IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Shailendra Kumar Yadav, Judicial Member
and Shri Jason P. Boaz, Accountant Member

ITA No. 457/Mum/2015
(Assessment Year: 2011-12)

M/s. Orient Overseas Container Line Ltd. C/o OOCL (India) Pvt. Ltd. ICC Chambers, 5th Floor Saki Vihar Road, Powai Opp. Santogen Silk Mills Mumbai 400072	Vs.	DCIT (International Taxation) - 4(2) Room No. 11, Scindia House, Ground Floor Ballard Estate Mumbai 400038

PAN - AAACO5679F

Appellant **Respondent**

Appellant by: Shri Paras Savla &
Ms. Priyanka Shah
Respondent by: Shri Anandi Verma

Date of Hearing: 30.08.2016
Date of Pronouncement: 02.09.2016

O R D E R

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the DDIT (IT), Range 4 Mumbai dated 14.11.2014 passed under section 143(3) r.w.s. 144C(13) of Income Tax Act, 1961 (in short 'the Act'), pursuant to the directions issued by the Dispute Resolution Panel-II Mumbai dated 18.09.1014.

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

2.1 The assessee-company, engaged in the business of transportation of cargo and operation of ships in international traffic filed its return of income for A.Y. 2011-12 declaring total income of ₹38,75,68,616/-. The case was taken up for scrutiny and the draft assessment order dated 28.02.2014 was served on the assessee. The assessee-company filed its objections thereto before the DRP-II, Mumbai. The DRP-II issued its

directions on the assessee's objection under section 144C(5) of the Act vide order dated 18.09.2014, pursuant to which the Assessing Officer (AO) has passed the impugned order under section 143(3) r.w.s. 144C(113) of the Act vide order dated 14.11.2014.

3. In this appeal the grounds raised by the assessee are as under: -

"GROUND 1 : Inclusion of service tax for the purpose of presumptive income under Section 44B of the Income- tax Act, 1961 ('the Act')

1.1 On the facts and in the circumstances of the case and in law, the learned DDIT has erred in including an amount of INR 1,79,11,894 being 7.5 percent of the service tax collected from customers and paid to Government (i.e. INR 23,88,25,253) for the purpose of computing presumptive income under Section 44B of the Act.

1.2 The Appellant humbly prays that the learned DDIT be directed not to include service tax collected and paid for the purpose of computing the presumptive income under Section 44B of the Act.

2. GROUND 2: Non consideration of correct amount of service tax collected and paid

2.1 ***Without prejudice to Ground 1,*** *on the facts and in the circumstances of the case and in law, the learned DDIT has erred and further the Hon'ble DRP has erred in not adjudicating that the amount of service tax, if included, should not exceed INR 19,63,30,732 i.e. the amount of service tax actually collected and paid during the year.*

3. GROUND 3: Short credit of advance tax and tax deducted at source

3.1 On the facts and the circumstances of the case and in law, the learned DDIT erred in granting short credit of tax deducted at source amounting to INR 34,583 and short credit for advance tax amounting to INR 10,95,525.

3.2 Application under section 154 of the Act for rectification of the aforesaid mistake apparent from record has been filed, which is pending disposal.

3.3 The Appellant prays that the learned DDIT be directed to give full credit of tax deducted at source and advance tax.

4. GROUND 4: Erroneous levy of interest under Section 234C of the Act

4.1 On the facts and circumstances of the case and in law, the learned DDIT erred in levying interest amounting to INR 2,34,228 under Section 234C of the Act.

4.2 The Appellant prays that the learned DDIT be directed to delete the interest levied under Section 234C of the Act.

5. GROUND 5: Erroneous levy of interest under Section 234D of the Act

5.1 On the facts and circumstances of the case and in law, the learned DDIT erred in levying interest - amounting to INR 10,58,987 under Section 234D of the Act.

5.2 The Appellant prays that the learned DDIT be directed to delete the interest levied under Section 234D of the Act.

6. GROUND 6: Initiation of penalty proceeding for the levy of penalty under Section 271(1)(c)

6.1 On the facts and circumstances of the case and in law, the learned DDIT erred in initiating penalty proceeding under section 271(1)(c) of the Act.

6.2 It is prayed that the learned DDIT be directed to drop the penalty proceeding under section 271(1)(c) of the Act."

4. **Ground No. 1 (1.1 & 1.2) - *Inclusion of service tax for the purpose of presumptive income under Section 44B of the Act***

4.1 In these grounds the assessee has assailed the impugned order of the AO for including the amount of ₹1,79,11,894/-; being 7.5% of the service tax collected from customers and paid to the government for the purpose of computing presumptive income under section 44B of he Act. Before us, the learned A.R. for the assessee submitted that the issue for consideration in these grounds has been considered and allowed in favour of the assessee by the decisions of Coordinate Bench of this Tribunal in assessee's own case for assessment years 2007-08 and 2008-09 in (2013) 60 SOT 86 (Mum Trib) and for A.Y. 2010-11 in ITA No.7494/Mum/2013 & 524/Mum/2014 dated 31.07.2015. It was prayed that in view of the above, the assessee's appeal on this issue be allowed.

4.2 Per contra, the learned D.R. for Revenue supported the orders of the authorities below which had placed reliance on the decision of the Coordinate Bench of this Tribunal in the case of M/s. China Shipping Container Lines (Hong Kong) Company Ltd. in ITA No. 8516/Mum/2010 dated 23.08.2013 in which the view of the authorities below in including the service tax receipt in the gross receipts taken for computing the presumptive profits of the assessee was upheld.

4.3 In rejoinder, the learned A.R. submitted that apart from this issue being covered in favour of the assessee by the decisions of Coordinate Benches of this Tribunal in the assessee's own case for assessment years 2007-08, 2008-09 and 2010-11 (supra), which has considered the decision cited by the learned D.R., the Hon'ble Delhi High Court in the case of DIT-I vs. Mitchell Drilling International (P) Ltd. (2015) 62 taxmann.com 24 (Delhi) dated 28.09.2015 has held this very same issue in favour of the assessee.

4.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited. The question for consideration before us is whether the service tax collected by the assessee and passed on to the government from the person to whom it has provided services can legitimately be considered to form part of the gross receipts for the purpose of computation of the assessee's presumptive income under section 44BB of the Act. We find that this very same issue has been considered and held in favour of the assessee by the decisions of the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2007-08, 2008-09 (2013) 35 taxmann.com 342 (Mumbai Trib) and for A.Y. 2010-11 in ITA Nos. 7498/Mum/2013 & 524/Mum/2014 dated 31.07.2015. In the order for A.Y. 2010-11, the Coordinate Bench, after considering the decision in the case of China Shipping Container Lines (Hong Kong) Co. Ltd. (supra), held as under at paras 3 to 5 thereof: -

> *"3. At the outset, the ld. Counsel for the assessee submitted that this issue is covered in favour of the assessee by the Tribunal order in assessee's own case for the Assessment Years 2007-08 and 2008-09 in ITA No.7809/Mum/2010 and 7365/Mum/2012. On the other hand, Ld. DR submitted that though this issue is covered in favour of the assessee by the Tribunal in assessee's own case, however, there are various contrary decision, which fact has been noted by the DRP, itself in the impugned order. They have followed Tribunal decision of China Shipping Container Lines (Hongkong Co. Ltd.) reported in 145 ITD 230, to decide this issue against the assessee.*
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> *4. After considering the rival contentions and on perusal of the impugned orders, we find that the main issue which has been challenged is, whether the service tax is to be treated as part of the*

total receipts for the purpose of computing the 'Presumptive income' u/s 44B. The assessee's case had been that service tax collected does not form total of the part receipts as it does not involve any element of profit, because it has been collected from the customers on behalf of the Government and cannot be included in the total receipts. We find that the Tribunal in assessee's own case has taken a note of various decisions for and against the assessee and has reached to the following conclusion :-

6. We have considered the rival submissions and also perused the relevant material on record. We have also carefully gone through the various judicial pronouncement relied upon by the Ld. Representatives of both the sides in support of their respective stands on the issue. It is observed that the Assessing Office in his impugned orders and Ld. DR at the time of hearing before us have heavily relied on the decision of Hon'ble Uttarakhand High Court in the cases of Halliburton Offshore Services Inc. (supra), Sedco Forex International Inc. (supra) and Trans Ocean Offshore Inc. (supra) in support of the Revenue's that the amount of service tax collected by the Assessee should be included in the gross receipts for the purpose of computing the total income as per the provisions of section 44B. It is observed that reliance on the said decisions was placed by the Revenue in the case of DIT Vs. Schiumberger Asia Service Ltd. (supra) where the issue involved was whether the reimbursement of custom duty paid by the Assessee could form part of the gross receipts for the purpose of determining the deemed profit of the Assessee under section 44BB and the Hon'ble Uttarakhand High Court found the said cases to be distinguishable on facts observing that in none of these cases the issue of reimbursement of the custom duty was involved, the nature of which was statutory payment. Their Lordship held that reimbursement towards the custom duty paid by the Assessee being statutory in nature could not form part of the gross receipts for the purpose of computing the deemed profit under section 44BB.

7. The Ld. DR has also relied on the decision of Delhi Bench of ITAT in the case of Deputy Director of Income Tax Vs. Technip Offshore Contracting B.V. (supra) wherein it was held that the Assessing Officer was justified in including the amount of service tax collected by the Assessee in connection with the services or facilities or supply specified under section 44BB provided by the Assessee in the total receipts for the purpose of determining presumptive profit of 10% under section 44BB. It is observed that the said decision of Delhi Bench of ITAT in the case of Deputy Director of Income Tax vs Technip Offshore Contracting B.V. (supra) was relied upon by the Rely in support of its case on the similar issue Case of Islamic Republic of Iran Shipping Lines (supra) before Mumbai Bench of ITAT and relying on the decision of the Hon'ble Bombay High Court in the case Sudarshan Chemical Industries 242 ITR 769 and that of Hon'ble Uttarakhand High Court in the case of DT Vs. Schlumberger ASIA Service Ltd. (supra) it was held by the Mumbai benches that the service tax, which is a statutory liability, would not involve any element of profits and since the service provider has collected the same from its customers on behalf of the Government, it cannot be included in the total receipts for determining the presumptive income of the assessee under section 44B. The decision of Mumbai bench in the case of Islamic Republic of Iran Shipping Lines (supra) has been subsequently followed by the Tribunal at least in three cases cited by the Ld. Counsel for the Assessee including the case of Sidco Forex Intt. Drilling Inc. (supra) wherein Delhi

bench of the ITAT has decided a similar issue in favour of the assessee holding that reimbursement of service tax, being a statutory liability, would not involve any element of profit and the same therefore could not be included in total receipts for determining presumptive income under Section 44BB.

8. Keeping in view all the judicial pronouncement discussed above, we are of the view that the preponderance of judicial opinion is in favour of the Assessee on the issue and keeping in view the same, we decide this issue in favour of the assessee holding that the amount of service tax, being in the nature of statutory payment which does not involve any element of profit, cannot be included in the gross receipts for the purpose of computing the presumptive income of the assessee under section 44B. Ground no. 1 of the Assessees Appeal for AY 2007-08 and ground No. 2 of the Assessees Appeal for AY 2008-09 are accordingly allowed".

5. Since in assessee's own case in the earlier years, one view has been taken therefore, consistent with the same precedence, we also hold that the amount of service tax cannot be included in the gross receipts for the purpose of computing the 'Presumptive income' of the assessee u/s 44B. Accordingly, ground no. 1 raised by the assessee is allowed."

4.4.2 We have respectfully perused the decision of the Hon'ble Delhi High Court in the case of Director of Income Tax-I vs. Mitchell Drilling International (P) Ltd. (2015) 62 taxmann.com 24 (Delhi) dated 28.09.2015. On consideration of the identical question of 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 44B of the Act, their Lordships at para 15 of their order held that 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 44B of the Act. At para 17 of the order it was observed that service tax is not an amount paid or payable or received or deemed to be received by the assessee for services rendered by it. The assessee is only collecting the service tax for passing it on to the government. Their Lordships at para 19 of their order held that for the purpose of computing the presumptive income of the assessee under section 44BB of the Act, the service tax collected by the assessee on the amount paid for rendering services is not to be included in the gross receipts.

4.4.3 Respectfully following the decision of the Hon'ble Delhi High Court in the case of Mitchell Drilling International Ltd. (supra) and of the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2007-08, 2008-09 & 2010-11 (supra), we hold that for the purpose of computing the 'presumptive income' of the assessee under section 44BB of the Act, since service tax collected by the assessee does not have any element of income, it therefore cannot form part of the gross receipts and consequently delete the addition made in this regard by the authorities below. Accordingly, ground 1 (1.1 & 1.2) of the assessee's appeal is allowed.

5. Ground No. 2 (2.1) has been raised by the assessee as an alternative ground without prejudice to what has been raised in ground No. 1 (supra). In view of our decision of allowing the assessee's appeal on ground No. 1 (1.1 & 1.2) (supra), this ground now becomes academic in nature and therefore no adjudication is called for thereon at this juncture.

6. ***GROUND 3 (3.1 to 3.3) : Short credit of advance tax and tax deducted at source (TDS)***

6.1 In this ground, the assessee contends that the AO in the order of assessment had granted it short credit of TDS amounting to ₹34,583/- and short credit for Advance Tax amounting to ₹10,95,525/- and that inspite of subsequently filing a rectification application under section 154 of the Act, the AO has not rectified the mistake. In this regard, after hearing both parties, we direct the AO to consider, examine and verify the assessee's claim of grant of short credit of Advance Tax of ₹10,95,525/- and TDS of ₹34,583/- while giving effect to this order, after affording the assessee of adequate opportunity of being heard in the matter and to file details/submissions required in this regard. Consequently, ground No. 3 of the assessee's appeal is treated as allowed for statistical purposes.

7. **Grounds Nos. 4 & 5: Charge of interest under section 234C and 234D of the Act.**

7.1 In these grounds, the assessee denies itself liable to be charged interest under sections 234C and 234D of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the

matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and we therefore uphold the action of the AO in charging the assessee interest under sections 234C and 234D of the Act. The AO is, however, directed to recompute the interest chargeable under sections 234C and 234D of the Act, if any, while giving effect to this order.

8. ***GROUND 6: Initiation of penalty proceeding for the levy of penalty under Section 271(1)(c)***

8.1 In this ground, the assessee has challenged the AO's action in initiating penalty proceedings under section 271(1)(c) of the Act. As fairly conceded by the learned A.R. for the assessee, this ground is premature since no penalty under section 271(1)(c) has been levied on the assessee. Since this ground is admittedly premature, no cause of grievance arising to the assessee, this ground is dismissed as not maintainable.

9. In the result, the assessee's appeal for A.Y. 2011-12 is partly allowed.

Order pronounced in the open court on 2nd September, 2016.

Sd/-	Sd/-
(Shailender Kumar Yadav)	**(Jason P. Boaz)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 2nd September, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The DRP-II, Mumbai*
4. *The CIT - concerned*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.