IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JM AND SMT RENU JAUHRI, AM

ITA No. 4815/Mum/2023
(Assessment Year: 2021-22)

Servicos De Petroleo Constellation SA India Project Office: Unit No. 1803 to 1808, 18th Floor, B-Wing, Business Park, Veer Savarkar Road, Part Site, Vikhroli (W), Mumbai-400 079	Vs.	DCIT(International Taxation), Circle-4(2)(1) Mumbai
PAN/GIR No.AACQ 4753 H		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	ShriPrashant Shah
Respondent by	:	Smt. Shaileja Rai & Shri Anil Sant

Date of Hearing	:	12.06.2024
Date of Pronouncement	:	09.09.2024

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the final assessment order of the Assistant Commissioner of Income Tax (ld. A.O. for short), Mumbai u/s. 143(3) r.w.s. 144C(13) of the Act dated 31.10.2023, passed in pursuance of the direction of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP' for short) vide order dated 22.09.2023, pertaining to the Assessment Year ('A.Y.' for short) 2021-22.

2. The only moot question to be adjudicated in this appeal is whether the GST amount paid by the assessee is to be included while computing the gross receipts u/s. 44BB of the Act.

3. Brief facts are that the assessee is a non-resident company incorporated under the law of Brazil and is engaged in providing onshore and offshore oil well drilling services and had entered into a contract with Oil and Natural Gas Corporation Limited (ONGC) for charter hire of Anchor Moored Drilling Rig “Olinda Star” for drilling operations to be carried out in offshore waters of India. The assessee filed its return of income for the year under consideration dated 15.03.2022, declaring total income at Rs.22,42,84,694/-. The assessee’s case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. It is observed that the assessee is liable to be taxed u/s. 44BB of the Act at a deemed profit of 10% on the gross receipts received by it for the work of extraction or production of mineral oils.

4. During the assessment proceedings, the ld. A.O. observed that the assessee had excluded the impugned amount of Rs.27,28,69,105/- which was received as ‘reimbursement of service tax’ from the total receipts while computing the deemed profit u/s. 44BB of the Act. After duly considering the assessee’s submission, the ld. A.O. passed the draft assessment order dated 05.12.2022 u/s. 144C(1) of the Act, proposing the impugned amount @ 10% to be added to the income as per section 44BB of the Act on the GST/service tax component, aggregating to Rs.27.28 crores and determined the total income at Rs.25,15,71,604/-.

5. The assessee filed its objection before the Hon’ble DRP which vide order dated 29.09.2023, disposed of the objection raised by the assessee and passed direction that the sum received on account of GST by the assessee from its customers with regard to the

shipping business are to be included while computing the total income u/s. 44BB(1) of the Act. The ld. A.O. then passed the final assessment order dated 31.10.2023.

6. The assessee is in appeal before us, challenging the final assessment order, passed in pursuance of the direction of the Hon’ble DRP.

7. The learned Authorised Representative (ld. AR for short) for the assessee contended that the service tax paid by the assessee after duly collecting from the customers to the government would not form part of the aggregate income as per clauses (a) and (b) of sub section (2) of section 44BB of the Act. The ld. AR relied on the decision of Hon'ble High Court of Uttarakhand in the case of *DIT (IT) & others vs. Schlumberger Asia Services Limited* in ITA No. 40 of 2012 vide order dated 12.04.2019 / [2019] 414 ITR 1 (Uttarakhand)(FB), Hon’ble Delhi High Court in the case of *DIT vs. Mitchell Drilling International (P) Ltd.* [2016] 380 ITR 130 (Delhi) and the decision of the co-ordinate bench in the case of *ACIT Int. Taxation vs. McDermott International Management* (in ITA Nos. 2373 & 2374/Del/2023 vide order dated 09.02.2024), where the said issue is said to have been covered in favour of the assessee. The ld. AR also relied on the CBDT Circular No. 1/2014 dated 13.01.2014 and CBDT Circular No/4/2008supporting the assessee’s contention.

8. The learned Departmental Representative (ld. DR for short), on the other hand, controverted the said argument and filed a detailed written submission dated 10.06.2024. The ld. DR stated that the GST amount has been paid by the customers to the assessee for the services and facilities, pertaining to the assessee’s business and, therefore, the said

amount has direct nexus to the service rendered by the assessee. The ld. DR relied on clause (2)(b) of section 44BB of the Act, which says that the 'amount received' or 'deemed to be received' in India for computation of the profit of the assessee. Further, the ld. DR contended that the amendment to section 145A of the Act was not there before the Hon'ble High Court while deciding the issue which is extensively relied upon by the ld. AR. Further, the ld. DR relied on the decision of the Hon'ble Apex Court in the case of *Sedco Forex International Inc. vs. CIT*[2017] 87 taxmann.com 29 (SC). The ld. DR relied on the decision of the lower authorities.

9. We have heard the rival submissions and perused the materials available on record. The Revenue's case is that section 44BB of the Act being a deeming provision having a non obstante clause which excludes the charging section 28 of the Act and there upon the computation methodology provided in the subsequent sections, is a special provision inclusive of the charging provision and the computation of income for non residence engaged in the business of providing services or facilities in connection with or supplying plant and machinery for hire used for extraction or production of mineral oil. This implies that the provision itself is a complete code for determination of the profit and gains for such undertaking. The said provision is reproduced hereunder for ease of reference:

> ***Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.***
> [96]***44BB.*** *(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee [99][, 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[1] of, mineral oils[1], 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 [2][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[3] (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[4] 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.*

[5][(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.]
Following sub-section (4) shall be inserted after sub-section (3) of section 44BB by the Finance Act, 2023, w.e.f. 1-4-2024:
(4) Notwithstanding anything contained in sub-section (2) of section 32 and sub-section (1) of section 72, where an assessee declares profits and gains of business for any previous year in accordance with the provisions of sub-section (1), no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee for such previous year.
Explanation.—For the purposes of this section,—
- (i) *"plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;*
- (ii) *"mineral oil" includes petroleum and natural gas.]*

10. The assessee in the present case comes under the purview of the said provision which is an undisputed fact, except to the extent that the service tax collected by the assessee from its customers for the services provided by it on account of activities pertaining to exploration of mineral oils ought not to have been excluded from the aggregate amount while computing the profit and gains as per sub section 2 of section 44BB of the Act. Further, the Revenue's contention is that whether or not there is a profit element in such receipt is immaterial for determination of the aggregate amount as per sub section 2 of section 44BB of the Act and stated that the service tax must be included in the total receipts while computing profit under the said provision. The Revenue further contended that it is immaterial whether the liability of service tax is on the assessee or on

its client, but the only issue is the said service tax component has to be included in the total receipts for computation of profits u/s. 44BB of the Act. The ld. A.O. reiterated that whether or not there is a profit element embedded in the said receipt, is irrelevant so far as the receipt pertains to the business of exploration and mineral oil activities of the assessee, thereby negating theory of element of profit. The ld. A.O. relied on the decision of the Hon'ble Apex Court in the case of *Sedco Forex International Inc.*(supra) on the issue of mobilization fee whether would be a receipt for computation of profits and gains u/s.44BB of the Act and further discussed on the expression 'amounts' specified in sub section (2) of section 44BB of the Act which cannot be interpreted as 'income' only. The ld. A.O. also placed reliance on the decision of Hon'ble High Court of Uttrakhand in the case of *CIT vs. Halliburton Offshore Service Inc.* [2008] 169 Taxman 138 (Uttrakhand) in support of his contention. The ld. DR stated that section 145A of the Act provides for method of valuation where the assessee can include the GST/service tax paid on the credit side on the P & L account and can debit the same in the P & L account on payment of the said amount and further stated that if the service tax amount is not an income element, it should not have been included in the P & L account at the very first instance. The Revenue concluded by holding that section 44BB of the Act being a special provision offers presumptive income at 10% giving 90% benefit of deduction to the assessee in which case the assessee cannot further avail undue benefit out of the same.

11. Per contra, the assessee's contention is that the GST/service taxes are statutory taxes which are to be paid to the government where the assessee is duty bound to collect the same from the service recipient and deposit the same to the Government Authority,

which at no stretch of imagination could be the income of the assessee. The assessee had relied on the CBDT Circular No. 1/2014 dated 13.01.2014 and CBDT Circular No/4/2008 which is reproduced hereunder for ease of reference:

CHAPTER XVII-B OF THE INCOME-TAX ACT, 1961 - COLLECTION AND RECOVERY OF TAX - DEDUCTION AT SOURCE - CLARIFICATION REGARDING TDS UNDER CHAPTER XVII-B ON SERVICE TAX COMPONENT COMPRISED OF PAYMENTS MADE TO RESIDENTS

CIRCULAR NO. 1/2014 [F.NO.275/59/2012-IT(B)], DATED 13-1-2014

The Board had issued a Circular No.4/2008 dated 28-04-2008 wherein it was clarified that tax is to be deducted at source under section 194-I of the Income-tax Act, 1961 (hereafter referred to as 'the Act'), on the amount of rent paid/payable without including the service tax component. Representations/letters has been received seeking clarification whether such principle can be extended to other provisions of the Act also. 2. Attention of CBDT has also been drawn to the judgement of the Hon'ble Rajasthan High Court dated 1-7-2013, in the case of CIT (TDS) Jaipur v. Rajasthan Urban Infrastructure (Income-tax Appeal No.235, 222, 238 and 239/2011), holding that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and was not included in the fees for professional services or technical services, no TDS is required to be made on the service tax component u/s 194J of the Act. 3. The matter has been examined afresh. In exercise of the powers conferred under section 119 of the Act, the Board has decided that wherever in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/payable without including such service tax component. 4. This circular may be brought to the notice of all officer for compliance.

Clarification on deduction of tax at source (TDS) on service tax component on rental income under section 194-I of the Income-tax Act

CIRCULAR NO. 4/2008, DATED 28-4-2008

Representations/letters have been received in the Board seeking clarification as to whether TDS provisions under section 194-I of the Income-tax Act will be applicable on the gross rental amount payable (inclusive of service tax) or net rental amount payable (exclusive of service tax).

2. The matter has been examined by the Board. As per the provisions of 194-I, tax is deductible at source on ***income*** *by way rent paid to any resident. Further rent has been defined in 194-I as*

'rent' means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,-

(a) land; or

(b) building (including factory building); or

(c) land appurtenant to a building (including factory building); or

(d) machinery; or

(e) plant; or

(f) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee;

3. 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 (TDS) under sections 194-I of Income-tax Act would be required to be made on the amount of rent paid/payable without including the service tax.

4. These instructions may be brought to the notice of all officers working in your region for strict compliance.

5. These instructions should also be brought to the notice of the officers responsible for conducting internal audit and adherence to these should be checked by the auditing parties.

[F.No.275/73/2007-IT(B)]

12. The assessee also placed reliance on the following decisions:

1. *DIT vs. M/s. Schulumberger Asia Services Limited* 317 ITR 156
2. *Pr. CIT(IT) vs. Boskalis International Dredging International CV* (ITA No. 55 of 2017)
3. *DIT vs. Mitchell Drilling International Pvt. Ltd.* (94 CCH 0031)
4. *ACIT vs. McDermott International Management* (ITA Nos. 2373 & 2374/Del/2023 vide order dated 09.02.2024)

13. In the above factual matrix of the case, it is observed that the CBDT Circulars mentioned by the assessee has been controverted by the Revenue on the ground that the said Circulars pertain to resident payees only where the charging section 28 and the computation sections are applicable for determining the profits and gains of business and profession and the same does not apply in case of a non resident tax payers when there is a special provision exclusively for this purpose. We do not find force in the argument of the Revenue on this aspect for the reason that the Hon'ble Delhi High Court in the case of *DIT vs. Mitchell Drilling International (P) Ltd.* (supra) has also dealt with this issue and has decided in favour of the assessee as herein under:

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

17. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44 BB of the Act, the service tax collected by the Assessee on the amount paid t it for rendering services is not to be included in the gross receipts in terms of Section 44 BB (2) read with Section 44 BB (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 service 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 194J of the Act.

14. From the above it is pertinent to point out that though the CBDT Circulars is a clarification on the issue of excluding service tax component while computing the income of the assessee who is a resident, the intention of the said Circular nevertheless is to exclude the service tax component while deducting TDS on the rent paid or payable for the purpose of computing the income of the assessee. This, in our view, would also be applicable in the present case where the assessee being a non resident is given the benefit of special rate of tax as per section 44BB of the Act where the intention of the legislature is only to tax the assessee @ 10% on the amount paid or payable to the assessee, received on account of the business activity of the assessee. The word ‘amount’ here cannot be interpreted to mean the GST/service tax which is collected by the assessee from its customers and paid to the Government. The CBDT Circular mentioned above has categorically excluded the service tax component, while computing the income of the

assessee and the same could not be interpreted differently to include GST/service tax while computing the profit and gains of a non resident, engaged in the business of exploration, etc. of mineral oils. Furthermore, it is to be noted that section 44BB of the Act is a special provision for computing the profits and gains in connection with the business of exploration, etc. of mineral oils which evidences that for the purpose of computing the profit and gains of the assessee, the natural corollary would be from the receipts which are in the nature of income that has to be considered for the said purpose and not the service tax that the assessee was duty bound to collect from its customers in addition to the charges for the services rendered by it.

15. With regard to the reliance placed by the assessee in the decision of the Hon'ble High Court of Uttrakhand in the case of *M/s. Schulumberger Asia Services Limited* (supra), which was in line with the issue in the present case as to whether the service tax collected by the assessee was to be included in the amount paid or payable for computation of presumptive tax as per section 44BB(1) and (2) of the Act, it was held that the reimbursement of service tax should not be included in the aggregate amount while calculating the profits and gains as per section 44BB of the Act. It is also observed that the said decision has relied on the decision of the Full Bench judgment of the Hon'ble High Court of Uttrakhand at Nainital in *DIT (IT) & others vs. Schlumberger Asia Services Ltd.* in ITA No. 40 of 2012 dated 12.04.2019 (2019) 414 ITR 1 (Uttrakhand) (FB) which has held this issue in favour of the assessee and the relevant extract of the said decision is also cited herein under for ease of reference:

> *"28. As the expression 'amount paid or payable' in Section 44BB(2)(a), and the expression 'amount received or deemed to be received' in Section 44BB(2)(b), is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and*

machinery, it is only such amounts, paid or payable for the services provided by the assessee, which can form part of the gross receipts for the purposes of computation of gross income under Section 44BB(1) read with Section 44BB(2). DIT v. Mitchell Drilling International Pvt. Ltd. (2015) 62 taxmann.com 24/234 Taxman 818/(2016) 380 ITR 130 (Delhi). On its literal construction, Section 44BB(2) would only be the amount paid by the ONGC to the assessee on account of (i) provision of services in connection with or (ii) supply of plant and machinery on hire used in, the prospecting, extraction and production of mineral oils. As the amount reimbursed by the ONGC, towards the service tax paid by assessee earlier to the Government, is not an amount paid to the assessee towards the services provided by the latter in connection with the prospecting, extraction or production of mineral oils, it is not required to be included in the amounts specified in clauses (a) and (b) of Section 44BB(2).

29. As shall be elaborated later in this order, service tax is a tax levied on services, and cannot be treated as the Service itself. It is difficult, therefore, to accept the submission of the revenue that the amount reimbursed by the ONGC, towards service tax paid earlier by the assessee to the Government, should be included in the amount paid to the assessee on account of provision of services and facilities. Even otherwise, it is not every amount paid on account of provision of services and facilities which must be deemed to be the income of the assessee under Section 44BB. It is only such amounts, which are paid to the assessee on account of the services and facilities provided by them, in the prospecting for or extraction or production of mineral oils, which alone must be deemed to be the income of the assessee. On a plain and literal reading of clauses (a) and (b) of Section 44BB of the Act, it is clear that reimbursement of service tax ought not to be included in the aggregate of the amounts specified in clauses (a) and (b) of Section 44BB(2), as it is not an amount received by the assessee on account of services provided by them in the prospecting, extraction or production of mineral oils.

16. It is observed that the Revenue has challenged the above said decision on the ground that it could not be appealed before the Hon'ble Apex Court due to the low tax effect and, therefore, has not attained finality, the subsequent decision by the Hon'ble High Court of Uttrakhand in case of *CIT vs. M/s. Vantage International Management Co.* (Special Leave Petition (Civil) Diary No(s). 36391/2023) & in other assessee’s case vide a consolidated order followed the decision of the Full Bench in the case of *Schlumberger Asia Services Ltd.* (supra), which SLP was dismissed by the Hon'ble Apex Court which implies that the decision of the Hon'ble High Court on this issue has thereby reached finality in the case of *M/s. Vantage International Management Co.*(supra). It is also pertinent to point out that the co-ordinate bench in the case of *McDermott International Management* (supra) has also held that the service tax component do not form part of the receipt for computation of income as per section 44BB of the Act.

17. By respectfully following the ratio laid down by the Hon'ble High Court and in the absence of any contrary decision by the Hon'ble Jurisdictional High Court, we deem it fit to decide the said issue in favour of the assessee. Therefore, the ground of appeal raised by the assessee is hereby allowed.

18. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 09.09.2024.

Sd/-	Sd/-
(Renu Jauhri) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated : 09.09.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai