

IN THE INCOME TAX APPELLATE TRIBUNAL " L " BENCH, MUMBAI
BEFORE S/SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER , AND RAVISH SOOD JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.4990/Mum/2015
(निर्धारण वर्ष / Assessment Year : 2010-2011)

Dy. CIT (IT)-3(2)(2) Scindia House, Ballard Pier, N.M. Road Mumbai-400 038	बनाम/ Vs.	M/s. Marubeni Corporation C/o/, M/s. Marubeni India Pvt.Ltd. 25, Mittal Chambers, 2 nd Floor, Nariman Point, Mumbai-400 021.
स्थायी लेखा सं./PAN :AAACM 7682 D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri M.V. Rajguru-Sr.DR
प्रत्यर्थी की ओर से/ Respondent by :	Shri V.K. Duggal

सुनवाई की तारीख /Date of Hearing : 17/04/2018
घोषणा की तारीख /Date of Pronouncement : 02.05.2018

आदेश / O R D E R

PER SHAMIM YAHYA, ACCOUNTANT MEMBER:

This appeal by the revenue is directed against the order of Id. Commissioner of Income tax(Appeals) dated 27/07/2015. It pertains to assessment year 2010-11. The Grounds of appeal read as under :-

- "1. On the facts and in the circumstances of the case and in Law, whether the Ld. CIT(A) is justified in excluding the amount of Service Tax for computing the income chargeable to tax when Article 12(2) of Indo-Japan DTAA prescribed that the tax rate has to be applied on " the gross amount".*
- 2. On the facts and in the circumstances of the case and in law, the Id. CIT (Appeals) is justified in excluding the amount of Service Tax for computing the income chargeable to the tax has to be despite the decision of the Hon'ble ITAT in the case of Technip Offshore contracting by in ITA 4613/D/07 where it was held that service tax forms part of gross receipt and tax has to be deducted accordingly.*
- 3. On the facts and in the circumstances of the case and in law, the Id, CIT (Appeals) is correct in directing the AO not charge interest u/s 234B of the Act on the ground that the entire income is subject matter of TDS without looking to the facts of the case and without appreciating that TDs provisions do not determine either taxability of income (or) liability to pay advance tax.*
- 4. The Appellant prays that the order of the Ld CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
- 5. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

2. Brief facts of the case are as under :-

Marubeni Corporation is company incorporated in Japan and is a tax resident of Japan. During the previous year relevant to AY 2010-11, the Assessee Company executed the contracts awarded to it by the following parties;

- a) NTPC
- b) BPLAP Power Project (AP) Ltd (normally referred to as Ramagundam Project)
- c) Government of Maharashtra, Irrigation Department (normally referred to as Ghatghar Project) for XLP cable & CIS
- d) West Bengal State Electricity Board for its Purulia Lot 6.2 & Lot 6.3 for erection & supply.
- e) JSW Steel Ltd.

2.1. The AO noted that, with respect to the above contracts, the assessee was offering tax in India on net basis and for this purpose audited accounts and other relevant details were filed with the return of income. The details of major expenses were requisitioned by the Assessing Officer, during the course of hearing. With respect to Civil Construction and Erection contract with BPL Power Projects (AP) Ltd, the assessee has opted to be taxed u/s 44BBB of the Income Tax Act 1961. In addition to the income from the above mentioned contracts, the assessee is also earning income in India through supervisory fees / fees for technical services on consultancy provided to the following parties :

- a) Marubeni India Pvt.Ltd. ; b) PPN Power Generating Co.; (c) JSW Steel Ltd. (d) Ravva Oil Singapore Pte.Ltd. e) Maruti Suzuki Ltd.

The assessee has offered to tax under the head Profit and Gains from Business or Profession, the net income after adjusting loss from Project Offices against income from other sources and income from fees for technical services / supervisory services as per the provisions of Section 72 of the I.T. Act 1961. The tax rate for fees for technical services is being adopted at 10% on gross basis as per amended DTAA.

3. The Assessing Officer further noted that it was seen from the details furnished that service tax has been reduced from the gross amount. However, he observed that the issue has been examined in detail in assessment years 2008-09 and 2009-10, where it was held that no deduction is permissible from such receipts. Accordingly, the Assessing Officer added the amount of service tax as additional income for the current year.

3.1. Upon the assessee's appeal the Id. Commissioner of Income tax(Appeals) decided the issue in favour of the assessee concluding as under :-

“From the above and from the various other submissions filed by the appellant including the reference to CDBT Circular No. 1/2014 dated 13.01.2014 clarifying TDS was not to be deducted on the service tax component, I find merit in the arguments advanced by the appellant. In any case has already mentioned above in the appellant submissions in assessee's own case in ITA No. 1086 & 1087/Mum/2012 the Hon'ble ITAT have decided this issue in favour of the appellant. Respectfully following the said decision this ground of appeal is accordingly allowed for this year also. In the result, the appeal of the revenue is dismissed.”

4. Against the above order, the revenue is in appeal before us. We have heard the rival submissions and have gone through the available material and perused the records. The Id. Counsel for the assessee submitted that this Tribunal in assessee's own case for AY 2008-09 and 2009-10 held that service tax receipt is never income of the assessee. In this regard the Id Departmental Representative fairly accepted that the issue has been decided by the ITAT in assessee's own case. Accordingly, respectfully following the precedent in assessee's own case, we do not find any infirmity in the order of the CIT(A) hence, we affirm the same.

5. As regards Ground No.3 relating to interest u/s. 234B, it has been submitted that the same is covered in favour of the assessee by several decisions including that of the Hon'ble Jurisdictional High Court in the case of Director of Income tax (Intl Taxation) vs. NGC Network Asia LLC (2009) 222 CTR 86 (Bom); (2009) (313 ITR 187). We find that in this case it was held that when duty is cast on the payer to pay tax at source, on failure, no interest can be imposed on the payee assessee. Accordingly, considering the above decisions, we do not find any infirmity in the order of the Id. Commissioner of Income tax(Appeals) in this regard.

In the result, appeal of the Revenue stands dismissed.
परिणामतः राजस्व द्वारा दाखिल की गई अपील नामंजूर की जाती है।

Order pronounced in the open court on 2nd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक: 2 मई, 2018 को की गई।

Sd/-

Sd/-

(RAVISH SOOD)

(SHAMIM YAHYA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 02/05/2018

JV, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant

2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai