THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 4424/Del/2017
(Assessment Year: 2012-13)

DCIT, Circle-II, International Taxation, Dehradun	Vs.	M/s. Weatherford Oil Tools ME Ltd, C/o. Nangia & Co, 3rd Floor, NCR Plaza, Municipal, No. 24A, New Cantt Road, Dehradun
(Appellant)		(Respondent)
PAN: AAACW1542G		

CO No. 192/Delhi/2017
(In ITA No. 4424/Del/2017)
(Assessment Year: 2012-13)

M/s. Weatherford Oil Tools ME Ltd, C/o. Nangia & Co, 3rd Floor, NCR Plaza, Municipal, No. 24A, New Cantt Road, Dehradun	Vs.	DCIT, Circle-II, International Taxation, Dehradun
(Appellant)		(Respondent)
PAN: AAACW1542G		

Assessee by :	Shri Salil Kapoor, Adv Shri Amit Arora, Adv
Revenue by:	Shri. Mayank Kumar, Adit CIT DR (International)
Date of Hearing	23/11/2023
Date of pronouncement	22/12/2023

O R D E R

PER M. BALAGANESH, A. M.

1. This appeal in ITA No. 4424/Del/2017 is filed by the revenue and the cross objection No. 192/Del/2017 for A.Y. 2012-13 arises out of the order by ld CIT(A)-2, Noida in appeal No. 28/CIT(A)-2/2015-16 dated 28.04.2017 (hereinafter referred to

as ld CIT(A) in short) against the order of assessment passed u/s 143(3)/ 144C(3)(b) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 12.05.2015 by the AO, DCIT, International Taxation, Circle-2, Dehradun (hereinafter referred to as ld. AO).

2. Let us take up the revenue's appeal first.

3. The revenue has raised the following grounds of appeal:-

> *"(i) Whether on the facts and in the circumstances of the case and in law, the CIT (A) has erred in allowing the appeal of the assessee by completely overlooking the amended provisions of section 9(1)(i), 9(1)(vii), 44AB, 44DA of the Act which were applicable to the AY under consideration.*
>
> *(ii) Whether the CIT (A) has erred in placing reliance on the judgment of the Hon'ble Supreme Court in the case of ONGC vs. CIT (Civil Appeal No. 731 of 2007) by failing to appreciate that the issue of taxability u/s 44BB vs. 44DA of the Act was not there before the Apex Court, and that the case before the Apex Court pertained to the AY 1985-86, and involved the issue of taxability u/s 44BB vs. 44D of the Act.*
>
> *(iii) Whether the CIT (A) has erred in failing to note that the Memorandum to Finance Bill 2010 makes it clear that any service which falls within the ambit of 44DA, even if it is in connection with prospecting for, or extraction or production of mineral oils as stipulated in section 44BB, has to be assessed u/s 44DA of the Act.*
>
> *(iv) Whether the CIT (A) has erred in ignoring the nature of activities and scope of work as per the contracts of the assessee thus arriving at conclusion that the receipts of the assessee were not in the nature of Royalty u/s 9(1)(vi) and FTS u/s 9(1)(vii) of the Act.*
>
> *(v) Whether the CIT (A) has erred in overlooking that the software provided by the assessee was not actually used for mining or like project and thus did not fall in the exclusion clause of section 9(1)(vi) and 9(1)(vii) of the Act, in distinction to the lead case of Foramer inter alia covered by the Hon'ble Apex Court in ONGC case supra where the dominant purpose of the contract was prospecting. extraction or production of mineral oil.*
>
> *(vi) Whether the CIT (A) has erred in overlooking that the dominant purpose of the contract for the software was not prospecting, extraction or production of mineral oil but was simulation & optimization and was basically back end processing.*
>
> *(vii) Whether on the facts and in the circumstances of the case and in law, the CIT (A) has erred in holding that receipts on account of service tax are not includible gross revenue of the assessee for the purpose of computation of profits under the provisions of section 44BB of the I.T. Act, 1961.*
>
> *(viii) Whether the CIT(A) has erred in not appreciating the fact that section 44BB of the Act is 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 the gross receipts are deemed to have been allowed to the assessee.

(ix) Whether the CIT(A) has erred in ignoring the ratio 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.

(x) Whether the CIT(A) has erred in ignoring the fact brought into by the AO that the comparable relied upon by the assessee were functionally different from the activities/sales carried out by the assessee.

(xi) Whether the CIT(A) was correct in holding that the net profit margin of average of " Hazel Mercantile Limited" and "Aseem Global Limited" were applicable in the case of the assessee without adjudicating or addressing the issue of their functional dissimilarity with the assessee, as highlighted by the AO. (xii) Whether the CIT(A) was correct in holding that the net profit margin of average of Hazel Mercantile Limited" and "Aseem Global Limited" were applicable in the case of the assessee without adjudicating or addressing the issue of their locational difference with the assessee, as highlighted by the AO.

(xiii) Based on above facts, whether the Ld. CIT(A) erred in not upholding the action of the AO in rejecting the Profit Attribution Report" submitted by the assessee.

(xiv) 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."

4. Ground Nos. (i), (ii) and (iii) raised by the revenue are challenging the action of the ld CIT(A) in holding that the receipts on account of service tax are not includible in the gross revenue of the assessee for the purpose of computation of profit u/s 44BB of the Act.

5. We have heard the rival submission and perused the material available on record. The assessee is a non-resident foreign company incorporated under the laws of British Virgin Island having registered office at P.O. Box. No. 4327, Dubai, United Arab Emirates. The Indian Project office is situated at 921, Solitaire Corporate Park, 167 Guru Hargovindji Marg, Chakala, Andheri East, Mumbai 400093. The assessee is engaged in the business of providing services and facilities in connection with exploration, extraction and production of mineral oil in India. For the AY 2012-13, the assessee filed its return of income on 29.03.2013 declaring total income of Rs. 16,16,74,580/-. In the said assessment, the taxable income

under the head "profits and gains of business and profession" was computed in terms of presumptive tax scheme provided u/s 44BB of the Act and receipts on account of service tax totaling to Rs. 15,09,26,645/- were claimed to be in the nature of royalty/ fee for technical services chargeable to tax u/s 44DA of the Act and determined the total income on this account at an estimated profit ratio of 25% as against the claim of the assessee that the same being statutory payment wherein, service tax receipts received from the party has been remitted to the account and accordingly the same is not chargeable to tax. The ld CIT(A) categorically held that the income of the assessee has to be computed only in accordance with the provisions of section 44BB of the Act and not u/s 44DA of the Act. Against this finding, the revenue has not filed any appeal. Hence, the determination of income of the assessee in terms of section 44BB of the Act had attained finality. Now the short question that arises for our consideration is whether the service tax reimbursement is to be included in the gross receipts of the assessee for the purpose of computation on presumptive tax u/s 44BB of the Act or not. This issue is no longer res-integra in view of the Full Bench decision of the Hon'ble Jurisdictional High court in the case of DIT Vs. Schlumberger Asia Services Ltd reported in 414 ITR 1 (Uttrakhand), wherein, it was held that the service tax reimbursment need not be included in the aggregate of the amounts specified in clause (a) and (b) of Section 44BB(2) of the Act as it is not an amount received by the assessee on account of service provided by them for the extraction or production of mineral oil and that the same is merely a tax levied on service which had been recovered and paid to the account of the Central Govt. Therefore, the same would not be eligible for inclusion in the value of gross receipts for the purpose of computation of profit u/s 44BB of the Act. Respectfully following the same the ground Nos. (i), (ii) and (iii) raised by the revenue are dismissed.

6. Ground Nos. (iv) to (vi) raised by the revenue are challenging the action of the ld CIT(A) in not including the amount received by the assessee on account of "equipment loss in hole" from gross revenue receipt for the purpose of computation of profits u/s 44BB of the Act.

7. We have heard the rival submissions and perused the materials available on record. The ld AO had considered the receipts on account of tools lost in hole amounting to Rs. 1,72,86,003/- as includible in the gross receipts. The assessee claimed the same to be in the nature of capital receipts on the ground that the same was received on account of destruction and loss of capital asset like drilling equipment which are provided by the assessee to oil exploration and production companies. It was pleaded that the money received is a mere reimbursement cost of equipment destroyed in the process of oil extraction and hence, the same would partake the character of capital receipt not chargeable to tax. The said contention was not appreciated by the ld AO. The ld CIT(A) by placing reliance on the decision of the coordinate bench of Delhi Tribunal in the case Schlumberger Asia Services Ltd Vs. Additional Director of Income Tax (International Tax) ITA No. 6063/Del/2010 reported in 22 taxmann.com 165 (del) dated 18.05.2012 deleted the addition made by the ld AO and treated the amounts received on account of tools lost as a capital receipt. For the sake of convenience, the relevant observation of the Delhi Tribunal in the case referred (supra) are reproduced herein:-

> *"7.7 It has further been noted that the A.O. has included a sum of Rs. 7,23,59,963/- received by the Assessee as reimbursements of certain expenses being customs duties paid by the Assessee on behalf of its clients, equipments lost in hole etc. It has been submitted that the inclusion of this amount within the scope of receipts for purpose of determining income of the Assessee is contrary to the settled law on the issue and decisions in the case of the Assessee itself. Income tax is leviable only on those receipts, which constitute 'income'. "Income" as contemplated under the Act does not include "reimbursement of expenses". There is no element of profit and gains in the reimbursements received by the Assessee, which has incurred expenses for and on behalf of other companies. Contractually the liability to incur these expenses was with those companies. Therefore the amounts towards reimbursement cannot be considered as income of the Assessee. Furthermore, we note that assessee's contention is that that Ld. Assessing Officer has also erred on facts and in law in not following the decision of the jurisdictional High Court of Uttarakhand in Assessee's own cases DIT v. Schlumberger Asia Services Limited [2009] 317 ITR 156] and CIT v. Schlumberger Asia Services Limited (ITA No. 58 of 2006, Order dated 26-10-2007, in which it was held that such reimbursement does not constitute income. These decisions have also been followed by the Hon'ble Tribunal in Assessee's own case ACIT ITA NO. 6063/Del/2010 v. Schlumberger Asia Services Limited, ITA No. 4180(Del)/2006 Order dated 13-04-2007. We find considerable cogency in assessee's submission as above. Hence, we hold that the Assessing Officer has erred in including Rs. 72359963/- received by the assessee as reimbursements for determining the taxable income of the assessee."*

8. Respectfully following the same the ground Nos. (iv) to (vi) of the revenue are dismissed.

9. Ground No. (vii) raised by the revenue is general in nature and does not require any specific adjudication.

10. In the result, appeal of the revenue is dismissed.

CO No. 192/Del/2017 (Assessee's appeal)

11. Though the assessee has raised several grounds in its cross objection, the only effective issue to be decided is with regard to attribution of profit on the activities of overseas sale of equipment of the assessee which has been considered by the ld AO as fee for technical services and the ld CIT(A) held the profit rate @3.13 % of gross sales to be attributed to Indian operation, as against the profit rate of 2% attributed by the assessee.

12. We have heard the rival submissions and perused the materials available on record. The assessee offered to tax in respect of sale of tools and equipments made overseas at profit rate of 2% of gross sales of Rs. 38,34,76,937/- as profit attributable to Indian operations carried out in India and accordingly, the same alone would be income deemed to accrue or arise in India. The ld AO however, held that the sales made by the assessee are in nature of composite activities involving supply of consumable and spares which are connected and form intricate part of service contract therefore, to be taxed u/s 44BB of the Act. Before the ld CIT(A), the dispute got narrowed down pursuant to various additional evidences furnished by the assessee and remand report given by the ld AO. The ld CIT(A) vehemently held that the profit attribution rate to Indian operations @3.13 % as against 2% declared by the assessee. Now the short point that arises for our consideration is whether the profit attribution should be estimated at 2% or 3.13%. The ld DR vehemently argued that the profit attribution @2% made by the assessee was without any basis and it was arbitrary and the assessee did not give any details to justify the estimated profit rate 2%. The ld CIT(A) on taking certain

comparables had arrived at the weighted average arithmetic mean of 3.13% as under:-

Sl No.	Company name	NPM FY 2009-10 (%)	NPM FY 2010-11	NPM FY 2011-12	Weighted average
1.	Hazel Mercantile Limited	3.61%	3.71%	2.97%	3.38%
2.	Super Domestic Machines Limited	0.75%	3.98%	1.70%	2.21%
3.	Jainex Ltd.	2.73%	4.30%	3.99%	3.81%
	Arithmetic mean				**3.13%**

13. The assessee on the other hand furnished the comparables and arrived at the weighted average arithmetic mean of 1.69% worked out in the following manner:-

Sr.No.	Company Name	NPM FY 2009-10 (%)	NPM FY 2010-11 (%)	NPM FY 2011-12 (%)	Weighted Average
1	Aseem Global Limited	1.06%	0.80%	0.40%	0.80%
2	Hazel Mercantile Limited	3.61%	3.71%	2.97%	3.38%
3	P O C L Enterprises Limited	-0.77%	-1.80%	0.14%	-0.87%
4	Veritas (India) Limited	1.37%	1.77%	0.01%	0.84%
5	Super Domestic Machines Limited	0.75%	3.98%	1.70%	2.21%
6	Jainex Ltd.	2.73%	4.30%	3.99%	3.81%
	Arithmetich mean				**1.69%**
	Min				**-0.87%**
	Max				**3.81%**

14. The ld AR before us argued that the ld CIT(A) had ignored the comparable cases where the weighted average of net profit margin were either negative or less than 1%, which has got absolutely no basis. Accordingly, he prayed for acceptance of comparables given by the assessee to be justified workings for adoptation of 2% profit attribution rate as against the comparables of the assessee wherein, arithmetic mean margin of the comparables were 1.69%. Similar issue had arose before the coordinate bench of this tribunal in the case of Smith International Inc. Vs. ADIT in ITA No. 4561/Del/2013 for AY 2009-10; 3824/Del/2014 for AY 2010-11 dated 10.11.2021, wherein, in that case, that assessee had offered 2% of gross sales as attributed to the Indian operations which was reworked by the ld CIT(A) @5.08% after ignoring the comparable companies (KOA tools India Ltd) which had incurred loss. The relevant observations of this tribunal are reproduced below:-

"14. It was argued that ignoring the functional comparability of KOA Tools Limited which is against comparability study. The company operates in 3 segments i.e., segment tools, Trading of tools and parking. Since the profile of this company, in respect of its trading business is comparable to SIO in terms of functions performed, risks assumed and assets employed, the trading segment of this company has been considered as comparable to SIO for AY 2009-10. However, for AY 2008-09 and AY 2007-08, the trading segment was not available, hence the company has not been considered comparable for these years. As regards the losses for AY 2009-10, the assessee submitted that losses are a regular business phenomenon. If a company is otherwise comparable in terms of functions performed, risks assumed and the assets employed, it cannot be rejected as a comparable merely because it has incurred losses in a particular year.

15. It was argued that Koa Tools India Limited meets all comparability criteria examined by the Appellant in view of income-tax regulations and OECD guidelines and hence, should be considered as comparable as per the law.

16. The assessee relied on the ruling of the Special Bench of Chandigarh ITAT in the case of DCIT vs. M/s Quark Systems Private Limited [2010-TIOL-31-ITAT-CHD-SB], wherein it was held as under:

> *"25..... While we agree that merely because a comparable is making loss, it cannot be excluded from the list of comparables, Imercius is a case in which not only functional area is different...*

17. The above principle has also been upheld by other benches of ITAT in the case of UCB India (P) Limited vs. ACIT (2009) (121 ITD 131) (Mumbai ITAT), ACIT vs. Wockhardt Limited (6 Taxmann.com 98) (Mumbai ITAT), Brigade Global Services Private Limited vs. ITO (ITA No 988/Hyd./2011) (Hyderabad ITAT).

18. In view of the orders of the Co-ordinate bench of ITAT, we hold that Koa Tools India Limited which clears the FAR test should not be rejected as a comparable for the AY 2009-10."

15. It is not in dispute that the comparables chosen by the assessee duly fulfilled the comparability test i.e. FAR (Functions performed, Assets employed and Risks assumed). The ld CIT(A) had also not disputed the comparability test of the 6 comparables chosen by the assessee. He had merely ignored the comparables incurring losses or having weighted average net profit margin less than 1%. Accordingly, we have no hesitation to hold that the comparables chosen by the assessee duly fulfilled the comparability test of FAR analysis and in view of the decision of the Special Bench of Chandigarh Tribunal in the case of M/s Quark Systems Pvt Ltd Vs ITO, Chandigarh reported in 2010-TIOL-31-ITAT-CHD-SB, we hold that Assem Global, POCL Enterprises Ltd and Veritas (India) Ltd should also be included as comparable companies and when these three are included, the

weighted average margin of the comparable companies works out @1.69% and the assessee itself had attributed 2% as profit for the Indian operations. Hence, there is no need for further attribution of profit for the Indian operations. Accordingly, we direct the ld AO to accept 2@ profit attribution made by the assessee. Hence, the ground raised by the assessee in its cross objection is allowed.

16. To sum up, the appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the open court on 22/12/2023.

-Sd/-	**-Sd/-**
(KUL BHARAT)	**(M BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:22/12/2023
A K Keot

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

ASSISTANT REGISTRAR
ITAT, New Delhi