

**IN THE INCOME TAX APPELLATE TRIBUNAL “L”
BENCH, MUMBAI**

**BEFORE SH. B. R. BASKARAN, AM &
SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 1228/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2012-13)

Evergreen Marine Coroporation (Taiwan) Ltd. A-G01 Marathon NextgenInnova Off G.K. Kadam Marg, Lower Parel(w), Mumbai-400015	बनाम/ Vs.	DDIT (IT)-2 (2)(1), Mumbai Pin-
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.		AABCE4797Q
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Ms. AavatiSathe
प्रत्यर्थीकीओरसे/Respondentby	:	Shri M. V. Rajguru

सुनवाईकीतारीख/ Date of Hearing	:	07/11/2017
घोषणाकीतारीख / Date of Pronouncement	:	05/01/2018

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assesseeis against the order of Ld. CIT (Appeal) – 56, Mumbai dated 30.11.16 fsor AY 2012-13 on the grounds mentioned herein below:-

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1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeal)-56 [CIT (A)-561 has erred in confirming the order of Deputy Commissioner of Income Tax (International Taxation)-2(2)(1) Mumbai [DCIT (IT)-2(2)(1)] in charging the amount of Service Tax Collected of Rs.6,15,55,967/- as part of gross receipts for determining the taxable income of the appellant.

2. The learned [CIT (A)-561 has erred in not considering the recent Judgement of Mumbai ITAT Tribunal in the case of Islamic Republic of Iran Shipping Lines vs Deputy Director of Income Tax circle 3(1) Mumbai dated 17 February, 2016 which is the latest judgment on the similar issue which is favoring to the appellant.

3. The learned [CIT (A)-561 ought to have appreciated that service tax is a statutory levy and the appellant only acts as an agent on behalf of the Government for collection and deposit of service tax into the treasury and therefore, the amount so collected should not form part of gross freight for computing the taxable income.

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4. The learned [CIT (A)-56] further erred in not appreciating that service tax is neither a collection 'on account of carriage of goods' nor in the nature of 'demurrage charges or handling charges or any other amount of similar nature' to fall within the purview of Section 44B of the Income Tax Act, 1961.

5. Without prejudice to above, the [CIT (A)-56] erred in not appreciating that since the Indian Agent of the appellant has been remunerated with a commission at arm's length, no further attribution can be made in the hands of the appellant since its tax liability gets extinguished.

6. Your applicant craves, leave to add/alter any ground, grounds of appeal at the time of hearing.

2. The brief facts of the case are that Evergreen Marine Corporation (Taiwan) Ltd. ('EMC or assessee') is engaged in shipping business and incorporated in Taiwan. EMC has appointed Evergreen shipping Agency (India) Pvt. Ltd (EGI) as agent in India to look after the international shipping business in

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India. The appellant has computed its income as per the provision of section 44B of the Act

The return of income for the year under consideration was filed, declaring total income at Rs. 12,89,09,348/-. The return was processed u/s 143(1) of the I.T. Act and subsequently selected for scrutiny under cash. The assessee has computed total income @ 7.5% of the total income attributable to the operation in India as per the provisions of section 44B r.w.s 172 of the I.T. Act 1961. After serving statutory notices and seeking reply of the assessee, assessment order u/s 143(3) r.w.s 144C(3) of the I.T. Act, 1961 was passed thereby including the amount of service tax collected of Rs. 6,15,55,967/- as part of gross receipts for determining the taxable income (deemed profits u/s 44B) of the appellant and accordingly enhanced the tax liability.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties dismissed the appeal of the assessee.

Now before us, the assessee has preferred the present appeal by raising the above grounds.

Ground No. (1 to 5)

3. Since all the above grounds raised by the assessee are inter-connected and inter-related and relates to challenging the order of Ld. CIT(A) in confirming the order of DCIT(IT)-2(2)(1) in including amount of service tax collected as part of the gross receipts for determining the taxable income of the assessee, therefore we thought it fit to dispose of the same through the present common order.

4. At the very outset, Ld. AR appearing on behalf of the assessee submitted before us that the only grievance of the assessee relates to including the amount of service tax collected as part of the gross receipts for determining the taxable income of the assessee. It was further submitted by Ld. AR that the present case is fully covered by the order of Hon'ble ITAT in ITA No. 89/Mum/15 for AY 2011-12 in assessee's own case as the identical grounds raised in the present appeal have already been decided on merits. The operative portion of the order of Hon'ble ITAT is reproduced below:-

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2. *The only grievance of assessee relates to including amount of service tax collected as part of the gross receipts for determining the taxable income of the assessee.*

3. *Rival contentions have been heard and record perused.*

4. *Facts in brief are that the assessee is engaged in the business of shipping, it was asked, vide order sheet noting dated 02.12.2013, to furnish the amount of service tax collected by it. The assessee was also asked to show cause, vide order sheet noting dated 20.01.2014' as to why the service tax so collected should not be considered as part of gross receipts for determining the taxable income as per provisions of section 44B. The assessee, in response to the show cause has furnished its submission on 29.01.2014. As per the submission the Service Tax Collected is Rs. 2,11,79,053/-. In respect of inclusion of Service Tax in gross receipts the relevant portion of assessee's submission is reproduce as under:*

"Thus the amount refer in Section 44B is the amount paid or payable to assessee and the amount received or deemed to be received in India by or behalf of the assessee on account of the carriage or passengers, livestock, mail or goods shipped at any port in India or

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outside India. Thus whenever a service tax is collected on behalf of government under the category Business Support Service or Business Auxiliary Service it is collected on behalf of government and not on account of the carriage of passengers, livestock, mail or goods shipped at any part in India or outside India. Hence, according to us service tax collected from customer on THC (BSS) and other charges (BUX) it is collected on behalf of government and not on account of the carriage of passenger, livestock, mail or goods shipped at any port in India or outside India. Thus, service tax collected cannot be part of income covered under Section 44B.”

5. However, AO did not agree with the assessee's contention and held that Section 44B of the Act is a special provision and any deduction u/s 28 to 43A would not be considered for the purpose 'of determination of income u/s 44B. Under the provision of section 44B what is to be considered is the amount received or payable to the assessee and not the net income. No exclusion from the aggregate of amounts provided under sub-section 2 of section 448 has been permitted while computing the profits and gains of the shipping business in case of non-residents as per section 44B.

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6. *By the impugned order, CIT(A) confirmed the action of the AO.*

7. *Learned AR appearing on behalf of the assessee relied on the decision of Bombay High Court in case of Knight Frank India Pvt. Ltd., 96 CCH 0153 in support of the proposition that as per the provisions of Section 145A(a)(ii) service tax billed on rendering of services has no relation to any goods nor has anything to bring to the goods to a particular location. Reliance was also placed on the decision of ITAT Mumbai Bench in case of Islamic Republic of Iran Shipping Lines 8845/M/2010 dated 20/04/2011 wherein it was held that service tax had no element of profit and the service provider is collecting the same from its customer on behalf of the Government and the same cannot be included in the total receipt for determining the presumptive income. Accordingly, AO was directed by the Tribunal not to include the amount of service tax in the total receipts for determining the income u/s.44B of the IT Act.*

8. *It was submitted by learned AR that in the case of Technip offshore 29 SOT 33, relied on by revenue, the decision of the Bombay High Court in the case of CIT v/s. Sudershan Chemical reported in 245 ITR Page 769 had not been considered, wherein it has been held that,*

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excise duty and sales tax could not be included in the total turnover for the purpose of deduction u/ s. 80HHC of the Act, as that would reduce the profits and gains from export business artificially as there was no element of profit involved in levy of sales tax and excise duty.

9. *Learned AR further submitted that the aforesaid view has been followed in the following decisions:-*

A. Islamic Republic of Iran Shipping Line vs. DCIT (IT)- 3(1), Mumbai in ITA no. 8845/Mum./ 2010 passed by "I" Bench, Mumbai Tribunal dated 20th April, 2011. B. DDIT Circle 3(2), New Delhi vs. Mitchell Drilling International in ITA no. 698/Del.1 2012 passed by Delhi Tribunal dated 31st August, 2012. C. Hanjin Shipping Ltd. vs. ADIT (IT)- Range-3, Mumbai in ITA no. 8672/Mum./ 2010 passed by "H" Bench, Mumbai Tribunal dated 31st October, 2012. D. Orient Overseas Container Line Ltd. vs. ADIT (IT)- Range- 4, Mumbai reported in 60 SOT page 196. E. Islamic Republic of Iran Shipping Line vs. DCIT (IT)- 3(1), Mumbai in ITA no. 4877/Mum./2014 passed by "I" Bench, Mumbai Tribunal dated 17th February, 2016. F. Director of Income-Tax vs. Mitchell Drilling International Pvt. Ltd. reported in 380 ITR page 130 (Delhi H.C.).

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10. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR during the course of hearing before us. The issue under consideration is squarely covered by the decision of Bombay Bench in case of Islamic Republic of Iran Shipping Line in ITA No.4877/Mum/2014 order dated 17/02/2016 wherein it was held that service tax having no profit element should not be included in turn over for the purpose of determining the income chargeable to be taxed u/s.44BB. Moreover, Hon'ble Uttarakhand High Court in case of Schlumberger Asia Services Ltd., held that service tax collected by the assessee on behalf of Government having no profit element cannot be included in the gross receipts for computing income u/s.44BB. Accordingly, we do not find any merit in the action of the lower authorities for including service tax in the gross turn over for the purpose of computing income u/s.44B of the IT Act.

5. We have heard the counsels for both the parties and also perused the orders passed by Ld. CIT(A) and Hon'ble ITAT as mentioned above in assessee's own case. We find that Hon'ble

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ITAT has already decided the identical grounds for AY 2011-12 in assessee's own case wherein it was held that the service tax cannot be included in the gross turnover for the purpose of computing income u/s 44B of the I.T. Act.

Therefore, respectfully following the decision of the coordinate bench of Hon'ble ITAT in ITA No. 89/Mum/15 for AY 2011-12 in assessee's own case and in order to maintain judicial consistency which is applicable mutatis mutandis in the case of the assessee, we do not find any merit in the action of the lower authorities for including service tax in the gross turn over for the purpose of computing income u/s.44B of the IT Act.

6. In the net result, the appeal filed by the assessee is **allowed.**

Order pronounced in the open court on 5th Jan, 2018.

Sd/-

(B. R. Baskaran)

लेखासदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05.01.2018

Sr.PS. Dhananjay

Sd/-

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai