. 608-6011, Dinasty Business Park,
Andheri Kurla Road,
Andheri (E), Mumbai 400 059
PAN:AACCC 5161B ... Appellant
Vs.

The Asstt. Director (Intl.Taxation) 1(2),
Scindia House, 1st Floor,
N.M.Road, Ballard Pier,
Mumbai 400 038 .... Respondent

Appellant by : None
Respondent by : Shri Prakash Ojha

Date of hearing : 19/01/2016
Date of pronouncement : 22/01/2016

ORDER

PER JASON P. BOAZ, A.M:

This appeal by the assessee is directed against the final order of assessment for assessment year 2010-11 dated 22/11/2013 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') in pursuance of the directions of the Dispute Resolution Panel ('DRP')-1, Mumbai issued on 18/10/2013 u/s. 144C (5) of the Act.

Since none appeared for the assessee, this appeal was disposed off with the help of the Ld. Departmental Representative for the Revenue and the material on record.

2. The facts of the case, briefly, are as under:-

2.1 The assessee company, engaged in shipping business, filed its return of income for assessment year 2010-11 on 15/10/2010 declaring total income of Rs.1,02,53,393/-. The case was taken up for scrutiny and the draft order of assessment was completed u/s. 144C(1) r.w.s. 143(3) of the Act wherein the income of the assessee was determined at Rs.1,06,42,360/- in view of an addition of Rs.51,86,212/- in respect of an addition on account of inclusion of service tax collected in the assessee's gross receipts for the purpose of determining the taxable income @ 7.5% u/s. 44B of the Act. Aggrieved, the assessee file its objections thereto before the DRP. The DRP issued its directions on 18/10/2013, upholding the Assessing Officer's action in including the service tax collected as a part of the gross receipts for determining the taxable income of the assessee u/s. 44B of the Act, by following the decision of the Co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in ITA No.8516/Mum/2010 dated 23/08/2013. The final assessment order was passed in consequence thereof. Vide order u/s.143(3) r.w.s. 144C of the Act vide order dated 22/11/2013.

3.1 Aggrieved by the final order of assessment for assessment year 2010-11 dated 22/11/2013, the assessee has preferred this appeal raising the following grounds:-

"1. <u>Ground of Appeal I: Service tax collected considered as income</u>

1.1 On the facts and in the circumstances of the case and in law, the learned Assistant Director of Income Tax (International Taxation) -1(2) ADIT has erred in including the amount of service tax collected Rs. 51,86,212/-, as part of freight collected for determining the taxable income of the appellant.

1.2 The learned ADIT ought to have appreciated that service tax is a statutory levy and your appellant acts as an agent on behalf of Government, for collection and deposit into the treasury. Since it does not have any profit element, the amount so collected should not form party' of gross freight for computing the taxable income.

1.3 The learned ADIT also erred in not appreciating that service tax is not a collection 'on account of carriage goods' etc. Such receipts, therefore, does not fall within the provision of section 44B(2) of the Act.

1.4 The learned ADIT also erred in not appreciating that service tax is not in the nature of 'demurrage charge or handling charges or any other amount of similar nature' to fall within the Explanation to Sec. 448(2) of the Act.

It is therefore prayed that the learned ADIT be directed not to include service tax collected as part of freight receipts, for computing the taxable income of your appellant."

3.2 We have heard the Ld. Departmental Representative for Revenue at length and perused and carefully considered the material on record, including the judicial pronouncements by a Co-ordinate Bench of ITAT, Mumbai in the assessee's own case for Assessment Year 2007-08 in ITA No.8516/Mum/2010 dated 23/08/2013, relied upon by the Ld. Departmental Representative for the Revenue.

3.3 **<u>Ground No.1 (1.1 to 1.4)</u>** (supra) are raised by the assessee in respect of the inclusion of service tax in the gross receipts of the assessee for determination of the assessee's taxable income as per the provisions of section 44B of the Act. The assessee company, incorporated in Hong Kong, is engaged in shipping business (i.e. operation of ships in international waters). The assessee had computed

its total income @ 7.5% of total collection as per the provisions of Section 44B r.w.s. 172 of the Act. In the course of assessment proceedings, the Assessing Officer found that the assessee has not included the service tax collected by it in the gross receipt for the purpose of computing its income u/s. 44B of the Act. On being queried by the Assessing Officer as to why the service tax of Rs.51,86,212/- should not be considered as part of gross receipts for the purpose of computation of its income under section 44B of the Act, the assessee submitted that the service tax is collected during the year under consideration but cannot be included in computing its income. The Assessing Officer did not accept the assessee's contention and completed the draft of assessment on 28/03/2013 including the service tax collected amounting to Rs.51,86,212/- in the gross receipts of the assessee for the purpose of computing its income as per the provisions of section 44B of the Act. This draft order of assessment was upheld by the DRP following the order of the Co-ordinate Bench of this Tribunal in the assessee's own case for assessment year 2007-08 in ITA No.8516/Mum/2010 dated 23/08/2013.

3.4 We find that, as contended by the Ld. Departmental Representative appearing for the Revenue, that the same issue of inclusion of service tax collections in the gross receipts of the assessee for determining its income u/s.44B of the Act has been considered and decided the issue in favour Revenue and against the assessee by the decision of Co-ordinate Bench of this Tribunal in the assessee's own

case for assessment year 2007-08 in ITA No.8516/Mum/2010 dated 23/08/2013 holding as under at paras 8 to 12 thereof:-

> *"8. We have considered the rival submissions and carefully gone through the relevant material on record as well as the various decisions relied upon by either of the parties. With a view to simplify and rationalise the assessment and computation of profit and gain of shipping business in the case of non-resident the Finance Act 1975 has made special provision in section 44B of the Income Tax Act. Under this provision, profits and gain of non-resident from the business of operation of ships will not be calculated in accordance with the provisions of section 28 to 43A of the Income Tax Act but the same will be taken as 7.5% of the aggregate of the amounts paid or payable to the assessee or to any persons on his behalf on account of carriage of passengers, livestock, mail or goods, shipped at any port in India as well the amount received or deemed to be received in India on account of carriage of passengers, livestock etc. at any port outside India. Thus, for the purpose*
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> *of determination of the income u/s 44B it is the gross amount which is aggregate of the amount paid or payable within or outside India on account of carriage or shipped at any port in India plus any amount received or deemed to received in India on account of carriage or shipped at any port outside India. There are two components of the amounts one which is paid or payable to the assessee in respect of the carriage or shipped at port in India and another the amount received or deemed to receive in India in respect of carriage or shipped at any port outside India. It is pertinent to note that section 44B over rides the provisions of section 28 to 43A, however, the other provisions of the Act are applicable apart from the provision of section 44B for computation of income of non-resident engaged in the business of shipping. It is pertinent to note that the sales tax receipt by any assessee is treated as trading or business receipt though the sales tax is collected by the assessee on behalf of the Government as held by Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (P) Ltd. (supra) in para 9 asunder:*
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> > *"9. The fact that the appellant credited the amount received as sales-tax under the head "sales-tax collection account" would not, in our opinion, make any material difference. It is the true nature and the quality of the receipt and not the head under which it is entered in the account books as would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt. We may in this context refer to the case of Punjab Distilling Industries Ltd. vs. CIT (1959) 35 ITR 519 (SC). In that case certain amounts received by the assessee were described as*

security deposits. This Court found that those amounts were an integral part of the commercial transaction of the sale of liquor and were the assessee's trading receipt. In dealing with the contention that those amounts were entered in a separate ledger termed "empty bottles return security deposit account", this Court observed."

9. It is clear from the decision of Hon'ble Supreme Court that this issue of the amount received as Sales Tax is treated as trading receipt of the assessee is settled. A similar view has been taken by the Hon'ble Supreme Court in case of ACIT Vs T. Naggi Reddy (supra) as well as in case of Mcdowell & CO. Ltd. Vs CTO (supra). The assessee has heavily relied upon the decision of this Tribunal in case of Islamic Republic of Iran Shipping Lines Vs DCIT (supra) wherein this Tribunal has relied upon the decision of Hon'ble High Court in case of CIT Vs Sudarshan Chemicals Industries Ltd. (supra) and held that service tax is statutory liability and would not involved any element of profit and accordingly the same cannot be included in the total receipt for determining the presumptive income. On the other hand, the Ld. DR has relied upon the decision of this Tribunal in case of DDIT Vs Technip of Sources Contracting B.V(Supra) wherein the Tribunal has relied upon the decision of Hon'ble Uttarakhand High Court in case of Sedko Forex Inc. (supra) and held that service tax collected by the assessee in connection with the services specified u/s 44BB of the Act will be included in the total receipt for the purpose of determining the presumptive profit u/s 44BB. There are other similar decisions of Hon'ble Uttarakhand High Court wherein it has been held that the handling charges received by the assessee will be included in the total receipt for the purpose of determination of presumptive profits u/s 44BB. Thus, it is clear that there are decisions of this Tribunal taking divergent view. The decision in case of Sudarshan Chemicals Industries Ltd. is in respect of turnover for the purpose of section 80HHC. It is pertinent to note that section 80HHC of Income Tax Act itself has provided the definition of export turnover as well as total turnover and the Hon'ble High Court has held that the Excise Duty and sales tax cannot be taken into account into turnover as they do not have any element of profit. This view has been taken by the Hon'ble High Court by drawing analogy from the definition of turnover provided u/s 80HHC itself wherein as per the clause (b) of explanation of section 80HHC export turnover is define by excluding freight and insurance charges. Therefore, on the similar analogy the Hon'ble High Court has held that the Excise Duty and Sales Tax also have no element of profit similar to that of freight and insurance. However no such exclusion from the aggregate of amounts provided under sub-section 2 of section 44B has been permitted while computing the profits and gains of the shipping business in case of non-resident as per section 44B. We quote section 44B as under:

