

आयकर अपीलीय अधिकरण  
दिल्ली पीठ "डी", दिल्ली  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D", DELHI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं . 2346 to 2348/दिल्ली/2024 (नि. व. 2013-14 to 2015-16)  
ITA Nos. 2346 to 2348/DEL/2024 (A.Ys.2013-14 to 2015-16)

M/s UMW Sher (L) Ltd.,  
C/o J.K Rai & Associates, Chartered Accountants,  
Flat No. 32-G, Sector-7, Gate No. 2, Jasola Vihar,  
New Delhi 110025  
PAN: AABCU-2120-P

..... अपीलार्थी / Appellant

बनाम Vs.

Assessing Officer,  
International Taxation Circle 3(1)(1),  
New Delhi 110002

..... प्रतिवादी / Respondent

अपीलार्थी द्वारा / Appellant by : Shri Ved Jain, Advocate &  
Ms. Supriya Mehta

प्रतिवादीद्वारा / Respondent by : Shri Vizay B Vasanta, CIT-DR

सुनवाई की तिथि / Date of hearing : 19/08/2024

घोषणा की तिथि / Date of pronouncement : 28/08/2024

आदेश / ORDER

**PER VIKAS AWASTHY, JM:**

These three appeals by the assessee are against the assessment orders passed u/s. 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for AYs. 2013-14, 2014-15 & 2015-16, respectively.

2. Since, identical issues are involved in all the three appeals, these appeals are taken up together for adjudication and are decided by this common order. For the

sake of convenience of adjudication of these appeals, the appeal for AY 2013-14 is taken as a lead case. Hence, the facts are narrated from the said appeal.

**ITA No. 2346/Del/2024 (AY 2013-14)**

3. The facts as emanating from the documents on record are as under:-

The assessee was incorporated under the laws of Malaysia and is a tax resident of Malaysia. The assessee is engaged in the business of leasing of machines and equipment used for exploration and extraction of mineral oil. The assessee has filed its return of income for AY 2013-14 declaring income of Rs. 1,94,84,400/- in accordance with provisions of Section 44BB of the Act. During the course of scrutiny assessment proceedings for AY 2012-13, 2016-17 and 2017-18, the Assessing Officer (AO) held that receipts of the assessee company are not eligible for the benefit u/s. 44BB of the Act. In fact, the receipts are taxable as royalty u/s. 9(1)(vi) of the Act and Article 12 of the India-Malaysia DTAA. Consequently, assessment for AY 2013-14 was reopened u/s. 148 of the Act. In re-assessment proceedings, the AO while passing the draft assessment order made addition of Rs. 19,48,44,021/- holding it to be royalty. The relevant extract of the findings of the AO in the impugned AY are as under:-

*“29. The income from equipment rental is sourced in India in view of Section 5(2) r.w.s. 9 of the Act as such services are utilized in India. The equipment rental is a royalty income u/s 9(1)(vi)Explanation 2, of the Income Tax Act as well as Under Article 12 of India-Malaysia DTAA. Though sub clause (iva) of Explanation 2 talks about the definition of royalty as 'use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB', But as the assessee's case does not fall under section 44BB as discussed above, the income received by it squarely falls under the definition of 'royalty' as per section 9(1)(vi) of the Act.*

30. *In view of the aforesaid discussions of facts and legal provisions, the consideration received by the assessee from JEPL of INR 19,48,44,021/- is royalty income which is taxable in India on gross basis as per Section 115A of the Act and under the Article 12 of the India-Malaysia DTAA.”*

4. The assessee filed objection before the Dispute Resolution Panel (DRP) against the draft assessment order. The DRP vide directions dated 23.02.2024 rejected objections and confirmed the addition made by AO. The AO vide impugned assessment order completed the assessment in accordance with the directions of DRP. Hence, the present appeal.

5. Shri Ved Jain appearing on behalf of the assessee submitted that the issue in appeal is identical to the issue raised by the assessee in appeals for AY 2012-13 and 2017-18 in ITA No. 569 & 570/Del/2021, respectively. The Tribunal after examining the issue threadbare vide order dated 01.02.2023 held that income of the assessee is taxable u/s. 44BB of the Act and directed the Assessing Officer to compute income in both the assessment years, accordingly. Against the said order of Tribunal, the Revenue carried the issue in appeal before the Hon'ble Delhi High Court for both the assessment years i.e. 2012-13 & 2017-18 in ITA No. 153/2024 and 160/2024, respectively. The Hon'ble Delhi High Court upheld the findings of the Tribunal and dismissed appeals of the Revenue. The Id. Counsel submits that since the issue in AY 2013-14 is identical to AY 2012-13 & 2017-18, the relief granted by the co-ordinate Bench in AY 2012-13 should be allowed to the assessee in impugned assessment year as well.

5. Shri Vizay B Vasanta, representing the department vehemently defended the assessment order. However, he fairly submitted that the Tribunal in AY 2012-13 and 2017-18 has considered the identical issue.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee has declared income of Rs. 1,94,84,400/- in AY 2013-14, in accordance with provisions of section 44BB of the Act. The return of assessee was not subject to scrutiny. Subsequently, on the basis of assessment orders passed in AY 2012-13, 2016-17 & 2017-18, the assessment for impugned assessment year i.e. AY 2013-14 was reopened and notice u/s. 148 of the Act was issued to the assessee on 30.06.2021. The stand of the Revenue is that the receipts of the assessee from equipment rental is royalty and is taxable under the provisions of section 9(1)(vi) of the Act as well as under Article 12 of India-Malaysia DTAA. The DRP while disposing of objections of the assessee in para 6.2 of directions observed that identical issue in assessee's own case for AY 2012-13 and 2017-18 have been decided by the DRP vide directions dated 16.02.2021. The DRP following its own directions for AY 2017-18 upheld the assessment order and rejected objections of the assessee. It is relevant to mention here that the DRP in its directions (para 6.3) has reiterated, *"that factual and legal issue involved in the instant case is identical to that in the AYs 2012-13 and 2017-18"*.

7. The co-ordinate Bench while deciding the appeal of the assessee for AY 2012-13 and 2017-18 in ITA No. 569 & 570/Del/2021 vide common order dated 01.02.2023 held as under:-

“9. Undisputedly, the activity carried on by the assessee falls within the third category, viz., supplying plant and machinery on hire used or to be used in prospecting, or extraction or production of mineral oils. Section 9 of the Act speaks of certain categories of income deemed to accrue or arise in India, whether directly or indirectly through any business connection in India or through any property in India or through or from any asset or source of income in India. Clause (vi) of section 9(1) provides for taxation of royalty by applying deeming fiction. Explanation (2) to section 9(1)(vi) defines the term 'royalty'. The term 'royalty' in Explanation (2) initially was in a restricted form. However, the scope of royalty under explanation (2) was enlarged with introduction of clause (iva) w.e.f. 01.04.2002, which reads as under:

"Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India :-- 37(i) to (v).....

(vi) income by way of royalty payable by--

(a) .....

(b) .....

(c) .....

.....

Explanation 2.--For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for--

(i) .....

(ii) .....

(iii) .....

(iv) .....

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;"

10. A careful reading of clause (iva) to explanation 2 would make it clear that the term 'royalty' will also mean any amount received towards the use or right to use of any

*industrial/commercial or scientific equipment. However, the second limb of the provision excludes the amounts referred to in section 44BB of the Act from the definition of royalty given under explanation -2. In other words, the amounts received in connection with activities enumerated under sub-section (1) to section 44BB, even if in the nature of royalty, has to be treated as business profits in case of a non-resident entity not having any Permanent Establishment (PE) in India. This is so because, section 44BB does not require existence of PE. Interestingly, similar receipts falling within the definition of royalty as defined in explanation 2 to section 9(1)(vi), which also includes equipment royalty, would be taxable under section 44DA of the Act, in a case, where the non-resident entity has a PE in India. Thus, sections 9(1)(vi), 44BB and 44DA apply in different situations. While existence of PE is a pre-condition for applicability of section 44DA, it is not so in case of 44BB of the Act.*

*11. In fact, in case of Paradigm Geophysical Pty. Ltd. Vs. CIT, 2020 (3) TMI 969 relied upon by the departmental authorities, the Hon'ble Jurisdictional High Court, while interpreting the provisions contained under section 44BB and 44DA of the Act, have observed that the distinguishing feature between the two provisions is, in section 44BB one does not find any reference to a PE in India and the services contemplated therein are more specific than what is contemplated under section 44DA. As rightly observed by learned DRP, and it is a fact also, section 44BB is a special provision applicable to certain categories of income earned by a non-resident from activities related to the business of extraction/exploration of mineral oils. One of the activities coming under the said provision relates to giving on hire/leasing of equipments to be used in exploration or extraction of mineral oil. In the facts of the present appeal, undisputedly, the assessee has given on hire/lease equipments used or to be used in extraction/exploration of mineral oils. Therefore, in our view, the amounts received by the assessee are fully covered under the provisions of section 44BB and taxable on gross basis at the rate of 10%.*

*12. In our view, learned DRP has made a fundamental error in ignoring the exceptions provided under clause (iva) to explanation 2 to section 9(1)(vi) of the Act while concluding that the amount received is in the nature of royalty under section 9(1)(vi) read with section 115A of the Act. One more fundament error committed by learned DRP is in holding that section 44BB will be applicable only in a case where non-resident has a PE in India. The aforesaid conclusion of learned DRP is based on complete misinterpretation of the provision and goes against the very essence of the provision, which does not put the condition of existence of PE for applicability of the provision.*

13. Thus, in our view, the conclusion drawn by learned DRP that the amounts received are in the nature of royalty under section 9(1)(vi) read with section 115A of the Act is unacceptable.

14. On the contrary, we accept the position taken by the assessee in offering the income to tax under section 44BB of the Act, as, it is in accordance with the statutory provision. In course of hearing, learned counsel appearing for the assessee has cited the following decisions in support of its claim that the amount is taxable under section 44BB of the Act:

1. Schlumberger Asia Services Ltd. Vs. Deputy Director of India Tax (International Taxation), 2022 (6) TMI 833 (ITAT, Delhi)

2. Louis Dreyfus Armateurs Sas Vs. ADIT, International Taxation, 2015 (2) TMI 899 (ITAT, Delhi)

3. Dy. DIT Vs. M/s. RPS Energy Pty. Ltd., 2018 (4) TMI 927 (ITAT, Delhi)

4. Paradigm Geophysical Pty. Ltd. Vs. CIT (International Taxation)-3, 2020 (3) TMI 969 (Delhi High Court)

5. DIT vs. OHM Ltd., 2012 (12) TMI 1091 (Delhi High Court)

15. In view of our reasonings in the foregoing paragraphs, we do not intend to discuss in detail the ratio laid down in these decisions. Suffice it to say, the conclusion drawn by us is fully supported by the ratio laid down in these decisions. Accordingly, we direct the Assessing Officer to compute the income in both the assessment years under dispute under the provisions of section 44BB of the Act.

16. In the result, appeals are allowed, as indicated above.”

[Emphasized by us]

The aforesaid decision of the Tribunal was upheld by the Hon'ble Delhi High Court in appeal by the department titled, CIT (International Taxation) vs. M/s. UMW Sher (L) Ltd. in ITA 153/2024 decided on 04.03.2024.

8. Both sides are unanimous in stating that the facts in the impugned assessment year are identical to AY 2012-13 & 2017-18. Thus, in view of admitted

facts, the decision rendered by the co-ordinate Bench on identical set of facts in assessee's own case and upheld by the Hon'ble Jurisdictional High Court would *mutatis mutandis* apply in the instant assessment year. For parity of reasons, appeal of the assessee is allowed.

**ITA No. 2347 & 2348/ Del/2024 (AY 2014-15 &AY 2015-16)**

9. It is undisputed that factual matrix and issue involved in appeals for AY 2014-15 & 2015-16 are identical to AY 2013-14. Thus, in view of the admitted position the findings given by us while adjudicating appeal of the assessee for AY 2013-14 would *mutatis mutandis* apply to both these appeals. Accordingly, both appeals of the assessee are allowed in similar terms.

10. **In the result, appeals of the assessee for AY 2013-14, 2014-15 & 2015-16 are allowed.**

Order pronounced in the open court on Wednesday the 28<sup>th</sup> day of August, 2024.

Sd/-

(NAVEEN CHANDRA)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली/Delhi, दिनांक/Dated 28/08/2024

NV/-

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , दिल्ली /DR, ITAT, दिल्ली
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BY ORDER,

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