IN THE INCOME TAX APPELLATE TRIBUNAL
(DEHRADUN BENCH, NEW DELHI)

(Through Video Conferencing)

BEFORE

SHRI AMIT SHUKLA, JUDICIAL MEMBER
and
Dr. B.R.R. KUMAR , ACCOUNTANT MEMBER

ITA No. 4639/Del./2017, A.Y. : 2012-13
ITA No. 4640/Del./2017, A.Y. : 2014-15

Dy. Commissioner of Income Tax, Circle-II, (International Taxation), Dehradun	Vs	M/s. Triton Holdings Limited C/o Nangia & Co. 3rd Floor, NCR Plaza, Municipal No. 24A, New Cantt Road, Dehradun.
(APPELLANT)		**(RESPONDENT)**
(PAN : AADCD1582A)		

Revenue by : Sh. T.S. Mapwal, Sr. DR
Assessee by : Shri Amit Arora, Adv.

Date of Hearing: 08.11.2021		**Date of Pronouncement: 12.11.2021**

O R D E R

PER B.R.R.KUMAR, ACCOUNTANT MEMBER :

Both appeals have been filed by the revenue against the order of the ld. CIT(A)-2, Noida, dated 09.05.2017.

2. Following grounds have been raised by the assessee:

ITA No. 4639/Del/2017, A.Y. 2012-13

"(i) Whether on the facts and circumstances of the case and in law, the CIT (A) has erred in holding that receipts of service tax are not includible in gross revenue of the assessee for the purpose of computation of profits under the presumptive provisions of u/s 44BB of the I.T. Act, 1961.

(ii) Whether the CIT (A) has erred in not appreciating the fact that the provision of section 44BB of the Act are a self-contained code providing for computation of profit at a fixed percentage of gross receipts of the assessee and all the deductions and exclusions from income are deemed to have been allowed to the assessee.

(iii) Whether the CIT (A) has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, there is no scope for computing or re-computing the profits by excluding any element of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a scheme of simple mode of computation of profits u/s 44BB of the Act and obviating the need for accounting for individual receipts and payments etc.

(iv) Whether the CIT (A) has erred in ignoring the ration of the judgment in the case of M/s Chowringhee Sales Bureau (P) Ltd. (82 ITR 542, SC) wherein the Hon'ble Apex Court has held that the Sales Tax collected by an assessee in the ordinary course of its business forms part of its business receipts. Owing to the inherent similarity in the nature of sales tax and service tax, the ratio of the judgment in the said case is directly applicable to the instant case.

(v) Whether on the facts and circumstances of the case the CIT(A) has erred in holding that interest u/s 234B was not chargeable in this case by relying upon the decision of Hon'ble Delhi High Court especially when the role of assessee in short deduction/non deduction has not been verified.

(vi) The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time of or before the hearing of the appeal.

ITA No. 4640/Del/2017, A.Y. 2014-15

"(i) Whether on the facts and circumstances of the case and in law, the CIT (A) has erred in holding that receipts of service tax are not includible in gross revenue of the assessee for the purpose of computation of profits under the presumptive

provisions of u/s 44BB of the I.T. Act, 1961.

(ii) Whether the CIT (A) has erred in not appreciating the fact that the provision of section 44BB of the Act are a self-contained code providing for computation of profit at a fixed percentage of gross receipts of the assessee and all the deductions and exclusions from income are deemed to have been allowed to the assessee.

(iii) Whether the CIT (A) has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, there is no scope for computing or re-computing the profits by excluding any element of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a scheme of simple mode of computation of profits u/s 44BB of the Act and obviating the need for accounting for individual receipts and payments etc.

(iv) Whether the CIT (A) has erred in ignoring the ration of the judgment in the case of M/s Chowringhee Sales Bureau (P) Ltd. (82 ITR 542, SC) wherein the Hon'ble Apex Court has held that the Sales Tax collected by an assessee in the ordinary course of its business forms part of its business receipts. Owing to the inherent similarity in the nature of sales tax and service tax, the ratio of the judgment in the said case is directly applicable to the instant case.

(v) The appellant prays for leave to added, amend, modify or alter any grounds of appeal at the time of or before the hearing of the appeal."

3. The only issue involved in this case is that whether service tax is includable in the gross revenue for computing profits under presumptive provisions of section 44BB of the I.T. Act, 1961 or not ?

4. We have heard the rival submissions on the issue under consideration and have gone through the entire material available on record. The contention of the ld. AR at the outset has been that the

core issue as culled out in grounds of appeal stands settled in favour of the assessee and against the Revenue by Co-ordinate Bench of Tribunal in the case of assessee itself for preceding assessment year in the identical facts and circumstances of the case. The ld. DR though relied on the order of the Assessing Officer, but could not controvert the above contention of the assessee regarding the issue having been covered by the decision of coordinate Bench of Tribunal. We have gone through the above referred order of Tribunal and find that the core issue involved in this case is covered in favour of the assessee in the similar facts and circumstances.

5. The assessee is a non-resident company .During the year under consideration, it had offered revenues to taxation on account of ongoing contract entered with ONGC Ltd. The assessee, in its return of income, had claimed that the taxable revenues were to be computed in terms of section 44BB of the Income Tax Act, 1961.During the course of assessment proceedings, the Assessing Officer found that an amount of Rs.****** received on account of service tax had not been added to the gross revenue chargeable to tax u/s 44BB of the Act. It was the assessee's contention that statutory charges cannot form part of the amount for the purpose of deemed profit u/s 44BB of the Act. As per the assessee, service tax was in the nature of reimbursement and hence not includible

in gross receipts for the purpose of taxation. The assessee contended that it had acted only as a collection agency for the Government for collection of service tax and as such, the collections on account of service tax could not be considered as income generating receipts in the hands of the assessee. It was further contended before the Assessing Officer that any receipt unconnected with the business of exploration, exploitation of oil etc. could not form part of the taxable receipts u/s 44BB of the Act. However, the Assessing Officer was of the opinion that for the purpose of presumptive determination of the assessee's profit, the quantum of amount received from the customers against its service tax obligation had to be essentially considered as part of the receipt and, accordingly, a sum of Rs. ***** was added back for the purpose of calculating the gross receipts on which the presumptive tax rate had to be applied.

6. The Ld. DR submitted that Section 44BB makes a special provision for computing profits and gains of the non-resident assessee engaged in the business of exploration, etc., of mineral oils. Sub-section (1) provides that in respect of such an assessee, notwithstanding anything contained in sections 28 to 41 and sections 43 to 43A, an assessee shall be deemed to have earned ten per cent profit on the amount mentioned in

sub-section (2) received by him. It was submitted by the Ld. DR that Section 44BB is a complete code in itself. It provides by a legal fiction to be the profits and gains of the non-resident assessee engaged in the business of oil exploration at the rate of 10 per cent of the aggregate amount specified in sub-section (2). He submitted that the Hon'ble Uttrakhand HC has consistently held in a number of cases that the aggregate amount received be included in total income for taxation under section 44BB:

7. The Ld. DR submitted that service tax receipts need to be included in aggregate amount brought to tax under section 44BB because:

(i) *Section 44BB is a self contained code providing for computation of profits at a fixed percentage of gross receipts of the assessee and all the deductions, exemptions and exclusions from income are deemed to have been allowed;*

(ii) *It is open to those who want to claim deductions, exemptions and exclusions in assessment to opt to proceed under section 44BB (3).*

(iii) *Once the receipts are offered to tax u / s 44BB (1) & (2), which provides for computation of profits on gross basis, there is no scope for computing or recomputing the profits by excluding any element*

of receipts from the total turnover as the same would amount to defeating the very purpose of providing for a scheme of simpler mode of computation of profits and obviating the need for accounting for individual receipts or payments.

8. The Ld. DR further submitted that the amount mentioned in sub-section (2) of section 44BB clearly shows that the amount paid to the assessee on account of provision of services and facilities in connection with the extraction or production of mineral oil, whether paid in or outside India, are to be included. It was submitted by the Ld. DR that the service tax receipt squarely falls within the principle enunciated in Chowringhee Sales Bureau (P.) Ltd. v. CIT [1973] 87 ITR 542 (SC) wherein it was laid down that sales tax charged forms part of the trading receipts and is as such liable to be assessed to income tax. The Ld. DR submitted that since then the courts have consistently held similarly for all kinds of taxes or government receipts (that were received by the assessee during the relevant PY) that these are taxable receipts and he relied on the following judicial pronouncements:

CITATION	TAX / RECEIPT
[1997] 228 ITR 112 (All) Jagdish Prasad Nigam	Excise Duty
[2006] 154 TAXMAN 266 (ALL) Mohan Shramic Udyog Ltd	Central Sales Tax and Local Sales Tax
[2012] 28 TAXMANN.COM 94 (CAL) Poddar Projects	Surcharge is part

		Of rent
[2013] 35 taxmann.com 565 (Allahabad)	UP Hotels	Luxury Tax
[1982] 9 Taxman 173 (Punj_Har)	Kunjpura Kiln	Royalty (payable to government)
[2006] 154 Taxman 274 (Allahabad)	Rampur Distillery	Export Duty
[2015] 58 taxmann.com 206 (Bombay)	Ovira Logistics	Service Tax.

8. The Ld. DR submitted that in view of the above mentioned case laws, the receipt of service tax from ONGC is definitely connected with the business of exploration and / or extraction of oil and needs to be included in the aggregate amount to be brought to tax under section 44BB. He further submitted that it is not precise to categorize service tax receipt merely as a statutory liability. It is also to be categorised as contractual liability whereby the 'service receiver' agrees to bear this expense and accordingly pays the 'service provider' (assessee). It was submitted that it is the practice in the oil and gas industry to contractually bind the 'service receiver' to bear this expense. Thus, it is a matter of contract (implicit or explicit) between the parties because it is improbable / impossible that 'service receiver' will agree to reimburse a liability which is specifically that of the service provider (assessee).

9. The Ld. AR, in response, submitted that the issue of service tax is covered by the decision of the Hon'ble Delhi High Court

in the case of DIT vs Mitchell Drilling International Pty. Limited in I.T.A. No. 403/2013 wherein the Hon'ble Delhi High Court in its decision dated 28.09.2015 has dealt the issue at length. He submitted that in view of the recent judgment of the Hon'ble Delhi High Court in Mitchell Drilling (Supra), the issue is covered in the favour of the assessee.

10. We have heard the rival submissions and have also perused the records. It is seen that the issue of excludability of service tax in the gross receipts is squarely covered by the judgment of the Hon'ble Delhi High Court in the case of Mitchell Drilling International Pty Limited (supra) wherein the Hon'ble Delhi High Court has held that service tax being statutory levy should not form part of gross receipts as per provisions of section 44BB of the Act. The relevant observations of the Hon'ble High Court are as under:- "8 *"44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits*

and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :

Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.

(2) The amounts referred to in sub-section (1) shall be the following, namely:—

(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India."

9. Section 44BB begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under Section 44 BB. It introduces the concept of presumptive income and states that 10% credit

of the amounts paid or payable or deemed to be received by the Assessee on account of "the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India" shall be deemed to be the profits and gains of the chargeable to tax. The purpose of this provision is to tax what can be legitimately considered as income of the Assessee earned from its business and profession.

10. The expression 'amount paid or payable' in Section 44 BB (2) (a) and the expression 'amount received or deemed to be received' in Section 44 BB (2) (b) is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and machinery.' Therefore, only such amounts which are paid or payable for the services provided by the Assessee can form part of the gross receipts for the purposes of computation of the gross income under Section 44 BB (1) read with Section 44 BB (2).

11. It is in this context that the question arises whether the service tax collected by the Assessee and passed on to the Government from the person to whom it has provided the services can legitimately be considered to form part of the gross receipts for the purposes of computation of the

Assessee's 'presumptive income' under Section 44BB of the Act.

12. In Chowringhee Sales Bureau (supra) sales tax in the sum of Rs. 32,986 was collected and kept by the Assessee in a separate 'sales tax collection account'. The question considered by the Supreme Court was:

'Whether on the facts and in the circumstances of the case the sum of Rs. 32,986 had been validly excluded from the assessee's business income for the relevant assessment year?". However, there the Assessee did not deposit the amount collected by it as sales tax in the State exchequer since it took the stand that the statutory provision creating that liability upon it was not valid. In the circumstances, the Supreme Court held that the sales tax collected, and not deposited with the treasury, would form part of the Assessee's trading receipt.

13. The decision in George Oakes (P) Ltd. (supra) was concerned with the constitutional validity of the Madras General Sales (Definition of Turnover and Validation of Assessments) Act, 1954 on the ground that the word turnover was defined to include sales tax collected by the dealer on inter-state sales. Upholding the validity of the said statute the Supreme Court held that "the expression 'turnover' means the aggregate amount for which goods are bought or sold,

whether for cash or for deferred payment or other valuable consideration, and when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover." Since the tax collected by the selling dealer from the purchaser was part of the price for which the goods were sold, the legislature was not incompetent to enact a statute pursuant to Entry 54 in List II make the tax so paid a part of the turnover of the dealer.

14. In the considered view of the Court, both the aforementioned decisions were rendered in the specific contexts in which the questions arose before the Court. In other words the interpretation placed by the Court on the expression "trading receipt' or 'turnover' in the said decisions was determined by the context. The later decision of the Supreme Court in CIT v. Lakshmi Machine Works (supra) which sought to interpret the expression 'turnover' was also in another specific context. There the question before the Supreme Court was "whether excise duty and sales tax were includible in the 'total turnover' which was the denominator in the formula contained in Section 80 HHC (3) as it stood in the material time?"

The Supreme Court considered its earlier decision in Chowringhee Sales Bureau (supra) and answered the question in the negative. The Supreme Court noted that for the purposes of computing the 'total turnover' for the purpose of Section 80 HHC (3) brokerage, commission, interest etc. did not form part of the business profits because they did not involve any element of export turnover. It was observed: "just as commission received by an assessee is relatable to exports and yet it cannot form part of 'turnover', excise duty and sales-tax also cannot form part of the 'turnover'." The object of the legislature in enacting Section 80 HHC of the Act was to confer a benefit on profits accruing with reference to export turnover. Therefore, "turnover" was the requirement. "Commission, rent, interest etc. did not involve any turnover." It was concluded that 'sales tax and excise duty' like the aforementioned tools like interest, rent etc. 'also do not have any element of 'turn over''.

15. In CIT v. Lakshmi Machine Works (supra), the Supreme Court approved the decision of the Bombay High Court in CIT v. Sudarshan Chemicals Industries Ltd. (supra) which in turn considered the decision of the Supreme Court in George Oakes (P) Ltd. (supra). In the considered view of the Court, the decision of the Supreme Court in Lakshmi Machines Works (supra) is sufficient to answer the question framed in the

present appeal in favour of the Assessee. The service tax collected by the Assessee does not have any element of income and therefore cannot form part of the gross receipts for the purposes of computing the 'presumptive income' of the Assessee under Section 44 BB of the Act.

16. The Court concurs with the decision of the High Court of Uttarakhand in DIT v. Schlumberger Asia Services Ltd (supra) which held that the reimbursement received by the Assessee of the customs duty paid on equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44 BB of the Act.

17. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44 BB of the Act, the service tax collected by the Assessee on the amount paid t it for rendering services is not to be included in the gross receipts in terms of Section 44 BB (2) read with Section 44 BB (1). The service tax is not an amount paid or payable, or received or deemed to be received by the Assessee for the services rendered by it. The Assessee is only collecting the service tax for passing it on to the government.

18. The Court further notes that the position has been made explicit by the CBDT itself in two of its circulars. In Circular No. 4/2008 dated 28th April 2008 it was clarified that "Service tax

paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of Service Tax. Therefore, it has been decided that tax deduction at source) under sections 194-I of Income Tax Act would be required to be made on the amount of rent paid/payable without including the service tax.' In Circular No. 1/2014 dated 13th January 2014, it has been clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act.

19. The question framed, is therefore, answered in the negative i.e. favour of the Assessee and against the Revenue."

20. Further Hon'ble High Court of Uttarakhand in the case of DIT International Taxation Vs M/s Schlumberger Asia Services Ltd. in ITA No. 40 of 2012 vide order dated 12.04.2019 held that the amount reimbursed to the assessee (service provider) by the ONGC (service recipient), representing the service tax paid earlier by the assessee to the Government of India, would not form part of the aggregate amount referred to in clauses (a) and (b) of sub-section(2) of Section 44BB of the Act. The Hon'ble Court is clearly spelt that even otherwise, it is not every amount paid on account of provision of services and

facilities which must be deemed to be the income of the assessee **under Section 44BB** . It is only such amounts, which are paid to the assessee on account of the services and facilities provided by them, in the prospecting for or extraction or production of mineral oils, which alone must be deemed to be the income of the assessee.

21. Therefore, respectfully following the ratio of the judgment as laid down by the Hon'ble Delhi High Court and Hon'ble Uttarakhand High Court , we hold that the service tax receipts donot form part of receipts for computation of income in the section 44BB of the Income Tax Act.

22. In the result, appeals of the revenue are dismissed.

Order pronounced in open court on this 12th day of November, 2021.

Sd/- **Sd/-**

(AMIT SHUKLA) **(Dr. B.R.R.KUMAR)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Binita
Dated : 12/11/2021
Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A), New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.