IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 965/MUM/2016
Assessment Year: 2012-13

The DCIT (IT)-2(2)(2), 17th Floor, Room No. 1729, Air India Building, Nariman Point, Mumbai - 400021	**Vs.**	Hanjin Shipping Company Ltd., C/o Hanjin Shipping India Pvt. Ltd., 402 Vedanta, 779 Makwana Road, Marol, Andheri (East), Mumbai - 400059 PAN: AAACH3759G
(Appellant)		**(Respondent)**

Revenue by : Shri Samuel Darse (CIT DR)
Assesseeby : None

Date of Hearing: 04/07/2018
Date of Pronouncement: 01/10/2018

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue, against the Dispute Resolution Panel directions dated 24.11.2015, issued u/s 144C(5) pertaining to the assessment year 2012-13, whereby the Ld. Dispute Resolution Panel has directed the AO not to include the service Tax collected by the assessee in the gross receipts for the purpose of computing presumptive income u/s 44B of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee a foreign company incorporated under the law of Korea has filed its return of income for the assessment year under consideration declaring the total income of Rs. 44,02,04,907/-. Since, the return was selected for scrutiny, the AO issued

notice u/s 143 (2) and 142 (1) of the Act. In response thereof, Sr. Manager (Finance) attended the proceedings filed the details called for including tax residential certificates and other details related to earnings of income and operation of ships. The AO vide draft order proposed the inclusion of service tax in the amount specified in section 44B of the Act and also levied interest u/s 234B and initiated penalty proceedings 271 (1) (c) of the Act.

3. Aggrieved by the directions u/s 144C(5)), the revenue has preferred this appeal before the Tribunal on the following effective grounds:-

> *"Whether on the facts and in the circumstances of the case and in law, the Ld. DRP was justified in directing that the "Service tax" collected by the assessee (Hanjin Shipping Co. Ltd.) on behalf of the Government was not to be included in the gross receipts for the purpose of computing presumptive income u/s 44B of the Income tax Act, 1961 (hereinafter 'Act') without appreciating the fact that the "Service tax" collected by the assessee directly in connection with service and facilities as spelt out in section 44B (2) of the Act and once an assessee opts to come under section 44N, there is no scope of any calculating or re-calculation of amount shown as payable in the contract, and doing so would defeat the very object of presumptive taxation, namely to avoid all complications in determining the tax liability of an assessee opting for or coming under that provision."*

4. This appeal was fixed for hearing on 04.07.2018. However, on the said date when the case was called out for hearing, none appeared on behalf of the assessee. Even no application for adjournment was receive. As reported, the postal department has returned the un-served notice sent through registered post to the Registry with the remarks that the party has left. We accordingly, decided to dispose of the case on the basis of material on record after hearing

the departmental representative (DR). Accordingly, we asked the Ld. DR to argue on behalf of the revenue.

5. Before us, the Ld. departmental representative submitted that since the service tax collected by the assessee is liable to be included in the gross receipts for the purpose of taxation under the provisions of section 44B read with section 172 of the Act, the Ld. DRP has wrongly allowed the objection raised by the assessee and directed the AO to delete the addition made on account of service tax.

6. We have gone through the material on record in the light of the submissions made by the Ld. DR, We have also orders passed by the authorities below and the cases relied upon by the authorities concerned. Admittedly, the assessee is a foreign company incorporated under the law of Korea. The assessee has contended before the Ld. DRP that the issue in question is covered by the order of the Mumbai Bench of the ITAT rendered in the assessee's own case for the A.Y. 2007-08 and 2008-09, wherein it was held that the service tax collected and paid to the govt. by the appellant is not includible in determining the income u/s 44B of the Act. The Ld. DRP has decided the issue in question in favour of the assessee by following the decision of Hon'ble Delhi High Court rendered in the case of *DDIT vs. Mitchell Drilling International Pvt. Ltd. ITA No. 403/2013 and 384/2015* dated 28.09.2015. The relevant part of the directions of the Ld. DRP reads as under:-

> *"2.3. We have considered the arguments and submissions of the assessee. We agree with the contentions of the assessee that the issue is covered in favour of the assessee in light of recent Delhi High Court decision Mitchell Drilling International Pvt. Ltd. (ITA No. 403/2013 and 384/2015 dated 28.09.2015) where in Court has held that service tax would not form part of gross receipts. Relevant portion of observations is reproduced as under;-*
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> > *"….. for the purpose of computing the 'presumptive income' of the assessee for the purpose of section 44 BB of the Act, the service tax collected by the Assessee on the amount paid it for*

rendering services is not be included in the gross receipts in terms of section 44 BB (2) read with Section 44 BB (1). The service tax is no an amount paid for 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. …

……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 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-I 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 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."

2.3.1 Apart from aforesaid High Court ruling, the issue is covered in favour of assessee by its own Tribunal order for AY 2007-08 and 2008-09. The decisions relied on by the Assessing Officer are therefore not applicable in view of the various other decisions cited by the assessee.

2.3.2. Further, section 44B(2) covered amount in connection with 'carriage' of goods, passengers, etc. The explanation thereto clarifies that the amounts in connection with the carriage would include 'demurrage charges. 'handling charges, and other amounts of a 'similar nature'. Thus what is sought to be included are the 'charges' recovered from the consignor of the cargo as a consideration for the transportation . Service tax being a mandatory 'statutory levy' , cannot be said to be in the nature of 'charges' by the shipping company towards the carriage.

2.3.3. Section 44B of the Act covers amounts paid/payable to or received/deemed to be received 'by or on behalf of a non-resident assessee engaged in the shipping business. In terms of the service tax provisions (as elaborated hereunder), any service tax collected,

whether rightly or wrongly, cannot be retained by the service provider and has to be deposited into the Government Treasury. Thus, the service tax collected by the assessee is not an amount paid/payable to or received/deemed to be received by it or on its behalf within the meaning of Section 44B of the Act.

2.3.4. The Assessing Officer in its remand report dated 31 August 2015 has argued for not to admit the additional evidences relying on Rule 46A of Income Tax Rules, 1962 dealing with production of additional evidence before the Commissioner of Income Tax (Appeals0. There is no such rule like Rule 46A in DRP Rules, 2009 and hence it cannot be applied to DRP proceedings. The additional evidences filed are to further the interests of justice and go to the root of the matter that of determination of fact whether service tax collected has been paid to the credit of the government and to verify the claim of the assessee which is otherwise decided in favour of the assessee by Hon'ble Tribunal in its own case. Therefore, we admit the additional evidences filed by the assessee and direct the AO to verify the payment of service tax to the credit of the government.

2.3.5. Keeping in view of all the judicial pronouncements especially recent Delhi High Court ruling in case of Mitchell Drilling International (supra0 and Tribunal ruling in assessee's own case, service tax being in the nature of statutory payment and is being collected on behalf of Government, we agree with the contention of the assessee that it cannot be included in the gross receipts for the purpose of computing presumptive income of the assessee u/s 44B of the Act. We therefore direct the AO to delete the addition on account of service tax, after verification of payments, proposed to be made u/s 44B of the Act. This objection is therefore accepted."

7. We notice that the directions of the DRP are based on the findings of the Hon'ble Delhi High Court in the case of *DDIT vs. Mitchell Drilling International Pvt. Ltd.* (supra). Moreover, the issue involved in the present case is covered in favour of the assessee by the order of the coordinate Bench rendered in the assessee's own case for the A.Y. 2007-08 and 2008-09. Since, the directions of the Ld. DRP are based on the principles of law laid down by the Hon'ble Delhi High Court and further covered by the decision of the coordinate Bench in

assessee's own cases for the assessment years 2007-08 and 2008-09, we do not find any reason to deviate from the view taken by the Ld. DRP. Hence, we uphold the DRP directions issued u/s 144C (5) of the Act holding that the same does not suffer from any factual or legal infirmity to interfere with. We therefore, uphold the DRP directions and dismiss the revenue's appeal and direct the AO to delete the addition made in question after verification of payments made by the assessee in terms of directions issued by the Ld. DRP dated 24.11.2015.

In the result, appeal filed by the revenue for assessment year 2012-2013 is allowed.

Order pronounced in the open court on 1st October, 2018.

Sd/-	*Sd/-*
(B.R. BASKARAN)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 01/10/2018

Alindra, PS

आदेशप्रतिलिपिअग्रेषित/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.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

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