

**IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM**

ITA No. 1025/Mum/2015
(निर्धारणवर्ष / Assessment Year:2011-12)

M/s Korea Marine Transport Co. Ltd. C/o Sea Horse Ship Agencies P. Ltd , Sea Horse House, 30/32, Marzben Street, Ballard Estate, Mumbai 400001	बनाम/ Vs.	Deputy Commissioner of Income Tax (Int. Tax)- 3(1)(2), Mumbai
स्थायीलेखासं ./जीआइआरसं ./PAN No.AACCK1101F		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

ITA No. 409/Mum/2016
(निर्धारणवर्ष / Assessment Year:2012-13)

Deputy Commissioner of Income Tax (Int. Tax)- 3(1)(2), Room No. 113, 1 st Floor, Scindia House, Ballard Estate, Mumbai-400038	बनाम/ Vs.	M/s Korean Marine Transport Co. Ltd. Sea Horse House, 30/32, Adi Marzben Street, Ballard Eatate, Mumbai 400001
स्थायीलेखासं ./जीआइआरसं ./PAN No.AACCK1101F		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

C.O. No.231/Mum/2017
(निर्धारणवर्ष / Assessment Year:2012-13)

Deputy Commissioner of Income Tax (Int. Tax)- 3(1)(2), Room No. 113, 1 st Floor, Scindia House, Ballard Estate, Mumbai-400038	बनाम/ Vs.	M/s Korean Marine Transport Co. Ltd. Sea Horse House, 30/32, Adi Marzben Street, Ballard Eatate, Mumbai 400001
स्थायीलेखासं ./जीआइआरसं ./PAN No.AACCK1101F		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे / Assessee by	:	None
प्रत्यर्थीकीओरसे / Revenue by	:	Shri Samuel Darse, D.R

सुनवाईकीतारीख / Date of Hearing	:	19.04.2018
घोषणाकीतारीख / Date of Pronouncement	:	11.07.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present set of appeals filed by the assessee and the revenue are directed against the respective orders passed by the A.O under Sec.143(3) r.w.s. 144C(13) of the Income tax Act, 1961 (for short 'Act') for A.Y. 2011-12 and A.Y 2012-13, respectively. Still further, the assessee has also filed a cross objection in A.Y 2012-13. As common issues are involved in the aforementioned appeals, therefore, the same are taken up and disposed of by way of consolidate order. We shall first take up the appeal of the assessee for A.Y 2011-12. The assessee has raised before us the following grounds of appeal:

- “1. *On the facts and circumstances of the case and in law, the learned Assessing Officer erred in including Services tax collected and remitted to the Government and which does not have any profit element, as part of freight receipts for the purpose of arriving at Gross Taxable Income under Section 44B of the Income Tax Act, 1961. The interpretation of the Assessing Officer is erroneous.*
2. *On the facts and circumstances of the case and in law, the Leaned Assessing Officer erred in relying only on the decisions of:*
 - a. *Authority for Advance Ruling in case of Siem Offshore Inc reported in 337 ITR 207*
 - b. *ITAT, Delhi Branch in the case of DDIT (Int. Tax) Dehradun Vs. Technip Offshore Contracting BV*
 - c. *ITAT, Mumbai Bench in case of China Shipping Container Lines (Hongkong) vs. ADIT (IT)-1(2)*
3. *On the facts and circumstances of the case and in law, the Assessing Officer failed to appreciate that the amounts received as Service Tax, being government dues, does not represent amounts payable or receivable on accounts of carriage of passengers, livestock, mail or*

goods shipped at any port in India as specified in Sec. 44B(2)(i) or 44B(2)(ii) of the Act.

4. *On the facts and circumstances of the case and in law the learned Assessing Officer failed to appreciate that the inclusion of service tax as income arising from carriage of good is not based on decisions of High Courts and contrary to the ratios held by High Courts and the order is in violation of judicial discipline.*
5. *On the facts and circumstances of the case and in law, the learned Assessing Officer passed the order without application of mind to the various judicial cases laws pointed out to him and without dealing with them.*

2. Briefly stated, the assessee company which is engaged in shipping business is incorporated under the laws of Korea. The assessee which is tax resident of Korea had filed its return of income for A.Y. 2011-12 on 30.03.2013, declaring total income of Rs.6,70,05,915/-. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee while computing its income from operation of ships under Sec. 44B of the Act, had excluded from its total receipts the amount of service tax of Rs.3,94,59,752/- collected from its clients. The A.O being of the view that the exclusion of the service tax collections by the assessee from its total receipts was not as per the mandate of Sec. 44B, thus recomputed the income of the assessee under the said statutory provision after including the service tax collections in its total receipts. On the basis of the aforesaid deliberations the A.O passed a draft assessment order under Sec. 144C(1) r.w.s. 143(3) on 24.03.2014.

4. Aggrieved, the assessee filed its objections with the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). It was submitted before the DRP that the A.O had wrongly taken the amount of service tax collected by the assessee as a statutory levy and deposited with the government treasury, as a part of the total receipts for the purpose of computing its taxable income in terms of

the provisions of Sec.44B r.w.s 172 of the Act. However, the DRP by relying on certain judicial pronouncements declined to accept the said claim of the assessee.

5. The A.O on receipt of the order passed by the DRP under Sec.144C(5) of the Act, included the service tax collections of Rs. 3,94,59,752/- in the total receipts of the assessee and recomputed its income from shipping business under Sec. 44B r.w.s. 172 of the Act. On the basis of the aforesaid deliberations the A.O passed his order under Sec.143(3) r.w.s. 144C(13) of the Act.

6. The assessee being aggrieved with the order passed by the A.O under Sec.143(3) r.w.s 144C(13) has carried the matter in appeal before us. We find that the assessee appellant despite having been intimated as regards the date of hearing of the appeal, has however neither put up an appearance nor filed any application seeking adjournment of the case. We thus, in light of the aforesaid facts are thus constrained to proceed with as per Rule 24 of the Appellate Tribunal Rules, 1963 and dispose the appeal after hearing the respondent revenue. The Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

7. We find that our indulgence in the present appeal has been sought by the assessee for adjudicating, as to whether the DRP is right in law in directing the A.O that service tax collections of the assessee were to be included in its total receipts for computing its income under Sec. 44B. We find that Sec. 44B which contemplates the special provisions for computing profit and gains of shipping business, provides that 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 percent of the aggregate of the amounts viz. (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, 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".

8. We have deliberated at length on the issue under consideration and are of the considered view, that as the service tax which is a statutory levy collected by the assessee in his capacity as a service provider from its customers on behalf of the government does not involve any element of profit thus, the same cannot be included in the total receipts of the assessee for determining its income under Sec.44B. We have perused the order passed by the A.O under Sec. 143(3) r.w.s 144(C)(13) and are unable to persuade ourselves to subscribe to the view taken to the contrary by him. We find that the issue involved in the present appeal is covered in favour of the assessee by the judgment of the Hon'ble High Court of Uttarakhand in the case of CIT (International taxation) Vs. Schlumberger Asia Services Ltd. (2009) 317 ITR 156 (Uttarakhand).The High Court in its aforesaid judgment had distinguished the earlier decisions of the Court in the case of Sedco Forex International Inc. Vs. CIT (2008) 299 ITR 238 (Uttaranchal) and CIT Vs. Trans. Ocean Offshore Inc. (2008) 299 ITR 248 (Uttaranchal). In the backdrop of the facts involved in the case before the High Court, it was held that reimbursement of custom duty paid by the assessee company, being in the nature of a statutory levy, would not form part of the freight receipts for the purpose of computing its deemed profit under Sec.44BB. We further find that a similar view had also been arrived at by the Hon'ble High Court of Delhi in the case of DIT Vs. Mitchell Drilling International Pty. Ltd (2016) 380 ITR 130 (Del). The High Court in the aforementioned case finding itself to be in agreement with the view taken by the High Court of Uttarakhand in the case of *Schlumberger Asia Services Ltd(supra)*, observed that for the

purposes of computing the presumptive income of the assessee for the purposes of Section 44BB of the Act, the service tax collected by the assessee on the amount paid to it for rendering services was not to be included in the gross receipts in terms of Section 44BB(2) r.w Section 44BB(1). The High Court while concluding as hereinabove, observed that as service tax was collected by the assessee for passing it on to the government, and was not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it, thus, the same could not be included in the gross receipts of the assessee for computing its income under Sec. 44BB. Still further, we find that a coordinate bench of the Tribunal in the case of Islamic Republic of Iran Shipping lines Vs. DCIT (International Taxation) (2011) 46 SOT 101 (URO) had also concluded that as service tax which was collected by the assessee from its customers on behalf of the government, did not involve any element of profit, therefore, the same was not liable to be included in the total receipts for determining the presumptive income of the assessee under Sec.44B of the Act. We further find that another coordinate bench of the Tribunal viz. ITAT Mumbai Bench "D" in the case of Orient Overseas Container Line Ltd. Vs. Addl. Director of Income Tax (International Taxation), Range-4, Mumbai(2013) 35 taxman.com 342 (Mum), after deliberating at length on the issue under consideration, had observed that service tax was not to be included in total receipts for computing the presumptive income under Sec.44BB of the Act.