"Special provision for computing profits and gains of shipping business in the case of non-residents.44B. (1) Notwithstanding anything to the contrary contained in sections 28 to 43A in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

> *(i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and (ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India. Explanation- For the purposes of this sub-section, the amount referred to in clause (i) or clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature."*

10. As we have already mentioned that the provisions of section 44B has been brought into statute to simplify the determination of taxable income of the non-resident who are in the business of shipping. The presumptive profits and gain of such business chargeable to tax under the provisions of section 44B are determined as a sum equal to 7.5% of the aggregate amounts paid or payable to the assessee on account of carriage of passengers etc. or goods shipped at any port in India as well as amount received or deemed to be received in India on account of carriage of passengers or goods shipped at any port outside India. There is no dispute that the service tax received/collected by the assessee is in respect of the services provided on account of carriage of passengers or goods shipped either any port in India or any port outside India. Therefore, the said amount of service tax is a part of the invoices/bills raised in respect of shipping business. The exclusion of the said amount only on the ground that it has no element of profit in our view is not consistent with the intention of the legislature when the amount received
or deemed to be received by way of demurrage charges or handling charges or any other amount of similar nature has to be included to the aggregate amount as per sub-section 2 of section 44B. The legislature has made it clear by inserting the explanation that the demurrage charges or handling charges or any other similar amount would be part of the aggregate amount for the purpose of determining the presumptive profits @ 7.5% of such amount. It is pertinent to note that if the element of profit is the only criteria for inclusion or exclusion of any amount then the demurrage charges or handling charges should not have been included in the aggregate amount for the

purpose of determining the presumptive income because the demurrage charges and handling charges also not having any element of profit. Since the service tax Act has been came into force subsequent to the insertion of the explanation therefore, there was no reason/occasion for including the service tax along with the demurrage charges and handling charges in the explanation however when any other amount of similar nature is required to be included then the service tax as far as on the aspect of having no element of profit is similar in nature to that of demurrage charges or handling charges.

11. Further the term turnover is not relevant for estimation of profit and gain u/s 44B and therefore, when the demurrege charges and handling charges are specifically included in the aggregate amount as prescribed under sub-section 2 then whatever amount received or receivable/paid or payable to the assessee on account of carriage of passengers etc. or goods shipped would be part of such amount for computation of profit and gains u/s 44B. Thus, the theory of element of profit would not apply to the aggregate amount as specified in section 2 of section 44B. Moreover service tax is incidental to the transactions of carriage of passengers etc. and goods shipped and the amount paid or payable to and received or receivable by the assessee on account of service tax is very much part of the amount received on account of the business of shipping. According to the normal commercial practice, levy of tax on sale of goods or service is reflected in the bills either as merged in the price or being shown separately. Therefore, the amount received on account of service tax as part of the price of carriage/shipped service is very much a trading/business receipt and would be part of the aggregate amount for presumptive profit and gain to be determined u/s 44B.

12. In view of the above discussion we hold that the service tax collected by the assessee would form part and partial of the aggregate amount as specified under sub-section 2 of section 44B for the purpose of determining the profit and gain under this section. Accordingly, we upheld the orders of the authorities below qua this issue."

3.5 Following the decision of the Co-ordinate Bench of this Tribunal in the assessee's own case for assessment year 2007-08 in ITA No.8516/Mum/2010 dated 28/3/2013, we hold that service tax collected by the assessee would form part and parcel of the aggregate amount as specified in Sub-section (2) of section 44B of the Act for the

purpose of determining the profits and gains of the assessee's business under this section. In this view of the matter, we uphold the orders of the authorities below and consequently dismiss the ground-1 (1.1 to 1.4) raised by the assessee.

4. In the result, the assessee's appeal for the assessment year 2010-11 is dismissed.

Order pronounced in the open court on 22/01/2016

Sd/-	Sd/-
(SANDEEP GOSAIN)	(JASON P. BOAZ)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 22/01/2016

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai