IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 4656/MUM/2015
Assessment Year: 2008-09

Allseas Marine Contractors SA C/o Nangia& Company Unit No. 1101, 11th floor, B Wing, Peninsula Business Park, GanpatraoKadam Marg, Lower Parel, Mumbai-400013. **PAN No. AAGCA0967P**	Vs.	Dy. Director of Income Tax-(International) Taxation)-1(1) Mumbai.
Appellant		**Respondent**

Assessee by : Mr. Porus Kaka, Senior Advocate
Revenue by : Mr. M.V. Raj Guru, DR

Date of Hearing : 11/06/2018
Date of pronouncement : 07/09/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-55 [in short 'CIT(A)'], Mumbai and arises out of the assessment completed u/s 143(3) r.w.s. 144C(3) of the Income Tax Act 1961, (the 'Act').

2. To begin with, we discuss together the 1st and 3rd ground of appeal and the application for additional ground filed by the appellant as these are interrelated.

"1st ground of appeal

That the Assessing Officer ('AO')/ Commissioner of Income Tax (Appeals)-55, Mumbai ('CIT(A)') has erred in holding that the amount aggregating to Rs.5,003,522,588/- being the proportionate amount received by the appellant for mobilization / de-mobilization of the vessels and equipment's outside Indian territorial waters is to be included in the gross receipts for the purpose of determination of income u/s44BB of the Income Tax Act, 1961 as opposed to the claim of the appellant that the same does not constitute income chargeable to tax in India as per section 5 read with section 9 of the Act."

"3rd ground of appeal

That the A.O / CIT(A) has erred in holding that the full receipts of Rs.218,599,550/- against supply of material from outside India was chargeable to tax in India u/s 44BB as opposed to the appellant's claim that the transaction was in the nature of "offshore supply" of goods chargeable to tax in India only to the extent of profits that are attributable to activities carried out by the Permanent Establishment in India and not under section 44BB of the Act as held by The AO.

The Ld. CIT(A) further erred in not accepting the additional evidence in the form of profit-attribution report, essential to ascertain the profit attributable to the activities undertaken by the Permanent Establishment in India from supply of material, on the following grounds:

- The principles res judicata or estoppel is not applicable to tax matters, and thus the profit-attribution report not accepted by Dispute Resolution Panel ('DRP') in succeeding years cannot be basis for not accepting the attribution report in the year under consideration;

The Ld. CIT(A) failed to appreciate that the profit-attribution report could not be filed before the AO did not question the determination of the profit rate and proceeded to complete the assessment holding the revenues from supply to be includible in the revenues chargeable to tax u/s 44BB of the Act."

3. The appellant has further filed an application for admission of additional grounds which reads as under:

"1A. That the Assessing officer ('AO')/ Commissioner of Income Tax (Appeals) - 55, Mumbai (CIT(A) has erred in holding that the amount aggregating to Rs.5,003,522,588/- being the proportionate amount received by the appellant for mobilization/ demobilization of the vessels and the equipment's outside Indian territorial waters is to be included in the gross receipts for the purpose of determination of income without appreciating the fact that the appellant was a tax resident of Switzerland and therefore such revenues were not taxable as per Article 7 read with Article 5 of the India - Switzerland DTAA.

2A. That the A.O. / CIT (A) has erred in holding that the full receipts of Rs.218,599,550/-against supply of material from outside India was chargeable to tax in India without appreciating the fact that the appellant was a tax resident of Switzerland and therefore such revenues were not taxable as per Article 7 read with Article 5 of the India -Switzerland DTAA.

The aforesaid ground has inadvertently not been raised at the time of filing the appeal. The appellant has now been recently advised to take this ground. The aforesaid grounds raise purely legal issues and do not require any further examination of facts. Further, the omission to raise the aforesaid grounds in the appeal was neither willful nor unreasonable. In view of the decision of the Supreme Court in the case of National Thermal Power

Corporation Ltd. 229 ITR 383, it is respectfully prayed that the aforesaid grounds of appeal may kindly be admitted and adjudicated upon on merits."

4. In the case of *NTPC Ltd.* (supra), the assessee-company had deposited its funds which were not immediately required, on short term deposits with banks. Interest received on such deposits was offered by the assessee for tax assessment and the assessment was completed on that basis. Before the CIT(A), a number of grounds were taken by the assessee challenging the assessment. However, the inclusion of interest amount was neither challenged by the assessee nor not considered by the CIT(A). The inclusion of the aforesaid amount was not challenged in the grounds of appeal as originally filed before the Tribunal. However, the assessee challenged the same in a forwarding letter. The Tribunal declined to entertain the additional grounds. On a reference, the Hon'ble Supreme Court held that "where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee."

In *Ahmadabad Electricity Co. Ltd. v. CIT* (1993) 66 Taxman 27 (Bom), the assessee-company, governed by the Electricity Supply Act, was required to transfer certain amounts to contingency reserve and dividend and tariff reserve during the AYs 1962-1963 to 1971-1972. It did not claim these amounts as deduction either before the ITO or before the AAC. Subsequently, the High Court in the case of *Amalgamated Electricity Co. Ltd. v. CIT* (1974) 97 ITR 334 (Bom) held

that such amounts represented allowable deduction on revenue account. The assessee, in view of the above case, raised a new claim before the Tribunal and it sought to raise additional grounds in that connection. The Tribunal, however, refused to grant leave to the assessee to raise such an additional ground. On appeal, the Hon'ble Bombay High Court held that :

> "Undoubtedly, the Tribunal has discretion to decide whether any additional points can be allowed to be raised before it at the stage of appeal before it. And it may not permit such a new point to be raised for good reasons. But the jurisdiction of the Tribunal is not confirmed only to points which were considered by the AAC and which may be challenged in appeal before the Tribunal. The Tribunal can permit other grounds also to be raised before it, provided of course, that they arise out of the proceedings. Thus, there is nothing in section 254(1) which limits the jurisdiction of the Appellate Tribunal in any manner. The phrase 'pass such order thereon' does not in any way restrict the jurisdiction of the Tribunal but, on the contrary, confers the widest possible jurisdiction on the Tribunal including jurisdiction to permit any additional ground of appeal if, in its discretion, and for good reason, it thinks it necessary or permissible to do so.
>
> Therefore, it was quite clear that the Tribunal had jurisdiction to permit additional grounds to be raised before it even though these might not have arisen from the order of the AAC, so long as these grounds were in respect of subject-matter of the entire tax proceedings."

5. It is the contention of the appellant that being a non-resident incorporated in Switzerland, it is entitled to be governed by the treaty as held by the Hon'ble Supreme Court in *CIT v. Hyundai Heavy Industries Co. Ltd.* (2007) 161 Taxman 191 (SC). It is further stated that income not

attributable to Indian operations is not taxable under Article 7 of India-Switzerland Double Taxation Avoidance Agreement (DTAA).

We find that the appellant had filed before the Ld. CIT(A) an additional ground on the issue of taxability under the Indo-Swiss Confederation DTAA. The same is placed at page 153-155 of the Paper Book (*P/B*) filed by the appellant before us. We refer here to the submission filed by the appellant and received by the office of Ld. CIT(A) on 07.02.2013 (*p.148 of the P/B*). Having gone through the facts, we find that the above question of law arises from facts available on record before the AO as well as the Ld. CIT(A). Thus in view of the decision in *NTPC Ltd*. (supra) and *Ahmadabad Electricity Co. Ltd.* (supra), we admit the application for admitting the additional grounds filed by the appellant.

