IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri Pramod Kumar, Vice President
and Shri Ravish Sood, Judicial Member

ITA No.7055/Mum/2017
(Assessment Year: 2014-15)

Smit Singapore Pte Ltd. SRBC & Associates, 14th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (West), Mumbai- 400028	Vs.	Deputy Commissioner of Income-tax (I.T.)-4(2)(1), 17th Floor, Room No. 1708, Air India Building, Nariman Point, Mumbai - 400021
PAN – AAOCS1031L		
(Appellant)		**(Respondent)**

Appellant by: Shri Madhur Agarwal, A.R
Respondent by: Shri Sanjay Singh &
Shri T.S. Khaisa, CIT, D.Rs

Date of Hearing: 06.11.2020
Date of Pronouncement: 09.11.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the A.O under Sec. 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated nil for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "Based on the facts and circumstances of the case, Smit Singapore Pte Ltd. (hereinafter referred to as the Appellant) respectfully craves leave to prefer an appeal against the order dated 10 October 2017 passed by Deputy Commissioner of Income-tax (International Taxation) - 4(2)(1) ('AO') in pursuance of the directions issued by Dispute Resolution Panel - 2 ('DRP'), Mumbai on the following grounds:
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> On the facts and in the circumstances of the case and in law, the AO, based on directions of DRP has;

GENERAL

1. erred in assessing total income at Rs 31 .95,27,485 as against returned income of Rs Nil;

Taxability of receipts on hire of vessel on time charter basis of Rs.30,45,66,351/-

2. erred in holding that charges received on account of time charter services rendered by the Appellant for the vessel 'Smit Borneo' to Leighton India Contractors Private Limited in India were rendered for the 'use' of industrial, commercial or scientific equipment, thereby treating the same as "Royalty" under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act'):

3. erred in holding that the impugned time charter services shall be covered within the definition of the term "Royalty" under Article 12(4) of the India - Singapore Double Tax Avoidance Agreement ('DTAA');

4. without prejudice to the above, erred in not applying the special deeming provisions of section 44BB of the Act, wherein 10% of the gross receipts shall be deemed to be income of the Appellant;

Taxability of Mobilization fees of Rs.17,80,500/-

5. erred in holding that mobilization fees received by the Appellant for the vessel 'Smit Borneo' amounting to Rs.17,80,500 is linked to time charter services and therefore it is for the 'use' of industrial, commercial or scientific equipment. thereby treating the same as Royalty" under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act');
6. erred in holding that the impugned mobilisation fees shall be covered within the definition of the term "Royalty" under Article 12(4) of the India - Singapore DTAA;
7. without prejudice to the above, erred in not applying the special deeming provisions of section 44BB of the Act, wherein 10% of the gross receipts shall be deemed to be income of the Appellant;

Taxability of reimbursement of expenses of Rs.1,31,80,903/-

8. erred in holding that reimbursement of expenses on account of on-hire water, fuel, lubricants and repairs cost received by the Appellant amounting to Rs. 1 31 .80903 is intrinsically linked to time charter services and therefore it is for the use' of industrial, commercial or scientific equipment, thereby treating the same as 'Royalty" under section 9(1)(vi) of the Income Tax Act, 1961 ('the Act'):

9. erred in holding that the impugned reimbursement of expenses shall be covered within the definition of the term "Royalty" under Article 12(4) of the India - Singapore DTAA:

10. Without prejudice to the above, erred in not applying the special deeming provisions of Section 44BB of the Act, wherein 10% of the gross receipts shall be deemed to be income of the Appellant;

Short granting of credit in respect of tax deducted at source ('TDS')

11. erred in granting TDS credit of Rs.95,64,832 as against a credit of Rs.1,20,29,183 claimed by the Appellant in the return of income, thereby short granting TDS credit by Rs.24,64,351/-

Levy of interest under section 234A of Rs.40,29,825

12. erred in levying interest under section 234A of the Act amounting to Rs.40,29,825

Levy of interest under section 234B of the Act of Rs.96,26,797

13. erred in levying interest under section 234B of the Act amounting to Rs. 96,26,797

Initiation of penalty proceedings under section 271(1)(c) of the Act

erred in initiating penalty proceedings under section 271(1)(c) of the Act.
The above grounds of appeal are mutually exclusive and without prejudice to one another. The Appellant craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law."

2. Briefly stated, the assessee is a company incorporated in Singapore, operating in the maritime sector and primarily engaged in the business of salvage, wreck removal, environmental protection and consultancy. During the year under consideration the assessee company had time chartered its vessel "Smit Borneo" along with crew to M/s Leighton India Contractors Pvt. Ltd., for providing services for exploration or extraction of mineral oils to Oil and Natural Gas Corporation ('ONGC'), in connection with I-tube and Flexible pipe installations for ONGC Pipeline Replacement Project-3 and Heera RD Phrase-II Pipeline Project. The assessee had filed its revised return of income for A.Y. 2014-15 on 23.03.2016, declaring its total income at Rs. nil. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. Observing that the assessee had not offered any income to tax under Sec. 44BB of the Act, the A.O called upon it to put forth an explanation as regards the same. In reply, it was submitted by the assessee, that as during the year under consideration it had not constituted a Permanent Establishment (PE) in India within the meaning of Article 5 of the India-Singapore Double Taxation Avoidance Agreement (DTAA), its income was thus not taxable in India. Elaborating on its said claim, it was submitted by the assessee that as the time charter period of its vessel viz. "Smit Borneo" had commenced from 10th October, 2013 and continued till 20th June, 2014, the same thus in the fiscal year 2013-14 was 173 days (i.e from 10th October 2013 to 31st March, 2014), which was less than the threshold period of 183 days that was required for an enterprise providing services or facilities in connection with exploration, exploitation or extraction of mineral oils in a contracting state, for the purpose of constituting a PE in that contracting state, during any fiscal year. In sum and substance, it was the claim of the assessee that as it

had no PE in India during the year under consideration, its revenue was thus not exigible to tax in India.

4. After deliberating on the reply filed by the assessee, the A.O called upon it to explain as to whether the receipts from time charter of the vessel "Smit Borneo" to Leighton India Contractor Pvt. Ltd. was claimed as exempt under Article 8 of India-Singapore tax treaty. In reply, it was submitted by the assessee that for the purpose of applicability of Article 8 of the India-Singapore Tax Treaty two conditions were required to be satisfied viz. (i) the nature of activity should be transportation by sea or air of passengers, mail, livestock or goods; and (ii) the activity of transportation is carried on by the owner or lessee or the charterer of the ship or aircraft. It was submitted by the assessee that given the nature of its activities and the further use of the vessel, the said primary condition for applicability of Article 8 of the India-Singapore tax treaty was not satisfied. Accordingly, it was submitted by the assessee that Article 8 was not applicable in its case for the year under consideration i.e A.Y. 2014-15. As regards the query raised by the A.O as to whether its receipts were covered under Section 44B of the Act, the assessee answered in the negative. It was submitted by the assessee that for applicability of Section 44B twin conditions were cumulatively required to be satisfied viz. (i) the assessee should be in the business of operation of ships; and (ii) the amounts received by the assessee or by any person on behalf of the assessee shall be on account of carriage of passengers, livestock, mail or goods shipped at any port in India. It was submitted by the assessee that as it had time chartered its vessel "Smit Borneo" along with the crew to Leighton India Contractor Pvt. Ltd., which in turn was being used for providing services for exploration or extraction of mineral oils to ONGC in connection with its I-tube and Flexible pipe installations for ONGC Pipeline Replacement Project-3 and Heera RD Phrase-II Pipeline Project, its income earned during the year was not on account of transportation of passengers or goods, but merely from chartering of vessel along with the

crew. As such, it was submitted by the assessee that given the nature of its activities and further use of the vessel by the charterer the primary condition for the applicability of Sec. 44B of the Act was not satisfied.

5. On being queried by the A.O as to whether its receipts from time charter of the vessel fell within the ambit of Sec. 44BB of the Act, the assessee answered in the affirmative. Elaborating on his aforesaid reply, it was submitted by the assessee that considering the pith and substance of its contract with Leighton India Contractor Pvt. Ltd., wherein it had chartered its vessel along with the crew to Leighton India Contractor Pvt. Ltd. on a time charter basis in connection with prospecting, extraction or production of mineral oils, the revenue therein generated would be covered within the ambit of Sec. 44BB of the Act. In order to fortify its aforesaid claim the assessee had drawn support from the judgment of the Hon'ble Supreme Court in the case of ONGC Vs. CIT (2015) 376 ITR 306 (SC). But then, it was submitted by the assessee that as it had not constituted a PE in India during the year under consideration i.e A.Y. 2014-15, thus as per Article 7 of the India-Singapore tax treaty its profits earned from the aforesaid activities were not taxable in India.

6. After considering the aforesaid submissions of the assessee, the A.O called upon it to explain as to why the receipts from the time charter of the vessel "Smit Borneo" may not be brought to tax in its hands as 'royalty'. Rebutting the aforesaid claim of the A.O, it was submitted by the assessee that providing of vessel on time charter basis along with crew was neither in the nature of any patent or a license nor as that of imparting of any information of any technical, industrial, commercial or scientific knowledge. Also, as stated by the assessee the time charter of the vessel did not involve transfer of any rights/licenses in respect of any copyright, literary, artistic or scientific work. Alternatively, it was the claim of the assessee, that even if the time charter of the vessel along with the crew was considered as 'use' or 'right to use' of any industrial, commercial or scientific equipment, the revenue earned therefrom by the

assessee being covered under Sec. 44BB of the Act would fall within the realm of the exclusion carved out in clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act, and thus fall beyond the purview of the definition of 'royalty' therein contemplated. Adverting to the India-Singapore tax treaty, it was submitted by the assessee that Article 12 of the tax treaty provided that the consideration for the use, or the right to use of any industrial, commercial, or scientific equipment was to be considered as a royalty. It was submitted by the assessee, that as its 'agreement' for time charter of the vessel was for providing the vessel along with the crew on a time charter basis and not a simpliciter hiring of any vessel/equipment, the same thus being an agreement akin to providing of services would not qualify as 'royalty'. However, the A.O after considering the aforesaid reply of the assessee was not persuaded to accept the same. It was observed by the A.O that the 'agreement' which resulted into income to the assessee was executed between the assessee and Leighton India Contractor Pvt. Ltd., and not with ONGC. On the basis of his aforesaid observation, the A.O was of the view that the claim of the assessee that the nature of its 'agreement' with Leighton India Contractor Pvt. Ltd. was akin to providing of services in connection with exploration of mineral oil under Sec. 44BB was not tenable. Apart from that, it was observed by the A.O that now when the assessee had not offered any income to tax under Sec.44BB during the year under consideration, it could not have thus raised a claim that its receipts were covered under the exclusion carved out in clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) of the Act. Accordingly, the A.O was of the view that now when the assessee had not paid taxes under the presumptive scheme contemplated under Sec. 44BB, it could thus not claim that its receipts were covered by the exclusion provided in clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) of Act. On the basis of his aforesaid observations, the A.O was of the view that the amount received by the assessee from time charter of the vessel "Smit Borneo" was in the nature of royalty under clause (iva) of 'Explanation 2' to Sec. 9(1)(vi). Also, holding a conviction that the providing of the vessel

by the assessee on time charter to Leighton India Contractor Pvt. Ltd. had resulted to use of the vessel by the charterer, the A.O was of the view that the consideration therein received by the assessee was 'royalty' within the meaning of Article 12(3)(b) of the India-Singapore tax treaty.

7. Further, it was observed by the A.O that the assessee was in receipt of mobilisation fees amounting to Rs.17,80,500/- from Leighton India Contractor Pvt. Ltd. On being called upon to explain as to why the said amount may not be treated as royalty, the assessee came forth with a two fold submission ,viz. (i) that as the mobilisation fees was received in connection with the delivery of the vessel at the location in Singapore, and thus the services were neither rendered or utilized in India, the same not having accrued or arisen in India could thus not be brought to tax in India.; and (ii) that, as the vessel was used by the assessee for rendering services to Leighton India Contractor Pvt. Ltd., and not used by the latter on an independent basis, the same thus could not be assessed as royalty. Alternatively, it was submitted by the assessee that if the mobilisation fees was to be considered as chargeable to tax, the same may be taxed as per the provisions of Sec. 44BB of the Act. However, the A.O was not persuaded to subscribe to the aforesaid contentions of the assessee. Observing, that the mobilisation fees was a part of the receipt for use of the vessel, the A.O assessed it as royalty in the hands of the assessee. Further, it was observed by the A.O that the assessee had claimed to have received an amount of Rs. 1,31,80,903/- towards reimbursement of expenses from Leighton India Contractor Pvt. Ltd. It was the claim of the assessee that the aforesaid receipts were in the nature of reimbursement of certain costs which were incurred by the assessee on behalf of Leighton India Contractor Pvt. Ltd., viz. costs incurred for obtaining fresh water, fuel, lubricants, repair cost etc. It was the claim of the assessee that the reimbursement of the aforesaid expenses was provided for in its 'agreement' with Leighton India Contractor Pvt. Ltd. In order to fortify its said claim, the assessee had in the course of the assessment proceedings

referred to the relevant clauses of the 'agreement'. However, it was observed by the A.O that the aforesaid receipts were intrinsically linked with the receipts from time charter of the vessel. Apart from that, it was noticed by the A.O that the assessee had not provided any details as to what actual expenditure was incurred by it towards common services, and also as to how the reimbursement had been computed. Further, it was observed by the A.O that there was also no evidence on record that the market value of the services received by Leighton India Contractor Pvt. Ltd. from the assessee were equivalent to the payments received by the assessee from any other entity. On the basis of his aforesaid observations, the A.O rejected the claim of the assessee that the amount of Rs.1,31,80,903/- received by it was towards reimbursement of expenses. Accordingly, the A.O re-characterised the aforesaid amount of reimbursement as royalty in the hands of the assessee.

8. On the basis of his aforesaid deliberations, the A.O passed a draft assessment order under Sec. 143(3) r.w.s 144C(1) of the Act, dated 13.12.2016, wherein he proposed to assess the income of the assessee at Rs.31,95,27,485/-.

9. Aggrieved, the assessee filed objections before the Dispute Resolution Panel-2, Mumbai (for short 'DRP'). It was observed by the DRP that there was no dispute about the fact that the assessee did not have a PE in India during the year under consideration. In fact, it was observed by the DRP that it was not the case of the A.O that the income of the assessee was taxable in India, for the reason, that the assessee had a PE in India. As per the DRP, the case of the A.O was that the receipts of the assessee were taxable within the meaning of "royalty" as per Article 12 of the DTAA, and thus, despite the fact that the assessee did not have a PE in India during the year under consideration, the same was liable to tax as per the rate prescribed in the India-Singapore tax treaty. It was observed by the DRP that the assessee had claimed to have provided on a time charter basis its vessel viz. "Smith Borneo" along with crew to

Leighton India Contractor Pvt. Ltd., for providing services for exploration or extraction of mineral oil to ONGC, in connection with the latters I-tube and Flexible pipe installations for ONGC Pipeline Replacement Project-3 and Heera RD Phrase-II Pipeline Project. It was observed by the DRP that Leighton India Contractor Pvt. Ltd. had obtained the aforesaid vessel viz. "Smith Borneo" alongwith crew on time charter basis from the assessee for providing services to ONGC in its exploration of mineral oils work. Observing, that the vessel "Smith Borneo" was a Crane barge, a specialised vessel used for a range of services, that included marine salvage work, lifting and transporting oil field equipment, deployment of mooring and riser systems, offshore installations services etc., the DRP concurred with the A.O that the same would fall within the definition of industrial, commercial or scientific equipment. Adverting to the definition of 'royalty' as contemplated in Article 12 of the India-Singapore tax treaty, it was observed by the DRP that the said term inter alia included payments of any kind received as consideration for the use of, or the right to use any industrial, commercial, or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b)or 4(c) of Article 8. On the basis of observations recorded in its order, the DRP was of the view that the consideration received by the assessee from Leighton India Contractor Pvt. Ltd. was in the nature of 'royalty' for the use of industrial, commercial or scientific equipment, as provided in Article 12 of the India-Singapore tax treaty, and was thus chargeable to tax as per the rate provided in the said tax treaty. As regards the alternative submission of the assessee, that as its income would be taxable as per the provision of Sec. 44BB of the Act, and hence, the same could not be taxed as royalty as per Article 12 of the India-Singapore tax treaty, the same was rejected by the DRP. It was observed by the DRP, that the assessee had chosen not to offer any income as per the provisions of Sec. 44BB of the Act, on the ground, that the said section was not applicable in its case as it had not constituted a PE in India during the year under consideration. In the backdrop of its aforesaid

observation, the DRP was of the view that the assessee could not claim the benefit of the provisions of Sec. 44BB of the Act, when admittedly, it was not eligible to be covered by the said provisions and had also not offered its income for tax under the said statutory provision. As regards the taxability of the mobilisation fees, the DRP was not impressed with the claim of the assessee that as the said amount was received in connection with the delivery of the vessel at the location in Singapore, and the services were neither rendered or utilized in India, the same thus not having accrued or arisen in India could not be brought to tax in India. It was observed by the DRP that the aforesaid claim of the assessee was liable to be rejected, for the reason, that the mobilisation services were not in the nature of separate activity but a part of the process of providing the vessel on time charter basis, which thereafter was used by the charterer in the course of its services rendered to ONGC. As such, observing that the mobilisation fees received by the assessee was for the services which formed an integral part of the receipts for providing the vessel on time charter basis to Leighton India Contractor Pvt. Ltd., the DRP upheld the view taken by the A.O that the mobilisation receipts were liable to be assessed as royalty in the hands of the assessee. Also, the alternate claim of the assessee that the said receipts be assessed as per the provision of Sec.44BB of the Act, was also rejected by the DRP, for the reason, that the provisions of Sec. 44BB were not applicable in the case of the assessee. As regards the amount of Rs. 1,31,80,903/- which was claimed by the assessee to have been received towards reimbursement of expenses from Leighton India Contractor Pvt. Ltd., the DRP observed, that the said receipts were intrinsically linked with the chartering receipts. Apart from that, it was observed by the DRP that the A.O had categorically noted that the assessee had not provided any details as to what actual expenditure was incurred by it towards providing of common services, and as to how the reimbursement amount had been computed. Also, it was noticed by the DRP, that the assessee had not provided any such details even in the course of the proceedings before it.

Further, it was observed by the DRP that no evidence could be led by the assessee to substantiate that the market value of the services received by Leighton India Contractor Pvt. Ltd. from the assessee were equivalent to the payments which were received by the assessee from any other entity. Apart from that, it was observed by the DRP, that as per Article 12(2)(b) of the India-Singapore tax treaty the assessee was required to pay 10% of the amount of the "gross royalties". As such, the DRP was of the view that the term gross royalties was to be construed as the gross amount i.e without deduction of any taxes or expenses. Accordingly, the DRP observing that the income of the assessee was not being computed as per the provisions of Section 28 of the Act, but as per Article 12 of the India-Singapore tax treaty, which provided for taxing of the gross receipts as royalty, therefore, was of the view that the amount of reimbursement of expenses could not be allowed as a deduction to the assessee. On the basis of his aforesaid deliberations the DRP upheld the view taken by the A.O as regards inclusion of the amount of the impugned reimbursement of expenses, as part of the gross amount of royalties received by the assessee. In the backdrop of its aforesaid deliberations the objections raised by the assessee were rejected by the DRP.

10. The A.O after receiving the order passed by the DRP under Sec. 144C(5), dated 05.09.2017, therein passed the assessment order under Sec. 143(3) r.w.s 144C(13), dated nil, wherein the income was assessed at Rs.31,95,27,484/-.

11. The assessee being aggrieved with the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated nil, has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted, that both the A.O and the DRP had erred in concluding that the amount received by the assessee on account of time charter of its vessel viz. 'Smit Borneo' along with the crew to Leighton India Contractor Pvt. Ltd., therein did tantamount to the 'use' of industrial, commercial or scientific

equipment, and was thus assessable as 'royalty' under Sec. 9(1)(vi) of the Act, as well as Article 12(3)(b) of the India-Singapore tax treaty. Elaborating on his said contention, it was submitted by the ld. A.R that for bringing a sum received by the assessee within the realm of the definition of the term 'royalty' as contemplated in the clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) of the Act, it has to be shown that it was received for the 'use' or 'right to use' any industrial, commercial or scientific equipment. Apart from that, it was the claim of the ld. A.R that clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) carved out an exclusion in respect of the amounts referred to in Sec. 44BB of the Act. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that as the assessee had time chartered its vessel viz. 'Smit Borneo' along with crew to Leighton India Contractor Pvt. Ltd., and had not passed over or parted with the use or right to use of the said vessel to the said charterer, therefore, the consideration therein received could not be brought within the realm of the definition of the term 'royalty' as contemplated in clause (iva) of the 'Explanation 2' to Sec. 9(1)(v) of the Act. Apart from that, it was submitted by the ld. A.R, that as the vessel time chartered along with the crew to Leighton India Contractor Pvt. Ltd. was used in connection with providing of services or facilities in the prospecting for, or extraction or production of mineral oils, therefore, the consideration therein received fell within the scope and gamut of Sec. 44BB of the Act, and were thus excluded from the definition of royalty as envisaged in clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) of the Act. In sum and substance, the ld. A.R had claimed that the time charter receipts in its case were not liable to be treated as royalty under the Act, for two fold reasons viz. (i) that, as the vessel 'Smit Borneo' was given on a time charter basis along with the crew to Leighton India Contractor Pvt. Ltd., and there was no passing over of the 'use' or 'right to use' of the said vessel to the charterer, the consideration therein received could not be treated as royalty; and (ii) that, the consideration received being covered by Sec. 44BB of the Act, therein fell within the exclusion carved out in clause (iva) of the

'Explanation 2' to Sec. 9(1)(vi) of the Act. Be that as it may, it was submitted by the ld. A.R, that the consideration received from the time charter of the vessel viz. "Smit Borneo" did not fall within the sweep of the definition of the term royalty as contemplated in Article 12(3)(b) of the India-Singapore tax treaty. As such, it was it was averred by the ld. A.R, that by no means the consideration received from the time charter of the vessel viz. 'Smit Borneo' could be brought within the definition of the term 'royalty' as embodied in Article 12(3)(b) of the India-Singapore tax treaty. On the basis of his aforesaid contentions, it was submitted by the ld. A.R that both the lower authorities had erred in treating the consideration received by the assessee from time charter of the vessel viz. 'Smit Borneo' as royalty in its hands. Alternatively, it was submitted by the ld. A.R, that the aforesaid consideration could only be brought to tax in India under Sec.44BB of the Act. As regards the re-characterisation of the mobilisation fees of Rs.17,80,500/- as royalty by the lower authorities, it was submitted by the ld. A.R that as the said amount was received in connection with the delivery of the vessel at the location in Singapore, and the services were neither rendered or utilized in India, the same thus not having accrued or arisen in India could not have been brought to tax in India. It was further submitted by the ld. A.R that as the assessee had not passed over the 'use' or 'right to use' of vessel viz. 'Smit Borneo', to Leighton India Contractor Pvt. Ltd., therefore, the mobilisation fees could not be treated as 'royalty'. Assailing the re-characterisation of the amounts received by the assessee towards reimbursement of expenses by Leighton India Contractor Pvt. Ltd., as royalty by the lower authorities, it was submitted by the ld. A.R that as the said amounts were simpliciter in the nature of reimbursement of certain expenses which were incurred by the assessee for and on behalf of Leighton India Contractor Pvt. Ltd, therefore, the same could not have been included and therein treated as 'royalty' in the hands of the assessee. It was averred by the ld. A.R, that it was not the case of the revenue that the assessee had not incurred any expenses for and on

behalf of Leighton India Contractor Pvt. Ltd. As such, it was the claim of the ld. A.R, that the consideration received by the assessee towards reimbursement of the expenses which were incurred by it on behalf of Leighton India Contractor Pvt. Ltd., as provided in the 'agreement', therein could not be have been assessed as royalty in the hands of the assessee.

12. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as the assessee had given the use, or right to use of the vessel viz. 'Smit Borneo' to the charterer viz. Leighton India Contractor Pvt. Ltd., therefore, it was incorrect on the part of the counsel for the assessee to claim that the consideration therein received would not fall within the scope and gamut of the definition of the term royalty under the clause (iva) of 'Explanation 2' to Sec. 9(1)(vi) of the Act, and also Article 12(3)(b) of the India-Singapore tax treaty. It was submitted by the ld. D.R that as per the 'Explanation 5' to Sec. 9(1)(vi) of the Act, the fact as to whether the possession or control of the right or property was with the payer, or the right or property was used directly by the payer, would have no bearing on adjudication of the issue as to whether the consideration received for 'use' or 'right to use' of the vessel viz. 'Smit Borneo' fell within the meaning of 'royalty', as contemplated in clause(iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act. Further, it was averred by the ld. D.R, that as the assessee had given the authority to the charterer viz. Leighton India Contractor Pvt. Ltd. to modify the vessel, it could thus safely be concluded that the possession of the vessel remained with the charterer. Apart from that, it was submitted by the ld. D.R, that as the time charter receipts in the absence of the assessee's PE in India could not be assessed under Sec. 44BB of the Act, therefore, the claim of the assessee that the said amount would fall within the exclusion carved out in the clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act was totally misconceived, or in fact misplaced. As regards the assessing of the

mobilisation fees as royalty by the lower authorities, it was submitted by the ld. D.R that as the same formed an inextricable part of the time charter services rendered by the assessee, thus had rightly been assessed by the lower authorities as royalty in its hands. Lastly, as regards the claim of the assessee that the consideration that was received by it towards reimbursement of expenses incurred on behalf of Leighton India Contractor Pvt. Ltd. was wrongly assessed as royalty in its hands, the ld. D.R relied on the orders of the lower authorities. It was submitted by the ld. D.R that the assessee had failed to demonstrate as to what all expenses were incurred by it on behalf of Leighton India Contractor Pvt. Ltd., for which it was thereafter reimbursed, and had also failed to furnish details as regards the allocation basis that was adopted for allocating the common expenses to the share of the charterer. Apart from that, it was submitted by the ld. D.R that there was also no evidence on record that the market value of the services received by Leighton India Contractor Pvt. Ltd. from the assessee were equivalent to the payments received by the assessee from any other entity.

13. Rebutting the aforesaid contention of the counsel for the revenue, it was submitted by the ld. A.R that the assessee had at no stage passed over either the 'use' or the 'right to use' of the vessel viz. 'Smit Borneo' to the charterer. In order to drive home his said contention the ld. A.R took us through the relevant clauses of its 'agreement' with Leighton India Contractor Pvt. Ltd. Further, it was submitted by the ld. A.R, that as the time charter receipts does not fall within the realm of the definition of the term 'royalty' as provided in Article 12 of the India-Singapore tax treaty, thus the said definition provided in the tax treaty would be applicable as per Sec. 90(2) of the Act. In support of his contention the ld. A.R had relied on the order of the Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunications Co. Ltd. Vs. DIT (2011) 332 ITR 340 (Del).

14. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on

record, as well as the judicial pronouncements relied upon by them. As observed by us hereinabove, the assessee had sought our indulgence for adjudication of three issues viz. (i) that, as to whether or not the consideration received by the assessee from time charter of its vessel 'Smit Borneo' had rightly been assessed as 'royalty' by the A.O/DRP under clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act, and also Article 12(3)(b) of the India-Singapore tax treaty; (ii) that, as to whether or not the A.O/DRP are right in law and the facts of the case in treating the mobilisation fees received by the assessee as 'royalty', both under the Act, as well as the India-Singapore tax treaty; and (iii) that, as to whether or not the A.O/DRP are justified in treating the consideration received by the assessee towards reimbursement of expenses from Leighton India Contractor Pvt. Ltd., as royalty.

15. In our considered view, the genesis of the controversy involved in the present appeal primarily hinges around the aspect that as to whether or not the lower authorities were right in concluding that the consideration received by the assessee from the time charter of the vessel viz. 'Smit Borneo' alongwith the crew was to be treated as 'royalty', both as per the clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act, AND Article 12(3)(b) of the India-Singapore Tax Treaty. Before proceeding any further, it may be relevant to point out that the fact that the assessee during the year under consideration had not constituted any PE in India is not in dispute before us. For a fair appreciation of the issue under consideration, it would be relevant to cull out the definition of the term 'royalty' as contemplated in 'Explanation 2' to Sec. 9(1)(vi) of the Act, AND Article 12(3)(b) of the India-Singapore tax treaty. The term 'royalty' as defined in the 'Explanation 2' of Sec. 9(1)(vi) of the Act, reads as under:

> "Explanation 2.—For the purposes of this clause, "royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains") for-

(i) the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(v) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(vi) the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vii) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)"

Further, the term 'royalty' has been defined as per Article 12 of the India-Singapore tax treaty, as under:

"3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :

(a) any copyright of a literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraphs 4(b) or 4(c) of Article 8."

As observed by us hereinabove, the assessee in order to impress upon us that its case does not fall within the meaning of the term 'royalty' as defined in 'Explanation 2' to Sec.9(1)(vi) of the Act, had came forth with two fold contentions viz. (i) that, as the assessee had time chartered its vessel 'Smit Borneo' along with the crew to Leighton India Contractor Pvt. Ltd., and had not given or parted with the 'use' or 'right to use' of the said vessel to the charterer viz. Leighton India Contractor Pvt. Ltd, therefore, the consideration received in lieu thereof could not be held as royalty; and (ii) that, as the services provided by the assessee by time charter of its vessel viz. 'Smit Borneo' were inextricably connected with prospecting,

extraction and production of mineral oils, the consideration therein received from the charterer being in the nature of amounts referred to in Sec. 44BB of the Act, would thus fall within the exclusion carved out in the definition of the term 'royalty' as contemplated in clause (iva) of the 'Explanation 2' to Sec.9(1)(vi) of the Act. We shall first deal with the second limb of the aforesaid contention advanced by the ld. A.R before us. As observed by us hereinabove, it is the claim of the assessee that as the time charter receipts were covered by Sec. 44BB of the Act, the same would thus fall within the exclusion carved out in the definition of the term 'royalty' as contemplated in clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act. We are unable to persuade ourselves to accept the aforesaid claim of the assessee. As had been observed by us hereinabove, in the absence of the assessee's PE in India, the aforesaid time charter receipts could not have been brought to tax under Sec.44BB of the Act. In fact, the assessee had itself not offered the aforesaid amount for tax under Sec.44BB of the Act. Accordingly, in the backdrop of the aforesaid facts, now when the time charter receipts during the year under consideration had not been brought to tax, or in fact, could not have been subjected to tax under Sec. 44BB of the Act, therefore, the claim of the assessee that the same would fall within the scope and gamut of the exclusion carved out in the definition of term 'royalty' as contemplated in clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) cannot be accepted, and is thus rejected.

16. We shall now advert to the claim of the assessee that as it had time chartered its vessel 'Smit Borneo' along with the crew to Leighton India Contractor Pvt. Ltd., and had at no stage given or parted with the 'use' or 'right to use' of the said vessel to the charterer, viz. Leighton India Contractor Pvt. Ltd., the same thus could not be treated as royalty in the hands of the assessee. On a perusal of the records, we find substantial force in the claim of the assessee that the nature of 'agreement' entered into by it with Leighton India Contractor Pvt. Ltd., was for providing of

time charter services, and not for hiring of any equipment. As such, there is substance in the claim of the ld. A.R that the assessee had only time chartered its vessel viz. 'Smit Borneo' along with the crew to Leighton India Contractor Pvt. Ltd., and had at no stage passed over the 'use' or 'right to use' of the said vessel to the charterer. But then, we cannot remain oblivious of the fact that the ld. A.R could not dislodge the claim of the revenue that as per 'Explanation 5' to Sec. 9(i)(vi) of the Act, the fact as to whether the possession or control of the right or property was with the payer or the right or property was used directly by the payer, would have any bearing on the characterising of the amounts received for 'use', or the 'right to use' of any industrial, commercial or scientific equipment, as 'royalty', within the meaning of clause (iva) of the 'Explanation 2' to Sec. 9(1)(vi) of the Act. In fact, it was the claim of the ld. A.R, that the consideration received on time charter of the vessel, viz. 'Smit Borneo' did not fall within the realm of the definition of the term 'royalty' within the meaning of Article 12 of the India-Singapore tax treaty, and thus, the same as per Sec. 90(2) could not be brought to tax under the Act. Before proceeding any further, we may herein observe, that as held by the **Hon'ble High Court of Delhi** in the case of **Asia Satellite Telecommunications Co. Ltd. Vs. DIT (2011) 332 ITR 340 (Del)**, the effect of a tax treaty made pursuant to Sec. 90 is that if no tax liability is imposed under the Act, the question of resorting to the tax treaty would not arise. Further, no provision of the tax treaty can fasten a tax liability when the liability is not imposed by the Act. But then, if a tax liability is imposed by the Act, the agreement may be resorted to for negativing or reducing it. Further, as observed by the Hon'ble High Court, in case of difference between the provisions of the Act and of a tax treaty under Sec. 90, the provisions of the tax treaty shall prevail over the provisions of the Act and can be enforced by an appellate authority or the Court. However, as provided by sub-sec (2) of Sec. 90, the provisions of the Act will apply to an assessee in the event they are more beneficial to him. A similar view has been arrived at by the **Hon'ble High Court of**

Bombay in the case of **CIT Vs. Siemens Aktionlesellschaft (2009) 310 ITR 320 (Bom)**. In the said case, it was inter alia observed by the Hon'ble High Court that though provisions of Sec. 9 of the Act would be applicable, however, considering the provisions of the DTAA if beneficial than the provisions of the IT Act, the provisions of DTAA would prevail.

17. In the backdrop of our aforesaid observations, we shall test the claim of the ld. A.R that the time charter receipts would not fall with the realm of the definition of 'royalty', as provided in Article 12 of the India-Singapore tax treaty. For a fair appreciation of the aforesaid issue we need to look into the relevant clauses of the aforesaid 'agreement', which reads as under :

Clause 7 (a)(i)

Subject to STCW code, The Master shall carry out his duties promptly and the Vessel shall render all reasonable services within her capabilities by day and by night and at such times and on such schedules as the Charterers may reasonably require without any obligations of the Charterers to pay to the Owners or the Master, Offices or the Crew of the Vessel any excess or overtime payment."

Clause 7 (b)

The Vessel's crew if required by charterers will connect and disconnect electric cables, fuel, water and pneumatic hoses when placed on board the Vessel for loading and unloading cargoes, and will hook and unhook cargo on board the Vessel when loading or discharging alongside offshore units.

Clause 7(d)

The entire operation, navigation, and management of the vessel shall be in the exclusive control and command of the Owners, their Masters, Officers and Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive Right of the Owners or the Master of the Vessel to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an contractor, the Charterers being concerned only with the results of the services performed.

Clause 8 (a)

The owners shall provide and pay for all provisions of Vessel crew during mobilization and demobilization voyages, all, wages and all other expenses of the Master, officers and Crew; all maintenance and repair of the Vessel's bull, machinery and equipment as specified in ANNEX "A".

Clause 46 (c) of the agreement which provides as under:

Owner shall Barge/Marine/ Maintenance crew adequate for 24 (Twenty /four) hours operation.

(Emphasis supplied by us)

On a perusal of the aforesaid extract of the 'agreement', we find, that the consideration received by the assessee was not on account of 'use' or 'right to use' of the aforesaid vessel viz. 'Smit Borneo', which in fact had throughout remained with the assessee and was never transferred to the charterer viz. Leighton India Contractor Pvt. Ltd. As such, the vessel viz. 'Smit Borneo' was though used by the assessee for rendering services to Leighton India Contractor Pvt. Ltd., but the same, as per the terms of the 'agreement' was not used by Leighton India Contractor Pvt. Ltd. on an independent basis. In our considered view there is a subtle distinction between the 'use' of an equipment by the assessee 'for' the charterer, and the use of the equipment 'by' the charterer. In our considered view, on the basis of the facts discernible from the records, as the vessel viz. 'Smit Borneo' along with crew was used by the assessee for rendering of services to Leighton India Contractor Pvt. Ltd., it could thus by no means be held as being in the nature of a contract of hiring of equipment by Leighton India Contractor Pvt. Ltd. from the assessee. Our aforesaid view that in a case where the control of the equipment throughout had remained with the assessee and did not get transferred to the charterer, the consideration therein received cannot be brought within the realm of the definition of the term 'royalty' is fortified by the judgment of the **Hon'ble High Court of Delhi** in the case of **Technip Singapore Pte. Ltd. Vs. DIT, 70 taxman.com 233 (Del)**. In the said case, the Hon'ble High Court relying on its earlier judgment in the case of Asia Satellite Telecommunication company ltd. Vs. DIT (2011) 332 ITR 340 (Del), had observed as under:

"34. As far as DTAA in the present case is concerned, the income earned by the Assessee would be treated as royalty only where it is received as consideration for the use of the equipment, i.e., industrial, commercial or scientific. It can also be for use of or the right to use any copyright or for information concerning industrial, commercial or scientific experience. It is clear from the contract itself

that the control of the equipment throughout remained with the Petitioner and did not get transferred to IOCL.

35.1 In this context, it is necessary to refer to the decision of this Court in Asia Satellite Telecommunications Co. Ltd (supra). The facts were that the Assessee in that case, Asia Satellite Telecommunications Co. Ltd. (ASTC), a company incorporated in Hong Kong, was carrying on the business of private satellite communications and broadcasting facilities and was the lessee of a satellite called AsiaSat 1 which was launched in April 1990 and was the owner of a satellite called AsiaSat 2 which was launched in November 1995. ASTC entered into agreements with television channels, communication companies or other companies who desired to utilize the transponder capacity available on the assessee's satellite to relay their signals. The customers had their own relaying facilities, which were not situated in India. From these facilities, the signals were beamed in space where they were received by a transponder located in the assessee's satellite.

35.2 The process of transmission of TV programmes started with TV channels (customers of ASTC) uplinking the signals containing the television programmes ; thereafter the satellite received the signals and after amplifying and changing their frequency relayed it down in India and other countries where the cable operators caught the signals and distributed them to the public. Any person who had a dish antenna could also catch the signals relayed from these satellites. The role of ASTC was that of receiving the signals, amplifying them and after changing the frequency relaying them on the earth. For this service, the TV channels paid ASTC.

35.3 The Court held that ASTC was the operator of the satellites and in control of the satellite. It had not leased out the equipment to the customers. ASTC had merely given access to a broadband width available in a transponder which could be utilized for the purpose of transmitting signals of the customer. It was held that the terms "lease of transponder capacity", "lessor", "lessee" and "rental" used in the agreement would not be the determinative factors. There was no use of "process" by the television channels. Moreover, no such purported use had taken place in India. It was held that the services provided were an "integral part of the satellite" and remained "under the control of the satellite/transponder owner (like the appellant in this case) and it does not vest with the telecast operator/ television channels." The Court rejected the plea that the payment made to ASTC could be 'royalty' within the meaning of Section 9 (1) (vi) of the Act. The Court reiterated that "the fact remains that there is no use of 'process' by the television channels. Moreover, no such purported use has taken place in India."

35.4 The Court has held that the concept of dominion or control is sine qua non use. Further Explanation 5 below Section 9 (vi), to the extent it is not beneficial to the Assessee, will have to in terms of Section 90 (2) of the Act, make way for the provision of the DTAA which is more beneficial to the Assessee. This aspect too has been clarified by the Court in Asia Satellite Telecommunications (supra). It was observed:

> "The effect of an agreement made pursuant to Section 90 is that if no tax liability is imposed under this Act, the question of resorting to agreement would not arise. No provision of the agreement can fasten a tax liability when the liability is not imposed by this Act. If a tax liability is imposed by this Act, the agreement may be resorted to for negativing or reducing it. In case of difference between the provisions of the Act and of an

> agreement under section 90, the provisions of the agreement shall prevail over the provisions of the Act and can be enforced by an appellate authority or the court. However, as provided by sub-section (2), the provisions of this Act will apply to the assessee in the event they are more beneficial to him. Where there is no specific provision in the agreement, it is the basic law, i.e., the Income-tax Act which will govern the taxation of income."

36. For the payment to be characterised as one for the use of the equipment, factually, the equipment must be used by IOCL. In the present case factually, there is no finding that the equipment had actually been used by IOCL. There is a difference between the use of the equipment by the Petitioner 'for' IOCL and the use of the equipment 'by' IOCL. Since the equipment was used for rendering services to IOCL, it could not be converted to a contract of hiring of equipment by IOCL."

18. On a perusal of the orders of the lower authorities, we find, that they in order to support their view that the consideration received by the assessee was liable to be assessed as 'royalty' had relied on the judgment of the **Hon'ble High Court of Madras** in the case of **Poompuhar Shipping Corporation Vs. ITO (I.T)-II Chennai (2014) 360 ITR 257 (Mad)**. In the said case, the Hon'ble High Court had held that by giving possession to the hirer who has control and custody of the vessel the condition of 'use' or 'right to use' is satisfied. In other words, the Hon'ble High Court was of the view that as long as the hirer is given the right to use (with a right to put the ship for a beneficial use for itself) and use the ship to its advantage, the requirement for 'use' or 'right to use' is met. We have perused the aforesaid judgment of the Hon'ble High Court, and are of the considered view, that the observations of the High Court have to be read in context of the facts as were involved in the case before the court. On a perusal of the facts involved in the case before the Hon'ble High Court, we find, that the assessee had entered into charter agreements with various non-resident companies for chartering of their ships in the course of its business of moving of coal from various ports in India to a particular location in India. As per the agreements entered into between the assessee with the various non-resident companies, we find, that there were certain peculiar clauses viz. (i) the place of redelivery of ships was at the option of the charterer; (ii) the masters/captain and others working on the ships were at the disposal of the charterer; and (iii)

the charterer had the right to use the ship, select the time and decide the route as per its requirement. We have given a thoughtful consideration to the facts involved in the aforesaid case before the Hon'ble High Court, and are in agreement with the claim of the ld. A.R that the facts therein involved are distinguishable as in comparison to those in the case before us, which can be briefly culled out as under:

Sr. No.	In case of Madras HC ruling	In case of assessee
1.	Assessee was engaged in the business of moving coal from various ports in India to a particular location in India.	Assessee was in the business of providing time charter services in connection with prospecting, extraction or production of mineral oil in India.
2.	The place of re-delivery of ships was at the option of the assessee (i.e charterer or the lessee).	The place of delivery and redelivery of the vessel was at the location of the assessee (i.e the owner or the lessor) in Singapore (refer Box No. 7 & 8 of the agreement).
3.	The masters/captains and others working in the ships are at the disposal of the assessee (i.e charterer or lessee.	The entire operation, navigation and management of the vessel was in the exclusive control and command of the assessee (i.e the owners/lessor, their masters, officers and crew.
4.	The assessee (i.e charterer or lessee) had the right to use the ship, select the time and decide the route as per its requirement.	The owners (i.e assessee/lessor) were deemed to be an independent contractor and the charterers (i.e Leighton India) were concerned only with the results at the time of the services performed. (Refer clause 7(d) of the agreement).

Accordingly, we are of the considered view, that unlike the facts involved in the aforesaid case before the Hon'ble High Court, in the case before us the control of the ship had throughout remained with the assessee, and the charterer viz. Leighton India Contractor Pvt. Ltd. was only concerned with the services and had no control over the vessel or its crew members. As such, we find that the reliance placed by the lower authorities on the judgment of the Hon'ble High Court of Madras in the case of Poompuhar Shipping Corporation Vs. ITO (I.T)-II Chennai (2014) 360 ITR 257 (Mad), being distinguishable on facts, would thus not assist the case of the revenue. In fact, our aforesaid view stands fortified by order of a co-ordinate bench of the Tribunal i.e ITAT, Chennai in the case of **Sical**

Logistics Ltd. Vs. ADIT (I.T) Chennai [ITA No. 1074-1079/Mad/2015, dated 14.12.2016]. In the said case, the tribunal had distinguished the facts involved in the case before its jurisdictional High Court in the case of Poompuhar Shipping Corporation (supra). It was observed by the tribunal that in case of time charter of vessel the control of the vessel remains with the foreign shipping companies. In the backdrop of the aforesaid factual matrix the Tribunal relying on the judgment of the Hon'ble High Court of Delhi in the case of Asia Satellite Telecommunication company ltd. Vs. DIT (2011) 332 ITR 340 (Del), had observed, that there is a distinction between letting the asset and use of the asset by the owner for providing services. By drawing support from the aforesaid judgment of the High Court, it was observed by the Tribunal that the payment made for use of the asset by owner cannot tantamount to royalty. The Tribunal while concluding as hereinabove had observed as under:

> "We are also not in agreement in Department's contention that the payment made in time charter of vessels in this case constitutes 'royalty''. This perception seems to be misconceived. The Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd. vs. DCIT (supra) has held that two things are necessary to christen a payment as a 'royalty' under Explanation 2 appended to clause (vi), which speaks about possession and control of the vessel in the given case, the assessee neither has control nor possession over the vessels. The Captain/Master and the crew is instructed, directed and controlled by the ship owner only and not by the assessee. The assessee simply informs the description of the cargo to be carried on and from which port to which port the cargo has to be transported. Thus, it becomes clear that the assessee neither has control/nor the possession over the vessel in question."

Apart from that, we find that a similar view had also been arrived at by the ITAT Ahmedabad bench 'I' in the case of **DCIT, International Taxation, Baroda Vs. Bombardier Transportation India Pvt. ltd. (2017) 162 ITD 586 (Ahd)**. In the said case, it was observed by the Tribunal that the rendition of I.T support services to the assessee by a Canadian company, even if certain equipment were to be used, that by itself would not vest any right in the assessee to use the equipment, and thus, payments made by the assessee could not be viewed as payments for 'use' or 'right to use' any industrial, commercial, or scientific

equipment. Further, we find that a similar view had also been taken by the ITAT Hyderabad Bench 'A' in the case of **DDIT (IT)-1, Hyderabad Vs. Dharti Dredging & Infrastructure Ltd. (2012) 146 TTJ 283 (Hyd)**. In the said case, it was observed by the Tribunal that as the assessee before them had only hired the dredger simpliciter from the foreign company viz. EMPL, and had neither used the same or any part thereof on its own nor was it given any right to use the same by the foreign company, the payment therein made could thus not be treated as royalty. On the basis of our aforesaid observations, we are of the considered view that as can be gathered from a perusal of the relevant extracts of the 'agreement' (as reproduced by the DRP in its order), it can safely be concluded that as the assessee had received charges on account of time charter services rendered by its vessel 'Smit Borneo' along with the crew to Leighton India Contractor Pvt. Ltd., and not for allowing the latter the 'use' or 'right to use' of industrial, commercial, or scientific equipment, the same therein cannot be treated as 'royalty' within the meaning of Article 12(3)(b) of the India-Singapore tax treaty. As such, we herein not being able to subscribe to the view taken by the lower authorities, to the extent they had concluded that the amounts received by the assessee for time charter of its vessel viz. 'Smit Borneo' was to be treated as royalty under Article 12(3)(b) of the India-Singapore tax treaty, therein vacate the same. As we have vacated the view taken by the A.O/DRP that the consideration received by the assessee from time charter of its vessel viz. 'Smit Borneo' was to be treated as 'royalty' as per Article 12 of the India-Singapore Tax Treaty, therefore, we refrain from adverting to the other contentions advanced by the ld. A.R to support its claim, which thus are left open. The **Grounds of appeal No. 2 to 4** are allowed in terms of our aforesaid observations.

19. We shall now advert to the claim of the ld. A.R that the mobilisation fees of Rs.17,80,500/- received by the assessee from Leighton India Contractor Pvt. Ltd. had wrongly been treated as royalty, both under Sec.

9(1)(iv) of the Act, and Article 12(3)(b) India-Singapore tax treaty. As noticed by us hereinabove, it was inter alia observed by the A.O/DRP that as the mobilisation of the vessel viz. 'Smit Borneo' formed an inextricable part of the time charter services rendered by the assessee, thus the fees therein received were also to be assessed as royalty. As we have concludd that the consideration received by the assessee from time charter of the vessel viz. 'Smit Borneo' would not fall within the realm of the definition of the term 'royalty' as contemplated in Article 12 of the India-Singapore tax treaty, therefore, the mobilisation fees, which as observed by the A.O/DRP formed an inextricable part of such time charter services has to be similarly construed. As such, we vacate the treatment of the mobilisation fees received by the assessee as royalty by the lower authorities. The **Grounds of appeal No. 5-7** are allowed in terms of our aforesaid observations.

20. We shall now take up the claim of the ld. A.R that the A.O/DRP had erred in concluding that the amount of Rs.1,31,80,903/- received by the assessee towards reimbursement of expenses which were incurred by it for and on behalf of Leighton India Contractor Pvt. Ltd. was to be assessed as royalty within the meaning of Sec. 9(1)(vi) of the Act, and Article 12(3)(b) of the India-Singapore tax treaty. As observed by us hereinabove, the amounts received by the assessee, insofar the same were towards time charter of the vessel viz. 'Smit Borneo' alongwith the crew to Leighton India Contractor Pvt. Ltd. are concerned, cannot be treated as royalty within the meaning of Article 12(3)(b) of the India-Singapore tax treaty. However, as neither the details of the expenses, which as claimed by the assessee were incurred for and on behalf Leighton India Contractor Pvt. Ltd., nor the basis of allocation of the common expenses to the share of the assessee are discernible from the records, therefore, it would be premature to adjudicate the said issue in the absence of the relevant facts. Accordingly, in all fairness we restore the issue to the file of the A.O, who is herein directed to verify the nature

of the amounts which as claimed by the assessee were received by way of reimbursements from Leighton India Contractor Pvt. Ltd., and also, the basis of allocation of the common expenses to the share of the said charterer. Needless to say, the A.O in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to place on record the requisite documents in support of its claim that the aforesaid amounts received from Leighton India Contractor Pvt. Ltd. were purely towards reimbursement of expenses which were incurred by the assessee for and on the latter's behalf.

21. The assessee has further claimed that the A.O while framing the assessment had allowed a short credit of the tax deducted at source (TDS). It is the claim of the assessee, that as against the credit for TDS of Rs.1,20,29,183/- that was raised in its return of income, the A.O had allowed credit of only Rs.95,64,832/-, which had thus resulted to a short grant of credit of TDS of Rs.24,64,351/-(principal amount). As the aforesaid issue would require verification of the facts borne from the records, we therefore restore the same to the file of the A.O who is directed to look into the said grievance of the assessee. In case, the assessee is able to substantiate the fact as regards short allowing of credit of TDS in the course of the 'set aside' proceedings, the A.O is directed to issue the balance refund to the assessee, as per law. The **Ground of appeal No. 11** is allowed for statistical purposes.

22. The assessee has assailed before us the levy of interest u/ss. 234A and 234B amounting to Rs.40,29,825/- and Rs.96,26,797/-, respectively. The ld. A.R had not placed any contention as to how the charging of the aforesaid respective interests suffered from any infirmity. Be that as it may, as the charging of the respective interests would be consequential to the giving effect of our aforesaid observations on the merits of the case, the A.O shall consider the claim of the assessee in the course of the

'set aside' proceedings. The **Grounds of appeal Nos. 12 & 13** are allowed for statistical purposes.

23. The assessee had further assailed before us the initiation of the penalty proceedings u/s 271(1)(c) by the A.O in the assessment order. As the said ground raised by the assessee is premature, therefore, the same is dismissed. The **Ground o appeal No. 14** is dismissed.

24. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 09/11/2020.

Sd/-	Sd/-
(Pramod Kumar)	(Ravish Sood)
VICE PRESIDENT	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 09.11.2020
P.S Rohit

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai.**