IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI

BEFORE SHRI. G. D. AGRAWAL, PRESIDENT
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.6537/DEL/2014
Assessment Year:2011-12

DCIT Circle – II, International Taxation Dehradun	v.	Sundowner Offshore International (Bermuda) Ltd. C/o M/s Nangia & Co. CAs, 3rd Floor,NCR Plaza, New Cantt. Road, Dehradun
		TAN/PAN:AAHCS0550M
(Applicant)		(Respondent)

Applicant by:	Shri Gaurav Dudeja, D.R.		
Respondent by:	Shri Amit Arora, C.A.		
Date of hearing:	29	08	2017
Date of pronouncement:	20	09	2017

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against the impugned order dated 9/9/2014, passed by the ld. CIT (Appeals)-II, Dehradun for quantum of assessment passed u/s. 143(3) read with 144(C)(3)(b) of the Income Tax Act, 1961 for assessment year 2010-11. The grounds raised by the Revenue in the grounds of appeal are as under:-

1. *Whether on the facts and in the circumstances of the case and in law, the Ld CIT (Appeals) has erred in holding that receipts on account of service tax are not includible in gross revenue of the assessee for the purpose of computation of profits under the presumptive provisions of u/s 44BB of the Income Tax Act, 1961 ("the Act").*

1.1 Whether the Ld CIT (Appeals) has erred in not appreciating the fact that the provisions of section 44BB of the Act are a self-contained code providing for computation of profit 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.

1.2 Whether the Ld CIT(Appeals) has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, 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.

1.3 Whether the Ld CIT(Appeals) 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.

2. At the outset, the ld. Counsel for the assessee submitted that this precise issue had come up for consideration before this Tribunal in the assessee's own case in the assessment year 2010-11, wherein this issue has been decided in favour of the assessee vide order dated 2/5/2017 in ITA No. 3882/DEL/2014. Apart from that, he submitted that this issue also now stands covered by the judgment of the Hon'ble Delhi High Court in the case of

DIT vs. Mitchell Drilling International Pvt. Ltd. (2016) 380 ITR 130 (Del.).

3. On the other hand, the ld. D.R. strongly relied upon the order of the Assessing Officer.

4. The brief facts are that the assessee is a non-resident company having its P.E in India, through which it is carrying on its business in India. Accordingly it has been showing its income under section 44BB of the Act, as it is not in dispute that the assessee is to be assessed under the Indian Income Tax Act. In the return of income, the assessee had shown its income under section 44BB(1) which was at 10% of gross revenue amounting to Rs.53,14,52,047/-. The Assessing Officer, from the perusal of the payment receipts and revenue breakup submitted by the assessee, noted that assessee has not offered to tax the reimbursement of service tax receipts which is part of gross receipt from ONGC amounting to Rs.5,51,20,576/-. In response to show cause notice by the AO, assessee submitted that statutory charges cannot form part of the amount considered for the purpose of deemed profit under section 44BB; and in support reliance was placed on the judgment of the Hon'ble Uttarakhand High Court in the case of **DIT vs. Schlumberger Asia Services Ltd., 317 ITR 556.** Further, reliance was also placed on various orders of Delhi Benches of ITAT. However, the Assessing Officer after detailed discussion held that entire receipts including on account of service tax is to be taken into account to determine the deemed profit of the assessee under section 44BB. He also for coming to this conclusion, relied upon another judgment of Hon'ble Uttarakhand High Court in the case of **CIT vs.**

Halliburton Offshore Services Inc., 300 ITR 265 (UK) and host of other decisions as noted by him at page 3 of the assessment order. Apart from that, he also analyzed the provisions of Service Tax Rules and various other decisions, which have been dealt by him from pages 4 to 6 of the assessment order.

5. The ld. CIT(A), following the Tribunal's order in the case of M/s Precision Energy Services Ltd. vs. ADIT in ITA No.5609/DEL/2012, allowed assessee's appeal.

6. We find that now this issue stands covered by the judgment of the Hon'ble Delhi High Court in the case of **DIT vs. Mitchell Drilling International Pvt. Ltd.(supra)** wherein the Hon'ble High Court, after analyzing various judgments of Hon'ble Uttarakhand High Court and the judgment in the case of Chowringhee Sales Bureau Pvt. Ltd. vs. CIT (1973) 87 ITR 542, observed and held as under:-

> *"9. Section 44BB begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under Section 44 BB. It introduces the concept of presumptive income and states that 10% credit of the amounts paid or payable or deemed to be received by the Assessee on account of "the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India" shall be deemed to be the profits and gains of the chargeable to tax. The purpose of this provision is to tax what can be legitimately considered as income of the Assessee earned from its business and profession.*
>
> *10. The expression 'amount paid or payable' in Section 44BB(2)(a) and the expression 'amount received or deemed to*

be received' in Section 44BB(2)(b) is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and machinery.' Therefore, only such amounts which are paid or payable for the services provided by the Assessee can form part of the gross receipts for the purposes of computation of the gross income under Section 44 BB (1) read with Section 44BB(2).

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 State exchequer since it took the stand that the statutory provision creating that liability upon 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) Act, 1954 on the ground that the word turnover was defined to include sales tax collected by 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 cn 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 44 BB of the Act.

16. The Court concurs with the decision of the High Court of Uttarakhand in on 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 is 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.

18. The Court further notes that the position has been made explicit by the CBDT itself in two of its circulars. In Circular No. 4/2008 dated 28th April 2008 it was clarified that "Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of Service Tax. Therefore, it has been decided that tax deduction at source) under sections 194-1 of Income Tax Act would be required to be made on the amount of rent paid/payable without including the service tax. In Circular No.1/2014 dated 13th January 2014, it has been clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act."

7. Apart from the aforesaid judgment, we find that in the assessee's own case for the earlier year, the Tribunal has allowed this issue in favour of the assessee. Accordingly, following the binding judicial precedence, we decide this issue in favour of the assessee that service tax element cannot be included in the gross receipts for the purpose of computing the profit and thus, the grounds raised by the Revenue are dismissed.

8. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 20th September, 2017.

Sd/-	Sd/-
[G.D. AGRAWAL]	**[AMIT SHUKLA]**
PRESIDENT	**JUDICIAL MEMBER**

DATED: 20th September, 2017

JJ:

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

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