

**IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.6796/Mum/2018
(Assessment Year: 2015-16)**

Orient Overseas Container Line Ltd. C/o OOCL (India) Pvt.Ltd. ICC Chambers, 5 th Floor Saki Vihar Road Opp. Santogen Silk Mills Powai Mumbai-400 072	Vs.	ACIT(IT)-3(2)(2) Room No.1615, 16 th Floor Air India Building Nariman Point Mumbai-400 021
PAN/GIR No.AAACO5679E		
(Appellant)	..	(Respondent)

Revenue by	Shri Avaneesh Tiwari, Sr.DR
Assessee by	Shri.Jinit Rathod, AR
Date of Hearing	19/12/2019
Date of Pronouncement	15/01/2020

आदेश / O R D E R

PER G.MANJUNATHA:

This appeal filed by the assessee is directed against final assessment order passed by the Ld. AO u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961 dated 27/09/2018, in pursuance of directions of the Dispute Resolution Panel (DRP)-2, Mumbai dated 28/08/2018 u/s 144C(5) of the I.T.Act, 1961 for the AY 2015-16.

2. The assessee has raised the following grounds of appeal:-

1. Ground 1: Inclusion of service tax for the purpose of computing presumptive income under Section 44B of the Income-tax Act, 1961 ('the Act')

1 On the facts and the circumstances of the case and in law, the learned ACIT has erred in including an amount of Rs.57.45,67,721, being the amount of service tax charged, to the total revenue for the purpose of computing presumptive income under Section 44B of the Act.

1.2 On the facts and the circumstances of the case and in law, the learned ACIT has erred in not following the order passed by the Mumbai Bench of Hon'ble Income Tax Appellate Tribunal ('ITAT') in Appellant's own case for AY 2007-08, AY 2008-09, AY 2010-11 and AY 2011-12 wherein it has been held that service tax collected and paid to the Government by the Appellant is not includible for the purpose of computing presumptive income under Section 44B of the Act

1.3 The Appellant humbly prays; that the learned ACIT be directed not to include service tax charged for the purpose of computing the presumptive income under Section 44B of the Act.

2. Ground 2: Short grant of credit of prepaid taxes (i.e. advance tax and self-assessment tax)

2.1 On the facts and the circumstances of the case and in law, the learned ACIT has erred in restricting the credit of prepaid taxes (i.e. advance tax and self-assessment tax) to Rs. 36,09,51,356 as against an amount of Rs.36,10,99,795 as claimed by the Appellant in its Return of Income ('ROI') filed for AY 2015-16, thereby resulting into a short credit for prepaid taxes of Rs.1,48,439/-.

2.2 Further, the Appellant is in the process of filing an application under section 154 of the Act for rectification of the aforesaid mistake apparent from record before the learned ACIT.

2.3 The Appellant prays that the learned ACIT be directed to grant the full credit of prepaid taxes.

3. Ground 3. Initiation of penalty proceeding for the levy of penalty under section 271(1)(c)

3.1 On the facts and circumstances of the case and in law, the learned ACIT erred in initialing penalty proceeding under section 271(1)(c) of the Act.

3.2 It is prayed that the learned ACIT be directed to drop the penalty proceeding under section 271(1)(c) of the Act.

The Appellant craves leave to add to, alter, amend, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at The time of hearing of this appeal as it may be advised.

3. The brief facts of the case are that the assessee company is incorporated under the Companies ordinance of Hong Kong and it is engaged in the business of transportation of cargo and operation of ships in international traffic. Its income comprises of freight income and ancillary detention charges such as terminal handling charges, inland haulage charges, demurrage and detention charges etc. In the absence of a Double Taxation Avoidance Agreement (DTAA) between India and Hong Kong, the assessee has offered its entire income to tax on presumptive scheme of taxation as per provision of section 44B of the I.T.Act, 1961. The assessee has filed return of income for AY 2015-16 on 30/11/2015, declaring total taxable income of Rs. 77,53,51,510/-. The case was selected for scrutiny and during the course of assessment proceedings, the AO noticed that the assessee has collected service tax of Rs. 57,45,67,721/- and the same has been excluded from total income received from operations for the purpose of computing presumptive income as per provisions of section 44B of the I.T.Act, 1961. Therefore, the Ld. AO after considering relevant submissions of the assessee and after taken note of provision of section 44B of the I.T.Act, 1961, included service tax collected amounting to Rs. 57,45,67,721/- in the total income from operations and estimated profit @ 7.5.% u/s. 44B of the I.T.Act 1961. The assessee has filed its objections against draft assessment order passed by the Ld. AO before the DRP-2 Mumbai. The DRP-2 Mumbai, vide its order dated 28/08/2018 u/s 144C(5) of the I.T.Act, 1961 rejected the arguments of the assessee and confirmed the findings of the Ld. AO, in respect of inclusion of service tax in gross receipts for the purpose of estimation of profit

u/s 44B of the I.T.Act, 1961. The Ld. AO, in pursuance of directions of the Ld. DRP passed final assessment order u/s 143(3) r.w.s. 144C(13) of the I.T.Act, 1961 on 27/09/2018 and made additions towards @ 7.5% profit estimated on service tax collected from rendering services to the customers and made additions of Rs. 4,30,92,579/-. Aggrieved by the final assessment order, the assessee is in appeal before us.

4. The first issue that came up for our consideration from ground No. 1 of assessee appeal is inclusion of service tax for the purpose of computing presumptive income u/s 44B of the I.T.Act, 1961. The Ld. AR for the assessee, at the time of hearing, submitted that this issue is squarely covered in favour of the assessee by the decisions of ITAT, Mumbai bench in assessee's own case for AY 2007-08 to 2013-14, wherein under identical set of facts, the Tribunal held that service tax component shall not be included in gross receipts from operations for the purpose of computation of presumptive income u/s 44B of the I.T.Act, 1961. The Ld. AR, further submitted that this issue is also covered by the decision of Hon'ble Bombay High Court, in the case of PCIT(IT)-1, Mumbai vs Boskalis International Dredging International CV in ITA No.55 of 2017, dated 25/03/2019.

5. The Ld. DR, on the other hand, fairly accepted that the issue is covered in favour of the assessee by the decision of ITAT in assessee's own case for earlier years.

6. We have heard both the parties, perused the material available on record and gone through orders of the authorities below along with case laws cited by the Ld. AR for the assessee. We find that the

issue involved in the present appeal i.e. whether service tax collected from service charges is includible in gross income from operations for the purpose of computation of presumptive profit as per provision of section 44B of the I.T.Act 1961 is no longer a res-integra. The Co-ordinate bench of ITAT, in assessee' own case for AY 2007-08 to 2013-14 had considered an identical issue and held that service tax collected by the assessee does not have any element of income, therefore, it cannot form part of gross receipts for the purpose of computation of presumptive income u/s 44B of the I.T.Act, 1961. We further noted that an identical issue has been considered by the Hon'ble Bombay High Court, in the case of PCIT(IT) vs Boskalis International Dredging International CV. (supra), where the Hon'ble High Court by following the decision of Hon'ble Delhi High Court, in the case of DIT-I vs. Mitchell Drilling International Pvt.Ltd. and other cases held that service tax collected by the assessee on the amount received by it for rendering services is not to be included in the gross receipts in terms of section 44BB(2) r.w.s. 44BB(1) of the I.T.Act, 1961.

7. In this view of the matter and respectfully following the case laws discussed hereinabove, we direct the Ld. AO to excluded service tax collected from gross receipts from operations for the purpose of computation of presumptive income under the provision of section 44B of the I.T.Act, 1961.

8. The next issue that came up for our consideration from ground No.2 of assessee appeal is short grant of credit for prepaid taxes, including advance tax and self assessment tax. We find that the assessee has taken a ground challenging the findings of the Ld. AO in short granting credit for prepaid taxes to the tune of Rs. 1,48,439/-

The issue of credit for TDS is based on material evidences placed by the assessee before the Ld. AO. Therefore, we set aside the issue to the file of the Ld. AO and direct him to reconsider the issue, in light of the evidences filed by the assessee and if, the Ld. AO found that the claim of the assessee is correct with reference to evidences filed before him, then the Ld. AO is directed to allow credit for prepaid taxes as claimed by the assessee.

9. In the result, appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on this 15 /01/2020

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 15 /01/2020
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai