IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.6585/Del/2014
Assessment Year : 2011-12

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| Deputy Commissioner of Income Tax,<br>Circle-1,<br>(International Taxation),<br>Dehradun. | Vs. | M/s Halliburton Offshore Services Inc.,<br>C/o Nangia & Co., CAs,<br>3rd Floor, NCR Plaza,<br>New Cantt Road,<br>Dehradun – 248 001.<br>PAN : AAACH5154M. |
| (Appellant) | | (Respondent) |

Cross Objection No.231/Del/2016
Assessment Year : 2011-12

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| M/s Halliburton Offshore Services Inc.,<br>C/o Nangia & Co., CAs,<br>3rd Floor, NCR Plaza,<br>New Cantt Road,<br>Dehradun – 248 001.<br>PAN : AAACH5154M. | Vs. | Additional Director of Income Tax,<br>International Taxation,<br>Dehradun. |
| (Appellant) | | (Respondent) |

Revenue by : Smt. Anupama Anand, CIT-DR.
Assessee by : Shri Amit Arora, CA.

Date of hearing : 30.06.2016
Date of pronouncement : 08.07.2016

ORDER

PER G.D. AGRAWAL, VP :-

ITA No.6585/Del/2014 – Revenue's appeal :-

This appeal by the Revenue for the assessment year 2011-12 is directed against the order of learned CIT(A)-II, Dehradun dated 4th September, 2014.

2. Ground No.1 of the Revenue's appeal reads as under:-

> *"1. Whether on the facts and circumstances of the case, the ld.CIT(A) has erred in holding that no distinction can be made between receipts from Production Sharing Contract Participants ('PSC Partners') and Non-Production Sharing Contract entities (Non-PSC Partners') and between services rendered by first-leg and second-leg vendors, ignoring the fact that the receipts from non-PSC partners on account of provision of equipment on hire ('equipment rental') and provision of technical services ('technical services'), are in respect of contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, not eligible for treatment under the presumptive provisions of section 44BB of the IT Act, 1961 ('Act').*
>
> *1(a) The ld.CIT(A) has erred in holding that the receipts of the assessee from 'non-PSC partners' on account of 'equipment rental' and 'technical services', including related receipts on account of 'sale of consumables' & 're-imbursement' of service tax etc., were taxable under section 44BB of the Act as opposed to Section 44DA read with Section 9(1)(vi)/9(1)(vii) applicable to Royalties and Fee for Technical Services ('FTS')."*

3. We have heard both the parties and have perused the material placed before us. We find this issue to be covered in favour of the assessee by the decision of ITAT in the case of SBS Marine Ltd. Vs. Additional DIT in ITA No.107/Del/2012, dated 13th February, 2015, wherein the ITAT held as under:-

> *"23. Further, there is no requirement of a direct contract or agreement with the person actually engaged in prospecting for, or extraction or production of, mineral oils as canvassed by the revenue for the applicability of section 44BB. One may refer other provisions of the statue which insists on an agreement. For instance, section 42 deals with allowances allowable in computing the profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation which the Central Govt. has entered into an agreement. Section*

*80IA(4)(i)(b) provides that the enterprise carrying on the business of developing, operating and maintaining any infrastructure facility has to enter into an agreement with the Central Government of a State Govt. or a local authority etc. In the absence of any requirement in section 44BB that the person providing services, facilities or plant and machinery on hire should have directly entered into a contract or agreement with the person actually engaged in prospecting for or extraction or production of, mineral oils, one cannot curtail the scope or applicability of section 44BB to second leg contractors whose contracts or agreements are with first leg contractors but whose services or facilities or plant and machinery are used in connection with prospecting for or extraction or production of, mineral oils as required under section 44BB. The Hon'ble Supreme Court in ICDS Ltd v CIT [2013] 350 ITR 527 = 2013 TIOL-06-Hon'ble Supreme Court-IT held that the assessee leasing the vehicles to others who use the said vehicles in their business of running them on hire is entitled for higher rate of depreciation on the vehicles given on lease. It was held by the Hon'ble Supreme Court that the lessor need not himself use the vehicles in the business of running them on hire. The rationale of the aforesaid decision of the Supreme court may be applied in the context of section 44BB in as much as section 44BB does not mandate that the assessee should directly enter into contract with the person engaged in the business of prospecting for or extraction or production of, mineral oils or the services or facilities or plant and machinery on hire should be directly provided to the said person alone. We have already given a finding of fact that the services and facilities provided by the assessee along with plant and machinery are used in offshore drilling operations i.e., the activity of prospecting for or extraction or production of mineral oils. Consequently, the requirements of section 44BB are satisfied in the present case.*