9. We have given a thoughtful consideration to the issue under consideration in the backdrop of the settled position of law. We are of the considered view that as the issue involved in the present appeal is squarely covered by the aforesaid judgments of the Hon'ble High Courts and the orders of the coordinate benches of the Tribunal, therefore, respectfully follow the same. We thus, in terms of our aforesaid observations, being of the considered view that the A.O had erred in including the service tax collections of Rs.3,94,59,752/- in the total receipts of the assessee for

computing its income under Sec.44B of the Act, direct him to recompute the income under the said statutory provision after excluding the said amount. The **Grounds of appeal Nos. 1 to 4** are allowed in terms of our aforesaid observations. The **Ground of appeal No. 5** being general in nature is dismissed as not pressed.

10. The appeal of the assessee is allowed.

ITA No. 409/Mum/2016
A.Y. 2012-13

11. We shall now take up the appeal of the revenue for A.Y 2012-13. The revenue assailing the order passed by the A.O under Sec. 144C(1) r.w.s 143(3), has raised before us the following grounds of appeal:

- “1. *Whether on the facts and in the circumstances of the cases and in law the Ld. DRP is justified in holding that service tax being in the nature of statutory payments and being collected on behalf of government cannot be included in gross receipts for the purpose of computing presumptive income of assessee u/s 44B of the Act.*
2. *The Appellant prays that the order of the Ld. DRP on the above ground be set aside and that of the Assessing Officer be restored.*
3. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

12. We may herein observe that the appeal filed by the revenue involves a delay of five days. The ld. D.R submitted that the inadvertent delay of five days involved in filing of the appeal may be condoned. We have considered the contention advanced by the ld. D.R and further observing that the issue involved in the present appeal is squarely covered by the order passed in the assessee's own appeal for the immediately preceding year viz. A.Y 2011-12 in ITA No. 1025/Mum/2015, thus condone the delay under Sec. 253(5) of the Act.

13. Briefly stated, the assessee had e-filed its return of income for A.Y 2012-13 on 26.09.2012, declaring total income of Rs.6,29,70,911/-. The case of the assessee was selected for scrutiny assessment under Sec.143(2). The A.O while framing the assessment observed that the assessee while computing its income under Sec. 44B had excluded the service tax collections of Rs.3,65,13,041/- from its total receipts. The A.O not being persuaded to subscribe to the aforesaid claim of the assessee, included the aforesaid amount of service tax collections in the total receipts of the assessee and recomputed the income of the assessee, vide his draft assessment order passed under Sec. 143(3) r.w.s 144C(1).

14. Aggrieved, the assessee filed objections before the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). The DRP after deliberating on the contentions advanced by the assessee accepted the same and directed the A.O to exclude the amount of service tax collections from the total receipts of the assessee for computing its income under Sec.44B of the Act. The A.O pursuant to the aforesaid directions of the DRP passed an order under Sec. 144C(1) r.w.s. 143(3), and accepting the total receipts (excluding service tax) of Rs.83,96,12,141/- as claimed by the assessee, recomputed its income under Sec.44B.

15. The revenue being aggrieved with the order passed by the A.O under Sec. 144C(1) r.w.s. 143(3) in compliance to the directions of the DRP, has carried the matter in appeal before us. We find that the issue involved in the present appeal as to whether the amount of service tax collected by the assessee would form part of its total receipts for computing its income under Sec. 44B, had already been adjudicated by us while disposing of the appeal of the assessee for A.Y 2011-12 in ITA No. 1025/Mum/2015 hereinabove. We have in our aforesaid order concluded, that for the purpose of computing the income of the assessee under Sec.44B, the amount of service tax collected by the assessee was not to be included in its total receipts. We are

of the considered view that as the issue involved in the present appeal remains the same, as was there before us in the aforesaid appeal of the assessee for A.Y 2011-12 in ITA No. 1025/Mum/2015, therefore, our order passed in the said appeal shall apply *mutatis mutandis* for disposing off the present appeal of the revenue.

16. The appeal of the revenue is dismissed in terms of our aforesaid observations.

C.O. No. 231/Mum/2017
A.Y 2012-13

17. That as we have dismissed the appeal of the revenue for A.Y 2012-13, therefore, the cross objection filed by the assessee are rendered as infructuous. The cross objections filed by the assessee are thus dismissed, as having been rendered as infructuous.

18. The appeal of the assessee in A.Y 2011-12 i.e ITA No. 1025/Mum/2015 is allowed and the appeal of the revenue for A.Y 2012-13 i.e ITA No. 409/Mum/2016 is dismissed. The Cross Objection No. 231/Mum/2017 (arising out of ITA No 409/Mum/2016) filed by the assessee for A.Y 2012-13 is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 11.07.2018

Sd/-

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

(RAVISH SOOD)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 11.07.2018

Ps. Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)

**आयकरअपीलीयअधिकरण, मुंबई / ITAT,
Mumbai**