# IN THE INCOME TAX APPELLATE TRIBUNAL
## "I" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.6588/Mum/2018
(A.Y: 2015-16)

| M/s. Smit Singapore Pte ltd.,<br>SRBC & Associates, LLP<br>14th Floor, The Ruby,<br>29 senapati Bapat Marg<br>Dadar (W) – 400028. | Vs. | DCIT (IT) – 4(2)(1)<br>17th Floor, Room No. 1708, Air India Building , Nariman Point, Mumbai |
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| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAOCS1031L | | |
| Appellant/Respondent | .. | Respondent/Appellant |

| Appellant by : | Shri Madhur Agarwal, AR |
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| Respondent by : | Shri S.S. Iyengar, SR DR |

| Date of Hearing | 24.06.2021 |
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| Date of Pronouncement | 20.07.2021 |

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the order of the Assessing officer (A.O) passed u/s 143(3) r.w.s 144C (13) of the Income Tax Act 1961 in pursuance to the directions of the Dispute Resolution Panel (DRP) u/s 144C(5) of the Act.

The assessee has raised the following grounds of appeal:

**GENERAL**

1. erred in assessing total income at Rs 13,64,81,159 as against returned income of Rs Nil;

**Taxability of receipts on hire of vessel on time charter basis of Rs 13,63,71,972/-**

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 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 revenues received on account of provision of services through time charter of vessel during the period when the vessel was outside India: Rs 2,02,53,777/-**

5, without prejudice to the above, erred in holding that an amount of Rs. 2,02,53,777 representing charter hire fees earned during the period when the vessel "Smit Borneo" was outside India shall be taxable as "Royalty" under the Act as well as under Article 12 of the India-Singapore DTAA.

6. without prejudice to the above, erred in not appreciating the fact that the aforesaid income was neither received nor deemed to be received in India nor accrued or arisen in India or deemed to accrue or arise in India and accordingly, the same ought not to be taxable in India.

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 of reimbursement of expenses of Rs 1,09,187/-**

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. 1,09,187 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 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

**Levy of surcharge amounting to Rs.6,82,406/- and Education cess amounting to Rs.4 29 916**

11. erred in levying tax @ 10.815% ie tax rate after including surcharge and education cess, without appreciating the fact that the rate of 10% prescribed under the India-Singapore DTAA is inclusive of surcharge and education cess and no further surcharge or education cess should be levied.

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

12. erred in not granting additional TDS credit of Rs 30,05,036 as claimed by the Appellant in the assessment proceedings.

**Levy of interest under section 234B of the Act of Rs 51,76,248**

13. erred in levying interest under section 234B of the Act amounting to

    Rs.51,76,248.

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

14. 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. The Brief facts of the case are that the assessee is a foreign company and is a nonresident and was incorporated in Singapore. The assessee operates maritime sector and primarily engaged in the business of salvage, wreck removal, environmental protection and consultancy services. In the Financial Year 2014-15 the assessee company has earned revenues in connection with its contracts with Leighton India Contractors Private Ltd in respect of charter of the vessel" Smit Borneo". The assessee has chartered the vessel for carrying out certain activities of exploration or extraction of mineral oils. The assessee has filed the return of income for A.Y 2015-16 on 30.09.2015 with total income of Rs.Nil. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and furnished the details and the case was discussed. The A.O scrutinized the details supporting the return of income filed. The assessee was called to explain the reasons for not offering any income to tax u/s 44BB of the Act and notice was issued. The assessee has submitted that the period of charter hire in F.Y 2014-15 was 81 days i.e from 1st April 2014 to 20th June 2014 and as per the Article 5 of the Indo-Singapore DTAA the threshold for constituting the permanent establishment (PE) is 183 days in a fiscal year where the services and

facilities are in connection with exploration and extraction of mineral oils in India. The contentions of the Ld. AR that they do not have any PE in India and accordingly revenue is no taxable.

3. The Asseesee was issued the notice u/s 142(1) of the Act to submit further details of income. The assessee has filed reply on 12.10.2017 referred at Para 7 of the assessment order. The assessee has explained reasons and the alternate submissions on charter hire fees earned of Rs 2,02,53,777/- during the period when the vessel was outside India and the income was neither received or deemed to be received in India. Further the assessee submitted the facts and evidence of non existence of PE but the A.O was not satisfied with the explanations and dealt on the disputed issue in his order and considered the provisions of Section 44BB and 9(1)(vi) of the Act and DTTA between India and Singapore, Articles, Technical feasibility study, judicial decisions and finally observed that the receipts from charter vessel services are taxed as royalty Rs.13,63,71,972/-and the reimbursement of expenses are taxed as royalty and assessed the total income of Rs. 13,64,81,159/- and passed the order u/s 143(3) r.w.s 144C(1) dated 20.01.2017. Against the draft assessment order, the assessee has filed the objections in Form no 35A before the Hon’ble DRP, the DRP has dealt on the objections

and passed the order u/s 144C(5) of the Act dated 26.06.2018. Subsequently, in pursuant to the directions of the Hon'ble DRP, the A.O has passed the order u/s 143(3) r.w.s 144C(13) of the Act dated 21.09.2018 with assessed total income of Rs. 13,64,81,159/-. Aggrieved by the order of the A.O u/s 143(3) r.w.s 144C13 of the Act, the assessee has filed an appeal before the Honble Tribunal.

4. At the time hearing, the learned Counsel for the assessee submitted that the disputed issue of treatment of income of chartering services and reimbursement of expenses was dealt in the assessee's own case in the A.Y i.e 2014-15 in ITA No. 7055/Mum/2017 by the Honble Tribunal and was decided the issue in favour of the assessee and are equally apply to the present assesseement year. Contra the Ld.DR made the submissions and relied on the orders of the A.O. and DRP.

5. We heard the rival submissions and perused the material on record. The issues in the present appeal are identical and similar to preceding Assesseement Year 2014-15 and were allowed in favour of the assessee by the the Hon'ble Tribunal in the assessee's own case for the A.Y 2014-15 in ITA No.

7055/Mum/2017 dated 9-11-2020 at page15 to 28 Para 14 to 20 are read as under:

> *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, <u>AND</u> 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, <u>AND</u> 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) <u>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</u>."*

*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. N* | *In case of Madras HC ruling* | *In case of assessee* |
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| o. | | |
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| 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* |

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|---|---|---|
| | | *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.*

6. We find the facts presented before us are similar to the assessee own case in the Honble ITAT decision. We fallow the judicial precedence and of the substantive view that the receipts from the charter of vessel *'Smit Borneo'* cannot be treated as royalty and direct the assessing officer to delete the addition as per the ratio of the decision discussed in the above paragraphs and allow the grounds of appeal in favour of the assessee.

7. On the issue of taxability of reimbursement of expenses received by the assessee in respect of *'Smit Borneo'* vessel and the contractors. We find that the relevant details and allocations are to be verified. Accordingly, we remit the disputed claim to the file of the assessing officer for limited purpose to verify and examine the facts with the evidences.The assesse should be provided adequate opportunity of hearing and shall co-operate in submitting the information and allow the grounds of appeal for statistical purpose.

8. We find the assessee has claimed additional TDS credits in the Assesseement proceedings. The asseesse has submitted the supporting claim of evidences before the A.O. We are of the opinion that the assessee should not be deprived of its legitimate right for TDS credits. Accordingly, the assessing officer is directed to verify and examine the documents filed in support of TDS claim.

9. The ground of appeal of chargeability of interest u/s 234B of the Act is consequential in nature and does not require any specific adjudication.

10. The assessee has assailed ground of appeal on the penalty proceedings initiated u/s 271(1)(c) of the Act. The

ground of appeal is raised prematurely by the assessee and is dismissed.

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11. In the result the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 20.07.2021.

Sd/-
(SHAMIM YAHYA)
**ACCOUNTANT MEMBER**

Sd/-
(PAVAN KUMAR GADALE)
**JUDICIAL MEMBER**

Mumbai, Dated 20.07.2021

KRK, PS

**<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

( Asst. Registrar)
ITAT, Mumbai