6. Now we turn to the facts of the case. During the financial year 2007-08, the appellant executed a contract with Reliance Industries Ltd. (RIL). As per the said contract, the appellant is required to develop RIL's offshore gas field known as Block KG-DWN-98/3 in the Krishna Godavari Basin, Bay of Bengal off the East Coast of India on a turnkey basis. The appellant was required to provide details engineering, design and analysis, procurement of bulk items, and material and equipment excluding FIM, manufacture, fabrication and testing, project planning, interface management, transportation, pre-engineering and pre construction surveys, installation of offshore and onshore facilities, post installation and as build survey, pre commissioning of the subsea production system and commissioning assistance etc.

During the course of assessment proceedings, the Assessing Officer (AO) observed that the appellant received the following amounts but did not offer to tax u/s 44BB.

Details	**Amount**
On account of reimbursement of Service tax	Rs.44,77,81,447
On account of Mobilisation	Rs.5,00,35,22,588
On account of sale of material	Rs.21,85,99,550
Total	**Rs.5,66,99,03,585**

6.1 In response to a query raised by the AO to explain why the above amount should not be brought to tax u/s 44BB of the Act, it was submitted by the appellant *vide* letter dated 23.12.2011 that the mobilisation fees amounting to Rs.5,00,35,22,588/- received outside the territorial waters of India are not liable to tax in India, since there is no nexus between the taxable event in India i.e. mobilisation activities in India and the receipts in respect of mobilisation activity carried out outside India. Accordingly, mobilisation revenues taxable in India should be restricted to the extent of operations carried out in India i.e. distance travelled in the Indian territorial waters as compared to the total distance travelled outside India. In this regard, the appellant placed reliance on the decision of the Tribunal in the case of *Halliburton Offshore Services Inc*., *Saipem S.P.A. v. DCIT* (83 ITD 213), *DCIT v. Sonata Offshore Drilling Inc.* (ITA No. 741/B/94), *R and B Falcon Drilling Co. v. ACIT* (14 SOT 281), *ACIT v. Jindal Drilling Leasing*.

It was further stated before the AO, that as the equipment and services are being provided/rendered solely and exclusively in connection with the exploration of mineral oils in India, it is safe to conclude that the services are covered by the provisions of section 44BB. In this regard, the appellant placed reliance on the decision in *Geofizyka Torun Sp zo.o* in AAR Petition no. 813 of 2009, *CIT v. Dresser Minerals International Inc* (1994) 50 TTJ (Del) 273, *Director of Income Tax v. Jindal Drilling & Industries Limited* (2009) 17 DTR (Del) 402, *Paradigm Geophysical Pty Limited* (ITA No. 4764/Del/2005), *DCIT v. Schlumberger Seaco Inc* (1995) 51 TTJ (Cal) 72.

Reliance was also placed on the CBDT Circular F No. 500/6, dated 22.10.1990.

Further it was stated before the AO that the services being provided by the assessee do not qualify for taxation in terms of section 115A r.w.s. 9(1)(vii) of the Act.

Stating that the income of a business activity as a whole should be apportioned on a reasonable basis in the event of business being carried on both within and outside India, the appellant placed reliance on the decision in *Corborandum Company v. CIT* [1977] [108 ITR 355 (SC)], *CIT v. Toshoku Limited* [1980] [125 ITR 525 (SC)], *Best and Company v. CIT* (60ITR11), *Anglo-French Textile Company Limited v. CIT* [231ITR101].

Stating the above, the appellant submitted before the AO that the AO had issued a withholding tax order u/s 195(2), wherein he directed RIL "to withhold tax @ 2% on the value of Offshore supplies". It was

submitted by the appellant before the AO that without prejudice to the claim that the revenue is not chargeable to tax in India, in order to buy peace of mind, it offered to tax revenue @ 2%.

6.2 However, the AO was not convinced with the above explanation of the appellant and relying on the decision of the AAR in the case of *Siem Offshore Inc.* (No. 875 of 2010) and the order of the ITAT, Delhi in the case of *Technip Offshore Contracting BV* (Appeal No. 4613 of 2007), brought to tax receipts on account of mobilisation charges, (Rs.5,00,35,22,588/-) and receipts on account of supply of imported materials (Rs.21,85,99,550/-).

7. Aggrieved by the order of the AO, the appellant filed an appeal before the Ld. CIT(A). Besides the submission filed before the AO as delineated at para 6.1 hereinbefore, the appellant also submitted an additional ground regarding taxability under the Indo-Swiss Confederation DTAA.

However, the Ld. CIT(A) was not convinced with the said submission of the appellant and rejected the appellant's request for admission of additional evidence. Relying on the two decisions cited by the AO, the Ld. CIT(A) confirmed the additions and dismissed the appeal in respect of the above grounds of appeal.

8. Before us, the Ld. counsel of the appellant submits that the judgement of the Hon'ble Supreme Court in *Hyundai Heavy Industries* (supra) is squarely applicable the facts of the present case. It is stated by him that appellant being a non-resident incorporated in Switzerland is

entitled to be governed by the treaty as held by the Hon'ble Supreme Court in the above case. Only income attributable to Indian operations ought to be taxed u/s 44BB of the Act. It is further stated that the appellant has already offered its income from Indian operations for taxation in India and no further income is attributable to operations in India. It is thus stated that income not attributable to Indian operations is not taxable under Article 7 of the India-Switzerland DTAA. The Ld. counsel further submits that the PE as per the decision of the Hon'ble Supreme Court comes into existence only after conclusion of the contract and this is the first year of the transaction. Thus it is stated that the decision in *Hyundai Heavy Industries* (supra) is squarely applicable to the facts of the case.

The Ld. counsel further relies on the decision in *CIT v. Enron Oil and Gas Expat Services Inc.* (2013) 29 taxmann.com 419 (Uttarakhand) & the order of the Hon'ble Supreme Court dismissing the SLP filed by the revenue against the above order; *CIT v. Enron Expat Services Inc.* (2010) 195 Taxman 342 (Uttarakhand); *Samsung Heavy Industries Co. Ltd. v. DIT* (2014) 42 taxmann.com 140 (Uttarakhand).

9. On the other hand, the Ld. DR submits that the judgment of the Hon'ble Supreme Court in the case of *Sedco Forex International Inc. v. CIT* (2017) 87 taxmann.com 29 (SC) is squarely applicable to the facts of the case and the mobilisation revenue would be taxable in India u/s 44BB of the Act.

10. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *Hyundai Heavy Industries Co. Ltd.* (supra), relied on by the Ld. counsel, the assessee, a non-resident company, incorporated in Korea, had entered into an agreement with ONGC for designing, fabrication, hook-up and commissioning of some platform in Bombay. The said contract was in two parts. One was for fabrication of platform in Korea and the other was installation and commissioning of said platform in Bombay High. The assessee filed its return declaring *nil* income and during the assessment proceedings submitted, *inter alia,* that it did not have a Permanent Establishment (PE) in India and, therefore, it was not assessable to tax in India; that its Indian operations consisting of installation and commissioning of the platform were completed within the duration of less than nine months; that it was entitled to exemption under article 7 of the Convention for Avoidance of Double Taxation (CADT); that in the alternative, it was liable to be assessed on the basis of the accounts annexed to the returns, which were based on the completed contract method in its worldwide accounts; that the contract in question was divisible into two types of operations, one being fabrication in Korea and the other consisting of installation in India and, therefore, any income arising from the activity of fabrication in Korea was not assessable to tax in India and to that extent, the revenues receivable under the said contract in respect of said fabrication activity should be excluded from the profit and loss account

together with the expenditure relating to that fabrication activity. The Hon'ble Supreme Court held, at para 15, as follows :

> "(a) In the facts and circumstances of the case, profits, if any, from the Korean Operations (designing and fabrication) arose outside India, hence not taxable.
>
> (b) As regards the quantum of profits embedded in the India Operations attributable to the Indian PE of the assessee, we hold that the CIT(A) was right, in the facts and circumstances of this case, in attributing the profits to the Indian PE at 10 per cent of the gross receipts in respect of its activity of installation, commissioning etc. performed in India. The same shall be taxable accordingly."

10.1 In the case of *Sedco Forex International Inc.* (supra), relied on by the Ld. DR, the assessee, a foreign company, had entered into contract ONGC for hire of their rig for carrying out oil exploration in India. For this purpose, they were paid mobilisation fee as well for and on account of mobilisation/movement of rig from foreign soil/country to the offshore site at Mumbai. The assessee offered its income to tax u/s 44BB but did not include the amount received as mobilisation charges to the gross revenue for the purpose of computation u/s 44BB. The AO included the amounts received for mobilisation/demobilisation to gross revenue to arrive at the 'profits and gains' for the purpose of computing tax u/s 44BB. The CIT(A) confirmed the action of the AO. The Tribunal dismissed the appeal of the assessee. The Hon'ble High Court held that the mobilisation charges reimbursed *inter alia* even for the services rendered outside India were taxable u/s 44BB as the same was not governed by the charging provisions of section 5 and 9. On appeal, the

Hon'ble Supreme Court held that "where assessee, foreign company, had entered into contracts with ONGC for giving hire of their rig for carrying out oil exploration activities in India, mobilisation fee received by the assessee was to be included for computation of deemed profits and gains of business, chargeable to tax u/s 44BB.

10.2 We are of the considered view that the issue in the instant case is to be examined by the AO on the touchstone of the above judgment of the Hon'ble Supreme Court in the case of *Hyundai Heavy Industries Co. Ltd.* (supra) and *Sedco Forex International Inc*. (supra) narrated hereinbefore. Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order, after giving reasonable opportunity to the appellant. We direct the appellant to file the relevant documents/evidence before the AO.

Thus the 1st & 3rd ground of appeal are allowed for statistical purposes.

11. **2nd ground of appeal**

> That the AO/CIT(A) has erred in holding that the service of Rs.447,781,447/- collected by the appellant from customers on behalf of the Government of India, is to be included in the gross receipts for the purpose of determination of income u/s 44BB of the Act.

11.1 We find that the above issue has been decided in favour of the appellant by the decision in *DIT v. Mitchell Drilling International (P) Ltd.* (2015) 62 taxmann.com 24 (Delhi), *Swiwar Offshore Pte Ltd. v. Addl. DIT* (2018) 89 taxmann.com 346 (Mumbai-Trib), *Islamic Republic of Iran*

Shipping Lines v. DCIT (2011) 11 taxmann.com 349 (Mumbai), *Sundowner Offshore International (Bermuda) Ltd. v. ADIT* (2015) 61 taxmann.com 170 (Delhi-Trib).

In the case of *Mitchell Drilling International (P) Ltd.* (supra), it is held that service tax collected by assessee and passed on to Government does not have any element of income and therefore cannot form part of gross receipts for purposes of computing 'presumptive income' u/s 44BB.

In *Swiwar Offshore Pte Ltd.* (supra), it is held that section 44BB is a special section and, thus, its provisions will prevail over provisions of section 44B and service tax could not be included in gross receipts for purpose of computing presumptive income of assessee u/s 44BB.

In *Islamic Republic of Iran Shipping Lines* (supra), it is held that service tax, being a statutory liability, would not involve any element of profit and a service provider collects same from its customers on behalf of Government and, therefore, same cannot be included in total receipt for determining presumptive income u/s 44B.

In *Sundowner Offshore International (Bermuda) Ltd.* (supra), it is held that service tax was to be excluded from gross receipts while determining income u/s 44BB.

Facts being identical, we set aside the order of the Ld. CIT(A) and direct the AO to delete the addition of Rs.44,77,81,447/- made on

account of reimbursement of service tax. Thus we allow the 2nd ground of appeal.

12. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 07/09/2018.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 07/09/2018
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai