

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DEHRADUN BENCH, DEHRADUN**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 2133/Del/2016 : Asstt. Year : 2011-12**

DCIT(International Taxation), Circle-2, Dehradun	Vs	Transocean Offshore Deepwater Drilling Inc., 1 <sup>st</sup> Floor, Spectra High Street, Hiranandani Business Park, Powai, Mumbai
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCT6720C</b>		

**Assessee by : Sh. Amit Arora, CA**

**Revenue by : Sh. T.S. Mapwal, Sr. DR**

<b>Date of Hearing: 17.09.2021</b>
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<b>Date of Pronouncement: 21.09.2021</b>
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**ORDER**

**Per Amit Shukla, Judicial Member:**

The present appeal has been filed by the revenue against the order of the Id. CIT(A)-2, Noida dated 10.02.2016.

2. The moot issue in this case is whether the Id. CIT (A) erred in reverse in the finding of the AO that the assessee along with its associate is liable to be taxed in the status of AOP in respect of revenues on account of provisions of drilling Rigs under a contract undertaken by the assessee as consortium with its associate.

3. We find from the records that the ground nos. (i), 1.1 (a), (b), (c) & (d) and (ii) are similar in *toto* to the grounds raised by the assessee for the A.Y. 2010-11 in ITA No.4405/del/2014 and for the earlier years.

4. For the sake of ready reference and complete understanding, the order authored by one of the Members of bench is reproduced hereunder:

**O R D E R**

*PER AMIT SHUKLA, J.M.: DATED: 7th May, 2018*

*"The appeal for the Assessment Year 2010-11, Revenue has filed the appeal against the order dated 28.05.2011, passed by Id. CIT (Appeals)-II, Dehradun for the quantum of assessment passed u/s.143(3) /144C(3)(b) of the Income Tax Act, 1961. The other appeals have been filed by the assessee against separate orders of even date, 30/05/2014 for the quantum of assessment u/s 143(3) /147/ 144C. Since common issues are involved in all the appeals, therefore, same were heard together and are being disposed of by way of this consolidated order. We will first take up the Revenue's appeal for the Assessment Year 2010-11, wherein following grounds have been raised:-*

*"1. Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in reversing the finding of the Assessing Officer that the assessee, along with M/s Schlumberger Asia Services Ltd ('SASL'), is liable to be taxed in the status of Association of Persons ('AOP') in respect of revenues on account of provision of deepwater Drilling Rigs alongwith integrated services to M/s ONGC under a contract undertaken by the assessee as Consortium with SASL.*

*1.1 Whether on the facts and circumstances of the case, the Ld CIT (A) has erred in not appreciating the fact that:*

*a) The Contract was awarded by M/s ONGC, not separately and individually to M/s Transocean Offshore Deepwater Drilling Inc and (TODDT) and M/s SASL, but to a consortium consisting of TODDI and SASL.*

*b) The bid was submitted by the parties as a single entity, the contract was negotiated by & awarded to consortium as a single entity, the risks and costs were cast on the consortium as a single entity, so much so that as per the terms of the Consortium Agreement, termination of contract by ONGC in respect of individual member would deem to constitute simultaneous termination of the Consortium Agreement.*

*c) The parties had come together for a common purpose & joint action, and in terms of the contract, had assumed joint and several responsibilities for successful completion of the project.*

*d) The nature, scope and magnitude of the contract was such that neither of the parties was individually competent or even eligible for executing the project on its own and the contract was awarded on the strength of the Consortium Agreement envisaging the bidding for and award/execution of the contract as a single entity and therefore, any subsequent agreement between the partners regarding the respective scope of work to be undertaken individually does not negate the constitution of AOP.*

*2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A), having on the one hand held that the assessee along with M/s SASL, does not constitute AOP, has erred in proceeding to also hold that the AO was wrong in making a protective assessment in the hands of the assessee in respect of its income from the contract with ONGC.*

*3. The Ld CIT(Appeals) has erred in holding that the assessee is not liable to pay interest u/s 234B of the Act and in observing that the issue is covered in favour of the assessee by decision in the case of M/s Maersk [334 ITR 79, UK]*

*3.1 The Ld CIT (Appeals) has erred in not appreciating the fact that the case of M/s Maersk was distinguishable on facts wherein the employer failed to deduct tax at source despite the specific mandatory provisions of the Act stipulating the employer being liable to deduct tax on the salary paid to the employee, thereby holding that an employee is not liable to pay advance tax on salary.*

*3.2 The Ld CIT(Appeals) has erred in not appreciating the fact the case does not lay down a general proposition of law that interest u/s 234B is not chargeable in all cases, particularly in cases where the Non-Resident assessee/payee/deductee has played a role in inducing non-deduction or short-deduction on the part of the payer/deductor.*

*3.3 The Ld CIT(Appeals) has erred in failing to take note of the observations of the Hon'ble High Court in the case of M/s Mitsubishi [330 ITR 578, Del] that the role of the assessee/payee/deductee in short-deduction or non-deduction of tax needs to be ascertained before claim regarding non-liability to interest u/s 234B of the Act is accepted, a proposition affirmed subsequently in the case of M/s Alcatel Lucent (judgement of Delhi High Court dated 7.11.2013 in ITA No. 327 & Ors of 2012) and followed by ITAT Delhi in the order dated 13.06.2014 in the case of Nortel Network India International Inc [ITA No. 4766/DEL/201] and order dated II Pacific Ltd & Ors [ITA No. 5283/Del/2010]."*

*2. At the outset, Id. counsel for the assessee submitted that all the appeals stands squarely covered by the decision of the Tribunal in assessee's own case as well as in the case of AOP, wherein exactly similar issue has been decided.*

*3. On the other hand, learned Department Representative has strongly relied upon the order of the learned Assessing Officer.*

*4. The facts in brief are that the assessee is a non-resident company and has offered its revenue on account of one contract entered as Consortium of Transocean Offshore Deepwater Drilling Inc. (TODDI), USA; and Schlumberger Asia Services Ltd. (SALS), Hong Kong, with Oil & Natural Gas Corporation Ltd. During the year under consideration, it has offered its revenue to the extent of Rs.66,08,27,503/- on account of contract entered with ONGC for the charter hire of Deep Water Drilling Unit Rig-Discoverer Seven Seas along with its consortium*

*member, M/s. Schlumberger Asia Services Ltd. The income was offered to tax u/s. 44BB (1) of the Act at 10% deemed profit rate. The Assessing Officer noted that assessee has reimbursement received from ONGC has been reduced from the gross profit while working the profit u/s.44BB. However, the Assessing Officer held that such reimbursement aggregating to Rs. 53,54,61,447/- should be taken as part of gross revenue. However, the addition has been made on protective basis in the case of assessee and on substantive basis the addition has been made in the hands of AOP of Schlumberger Asia Services Ltd. and Transocean Offshore Deepwater Drilling Inc.*

*5. Ld. CIT (A) following the appellate order for the Assessment Year 2009-10 held that since already issue has been decided in favour of the assessee in the case of AOP, therefore, this appeal of the assessee is allowed.*

*6. Similarly for the Assessment Years 2007-08 and 2008- 09 also substantive assessment has been made in the case of AOP and protective in the case of present assessee. Ld. CIT (A) has held that since already appeal has been filed against AOP, therefore, the present appeal filed by the assessee have become infructuous.*

*7. We find that Tribunal in the case of the assessee as well as in the case of the AOP has decided the issues after observing and holding as under:-*

*"We have perused the submissions advanced by both the parties in the light of the records placed before us.*

*We refer to Circular No. 7/2016 dated 07/03/16 issued by CBDT, wherein, clarification regarding taxability of consortium members has been provided, which reads as under:-*

*"A consortium of contractors is often formed to implement large infrastructure projects, particularly in Engineering, Procurement and Construction ('EPC') contracts and Turnkey Projects. The tax authorities in many cases have taken a position that such a consortium constitutes an Association of Persons (AOP') i.e. a separate entity for charging tax. The claim of taxpayers, on the other hand, is contrary to this view. This has led to tax disputes particularly in those cases where each member of the consortium, although jointly and severally liable to the contractee, has a clear distinction and role in scope of work, responsibilities and liabilities of the consortium members.*

*2. The term AOP has not been specifically defined in the Income-tax Act, 1961 (Act'). The issue as to what would constitute an AOP was considered by the Apex Court in some cases. Although certain guidelines were prescribed in this regard, the Court opined that there is no formula of universal application so as to conclusively decide the existence of an AOP and it would rather depend upon the particular facts and circumstances of a case: In the specific context of the EPC contracts/Turnkey projects, there are several contrary ruling of various Courts on what constitutes an AOP. The matter has been examined.*

*With a view to avoid tax-disputes and to have consistency in approach while handling these cases, the Board has decided that a consortium arrangement for executing EPC/ Turnkey contracts which has the following attributes may not be treated as an AOP:-*

*a. each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work:*

*b. each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level only to facilitate convenience in billing:*

*c. the men and materials used for any area of work are under the risk and control of respective consortium members;*

*4.1 The control and management of the consortium is not unified and common management is only for the inter-se coordination between the consortium members for administrative convenience 4.1. On a detailed comparison of various Clauses of two agreements dated 04/05/03, 28/05/03, we are of the considered opinion that Consortium Agreement dated 04/05/03 is the basis on which the entire scope of work has been executed by*

*consortium members. The entire relationship between the consortium members are governed by Consortium Agreement dated 04/05/03, whereas MoU dated 28/05/03 has been executed by consortium members solely for ONGC and is as per format of ONCG, therefore contained clauses relevant only for the sake of application of bid with ONGC. In our considered opinion in case of any differences between the consortium members the agreement dated 04/05/03 are enforceable independently.*

*4.2. Further from the agreement dated 06/11/03 entered into by Consortium with ONGC makes it clear that Consortium members being Slumberger Asia Services Ltd. and Transocean Offshore Deepwater Drilling Pvt. Ltd. had distinct and separate scope of work by virtue of their technical expertise and their respective spheres of work. Slumberger Asia Services Ltd was to provide various services like logging while drilling, cementing services, wire line logging services, mud logging services and mud services whereas Transocean Offshore Deepwater Drilling Pvt. Ltd. was to provide drilling unit which is major capital equipment provided on charter hire basis along with personnel to operate the said drilling unit.*

*4.3. In respect of the payments by ONGC it is further observed that each consortium member raised separate invoices, on which ONGC shall honour both the invoices independently. It is also observed that do both the members have agreed to maintain separate books of*

*accounts which further emphasises their independent role of work with ONGC though work has to be performed jointly. Further it is also observed that no member had any role to play in respect of the scope of work allocated to the other- member and neither of the consortium members shared any costs nor risk and had managed their own deliverables.*

*4.4. Ld. Counsel placed reliance upon decision of Hon'ble Delhi High Court in case of Linde AG Linde Engineering division vs. DDI reported in 365 ITR 1 wherein identical issue has been addressed by Hon'ble Court.*

*4.5. Thus, respectfully following the decision of Hon'ble Delhi High Court in the case of Linde AG Linde Engineering Division vs. DDI (supra) we hold that Consortium Agreement dated 04/05/03 between Slumberger Asia Services Ltd and Transocean Offshore Deepwater Drilling Pvt. Ltd., do not constitute an AOP.*

*4.6. From the assessment order it is observed that Ld.AO has taxed the revenue under section 115 A at 10%. Section 115A presupposes the rendering of technical services by assessee and now with the decision of Hon'ble Supreme Court in the case of ONGC Ltd (supra) the issue stands settled as on date, regarding prospecting for or extraction or production of mineral oil is not to be treated as technical services for the purposes of Explanation 2 to section 9 (1) (vii) and would rather be covered by section 44 BB of the Act.*

*4.7. Thus in our considered opinion Transocean Offshore Deepwater "Drilling Inc, being consortium member has rightly offered to tax the receipts u/s 44BB in the return of income. 4.8. Accordingly, we allow Grounds 1-2 raised by assessee."*

5. Since, there is no material change in the facts of the case and the legal propositions for the instant year, following the same ratio, we hereby dismiss the appeal of the revenue.

6. In the result, the appeal of the revenue is dismissed.

Order Pronounced in the Open Court on 21/09/2021.

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 21/09/2021**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

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

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**ASSISTANT REGISTRAR**