

आयकर अपीलीय अधिकरण  
मुंबई पीठ "आई", मुंबई पीठ  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "I", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
आअसं. 2135/मुं/ 2022 (नि.व. 2015-16)  
ITA NO. 2135/MUM/2022(A.Y.2015-16)

Shelf Drilling J.T.Angel Limited,  
4<sup>th</sup> Floor, Schindier House,  
Main Street, Hiranandani Gardens,  
Powai, Mumbai 400 076.

PAN: AASCS-2719-P

..... अपीलार्थी /Appellant

बनाम Vs.

Asstt . Commissioner of Income Tax(Int. Tax),  
Circle -4(2)(1), Room No.X,  
16<sup>th</sup> Floor, Air India Building,  
Nariman Point,Mumbai – 400 021.

..... प्रतिवादी/Respondent

आअसं. 2613/मुं/ 2022 (नि.व. 2015-16)  
ITA NO. 2613/MUM/2022(A.Y.2015-16)

Dy. Commissioner of Income Tax(Int. Tax),  
Circle -4(2)(1), Room No.X,  
16<sup>th</sup> Floor, Air India Building,  
Nariman Point,Mumbai – 400 021.

..... अपीलार्थी /Appellant

बनाम Vs.

Shelf Drilling J.T.Angel Limited,  
4<sup>th</sup> Floor, Schindier House,  
Main Street, Hiranandani Gardens,  
Powai, Mumbai 400 076.

PAN: AASCS-2719-P

..... प्रतिवादी/Respondent

आअसं. 2137/मुं/ 2022 (नि.व. 2015-16)  
 ITA NO. 2137/MUM/2022(A.Y.2015-16)

Shelf Drilling Ron Tappmeyer Limited  
 4<sup>th</sup> Floor, Schindier House, Main Street,  
 Hiranandani Gardens, Powai,  
 Mumbai 400 076.

PAN: AASCS-2715-B

..... अपीलार्थी /Appellant

बनाम Vs.

Asstt . Commissioner of Income Tax(Int. Tax),  
 Circle -4(2)(1 Mumbai – 400 021.

..... प्रतिवादी/Respondent

आअसं. 2614/मुं/ 2022 (नि.व. 2015-16)  
 ITA NO. 2614/MUM/2022(A.Y.2015-16)

Dy. Commissioner of Income Tax(Int. Tax),  
 Circle -4(2)(1 Mumbai – 400 021.

..... अपीलार्थी /Appellant

बनाम Vs.

Shelf Drilling Ron Tappmeyer Limited  
 4<sup>th</sup> Floor, Schindier House, Main Street,  
 Hiranandani Gardens, Powai,  
 Mumbai 400 076.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Nitesh Joshi

प्रतिवादी द्वारा/Respondent by : Shri Soumendu Kumar Dash

सुनवाई की तिथि/ Date of hearing : 24/01/2023

घोषणा की तिथि/ Date of pronouncement : 25/01/2023

### आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

These set of two cross appeals in the case of two different assessee's are taken up together for adjudication as the grounds raised in the cross appeals and the facts germane to the issue raised in the appeals are identical.

**ITA NO.2135/M/2022 & ITA NO.2613/M/2022 -A.Y. 2015-15.**

2. These cross appeals by the assessee and Revenue are directed against the order of Commissioner of Income Tax(Appeals)-58, Mumbai [in short 'the CIT(A)'] dated 17/06/2022 for the Assessment Year 2015-16.

3. The solitary issue raised by the assessee in appeal assailing the findings of CIT(A) read as under:

*"II. Non-grant of carry forward and set-off of unabsorbed business losses pertaining to AY 2014-15*

*2. erred in not granting carry forward and set-off of unabsorbed business losses pertaining to AY 20 14-1 5 even though the assessment order of AY 20 14- 15 denying business loss was quashed by the Income-tax Appellate Tribunal, and the fresh assessment as per directions of the Income Tax Appellate Tribunal has not been finalized as on date."*

4. Shri Nitesh Joshi appearing on behalf of the assessee submitted that the Tribunal in ITA No.7414/Mum/2017 for Assessment Year 2014-15 vide order dated 14/10/2019 has set aside the assessment and directed to pass fresh order. In the impugned assessment year, the Assessing Officer has erred in not granting carry forward and setting aside off unabsorbed business loss pertaining to Assessment Year 2014-15. Since, the Tribunal has directed the Assessing Officer to re-do the assessment for Assessment Year 2014-15, the outcome of that assessment will have bearing on the later assessment years, including the assessment year under appeal. The Id. Authorized Representative for the assessee further submitted that the Co-ordinate Bench in assessee's own appeal for Assessment Years 2016-17 and 2017-18 i.e. ITA No.1890 & 1892/Mum/2020 vide order dated 05/01/2021 has restored the issue back to the file of Assessing Officer.

5. Shri Soumendu Kumar Dash representing the Department fairly admits that the Tribunal has restored the issue of set off of unabsorbed business loss pertaining to assessment year 2014-15 to the file of Assessing Officer for adjudication after the assessment for 2014-15 is completed.

6. Both sides heard. We find that the Tribunal in ITA No.7414/Mum/2017 (supra) has quashed the assessment order for Assessment Year 2014-15 and has restored the issue back to the file of Assessing Officer for fresh assessment. The assessee in present appeal has claimed carry forward of unabsorbed business loss pertaining to Assessment Year 2014-15. The same has been denied to the assessee by Assessing Officer as well as the CIT(A). Similar issue had come up before the Tribunal in assessee's own case before the Co-ordinate Bench for Assessment Year 2016-17 and 2017-18. The Co-ordinate Bench restored this issue back to the file of Assessing Officer with following directions:

*"8. Having given our careful consideration to the rival contentions and having perused the material on record, we see merits, in principle, in the stand of the assessee. As the things as on now, the assessment proceedings for the assessment year 2014-15 are not yet finalized, and, therefore, any determination of tax liability, on the assumption that the claim of loss in the said income tax return is untenable in law, is certainly uncalled for, and, at the minimum, premature. This is, however, precisely what the Assessing Officer ends up doing when he declines the set off of the loss, as claimed by the assessee, in the income tax return for the assessment year 2014-15. In our considered view, therefore, the set off of the loss claimed by the assessee, at this stage, cannot indeed be declined. However, as we hold so, let us also deal with the apprehension of the learned Departmental Representative so far as refund becoming due to the assessee even as a related assessment, having crucial bearing on the refund, is in progress. That position, if correct, does seem incongruous at the first sight, but that does not seem to be the correct legal position. The reason is this. When one carefully looks at the scheme of Section 240, the apprehensions seem to be perhaps ill conceived. Section 240 inter alia, provides that "(w)here, as a result*

*of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf: Provided that where, by the order aforesaid, an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment. In the present case, the coordinate bench decision, by of which the assessment under section 143(3) was remanded to the Assessing Officer, was passed on 4 October 2019, whereas the related income tax returns for the present assessment years were filed by the assessee much before that date. The refunds, if any due to the assessee, have thus become due as a result of the appellate order dated 4" October 2019 and, to borrow the words of section 240, "by the order aforesaid, an assessment is set aside of cancelled and an order of fresh assessment is directed to be made". It would appear to us that the law does not provide that the assessment in which the refund has arisen must be the assessment set aside or cancelled. Therefore, a view is indeed possible that even though the assessment set aside and directed to make afresh may be of a year other than the assessment year in which the refund has arisen, refund will become due only on such fresh assessment being made. There does, therefore, seem to be a prima facie valid school of thought that in such a situation, as in the present case, refund of taxes for the present assessment years must wait the finalization of the assessment for the assessment year 2014-15 because of which the refund may arise. Viewed thus, the apprehension of the learned Departmental Representative, therefore, does not seem valid. In any case, the remanded assessment is to be finalized, as learned Departmental Representative himself accepts, within less than three months from today, and, therefore, this situation of uncertainty is too transitory and too short by any standard. As soon as the remanded assessment is finalized, any variations in the assessed loss/income will have to be taken into account by suitably amending these set off claims in these years as well.*

*9. In view of the above discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee that so far as set off of loss returned by the assessee in the assessment year 2014-15 is concerned, the same cannot be declined by the Assessing Officer in the assessment years 2016-17 and 2017-18, if otherwise admissible, only for the reason that the assessment for the assessment year 2014-15 is in progress. We direct the Assessing Officer to allow, for the time being, the claim for set off of loss brought forward, in the light of the above observations. The above direction, however, should not be construed as our direction for the grant of refund, if any is found admissible as a result of income computed as above, for the simple reason that a call will have to be taken by the Assessing Officer as to whether, in the*

*light of the discussions above, refund of taxes is permissible in such a situation in the light of first proviso to Section 240. While doing so, needless to say, the Assessing Officer shall give a due and reasonable opportunity of hearing to the assessee on this point as well. Ordered, accordingly."*

Following the aforesaid decision we deem it appropriate to restore the file back to the Assessing Officer with similar directions.

7. The assessee in ground No.3 of appeal has assailed charging of interest u/s. 234B of the Income Tax Act, 1961 [in short 'the Act']. Ground No.3 is consequential, hence, the same is dismissed as such.

**8. In the result, appeal of the assessee is allowed for statistical purpose.**

9. The Revenue in its appeal has assailed the order of CIT(A) by raising following grounds:

*"1) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in excluding service tax from the amount paid or payable to, received or receivable 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 for the purpose of determining presumptive profit u/s 44BB of the Act ?"*

*2) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the service tax collected by the assessee does not have any element of income and therefore cannot form part of gross receipts when the clause (2) of section 44BB of the IT Act clearly states that the aggregate amount should include all the amount received / receivable or paid/payable by the non-resident for provision/facilitation of services, without any qualification or any exclusions?"*

*3) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that amount of service tax received by the assessee will be excluded from gross receipts for the purpose of section 44Bb of the Act, despite provisions contained in section 145A and judgement of the Hon'ble Supreme Court in*

*the case of Chowringee Sales Bureau Pvt. Ltd. v/s CIT (1973 AIR 376) (1973 SCR(2) 618)".*

*4) "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in relying on the case of Director of Income Tax-1 v/s M/s. Mitchell Drilling International (P) Ltd and extending the benefit in deduction of tax at source to non-resident tax payer when the CBDT circular 1/2014 dated 13.01.2014 was applicable only for resident taxpayer".*

10. The Id. Authorized Representative for the assessee submitted that the issue raised by the Revenue in appeal has been decided by the Tribunal in various group concerns of the assessee against the Department. The Id. Authorized Representative for the assessee furnished the Tribunal orders in following cases of the assessee's group concerns:

S.No.	ITA No.	Name of the Case	Date of decision
1.	2539/Mum/2021	DCIT (Intl. Tax), Cir.4(2)(1) v. Shelf Drilling C.E.Thronton Ltd.	07/04/2022
2.	2540/Mum/2021	DCIT(Intl. Tax),Cir.4(2)(1) vs. Shelf Drilling F G Mc Clintock Ltd.	07/04/2022
3.	2537/Mum/2021	DCIT (Intl. Tax), Cir.4(2)(1) vs. Shelf Drilling Offshore Resources Ltd.	07/04/2022
4.	2538/Mum/2021	DCIT(Intl. Tax),Circ.4(2)(1) vs. Shelf Drilling Trident XII Ltd.	07/04/2022

11. Per contra, the Id. Departmental Representative vehemently supported the findings of Assessing Officer. The Id. Departmental Representative furnished written submissions in support of assessment order. The relevant extracts of the written submissions dated 24/01/2023 are reproduced herein below:

*“2. Section 448B of the Act is special provision and any deduction u/s 28 to 43A would not be considered for the purpose of determination of income u/s 44BB. Under the provisions of section 44BB what is to be considered is the amount received or payable to the assessee and not the net income. Therefore, the amount received includes all the amounts received or receivable by the assessee including the service tax. The service tax is an integral part of receipts and cannot be treated as separate receipts as it is included in the invoices. Reliance is placed on the decision of Delhi Benches of Tribunal in case of Technip Offshore Contracting BV [2009] 29 SOT 33, in which the Tribunal has held that the service tax would be a part of the gross receipts for the purpose of determining the income u/s 448. The Tribunal while deciding the issue in case of Technip Offshore Contracting B.V. (supra) has relied upon the decision of Hon'ble Uttarakhand High Court in case of Sedco Forex International Inc. v. CIT [2008] 170 Taxman 459 Reliance is also placed on the decision of Hon'ble Uttarakhand High Court in case of CIT v Trans Ocean Offshore Inc. [2008] 299 ITR 248/173 Taxman 429, where the Hon'ble High Court has held that the mobilization charges received by the assessee should be taxed as per the provisions of section 44BB.*

*3. In absence of a definition of income element in this non obstante clause, the aggregate amount has to be considered for determining of income and not the profit element in the receipts. In view of the various decisions of Hon'ble Supreme Court as well as High Court the Excise Duty, sales tax has been treated as trading receipts and service tax which is similar to sales tax would also the part of the trading receipt and therefore would be included in the aggregate amount paid or payable to the assessee for the purpose of computation of income as per the provisions of section 448. On this point Reliance is placed upon the following decisions:*

- Chowringhee Sales Bureau (P) Ltd. v. CIT [1973] 87 ITR 542 (SC)*
- CIT v. T. Naggi Reddy [1993] 202 ITR 253 (SC)*
- McDowell & Co. Ltd. v. CTO [1985] 154 ITR 148/22 Taxman 11 (SC)*
- China Shipping Container Lines (Hong Kong) Co. Ltd. IT Appeal No.8516 (Mum.) of 2010*

*4. With a view to simplify and rationalize the assessment and computation of profit and gain of shipping business in the case of non resident, the Finance Act 1975 has made special provision in section 448 of the Income Tax Act Under this provision, profits and gain of non- resident from the business of operation of ships will not be calculated in accordance with the provisions of section 28 to 43A of the Income Tax Act but the same will be taken as 10% of the aggregate of the amounts paid or payable to the assessee or to any persons on his behalf on account of carriage of*

*passengers livestock, mail or goods, shipped at any port in India as well the amount received or deemed to be received in India on account of carriage of passengers, livestock etc. at any port outside India Thus, for the purpose of determination of the income u/s 44B it is the **gross amount** which is aggregate of the amount paid or payable within or outside India on account of carriage or shipped at any port in India plus any amount received or deemed to receive in India on account of carriage or shipped at any port outside India. There are two components of the amounts one which is paid or payable to the assessee in respect of the carriage or shipped at port in India and another the amount received or deemed to receive in India in respect of carriage or shipped at any port outside India. It is pertinent to note that section 44B over rides the provisions of section 28 to 43A, however, the other provisions of the Act are applicable apart from the provision of section 448 for computation of income of non-resident engaged in the business of shipping.”*

12. The Id. Authorized Representative for the assessee submits that the decision rendered in the case of *Chowringhee Sales Bureau (P) Ltd. v. CIT*, 87 ITR 542(SC) , on which the Department has placed reliance has been considered by the Hon'ble Delhi High Court in the case *Mitchell Drilling International Pvt. Ltd.* 380 ITR 130 and has distinguish the same. Following the aforesaid decision of Hon'ble Delhi High Court, the Hon'ble Jurisdictional High Court in the case of *PCIT vs. Boskalis International -Dredging International CV* in Income Tax Appeal No.55 of 2017 vide order dated 25/03/2019, wherein similar question was raised, had decided the issue against the Department.

13. We have heard the submissions made by rival sides. We find that the Co-ordinate Bench in assessee's group concerns for Assessment Year 2015-16 (supra), wherein identical ground was raised held as under:

*“2. As learned representatives fairly agree, the issue in the appeal is covered, in favour of the assessee, by several decisions of Hon'ble High Courts, including in the cases of DIT Vs Mitchell Drilling International Pvt Ltd [(2015) 62 taxmann.24 (Del)], DIT Vs Schlumberger Asia Services Ltd [(2019) 104 taxmann.353 (Uttarakhand FB)] and PCIT Vs Boskalis International- Dredging International [24 ITXA 55-17 (Bom)]. The conclusions arrived at by the learned CIT(A), which are in harmony with the views*

*so expressed by Hon'ble Courts above- including the Hon'ble jurisdictional High Court, cannot be faulted.*

*3. We, therefore, see no reasons to take any other view of the matter than the view so taken by the several decisions of Hon'ble High Courts. Respectfully following the same, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter”.*

In all the above mentioned cases of group concerns identical orders have been passed by the Tribunal.

14. Here it would be relevant to refer to the decision of Hon'ble Delhi High Court in the case of Director of Income Tax. Vs. Mitchell Drilling International Pvt. Ltd.(supra) as well. The question of law before Hon'ble Delhi High Court for adjudication was:

***“Whether the amount of service tax collected by the Assessee from its various clients should have been included in gross receipt while computing its income under the provisions of section 44BB of the Act?”***

15. The Hon'ble High Court after considering the provisions of section 44BB of the Act and various decisions including the decision of Hon'ble Supreme Court of India in the case of Chowringhee Sales Bureau (P) Ltd. v. CIT (supra) and George Oks Pvt. Ltd. vs. State of Madras, AIR 1962 SC 1352 held as under:

*“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 decisions of the Supreme Court in 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 80HHC(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 80HHC(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 80HHC 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 'turnover'"*

*15. In Lakshmi Machine Works (supra), the Supreme Court approved the decision of the Bombay High Court in 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 44BB 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 44BB of the Act.*

*17. The Court accordingly holds that for the purposes 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 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 194] of the Act.*

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

16. Similar view has been taken by the Hon'ble Jurisdictional High Court in the case of PCIT vs. Boskalis International -Dredging International CV (supra). **Thus, in view of the facts of the case and the decisions referred above, we find no infirmity in the findings of CIT(A) on this issue. The appeal of the Revenue is dismissed, accordingly.**

**ITA NO.2137/MUM/2022 & 2614/MUM/2022-A.Y. 2015-16:**

17. These cross appeals by the assessee and Revenue are directed against the order of CIT(A) -58, Mumbai dated 17/06/2022 for the Assessment Year 2015-16.

18. We find that the grounds raised by the assessee assailing the findings of CIT(A) are identical to the grounds adjudicated by us in ITA No.2135/Mum/2022(supra).

19. The grounds raised by the Revenue in the appeal are also identical to the grounds raised in ITA No.2613/Mum/2022 adjudicated by us herein above.

20. Both sides are unanimous in stating that the facts germane to the grounds raised in the cross appeals are identical to the facts in ITA No.2135 & 2613/Mum/2022 above.

21. Since, the grounds in the cross appeals and the facts are identical to the appeals adjudicated by us herein above, the findings given therein would *mutatis mutandis* apply to the present set of cross appeals. For parity of reasons, the appeal of the assessee is allowed for statistical purpose and the appeal of Revenue is dismissed.

22. To sum up, ITA No.2135& 2136/Mum/2022 for Assessment Year 2015-16 are allowed for statistical purpose and ITA No.2613 & 2614/Mum/2022 for Assessment Year 2015-16 are dismissed.

Order pronounced in the open court on Wednesday the 25<sup>th</sup> day of January, 2023.

Sd/-

(AMARJIT SINGH )

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 25/01/2023

Vm, Sr. PS(O/S)

**प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar), ITAT, Mumbai