

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. Nos. 2861/Mum/2022
(निर्धारण वर्ष / Assessment Year: 2016-17)

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आयकर अपील सं/ I.T.A. Nos. 446/Mum/2022
(निर्धारण वर्ष / Assessment Year: 2017-18)

DCIT (IT)-3(1)(2) Room No. 1628, 16 th Floor, Air India Building, Nariman Point, Mumbai-400021.	बनाम/ Vs.	M/s. Korea Marine Transport Co. Ltd. 30/32 Sea Horse, Adi Marzban Street Ballard Estate, Mumbai-400001.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCK1101F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Soumendu Kumar Dash (Sr. DR)	
Assessee by:	Shri Sandesh Desai	

सुनवाई की तारीख / Date of Hearing: 11/01/2023
घोषणा की तारीख /Date of Pronouncement: 17/03/2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These are appeals preferred by the revenue against the order of the Ld. CIT(A)-57, Mumbai dated 16.08.2022 for A.Y.2016-17 and dated 20.12.2021 for AY. 2017-18.

2. The main grievance of the revenue is against the action of Ld. CIT(A) directing the AO to exclude from gross receipt, the service tax for the purpose of Section 44B of the Income Tax Act, 1961 (hereinafter "the Act"). Since the dispute/lis-involved in both appeals of revenue are same, the appeal of AY. 2016-17 is taken as the lead case and the result of it will be followed in the other AY. 2017-18.



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

3. Briefly stated the facts are that the assessee company is engaged in shipping business and is incorporated under the laws of Korea. The assessee which is tax resident of Korea had filed its return of income for AY. 2016-17 on 20.09.2016 declaring total income of Rs.22,25,29,690/-. The case of the assessee was thereafter selected for scrutiny assessment and notice under section 143(2) of the Act was issued against the assessee. During the course of the assessment proceedings it was observed by the A.O that the assessee while computing its income from operation of ships under Sec. 44B of the Act, had excluded from its total receipt the amount of service tax of Rs.31,79,39,880/- collected from its clients. The A.O was of the view that the exclusion of the service tax collections by the assessee from its total receipts was not as per the mandate of Sec. 44B of the Act and thus recomputed the income of the assessee after including the service tax collection in its total receipts. On the basis of the aforesaid facts the A.O passed draft assessment order under Sec. 144C(1) r.w.s. 143(3) on 24.12.2018; and since assessee didn't file any objection before Ld. DRP against the draft assessment order, the AO passed the final assessment order on 08.02.2019 which included the service tax collected of Rs.31,79,30,880/- in the total receipt of the assessee and recomputed its income from shipping business u/s 44B r.w.s 172 of the Act and passed the final assessment order u/s 143(3) r.w.s. 144C(3) of the Act. Aggrieved, the assessee filed an appeal before the Ld. CIT(A) against inclusion of service tax collections in the total receipt for the purpose of computing the presumptive taxation u/s 44B



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

of the Act. And the Ld. CIT(A) was pleased to allow the same by following the order of this Tribunal in assessee's own case for earlier years wherein the Tribunal held that service tax charges is not taxable as income of the assessee u/s 44B of the Act in for AY. 2011-12 to AY. 2014-15. Therefore, the Ld. CIT(A) held that for the purpose of Section 44B of the Act (presumptive taxing for shipping business in the case of non-resident) service tax cannot be included in the turnover of the assessee because the service tax is a statutory levy and does not have any profit element in the same. Further, according to the Ld. CIT(A) service tax was not received by the assessee for services rendered but was received in compliance to law. And the Ld. CIT(A) noted that Tribunal has taken note of the fact that the service tax (statutory levy) has been collected by the assessee on behalf of the Government and has to deposit the same with the Government. And therefore, there is no profit element in the said service tax which has not been collected for rendering any service to the customer. Therefore, the same cannot be included in the total receipt of the assessee for determines income u/s 44B of the Act. Aggrieved, the revenue is before us.

4. We have heard both the parties and perused the records. It is undisputed that the assessee is a resident of Korea and is engaged in shipping business. And therefore the special provisions for computing profit and gains of shipping business in the case of non-resident is attracted; and accordingly Section 44B of the Act is applicable i.e.



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

sum equal to seven and a half (7.5) percent of the aggregate of the amounts viz. (i) 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 carriage of passengers, livestock, mail or goods shipped at any port in India; and (ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India, 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”. In the year under consideration, the assessee has filed return of income declaring of Rs.22,25,29,690/-. However, the AO noted that in the gross total receipt the assessee has not included the service tax amount of Rs.31,39,30,880/- (as per service tax return filed by the assessee which has been collected and deposited by the assessee in the Government Treasury). The assessee’s contention for non-inclusion of the same was that the service tax collected by it has already been offered to the Government and therefore the statutory levy (service tax) cannot be included in gross receipt of the assessee for the purpose of taxing as per Section 44B of the Act. The AO did not accept the contention of assessee and therefore he included the service tax of Rs.31,39,30,880/- which increased the total gross receipt of Rs.296,70,62,574/- + Rs.31,79,30,880/- which comes to Rs.328,49,93,454/-. Then he re-computed the taxable income u/s 44B of the Act @ 7.5% which comes to Rs.24,63,74,509/- in place of assessee’s returned of income of Rs.22,25,29,690/-. On appeal, the



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

Ld. CIT(A) taking note of the decision of this Tribunal in assessee's own case for earlier years i.e. AY. 2011-12 to AY. 2014-15 was pleased to delete the same. We note that the Tribunal in assessee's own case for AY. 2011-12 (ITA. No.1025/Mum/2015) while adjudicating this issue has held as under: -

“8. We have deliberated at length on the issue under consideration and are of the considered view, that as the service tax which is a statutory levy collected by the assessee in his capacity as a service provider from its customers on behalf of the government does not involve any element of profit thus, the same cannot be included in the total receipts of the assessee for determining its income under Sec.44B. We have perused the order passed by the A.O under Sec. 143(3) r.w.s 144(C)(13) and are unable to persuade ourselves to subscribe to the view taken to the contrary by him. We find that the issue involved in the present appeal is covered in favour of the assessee by the judgment of the Hon“ble High Court of Uttarakhand in the case of CIT (International taxation) Vs. Schlumberger Asia Services Ltd. (2009) 317 ITR 156 (Uttarakhand).The High Court in its aforesaid judgment had distinguished the earlier decisions of the Court in the case of Sedco Forex International Inc. Vs. CIT (2008) 299 ITR 238 (Uttaranchal) and CIT Vs. Trans. Ocean Offshore Inc. (2008) 299 ITR 248 (Uttaranchal). In the backdrop of the facts involved in the case before the High Court, it was held that reimbursement of custom duty paid by the assessee company, being in the nature of a statutory levy, would not form part of the freight receipts for the purpose of computing its



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

deemed profit under Sec.44BB. We further find that a similar view had also been arrived at by the Hon“ble High Court of Delhi in the case of DIT Vs. Mitchell Drilling International Pty. Ltd (2016) 380 ITR 130 (Del). The High Court in the aforementioned case finding itself to be in agreement with the view taken by the High Court of Uttarakhand in the case of Schlumberger Asia Services Ltd(supra), observed 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 was not to be included in the gross receipts in terms of Section 44BB(2) r.w Section 44BB(1). The High Court while concluding as hereinabove, observed that as service tax was collected by the assessee for passing it on to the government, and was not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it, thus, the same could not be included in the gross receipts of the assessee for computing its income under Sec. 44BB. Still further, we find that a coordinate bench of the Tribunal in the case of Islamic Republic of Iran Shipping lines Vs. DCIT (International Taxation) (2011) 46 SOT 101 (URO) had also concluded that as service tax which was collected by the assessee from its customers on behalf of the government, did not involve any element of profit, therefore, the same was not liable to be included in the total receipts for determining the presumptive income of the assessee under Sec.44B of the Act. We further find that another coordinate bench of the Tribunal viz. ITAT Mumbai Bench “D” in the case of Orient Overseas Container Line Ltd. Vs. Addl. Director of Income Tax (International



Taxation), Range-4, Mumbai (2013) 35 taxman.com 342 (Mum), after deliberating at length on the issue under consideration, had observed that service tax was not to be included in total receipts for computing the presumptive income under Sec.44BB of the Act.

9. We have given a thoughtful consideration to the issue under consideration in the backdrop of the settled position of law. We are of the considered view that as the issue involved in the present appeal is squarely covered by the aforesaid judgments of the Hon^{ble} High Courts and the orders of the coordinate benches of the Tribunal, therefore, respectfully follow the same. We thus, in terms of our aforesaid observations, being of the considered view that the A.O had erred in including the service tax collections of Rs.3,94,59,752/- in the total receipts of the assessee for computing its income under Sec.44B of the Act, direct him to recompute the income under the said statutory provision after excluding the said amount. The Grounds of appeal Nos. 1 to 4 are allowed in terms of our aforesaid observations. The Ground of appeal No. 5 being general in nature is dismissed as not pressed.”

5. However, the Ld. DR has placed before us an order of this Tribunal in M/s. China Shipping Container Lines Vs. DCIT (International Taxation) (ITA. No.7653/Mum/2014) wherein the Tribunal has held that service tax collected by the assessee would form part and parcel of the aggregate amount as specified under sub-section 2 of Section 44B of the Act for the purpose of determining the profit and gain under this section. However, on perusal of this order,



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

we note that this was an order passed ex-parte qua the assessee, even though it was an assessee's appeal, after hearing only the revenue side. Therefore, it would not be safe to rely on the same; and since we find that in assessee's own case for earlier year, this Tribunal has decided in favour of assessee, we respectfully follow the order of the Tribunal and dismiss the appeal of the revenue.

ITA. NO. 446/MUM/2022 (AY. 2017-18):-

6. Since there is no change in facts or law for AY. 2017-18, applying the same reasons given for deciding appeal for AY 2016-17, the revenue appeal pertaining to AY. 2017-18 stands dismissed.

7. In the result, the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 17/03/2023.

Sd/-
(AMARJIT SINGH)
लेखा सदस्य / ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक Dated : 17/03/2023.
Vijay Pal Singh, (Sr. PS)

Sd/-
(ABY T. VARKEY)
न्यायिक सदस्य/JUDICIAL MEMBER



ITA No. 2861 & 446/Mum/2022
A.Y. 2016-17 & 2017-18
M/s. Korea Marine Transport Co. Ltd.

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//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**