*24. In view of the above, there is no merit in the contentions of the revenue that the assessee is not an eligible assessee under section 44BB since it has not directly entered into contract with the ONGC and it is not undertaking the activities specified in section 44BB itself and being second leg contractors they are not eligible under section 44BB."*

4. The facts of the case under appeal are similar because in this case also, the Assessing Officer denied the benefit of Section 44BB to the assessee on the ground that the assessee has not entered into an agreement directly with Central Government but is only a second leg contractor. The identical issue has been considered and decided by the ITAT in the above mentioned case. Therefore, the ratio of the above decision would be squarely applicable. It was also pointed out by the learned counsel that the above decision of ITAT has been upheld by Hon'ble Jurisdictional High Court in the case of CIT Vs. M/s SBS Marine Limited vide Income Tax Appeal No.36 of 2015. In view of the above, we, respectfully following the above decision of ITAT and Hon'ble Jurisdictional High Court, uphold the order of learned CIT(A) and reject ground No.1 of the Revenue's appeal.

5. Ground Nos.2 to 5 of the Revenue's appeal read as under:-

> *"2. Whether on the facts and in the circumstances of the case, the ld.CIT(A) has erred in ignoring the effect of the amendment brought in vide Finance Act, 2010 w.e.f. 01.04.2011, in terms of which income covered by section 44DA has been specifically excluded from the scope of section 44BB for Asstt Years 2011-12 (the year under consideration) onwards.*
>
> *2(a) Whether on the facts and circumstances of the case, the ld.CIT(A) has erred in ignoring the distinct scheme of taxation of fee for technical services and royalty and disregarding the insertion of provisos in section 44BB/44DA/115A and the rationale behind the introduction of said amendment in the Finance Bill 2010 in holding that the income of the assessee company from 'equipment rental' and 'technical services' from Non-PSC Partners was covered under the presumptive provisions of section 44BB.*
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> *2(b) The ld.CIT(A) has erred in not appreciating the fact that even in terms of ratio of the judgment in the said of OHM Ltd [352, ITR 406 (Delhi)] cited by him, the provisions of section 44BB are not applicable where the scope of the*

*services/facilities provided by an assessee is general in nature falling under section 44DA(1) of the Act.*

*2(c) The Ld.CIT(A) has erred in mechanically following the decision in the case of M/s OHM Ltd without first adjudicating upon the issue as to whether and how the scope of the services/facilities rendered under the contracts is not general in nature and therefore, does not qualify as Royalty/FTS u/s 9(1)(vi)/9(1)(vii) of the Act taxable under section 44DA.*

*3. Whether on the facts and in the circumstances of the case, the ld.CIT(A) has erred in holding that the income earned by the assessee for imparting of services was eligible for treatment u/s 44BB of the Act, without adjudicating the aspect of eligibility under the second limb of the exclusionary proviso (Explanation to section 9(1)(vii) of the IT Act, 1961) i.e. "for a project undertaken by the recipient" in terms of decision of Hon'ble Delhi High Court in CIT V Rio Tinto Technical Services [2012-TII-01-HC-DEL-INTL].*

*4. Whether on the facts and circumstances of the case, the ld.CIT(A) has erred in ignoring the decisions of Jurisdictional High Court in the cases of ONGC as Agent of Foramer France and M/s Rolls Royce Pvt Ltd [2007-TII-03-HC-UKHAND-INTL].*

*5. Whether on the facts and circumstances on the facts, the ld CIT(A) has erred in reversing the action of the AO who, having held that the assessee's revenues on account of 'equipment rental' and 'services' under contracts with Non-PSC Partners is liable to be taxed u/s 44DA, rightly estimated the income of the assessee by applying 25% rate of profit on gross receipts in the absence of books of accounts and details of expenses incurred in providing the services."*

6. At the time of hearing before us, it was pointed out by the learned counsel that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Apex Court in assessee's own case which is reported in 278 CTR 153. It was also stated that there were group of appeals before Hon'ble Apex Court in which the lead case was of ONGC and various other assessees which included the assessee

under appeal before us. In the above mentioned case, Hon'ble Apex Court held as under:-

> *"A careful reading of the aforesaid provisions of the Act goes to show that under Section 44BB(1) in case of a non-resident providing services or facilities in connection with or supplying plant and machinery used or to be used in prospecting, extraction or production of mineral oils the profit and gains from such business chargeable to tax is to be calculated at a sum equal to 10% of the aggregate of the amounts paid or payable to such non-resident assessee as mentioned in Sub-section (2). On the other hand, Section 44D contemplates that if the income of a foreign company with which the government or an Indian concern had an agreement executed before 1.4.1976 or on any date thereafter the computation of income would be made as contemplated under the aforesaid Section 44D. Explanation (a) to Section 44D however specifies that "fees for technical services" as mentioned in Section 44D would have the same meaning as in Explanation 2 to Clause (vii) of Section 9(1). The said explanation as quoted above defines "fees for technical services" to mean consideration for rendering of any managerial, technical or consultancy services. However, the later part of the explanation excludes from consideration for the purposes of the expression i.e. "fees for technical services" any payment received for construction, assembly, mining or like project undertaken by the recipient or consideration which would be chargeable under the head "salaries". Fees for technical services, therefore, by virtue of the aforesaid explanation will not include payments made in connection with a mining project.*
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> *The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act 1948. While construing the somewhat pari materia expressions appearing in the Mines and Minerals (Development and Regulation) Act 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957 Act. Regard must also be had*

*to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Section 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non- resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act.*

*The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not*

*Section 44D of the Act. On the basis of the said conclusion reached by us, we allow the appeals under consideration by setting aside the orders of the High Court passed in each of the cases before it and restoring the view taken by the learned Appellate Commissioner as affirmed by the learned Tribunal."*

7. It was also pointed out that while deciding the issue against the assessee, the Assessing Officer has relied upon the decision of Hon'ble High Court of Uttarakhand in the case of ONGC which has been reversed by Hon'ble Apex Court in the case of ONGC (supra). Since the issue is squarely covered in favour of the assessee by the decision of Hon'ble Apex Court, we, respectfully following the same, uphold the order of learned CIT(A) on this point and reject ground Nos.2 to 5 of the Revenue's appeal.

8. Ground No.6 of the Revenue's appeal reads as under:-

*"6. Without prejudice to the generality of the ground relating to taxation of entire receipts as Royalty/FTS, whether on the facts and in the circumstances of the case, the ld.CIT(A) has erred in holding that the amounts received as 're-imbursement' of Service Tax are not includible in gross turnover even for the purpose of computing taxable income u/s 44BB.*

*6(a) The ld.CIT(A) has erred in not appreciating the fact the provisions of section 44BB are a self-contained code providing for computation of profits at a fixed percentage of gross receipts of the assessee and all the deductions and exclusions from income are deemed to have been allowed to the assessee.*

*6(b) Whether the ld.CIT(A) has erred in not appreciating the fact that once the receipts held as taxable u/s 44BB of the Act, there is no scope for computing or re-computing the profits by excluding any element of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a scheme of simpler mode of computation of profits u/s 44BB of the Act and*

*obviating the need for accounting for individual receipts and payments etc.*

*6(c) Whether the ld.CIT(A) has erred in ignoring the ratio of the judgment in the case of M/s Chowringhee Sales Bureau (P) Ltd. (82 ITR 542, SC) wherein the Hon'ble Apex Court has held that the Sales Tax collected by an assessee in the ordinary course of its business forms part of its business receipts. Owing to the inherent similarity in the nature of the sales tax and service tax, the ratio of the judgment in the said case is directly applicable in the facts of the instant case."*

9. We have heard both the parties and perused the material placed before us. We find this issue also to be covered in favour of the assessee by the decision of Hon'ble Delhi High Court in the case of DIT Vs. Mitchell Drilling International Pvt.Ltd. – [2016] 380 ITR 130 (Delhi), wherein Hon'ble High Court at paragraph 16 & 17 held as under:-

*"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 the gross receipts for the purposes of Section 44 BB 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 by 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."*

10. From the above, it is evident that while deciding the above issue, Hon'ble Delhi High Court has concurred with the decision of Hon'ble High Court of Uttarakhand in the case of DIT Vs. Schlumberger Asia Services Ltd. – [2009] 317 ITR 156. No contrary decision has been

brought to our knowledge. We, therefore, respectfully following the above decision of Hon'ble Delhi High Court concur with the learned CIT(A) that service tax collected by the assessee will not form part of receipt for the purpose of computing income u/s 44BB of the Act. Ground No.6 of the Revenue's appeal is accordingly rejected.

11. Ground No.7 of the Revenue's appeal reads as under:-

> *"7. Whether on the facts and in the circumstances of the case and in law, the ld.CIT(A) has erred in holding that interest u/s 234B of the Income Tax Act, 1961 ('the Act') was not chargeable in this case by relying upon the case of M/s Maersk [334 ITR 79].*
>
> *a. The ld.CIT(A) has erred in not appreciating the fact that the case of M/s Maersk was distinguishable on facts as it dealt with a case where the employer failed to deduct tax at source despite the specific provisions of the Act in terms of which the employer was mandatorily required to deduct tax from the salary paid to the employee. In the said case, the Hon'ble Court held that an employee is not liable to pay advance tax on salary because u/s 192 there is an obligation on the employer to deduct tax at source. The case does not lay down a general proposition of law that interest u/s 234B is not chargeable in all cases, particularly in cases where the Non-Resident assessee/payee/deductee has played a role in inducing non-deduction or short-deduction on the part of the payer/deductor.*
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> *b. The ld.CIT(A) has erred in failing to take note of the observations of the Hon'ble High Court in the case of M/s Mitsubishi [330 ITR 578, Del] that the role of the assessee/payee/deductee in short-deduction or non-deduction of tax needs to be ascertained before claim regarding non-liability to interest u/s 234B of the Act is accepted, a proposition affirmed subsequently in the case of M/s Alcatel Lucent (judgment of Delhi High Court dated 7.11.2013 in ITA No.327 & Ors of 2012)."*

12. We find that learned CIT(A) has decided this issue in favour of the assessee following the decision of Hon'ble Jurisdictional High Court

in the case of DIT and Another Vs. Maersk Co.Ltd. – [2011] 334 ITR 79 (Uttarakhand)(FB). No contrary decision is brought to our knowledge. Therefore, we uphold the order of learned CIT(A) and reject ground No.7 of the Revenue's appeal.

**Assessee's C.O. No.231/Del/2016 :-**

13. Ground Nos.1, 2 & 3 of the cross-objection filed by the assessee are admitted to be in support of the order of learned CIT(A). Therefore, the same are treated as infructuous and rejected as such.

14. Ground No.4 of the assessee's cross-objection reads as under:-

> *"That without prejudice to the above, the respondent's claim that reimbursement of expenditure aggregating to INR 36,552,043 is not chargeable to tax at all since the receipts lack any element of profit, the ld.CIT(A) has erred in holding that reimbursements were to be included in the receipts for the purpose of determination of income under section 44BB of the Act."*

15. At the time of hearing before us, it was fairly conceded by the learned counsel that this issue is covered against the assessee by the decision of Hon'ble Jurisdictional High Court in the case of CIT and Another Vs. Halliburton Offshore Services Inc. – [2008] 300 ITR 265 (Uttarakhand). In the above mentioned case, the assessee rendered services to the ONGC. For the assessment year 1991-92, it claimed that the amount of Rs.6,16,989 received on account of reimbursement of freight and transportation charges actually incurred in respect of equipment was not includible while computing its income under section 44BB. The Assessing Officer rejected the claim but the Commissioner of Income-tax (Appeals) and the Tribunal accepted it. On appeal to the High Court, it was held as under :-

*"Held, allowing the appeal, that it was not in dispute that the amount had been received by the assessee. Therefore, the Assessing Officer added the said amount which was received by the non-resident company rendering services under the provisions of section 44BB to the ONGC and imposed the income-tax thereon. He was justified in doing so."*

16. We, therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court, uphold the order of learned CIT(A) on this point and reject ground No.4 of the cross-objection filed by the assessee.

17. In the result, the appeal of the Revenue and the cross-objection of the assessee both are dismissed.

Decision pronounced in the open Court on 08.07.2016.

| Sd/- | Sd/- |
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| **(BEENA A. PILLAI)** | **(G.D. AGRAWAL)** |
| **JUDICIAL MEMBER** | **VICE PRESIDENT** |

VK.

Copy forwarded to: -

1. Appellant : **Deputy Commissioner of Income Tax, Circle-1, (International Taxation), Dehradun.**
2. Respondent : **M/s Halliburton Offshore Services Inc., C/o Nangia & Co., CAs, 3rd Floor, NCR Plaza, New Cantt Road, Dehradun – 248 001.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar