IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 4040/DEL/2016 (A.Y 2012-13)
ITA No. 4041/DEL/2016 (A.Y 2013-14)

Tidewater Marine International Inc. C/o. Nangia & Company, A-109, Sector-136 Noida AAACT7572Q **(APPELLANT)**	Vs	DCIT (International Taxation) Circle-2 Dehradun **(RESPONDENT)**

Appellant by	**Sh. Amit Arora, Sh. Vishal Mishra, CA**
Respondent by	**Sh. N. K. Bansal, Sr. DR**

Date of Hearing	**01.05.2019**
Date of Pronouncement	**02.05.2019**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee against the orders dated 3/05/2016 and 31/5/2016 passed by CIT(A)-2, Noida for Assessment Year 2012-13 & 2013-14 respectively.

2. The grounds of appeal are as under:-

ITA No. 4040/DEL/2016 (A.Y. 2012-13)

"Based on the facts and circumstances of the case, your appellant respectfully submits the following grounds.

Ground No. 1
That the Ld.CIT(A) has erred on facts and in law in affirming the action of the AO in holding that the receipts on account of reimbursements of expenses

were includible in the gross receipts for the purposes of determination of income under section 44BB of the Income Tax Act 1961 ('the Act').

Ground No. 2
That the Ld.CIT(A) has erred on facts and in law in affirming the action of the AO in holding that the income on account of towing Jet Drilling (S) Pte Limited's rig - Energy Driller, from Kakinada to Singapore was taxable as royalty payments as opposed to the claim of the appellant that the receipts are explicitly qualified for determination of income under section 44BB of the Act.

Your appellant prays that the erroneous order be cancelled and appropriate relief may be granted to the appellant.

Your appellant craves leave to add to, alter, amend, vary, omit, substitute or delete any of the aforementioned grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal."

3. Firstly we are taking up appeal for A.Y. 2012-13. A draft Assessment Order under Section 143(3)/144C(1) of the Income Tax Act, 1961 for A.Y. 2012-13 was passed on 05.03.2015 at a total income of Rs. 4,78,04,550/- as against income of Rs. 1,85,81,544/- shown in the revised return of income. The assessee did not file objections against the draft order before the Dispute Resolution Panel. The Assessment order was passed by the Assessing Officer on 11.05.2016. The Assessing Officer considered receipts of the Non-Resident (NR) taxable as royalty under Section 44DA of the Act and calculated deemed profit at the rate of 25% of the gross receipt treating them in the nature of Royalty.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal.

5. As regards Ground No. 1, the Ld. AR submitted that the issue contested by the assessee is squarely covered against the assessee by the decision of the

Hon'ble Apex Court in case of Sedco Forex International Inc. vs. CIT (CA No. 4906/10 judgment dated 30.10.2017).

6. The Ld. DR relied upon the decision of Apex Court in case of Sedco Forex International Inc. (supra) as well as the Assessment order and the order of the CIT(A).

7. We have heard both the parties and perused all the relevant material available on record. The Hon'ble Apex Court in case of Sedco Forex International Inc. (supra) held as under:

> *47) Section 44BB starts with non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of Sections 28 to 41 and Sections 43 and 43Aof the Act. It is not in dispute that assessees were assessed under the said provision which is applicable in the instant case. For assessment under this provision, a sum equal to 10% of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head 'profits and gains of the business or profession'. Sub-section (2) mentions two kinds of amounts which shall be deemed as profits and gains of the business chargeable to tax in India. Sub-clause (a) thereof relates to amount paid or payable to the assessee or any person on his behalf on account of provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used in the prospecting for, or extraction or production of, mineral oils in India. Thus, all amounts pertaining to the aforesaid activity which are received on account ofprovisions of services and facilities in connection with the said facility are treated as profits and gains of the business. This clause clarifies that the amount so paid shall be taxable whether these are received in India or outside India. Clause (b) deals with amount received or deemed to be received in India in connection with such services and facilities as stipulated therein. Thus, whereas clause (a) mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received have to be in India.*

48) From the bare reading of the clauses, amount paid under the aforesaid contracts as mobilisation fee on account of provision of services and facilities in connection with the extraction etc. of mineral oil in India and against the supply of plant and machinery on hire used for such extraction, clause (a) stands attracted. Thus, this provision contained in Section 44BB has to be read in conjunction with Sections 5and 9 of the Act and Sections 5 and 9 of the Act cannot be read in isolation. The aforesaid amount paid to the assessees as mobilisation fee is treated as profits and gains of business and, therefore, it would be "income" as per Section 5. This provision also treats this income as earned in India, fictionally, thereby satisfying the test of Section 9 of the Act as well.

49) The Tribunal has rightly commented that Section 44BB of the Act is a special provision for computing profits and gains in connection with the business of exploration of mineral oils. Its purpose was explained by the Department vide its Circular No. 495 dated September 22, 1987, namely, to simplify the computation of taxable income as number of complications were involved for those engaged in the business of providing services and facilities in connection with, or supply of plant and machinery on hire used or to be used in the prospecting for, or extraction or production of, mineral etc. Instead of going into the nitigrities of such computation as per the normal provisions contained in Sections 28 to 41 and Sections 43 and 43A of the Act, the Legislature has simplified the procedure by providing that tax shall be paid @10% of the 'aggregate of the amounts specified in sub-section (2)' and those amounts are 'deemed to be the profits and gains of such business chargeable to tax...'. It is a matter of record that when income is computed under the head 'profits and gains of business or profession', rate of tax payable on the said income is much higher. However, the Legislature provided a simple formula, namely, treating the amounts paid or payable (whether in or out of India) and amount received or deemed to be received in India as mentioned in sub-section (2) of Section 44BB as the deemed profits and gains. Thereafter, on such deemed profits and gains (treating the same as income), a concessional flat rate of 10% is charged to tax. In these circumstances, the AO is supposed to apply the provisions of Section 44BB of the Act, in order to find out as to whether a particular amount is deemed income or not. When it is found that the amount paid or payable (whether in or out of India), or amount received or deemed to be received in India is covered by sub-section (2) of Section 44BB of the Act, by fiction created under Section 44BB of the Act, it becomes 'income' under Sections 5 and 9 of the Act as well.

50) It is stated at the cost of repetition that, in the instant case, the amount which is paid to the assessees is towards mobilisation fee. It does not mention that the same is for reimbursement of expenses. In fact, it is a fixed amount paid which may be less or more than the expenses incurred. Incurring of expenses, therefore, would be immaterial. It is also to be borne in mind that the contract in question was indivisible. Having regard to these facts in the present case as per which the case of the assessees get covered under the aforesaid provisions, we do not find any merit in any of the contentions raised by the assessees. Therefore, the ultimate conclusion drawn by the AO, which is upheld by all other Authorities is correct, though some of the observations of the High Court may not be entirely correct which have been straightened by us in the above discussion. For our aforesaid reasons, we uphold the conclusion. Resultantly, all the appeals of the assessees are dismissed.

During the year the assessee was engaged in the business of providing offshore supply vessel in respect of all the contracts mentioned in the Assessment Order. In the present case also the amount which is paid to the assessee is towards the expenses incurred on behalf of the payer and no where mentions that it is for reimbursement of expenses. The assessee also relied upon the decision of the Hon'ble Delhi High Court in case of Sedco Forex International Inc. which is now decided by the Hon'ble Apex Court against the assessee. Therefore, Ground No. 1 is dismissed.

8. As regards to Ground No. 2, the Ld. AR submitted that the issue of receipts qualified for determination of income under Section 44BB of the Act has been decided in favour of the assessee in assessee's own case for A.Y. 2011-12 being ITA No. 6166/Del/2014 order dated 31.10.2017.

9. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

10. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 2011-12 held as under:

"6. Further, on the issue of operation of the amendment to section 44BB and 44DDA, the Ld. CIT-(A) has observed that considering the interpretation contained in the case of OTIM Ltd., reported in 352 ITR 406 (Del), the position of the case would not change specially when the services are squarely covered in consonance with what is envisaged under section 44BB of the Act. We find that the Tribunal (supra) has also held the services rendered as envisaged under section 44BB of the Act. The Ld. CIT (A) has followed the decision of the jurisdictional High Court on the issue in dispute and thus, we do not find any error in the finding of the ld. CIT-A."

Section 44DA specifically covers income in the nature of fees for technical services received by a non-resident from the Indian Government and/or an Indian Concern. Any income in the nature of fees for technical services received by a non-resident from another non-resident cannot be taxed under section 44DA of the Act. Thus, the issue is squarely covered by the order of the Tribunal for A.Y. 2011-12 as facts are identical. Ground No. 2 is allowed.

11. In result, ITA No. 4040/DEL/2016 for A.Y. 2012-13 is partly allowed.

12. Now we take up appeal for A.Y. 2013-14, the ground of appeal are as under:

ITA No. 4041/DEL/2016 (A.Y. 2013-14)

"Based on the facts and circumstances of the case, your appellant respectfully submits the following grounds:

Ground No. 1
That the Ld.CIT(A) has erred on facts and in law in affirming the action of the AO in holding that the receipts aggregating to INR 59,481,870 on account of mobilization for the activities carried outside Indian Territorial Waters, are includibie in the revenue taxable u/s 44BB of the Act.

Ground No. 2
That the Ld.CIT(A) has erred on facts and in law in affirming the action of the AO in holding that the receipts on account of reimbursements of expenses

aggregating to INR 6,482,115 are includible in the gross receipts for the purpose of determination of income under section 44BB of the Act.

Your appellant prays that the erroneous order be cancelled and appropriate relief may be granted to the appellant.

Your appellant craves leave to add to, alter, amend, vary, omit, substitute or delete any of the aforementioned grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal."

12. The Draft Assessment Order under Section 143(3)/144C(1) of the Act for the Assessment Year 2013-14 was passed on 18.01.2016 at a total income of Rs. 2,43,34,390/- as against income of Rs. 1,72,99,395/- shown in the revised return of income. The assessee did not file objections against the draft order before the Dispute Resolution Panel (DRP). The Assessment order was passed under Section 143(3)/144C(3)(b) of the Act on 02.03.2016 thereby making addition on account of mobilization/demobilization receipts, reimbursement expenses and service tax.

13. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

14. The Ld. AR submitted that both the grounds are decided against the assessee as per the decision of the Hon'ble Apex Court in case of Sedco Forex International Inc.

15. The Ld. DR relied upon the order of the Assessing Officer and the CIT(A) and also the decision of the Hon'ble Supreme Court in case of Sedco Forex International Inc. vs. CIT (supra).

16. We have heard both the parties and perused the material available on record. As regards Assessment Year 2013-14, the issue contested by the assessee is squarely covered against the assessee by the decision of the Hon'ble

Apex Court in case of Sedco Forex International Inc. (supra) wherein it has been held that:

a. That mobilization charges are to be included in gross receipts for the purpose of provisions of section 44BB of the Income Tax Act, 1961.

b. The reimbursement charges are to be included in gross receipts for the purpose of provisions of section 44BB of the Income Tax Act, 1961.

In the present Assessment Year also the assessee was in receipt of certain amounts being reimbursements of actual expenditure incurred. The provision of Section 44BB considers inclusion of all kind of amount paid or payable to the assessee or to any person on his behalf on account of the provision of services or facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of mineral oils in India. Thus, both the grounds are dismissed.

17. In result, ITA No. 4041/DEL/2016 for A.Y. 2013-14 is dismissed.

Order pronounced in the Open Court on 02nd MAY, 2019.

Sd/-	**Sd/-**
(R. K. PANDA)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 02/05/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	18.03.2019
Date on which the typed draft is placed before the dictating Member	19.03.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	03.05.2019
Date on which the final order is uploaded on the website of ITAT	03.05.2019
Date on which the file goes to the Bench Clerk	03.05.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	