

**THE INCOME TAX APPELLATE TRIBUNAL  
DEHRADUN BENCH, DEHRADUN  
Before Shri Saktijit Dey, Vice President  
and  
Shri M. Balaganesh, Accountant Member**

**ITA No. 1828/Del/2015  
(Assessment Year: 2011-12)**

MB Petroleum Services LLC, Kirtane & Pandit, H-16, Saraswati Colony, Sitaldevi Temple Road, Mahim, Mumbai (Appellant) <b>PAN: AAECM2604H</b>	Vs. DDIT, Circle-1, International Taxation, Dehradun  (Respondent)
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Assessee by :	Smt Shashi M. Kapila, Adv Shri Jeetan Nagpal, CA Ms. Pallavi, CA
Revenue by:	Sh. Mayank Kumar, JCIT, DR
Date of Hearing	26/07/2023
Date of pronouncement	15/09/2023

**ORDER**

**PER M. BALAGANESH, A. M.:**

1. The appeal in ITA No. 1828/Del/2015 arises out of the order of the AO/ DCIT, International Taxation, Circle-1, Dehradun [hereinafter referred to as 'ld. AO)', in short] in for A.Y. 2010-11 dated 30.01.2015 passed u/s 143(3)/144C(13) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').
2. The assessee has raised the following grounds of appeal:-

*"1. That the AO (Assessing officer) and DRP (Dispute Resolution Panel) have grossly erred on facts and in law in passing the impugned order and assessing the income at Rs 2,72,23,425/- as against the returned income of the assessee.*

2. *That the AO and DRP have grossly erred on facts and in law in not assessing the income of the assessee u/s 44BB of the IT Act.*
  3. *That the AO and DRP have grossly erred on facts and in law in passing the impugned order without giving a sufficient and proper opportunity to the assessee to be heard. The order has been passed in violation of principles of natural justice.*
  4. *That the AO and DRP have grossly erred in not adjudicating the grounds of objections in which all the additions on merits have been challenged.*
  5. *That the AO has grossly erred in law and on facts in not following the directions of DRP in letter and spirit.*
  6. *That the AO has grossly erred in making disallowance of Rs 9,41,400/- on account of purchase of chemicals.*
  7. *That the AO and DRP have grossly erred on facts and in law in making disallowance of Rs 39,86,242/- on account of disallowance of salary of Kameshwar Shukla.*
  8. *That the AO and DRP have grossly erred on facts and in law in making disallowance of Rs 8,273/- on account of payment to JM Bakshi & Co.*
  9. *That the AO and DRP have grossly erred on facts and in law in making disallowance of Rs 1,22,689/- on payment to Utkal Auto.*
  10. *That the AO and DRP have grossly erred on facts and in law in making disallowance of Rs 5,41,080/- being payment to NOV Brandt Oilfield.*
  11. *That the AO and DRP have grossly erred on facts and in law in making disallowance of Rs 20,22,921/- being payment to Global Marine Technologies.*
  12. *That the AO and DRP have grossly erred on facts and in law in not allowing the assessee the proper and due credit of TDS.*
  13. *That the explanations, submissions and evidences filed by the assessee have not been considered judiciously and examined and interpreted legally.*
  14. *That the additions are based on surmises and conjectures and guesswork and cannot be justified by the material on record.*
  15. *That in any case the additions sustained are highly excessive and cannot be justified by the material on record."*
3. The assessee has raised an additional ground of appeal vide letter dated 19.08.2018 which is as under:-

*"That on the facts and circumstances of the case and in law, the Ld. AO has erred in not following the directions of the Hon'ble DRP and in not allowing the claim of depreciation to the Appellant under section 32 of the Act in accordance with law."*

4. We have heard the rival submissions and perused the materials available on record. At the outset, we find that the additional ground of appeal raised by the assessee is a legal issue and does not require verification of any facts. Hence, it is admitted and taken up for adjudication along with main grounds of appeal.

5. From the perusal of the original grounds of appeal read with additional grounds of appeal, we find that the core issue to be decided in this appeal is whether the income of the assessee could be subjected to tax in terms of section 44BB of the Act.

6. M/s. MB Petroleum Services LLC is a non-resident company incorporated under the laws of Oman, engaged in the business of providing services and facilities in connection with prospecting/ extraction/ production of mineral oil. The return of income was filed electronically for AY 2011-12 by the assessee on 30.09.2011 declaring loss of Rs. 9,33,567/- in the profit and loss account filed along with return. During the course of assessment proceedings, the assessee gave the details of various contracts entered with Oil and Natural Gas Corporation Ltd (ONGC Ltd) and Petrogas E&P LLC. The details of the contracts entered into are as under:-

- a. Contract No. MR/MM/WS/SER/PTS/S006/03-04/OT-1011/9010003516 with ONGC for Hiring of Production Testing Surface Equipments & Services for CBM-BPM Basin, Kolkata.
- b. Contract No. PG/IND/MB2/DRILL/CONTRACT/MUD/08 with Petrogas E&P for Mud Engineering Services.

7. The assessee filed its return of income on the basis of profit and loss account/ consolidated statement in respect of both the contract and offered income on net basis under normal computation provisions of the Act. During the assessment proceedings, the assessee filed copy of audited balance sheet along with profit and loss account in respect of two contracts executed during the year and requested that the assessment be completed based on the audited financial statements filed during the assessment proceedings. The assessee also furnished entire supporting documents in respect of the audited financial statements and filed a written submission before the Id AO. The Id AO observed that the assessee has earned revenue during the year at :-

- a) Rs. 1,77,14,810 (for services under contract with Petrogas).
- b) Rs. 3,36,20,743/- (for material and others in respect of Petrogas contract).
- c) Rs. 2,53,99,401/- ( for services contract under well test division of ONGC Contract).

8. The Id AO concluded that the services performed under both the contracts are in the nature of Fees For Technical Services (FTS) as defined u/s 9(1)(vii) of the Act as according to him, the services rendered are technical in nature.

9. The Id AO observed that under the head "Chemical Purchase" a sum of Rs. 3,07,19,295/- has been debited by the assessee in the profit and loss account. Out of this, the Id AO observed that the assessee could not produce the invoices for Rs. 67,33,505/- and accordingly, proceeded to disallow the same as not allowable expenses u/s 37(1) of the Act in the draft assessment order. Pursuant to the directions of the Id DRP, this disallowance was

reduced to Rs. 9,41,400/- on the ground that assessee could not produce the bill No. 161 dated 07.03.2011 for Rs. 9,41,400/- only.

10. The Id AO observed under the head "clearing and forwarding expenses", the assessee has debited a sum of Rs. 12,20,071/- in its profit and loss account, out of which, it could not produce bill amounting to Rs. 8,273/- stated to be incurred in the name of JM Bakshi and Co on 02.11.2010. This was also disallowed by the Id AO u/s 37(1) of the Act in the draft assessment order which was upheld by the Id DRP.

11. The Id AO observed that the assessee has debited an expenses amounting to Rs. 1,05,362/- and Rs. 17,327/- being payment made to Utkal Auto without deduction of tax at source. The sum was disallowed u/s 40(a)(i) of the Act by the Id AO totaling to Rs. 1,22,689/- in the draft assessment order which was upheld by the Id DRP.

12. The Id AO observed that the assessee had debited amounting to Rs. 5,41,080/- being payment made to NOV Brandt Oilfield Services towards "rent for chemical handing equipment" without deduction of tax at source. Accordingly, the Id AO disallowed the same u/s 40(a)(i) of the Act in the draft assessment order which was upheld by the Id DRP.

13. The Id AO observed that the assessee has debited an amount amounting to Rs. 20,22,921/- being payment made to Global Marine Technologies towards "rent for containers" without deduction of tax at source. The Id AO accordingly disallowed the same u/s 40(a)(i) of the Act in the draft assessment order which was upheld by the Id DRP.

14. The Id AO observed that the assessee has debited salary in its profit and loss account on lump sum basis of employee Shri

Kameshwar Shukla. The assessee was asked to produce the salary register in support the claim of deduction together with nature of services performed by the concerned employee to the assessee. The Id AO also observed that from the perusal of the Form 16 filed by the assessee before the Id AO, the designation of the concerned employee is not mentioned thereon, whereas in respect of other employees, the designations were duly mentioned. Accordingly, the Id AO proceed to treat the salary expenditure debited in the books in the name of Shri Kameshwar Shukla in the sum of Rs. 39,86,242/- as bogus expenses and disallowed the same u/s 37(1) of the Act in the draft assessment order which was upheld by the Id DRP.

15. With the aforesaid observations the Id AO pursuant to the order of the Id DRP passed a final assessment order u/s 143(3) read with section 144C(13) of the Act on 30.01.2015 starting the computation of total income by taking the income as reflected in the audited profit and loss account of the assessee and determining the total income of the assessee at Rs. 2,72,23,425/-.

16. Aggrieved the assessee is in appeal before us.

17. The copy of contract entered into by the assessee with ONGC Ltd is enclosed at pages 1 to 30 of the paper book. The copy of the contract entered into by the assessee with Petrogas E&P LLC is enclosed in pages 31 to 84 of the paper book. During the course of assessment proceedings, it is not in dispute that the assessee has furnished copy of audited balance sheet and profit and loss account of the year ended on 31.03.2011 and also produced the books of account with supporting documents and evidences before the Id AO. The assessee also furnished the details of gross receipts earned by its from the execution of the contracts together with the corresponding TDS thereon as under:-

Sr. No.	Particulars	WT (Well Test Division) Rs.	DF (Mud Engineering Service) Rs.	Total Rs.	TDS as per 26AS Rs.
1	PetroGas E&P LLC For Services For Material & Others	Nil Nil	1,77,14,810 3,36,20,743	1,77,148,10 3,36,20,743	19,73,013
2	ONGC, CBM-BPM, Basins, Kolkatta For Services	2,53,99,401	NIL	2,53,99,401	29,31,524
	<b>Total</b>	<b>2,53,99,401</b>	<b>5,13,35,553</b>	<b>7,67,34,954</b>	<b>49,04,537</b>

18. The assessee also furnished the sample bills raised on the above two customers before the Id AO. It is not in dispute that the Id AO called for details of all the expenses more than Rs. 1 lakh from the assessee and the same had been duly furnished by the assessee vide its authorized representative letter dated 28.01.2014. In fact from the perusal of those documents only with the supporting evidences, the Id AO could proceed to make certain disallowance of expenses on various grounds. The assessee pleaded before the Id AO that its income from the execution of the two contracts should be determined in accordance with the provisions of section 44BB(1) of the Act. The assessee also gave detailed note on contract income earned by it with ONGC, Petrogas E&P LLC. As under:-

*3.0 Detailed note on Contract Income with ONGC & PetroGas E&P:  
The assessee company has earned contract income from two contracts as under:*

*(a) ONGC - Contract No.: MR /MM /WS /SER /PTS /S006 /03-04 /OT-1101/ 9010003516 for Hiring of production testing surface equipment & services for CBM-BPM Basin, Kolkata.: The scope of work is providing Production Testing Surface equipment (alongwith accessories) in operation condition and services suitable for carrying out production testing of High Pressure (15,000 psi) exploratory and development wells.*

*b) PetroGas E&P LLC-Contract No.: PG /IND /MB2 /DRILL /CONTRACT /MUD/ 08 for providing mud services on service contract to drill 04 number of wells (out of 04, including 01 of contingency). The well is drilled with water based mud system. The total Individual*

well depts. is ca 2,000m+- 100m (6,560ft+ 320ft) below sub-sea. The water depth in the block is expected to be between 45 & 60m (150ft & 200ft). The well has two oil-bearing objectives. The primary objectives is the Sistine of Palaeocene formation and second is the predominantly limestone of Oligocene/Eocene formation.

The nature of services provided by the assessee under the said contracts are "in connection with" prospecting for or extraction or exploration or production of mineral oils. The services provided by the assessee are explicitly connected with the activities of prospective, exploration, extraction and production of minerals oil and covered under the provision of section 44BB.

Further, we would like to draw your attention to appellate order passed u/s 250(6) of Income Tax Act, 1961. In the said order Hon'ble CIT (A) - II has also accepted above argument i.e. the provision of section 44BB(3) of I.T. Act, 1961 is applicable and not 44DA (copy of order is attached). Therefore we submit that the assessment should be completed u/s 44BB."

19. The assessee furnished the bill wise income from two contracts as under:-

Details of Income from Contracts						
FROM Petrogas E&P LLC						
Date	Bill No.	USD Bill Amount	USD	Net Amount PA L M C	Service Tax	Total (INR)
31/12/2010	Dec-01	16,545	45.32	679,808	70,020	749,828
31/01/2011	Jan-01	151,654	45.79	6,295,804	648,468	6,944,272
31/01/2011	Jan-02	13,490	49.00	660,986	-	660,986
28/02/2011	Feb-01	111,776	45.07	4,566,815	470,382	5,037,197
28/02/2011	Feb-05	160,283	49.00	7,853,857	-	7,853,857
28/02/2011	Feb-03	210,635	49.00	10,321,134	-	10,321,134
28/02/2011	Feb-04	285,397	49.00	13,984,461	-	13,984,461
28/02/2011	Feb-06	16,333	49.00	800,305	-	800,305
31/03/2011	Mar-01	138,941	49.00	6,172,383	635,755	6,808,138
<b>TOTAL</b>				<b>51,335,553</b>	<b>1,824,625</b>	<b>53,160,178</b>

  

FROM ONGC, CBM-BPM Basin, Kolkatta.						
Date	Bill No.	USD Bill Amount	USD (\$)	Net Amount PA L M C	Service Tax	Total (INR)
18/05/2010	01-2010	71,144	45.59	2,940,555	302,877	3,243,432
18/05/2010	02-2010	-	-	267,838	27,587	295,425
13/06/2010	04-2010	1,68,436	47.05	7,184,864	740,041	7,924,905
13/06/2010	05-2010	-	-	216,000	22,248	238,248
07/07/2010	06-2010	174,053	46.74	7,375,572	759,684	8,135,256
07/07/2010	07-2010	-	-	352,000	36,256	388,256
07/08/2010	08-2010	157,839	46.74	6,588,324	678,597	7,266,921
07/08/2010	09-2010	-	-	324,000	33,372	357,372
28/08/2010	10-2010	3,537	47.00	150,248	15,475	165,723
<b>TOTAL</b>				<b>25,399,401</b>	<b>2,616,137</b>	<b>28,015,538</b>

20. The assessee also furnished the entire invoices raised by it with ONGC and Petrogas E&P LLC. The gross receipts derived by the assessee from the contracts were Rs. 7,67,34,954/-. If the presumptive income @10% is applied as per section 44BB(1) of the

Act, then the income of the assessee would be Rs. 76,73,495/- . Whereas, the Id AO in the instant case has determined the income of the assessee at Rs. 2,72,23,425/- which is more than even the presumptive income prescribed under section 44BB(1) of the Act.

21. From the scope of work executed by the assessee in the contract, it is very clear that the assessee's nature of business is to provide services and facilities for prospecting/ extraction/ production of mineral oil thereby it clearly falls within the ambit of provisions of section 44BB of the Act. Hence, the income of the assessee should be determined in accordance with provisions of section 44BB(1) or 44BB(3) of the Act, as the case may be. Hence, the observation of the Id DRP that claim of assessee to determine the income in accordance with the provisions of section 44BB of the Act as an afterthought, is not in accordance with the law. When the activities carried out by the assessee are not disputed by the revenue, then it would be unjust to reject the claim of the assessee for determining the income in terms of the section 44BB of the Act. We have also noticed from the contracts executed by the assessee that the pith and substance of assessee's work is providing services in connection with prospecting/ extraction/ production of mineral oil, as such, is squarely eligible to be assessed u/s 44BB of the Act. In fact a similar view has been accepted by the Id CIT(A) for AY 2009-10 which order has been approved by this Tribunal for AY 2009-10 in ITA No. 5109 and 5110/Del/2013 dated 28.02.2014 in assessee's own case in respect of contract with ONGC. Hence, there is no scope of taking a divergent stand from the view taken by this Tribunal in AY 2009-10 in respect of contract with ONGC which is continuing during this year also. However, with regard to contract entered with the Petrogas E&P LLC, we find that the same was entered for provision of MUD services on service contract to drill 04 number of wells with water based mud system. Infact this contract with Petrogas was entered as a

consortium of Oil exploration company with shares of Petrogas @20%; share of Gas Authority of India Ltd of 20%; share of Gujarat State Petroleum Corporation Ltd of 20%; share of Hindustan Petroleum Corporation of 20%; share of India Oil Corporation of 20% and assessee herein. The nature of services rendered under this Petrogas contract has already been detailed herein (supra). From the same it is evident that the services provided by the assessee are in connection with prospecting/ extraction/ production of mineral oil and hence, its activities would be squarely covered within the ambit of provision of section 44BB of the Act. We also find similar services were rendered by the assessee in the past and the same had been subject matter of adjudication of this Tribunal for AY 2007-08 to 2009-10 wherein, this tribunal had categorically observed that the services rendered by the assessee would be falling under the ambit of provision of section 44BB of the Act. As stated supra, the Tribunal in AY 2009-10 in assessee's own case had already held that income of the assessee would have to be determined in accordance with the provision of section 44BB of the Act and not section 44DA of the Act. Hence, the entire contract receipts derived by the assessee would have to be determined for the purpose of taxability only in accordance with the provisions of section 44BB of the Act. The assessee in the instant case has reported consolidated profit of Rs. 1,96,00,820/- in its profit and loss account and business income of Rs. 1,86,97,157/- under normal provisions of the Act in the income tax which works to 24.36% of gross receipts. Now the question arises that whether the assessee though falling under the ambit of provisions of section 44BB of the Act, but earning income above the presumptive rate of 10% fixed u/s 44BB(1) of the Act, would be eligible for showing income in terms of section 44BB(1) of the Act. In order to understand this issue, it would be pertinent to look at the same in the event of assessee's incurring losses. If the assessee is incurring losses, still it has to offer income at the presumptive rate of

10% on gross receipts as per section 44BB(1) of the Act. As a corollary, if an assessee earns income more than 10% on gross receipts actually, then still its income would be determined only in terms of section 44BB(1) of the Act. There is absolutely no scope for determining income of the assessee under normal provisions of the Act. This is so because of non obstante clause provided u/s 44BB of the Act which reads as under:-

***“Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.***

***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.***

***(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.”***

22. In view of non obstante clause of section 44BB(1) of the Act, all other disallowances made by the Id AO either u/s 37(1) of the Act

or section 40(a)(i) of the Act would not survive. Similarly, the adjudication of additional ground for claim of income tax depreciation u/s 32 of the Act also would become academic. In our considered opinion, even though the assessee has offered more income in its return than the income u/s 44BB(1) of the Act, still it is not estopped from pointing out a mistake in the assessment though such mistake is on account of submission by the taxpayer. It is trite law that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to prevail. Further, it is also settled law that there is no estoppel against the statute. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Kedarnath Jute Manufacturing Company Ltd Vs. CIT reported in 82 ITR 363 as under:-

*"We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry to the books of account and although under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter."*

23. Further, the Hon'ble Delhi High Court also in the case of CWT Vs. Meattles (P) Ltd reported in 156 ITR 569 had held "whether the revenue authorities take a particular view of the statutory provision in the income tax assessment and later on realise that it was mistaken view, then they cannot be estopped from taking correct view of the statutory provision later on." Further, Hon'ble Supreme Court in the case of Director of Inspection of Income Tax Vs. Pooran Mall and sons reported in 96 ITR 390 had held as under:-

*The question whether a certain provision of law is directory does not fall to be decided on different standards because it is found in a taxing statute. There is no rule that every provision in a taxing statute is mandatory. The strict construction that a citizen does not*

*become liable to tax unless he comes within the specific words of a statute is a different proposition. That a person cannot be taxed on the principle of estoppel does not admit of much argument. Article 265 of the Constitution lays down that no tax shall be levied except when authorised by law.*

24. In any case, the elaborate circular has been issued by the CBDT vide Circular No. 14 (SL-35) dated 11.04.1955 wherein, it has been specifically observed by CBDT that the purpose of this circular is merely to emphasis that Income Tax Officer should not take advantage of assessee's ignorance to collect more tax out of him than his legitimate due from him.

25. In view of the aforesaid detailed observations and respectfully following the judicial precedents relied upon hereinabove, we hold that income of the assessee should be determined on presumptive basis as per section 44BB(1) of the Act in the peculiar facts and circumstances of the case. Accordingly, the various disallowances made by the Id AO in the assessment would be liable for deletion. Accordingly, the ground nos. 2 to 11 raised by the assessee are allowed and additional ground raised by the assessee is allowed.

26. With regard to ground raised in seeking correct credit for TDS, the same requires factual verification and hence Ld AO is directed to give credit for TDS in accordance with law. Accordingly, the ground no12 raised by the assessee is allowed for statistical purposes.

27. The Ground No. 16 raised by the assessee is regarding initiation of penalty proceedings u/s 271G and section 271BA of the Act. These are separate and distinct proceedings and are not connected with the present quantum appeals. Hence dismissed as not emanating out of the orders of the lower authorities.

28. The Ground Nos. 1, 13,14 and 15 raised by the assessee are general in nature and does not require any specific adjudication.

29. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 15/09/2023.

-Sd/-  
**(Saktijit Dey)**  
**VICE PRESIDENT**

-Sd/-  
**(M. Balaganesh)**  
**ACCOUNTANT MEMBER**

Dated: 15/09/2023  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi