

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

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 7847 /MUM/2019  
(Assessment Year: 2016-17)

Swiber Offshore Construction Pte. Ltd.,  
(Judicial Manager appointed),  
C/o M/s BSR & Associates LLP  
(Att.: Ms. Neetu Vinayek),  
C/o KPMG Services Pte. Ltd.  
(Judicial Managers),  
B S R & Associates LLP,  
1<sup>st</sup> Floor, Lodha Excelus, Apollo Mills  
Compound, N.M. Joshi Marg, Mahalakshmi,  
Mumbai - 400011 [PAN: AALCS6312H] ..... Appellant

Assistant Commissioner of Income-tax,  
(International Taxation) – 4(2)(2), Mumbai, Vs  
16<sup>th</sup> Floor, Air India Building, Nariman Point,  
Mumbai - 400021 ..... Respondent

For the Appellant/Assessee : Shri Jigar Vora  
For the Respondent/Department : Shri Somendu Kumar Dash

Date of conclusion of hearing : 07.07.2022  
Date of pronouncement of order : 29.09.2022

**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. The present appeal is directed against the final Assessment Order dated, 25.10.2019 passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2016-17 as per directions issued by Dispute Resolution Panel-2, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act on 25.09.2018.

2. The Appellant filed return of income for the Assessment Year 2016-17 on 30.11.2016 and offered to tax the contractual revenues received from Oil and Natural Gas Corporation Ltd. (ONGC) and Punj Loyd Limited (PPL) under Section 44BB of the Act as the Appellant was engaged in the business of providing engineering, procurement, construction, installation and commissioning services to the companies engaged in the business of prospecting for, and/or extraction & production of mineral oils. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noticed as under:
  - (a) Service tax component of INR 85,34,00,739/- was included in Gross Receipts for the purpose of determination of income under Section 44BB of the Act.
  - (b) Receipt of INR 10,54,58,018/- appearing in Form 26AS was not offered to tax as income during the relevant previous year.

Accordingly, the Assessing Officer proposed addition of the aforesaid service tax component (INR 85,34,00,739/-) and differential income reflected in Form 26AS (INR 10,54,58,018/-) in the Drat Assessment Order, dated 21.12.2018, passed under Section 144C of the Act.

3. The Objections filed by the Appellant before the DRP were disposed off vide order, dated 25.09.2018, passed under Section 144C(5) of the Act. The DRP concluded that the service tax component should be included in the Gross Receipts for the purpose of computing tax in terms of Section 44BB of the Act.

Further, the DRP issued directions to the Assessing Officer to bring to tax the service tax component collected but not paid as to the Government as business income taxable at normal rates as opposed to concessional rate available under Section 44BB of the Act. The DRP also rejected objections of the Appellant against the inclusion of receipts of INR 10,54,58,018/- in Gross Receipts.

4. As per the directions issued by DRP, Assessing Officer passed the Final Assessment Order under Section 143(3) read with Section 144C(13) of the Act on 25.10.2019 computing Gross Receipts for the purpose of Section 44BB of the Act at INR.95,88,58,757/- after including service tax component of INR 85,34,00,739/ and differential income of INR 10,54,58,018/. The Assessing Officer also made an addition of INR 62,35,88,161/- holding the same to be service tax not paid to the Government taxable at normal tax rate of 40% as approved to concessional rate of 10% under Section 44BB of the Act.
5. Being aggrieved, the Appellant has preferred the present appeal. We have heard the Ld. Departmental Representative who relied upon the orders passed by the Assessing Officer/DRP, and perused the material on record. The grounds raised by the Appellant are taken up in seriatim hereinafter.
6. Ground No. 1 pertains to inclusion of service tax of INR.85,34,00,739/- in Gross Receipts for determination of income under Section 44BB of the Act. We note that this issue stands decided in favour of the Assessee by the judgment of the Hon'ble Delhi High Court in the case of DCIT vs. Mitchell

Drilling International (P) Ltd. : (2016) 380 ITR 130 (Del) as well as by the decision of the Tribunal in the case of M/s Weatherford Drilling International (BVI) Ltd. Vs DCIT (Intl. Taxation) - 4(3)(2) [ITA NO. 495 & 514 /Mum/2017, Assessment Year 2009-10, pronounced on 20.06.2018].

7. The relevant extract of the judgment of the Hon'ble Delhi High Court in the case of Mitchell Drilling International (P) Ltd. (supra) read as under:

*"17. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44BB of the Act, the service tax collected by the Assessee on the amount paid to it for rendering services is not to be included in the gross receipts in terms of Section 44BB(2) read with Section 44BB(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.” (Emphasis Supplied)*

8. The above judgment of the Hon’ble Delhi High Court was followed by the Mumbai Bench of the Tribunal in the case of M/s Weatherford Drilling International (BVI) Ltd. (supra) wherein it was held as under:

*“10. We have heard the rival submissions on this issue and perused the record. We noticed that the learned CIT(A) has followed the decision rendered by the Hon'ble Delhi High Court in the case of Mitchell Drilling International (P) Ltd. (supra) in holding that service tax collected by the assessee cannot form part of gross receipts.*

*11. On the contrary, Revenue has placed reliance on the decision rendered by the Coordinate Bench of the Tribunal in the case of China shipping Container lines (supra). The learned A.R. has, on the contrary, pointed out that the Coordinate Benches of the Tribunal have followed the decision rendered by the Hon'ble Delhi High Court in other cases (referred above) and have held that the service tax shall not form part of Gross receipts. Since the High Court is superior to the Tribunal, the inferior Court should bow to the wisdom of Superior Court. Accordingly, the decision rendered by the High Court should be preferred over the decision rendered by the Tribunal. Accordingly we do not find any infirmity in the action of the AO in following the decision rendered by the Hon'ble Delhi High Court. Therefore we affirm the order passed by the learned CIT(A) on this issue.” (Emphasis Supplied)*

9. Respectfully following the above judgment/decision, we hold that the service tax component would not be included in Gross Receipts for determination of income under Section 44BB of the Act. Ground No. 1 raised by the Appellant is allowed.

10. Ground No. 2 & 3 pertains to addition of INR 62,35,88,161/- made by the Assessing Officer holding the same to be service tax component not paid to the Government and therefore, taxable as business income at normal rate. It is admitted position that service tax amount of INR 85,34,00,739/- referred to in Ground No. 1 above, includes the aforesaid service tax amount of INR 62,35,88,161/-. Therefore, the separate addition of INR 62,35,88,161/- made by the Assessing Officer resulted in double addition/taxation. Further, since we have concluded in paragraph 9 above that services tax component is not to be included in the Gross Receipts the question of same being taxed at the rate of 40% as normal business income or at a concessional rate of 10% under presumptive method of taxation prescribed under Section 44BB of the Act does not arise. In view of the aforesaid, addition of INR 65,35,88,161/- made by the Assessing Officer is deleted. Ground No. 2 & 3 raised by the Appellant are allowed.
  
11. Ground No. 4 pertains to addition of differential income of INR 10,54,58,018/- appearing in Form 26AS but not offered to tax by the Appellant in the return of income on the ground that the same has not accrued during the relevant previous year. The Appellant had explained before DRP that as per method of accounting consistently followed by the Appellant contractual receipts has been recognized as income on accrual basis once the Appellant gets a right to receive the income, i.e., on completion of milestone provided in the contract and after raising invoice on its customer which is subsequently accepted. Reliance was also placed on the decision of the Mumbai Bench of the Tribunal in the case of Deep Drilling 1 Pte. Ltd. vs. ADIT,

(International Taxation)-1(2), Mumbai [ITA No. 9038/Mum/2010, Assessment Year 2007-08, pronounced on 02.04.2012] has held that that mere claim of income without any enforceable right does not result in any income in terms of Section 5 read with Section 44BB of the Act. It was also explained that ONGC, in its books of accounts, records payables on provisional basis resulting into a difference between the expenditure recorded by ONGC in its books of accounts as against income offered to tax by the Appellant. Since income of INR 1,05,45,800/- had not accrued to the Appellant during the relevant previous year, the same was not offered to tax as income. However, the authorities below rejected the aforesaid contentions and included INR 1,05,45,800/- in Gross Receipts for determining income under Section 44BB of the Act.

12. We note that the Assessing Officer had proposed inclusion of the aforesaid amount merely for the reason that the same was reflected in Form 26AS. The relevant extract of the assessment order read as under:

*“On perusal of the reconciliation statement between as per Form 26AS and return of income, it is seen that difference amount of Rs. 10,54,58,018/- has been shown as receipts/TDS considered by ONGC on provisional basis, not offered to tax as not accrued to the assessee and hence carried forward to subsequent years. However, TDS on the above receipt has been deducted in the year under consideration and receipt is being duly reflected in ITS details vis-a-vis TDS is shown in the system. Since the TDS has already been reflected in the current year, income should also be taken in the same year. TDS cannot be carried forward to the subsequent years in the system, accordingly income can also not be carried forward to the subsequent years. Hence, in which year TDS has been*

*reflected in the system, income should also be taken for that year only.*

*In view of the above discussion, difference amount of Rs. 10,54,58,018/- is to be added to the gross receipts under Section 44BB of the Act, and 10% of the same is added to the total taxable income under the head Profits and gains of business or profession.”*

13. Further, the DRP had also rejected objections filed by the Appellant on this issue holding that provisions of Section 44BB of the Act do not mandate taxability of income on accrual or paid basis but on the first occasion of the amount having been paid or becoming payable.
14. In our view, the approach adopted by the Assessing Officer and the DRP cannot be countenanced. Merely because an income is reflected in 26AS cannot lead to an un-rebuttable presumption against the Appellant that income has accrued to the Appellant and/or has been paid or has become payable to the Appellant as per section 44BB of the Act during the relevant previous year. As per Section 199 of the Act tax credit is allowable to the extent of income has been offered to tax. Since the aforesaid income of INR 1,05,45,800/- did not accrue to the Appellant, the corresponding TDS amount of INR.45,65,695/- was not claimed by the Appellant in its return of income. It was contended on behalf of the Appellant that even the return form [ITR 6 - Schedule TDS], gave option to provide details of tax credit not claimed in the return of income and that the Appellant had duly filled/furnished in the relevant details pertaining to tax credit of INR 45,65,695/- not claimed in its return of income so that the same can be carried forward to subsequent assessment year. We note that Hon'ble Mumbai

Bench of the Tribunal has in the case of Deep Drilling 1 Pte. Ltd. (supra), cited by the Appellant, before DRP, held as under:

*“12. The main plank of the submissions of the learned Departmental Representative in this regard has been that the assessee was following mercantile system of accounting and as such the raising of invoice led to the accrual of income. It is noted that under the mercantile system of accounting, deduction for expenses is allowed when liability to pay such expenses is incurred irrespective of the fact whether such an amount has been paid or remained unpaid at the end of the year. In the like manner, income, under such a method of accounting, is recognized on accrual basis. In other words, only when the assessee finally acquires a right to receive such income, that it is charged to tax. Actual receipt of such amount, whether before or after accrual, is of no consequence. The material thing is the time of its accrual. Once an income has accrued, it is liable to taxed, notwithstanding the fact that it was not received during the year. In the same manner, if some amount has been received, which does not represent the income accrued during the year, the same shall not be charged to tax and will continue to retain the character of liability till the time of its accrual. Only when such amount accrues as income, the hitherto liability will get converted into income. Thus what is relevant to magnetize tax under the mercantile system of accounting is the fact of accrual of income during the year and not the receipt of any amount or non-receipt of income. Unless an income has actually accrued there can be no question of its inclusion in the total income.*

*13. It is trite that a mere claim of income without any enforceable right does not result into any income. In the like manner there does not arise any liability to pay against whom such a claim is made. Thus at the stage of making such a claim which has no contractual or legal force, it cannot be said that any income has accrued to the person making such a claim or any liability for expenditure has been incurred in the hands of a person on whom such a claim is made. If it remains a mere*

claim without the force of any enforceable right to receive, practically there can be no accrual of income. In the case of Godhra Electricity Co. v. CIT [1997] 225 ITR 746 / 91 Taxman 351 (SC) the assessee electricity company, after enhancing tariff, was restrained from realizing the enhanced rate. Having never been able to receive the enhanced tariff, it was taken over by the State Electricity Board. The Revenue took the stand that since the assessee had issued the bills in respect of the enhanced tariff, such amount accrued to it and hence became taxable. Repelling such contention, the Hon'ble Supreme Court held that no real income accrued to the assessee and nothing on that count could be added even though the assessee followed mercantile system. Thus it is manifest that only when some enforceable right to receive the amount vests in the claimant simultaneous with or after making a claim, that the income accrues. In the absence of any such enforceable right, it does not lead to accrual of any income. The concept of "real income" thus gives a pragmatic and rational meaning to the concept of "accrual of income". Rather the former supplements the latter so as to give a true colour and meaning to the definition of "income" liable to tax."(Emphasis Supplied)

15. We note that it is admitted position that amount of INR.1,05,45,800/- was not paid to the Appellant during the relevant previous year. The contention of the Appellant is that the aforesaid amount has not even become payable as per the terms of the contract since invoice has not been raised by the Appellant and approved by ONGC. However, the authorities below had brushed aside the aforesaid contention without examining the contractual terms. Therefore, we remand the issue back to the file of Assessing Officer to examine the contention raised by the Appellant that amount of INR 1,05,45,800/- has not become payable during the relevant previous year after examining the contractual arrangement between the parties, invoice raised by the Appellant and the

relevant ledger accounts. In case the Assessing Officer arrives at the conclusion that the aforesaid receipts have not become payable during the relevant previous year, the same would not be taxable during the relevant previous year in terms of Section 44BB of the Act. While deciding the aforesaid issue, the Assessing Officer is also directed to ensure that the same receipts/income does not get taxed in the hands of the Appellant in two assessment years and for the same the Assessing Officer should take into consideration the accounting policy being followed by the Appellant and verify whether or not the Appellant has offered the aforesaid receipt amount to tax in the subsequent assessment year(s). Accordingly, in view of the aforesaid directions the issue is remanded to the file of the Assessing Officer. In view of the aforesaid, Ground No. 4 raised by the Appellant stands disposed off.

16. Ground No. 5 pertaining to levy of interest under Section 234B of the Act is disposed of as being consequential in nature.
17. Ground No. 6 pertaining to levy of penalty under Section 271(1)(c) of the Act is disposed of as being premature in nature.
18. In view of the above, the present appeal preferred by the Appellant is partly allowed.

Order pronounced on 29.09.2022.

*Sd/-*

(Om Prakash Kant)  
Accountant Member

*Sd/-*

(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 29.09.2022  
Alindra, PS

**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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai