

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.3278/Mum/2023
(Assessment Year: 2020-21)**

Orient Overseas Container Line Limited C/o. OOCL (India) Private Limited ICC Chambers, 5 th Floor Saki Vihar Road Opp. Santogen Silk Mills, Powai Mumbai – 400 072	Vs.	Deputy Commissioner of Income Tax (International Taxation)- Circle 3(2)(2) Mumbai
PAN/GIR No.AAACO5679E		
(Appellant)	..	(Respondent)

Assessee by	Shri Rajan Vora & Shri Nikil Tiwari
Revenue by	Smt. Rajeshwari Menon
Date of Hearing	26/07/2024
Date of Pronouncement	24/10/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final assessment order dated 12/07/2023, passed in pursuance of the direction given by the DRP vide order dated 20/07/2023 for quantum of assessment passed u/s.143(3) r.w.s. 144C for the A.Y. 2020-21.

2. Before us the effective ground which has been raised is ground No.3, wherein assessee has challenged that GST amount cannot be considered for the purpose of computing presumptive income u/s.44B of the Act. For the sake of ready reference, the said grounds read as under:-

“3.1. On the facts and circumstances of the case and in law, the Ld. AO and Ld. DRP has erred in including an amount of Rs. 96,51,49,085, being the amount of GST charged, to the gross revenue for the purpose of computing presumptive income under section 44B of the Act.

3.2. On the facts and circumstances of the case and in law, the Ld. AO and Ld. DRP has erred in not following the order passed by the Mumbai Bench of Hon'ble Income-tax Appellant Tribunal ("ITAT") in Appellant's own case for AYs 2007-08, 2008-09, 2010-11, 2011-12, 2013-14, 2015-16 and 2016-17 wherein it has been held that service tax is not includible for the purpose of computing presumptive income under Section 44B of the Act.

3.3. On the facts and circumstances of the case and in law, the Ld. AO and Ld. DRP have breached the principle of consistency and principle of judicial discipline by not following the aforesaid decisions and directions.

3.4. Without prejudice to the fact that addition of Rs. 7,23,86,182 relating to inclusion of GST in gross receipts is bad in law, Ld. AO has erred in not providing eligible treaty benefit as per Article 8 of the India-Hong Kong DTAA."

3. The brief facts are that assessee, Orient Overseas Container Line Limited is a company incorporated under the Companies Ordinance of Hong Kong. It is engaged in the business of operation of ships in international traffic and its revenue comprises of freight income and ancillary charges from import

transportation (i.e. carriage inward) and export transportation (i.e. carriage outward). Since assessee is a tax resident of Hong Kong and therefore, it has claimed the beneficial provisions of the India-Hong Kong Tax Treaty under Article 8. In India assessee has filed its return of income for the A.Y 2020-21 declaring total income of Rs. 46,07,99,198/- and offered its income from operation of ships to tax under the deemed provisions of Section 44B of the Act. The ld. AO in his draft assessment order u/s.143(3) r.w.s. 144C(1) proposed that GST should be considered as part of the turnover for the purpose of computing the income u/s.44B and accordingly added 7.5% of GST of Rs. 96,51,49,085/- which worked out to Rs. 7,23,86,182 to the deemed income computed u/s.44B. The ld. AO observed that in the case of the assessee, the partner has been treating the service tax also the part of the turnover for the purpose of u/s.44B of the Act. In response, assessee submitted that the same issue had come up before the Tribunal in various assessment years right from A.Y. 2007-08 to 2016-17, wherein the additions have been deleted. The Tribunal had followed various judgments of Hon'ble High Courts including **Directorate of Income Tax International Taxation vs. Schlumberger Asia Services Ltd. (2019) 104 taxmann.com 353 (Uttarakhand Full Bench); DCIT vs. Mitchell Drilling International Pvt. Ltd., (Delhi HC) in ITA No.403/2013 and other judgments.** However, the ld. AO proposed addition in the following manner:-

“3.2 Thus, Sec 44B provides presumptive basis of assessment and income is computed on the gross receipts collected. The gross amount which is paid or payable in India on account of

transportation services for export or gross amount received in India on account of transportation services for import is to be considered while computing 7.5% of the gross receipts. The service tax and GST collected by the assessee is also part of such receipts. It is an undisputed fact that invoices billed by the assessee to the customers included service tax and GST also

3.3 The assessee's contention that the service tax and GST collected is not includible in determining the income under section 44B of the Act has been confirmed by the jurisdictional Mumbai ITAT in the assessee's own case for assessment years 2007-08, 2008-09, 2010-11, 2013-14, 2015-16 and 2016-17 (ITA No.7089/Mum/2010, ITA No 7365/Mum/2012, ITA No 7494/Mum/2013, ITA No 457/Mum/2015, ITA No. 2420/Mum/2017, ITA No. 6796/Mum/2018 and ITA no 6929/Mum/2019). However this decision of the Hon'ble ITAT has not been accepted by the department and further appeal filed is filed before Bombay High Court. The Department has also filed appeal for AY 2013-14 arising from the ITA no. 2420/M/2017 dated 20.11.2018 and AY 2015-16 arising from the ITA no 6796/Mum/2018 dated 15.01.2020. The Hon'ble DRP has also upheld the addition on this issue for AY 2015-16 and 2016-17

3.4 The various decisions quoted by the assessee in support of its argument are distinguishable on facts & circumstances of the case. The service tax / GST is the liability of service provider. Whether the assessee collects service tax / GST from service recipient or not is totally irrelevant. Even without collection of service tax / GST from the service recipient, the assessee will still be liable to pay service tax / GST. Section 68 of the Service Tax Act read with Rule 2(1)(d) of Service Tax Rules has been judicially interpreted to mean that if the payer is entitled to realize or recover the same from the recipient, then it can be done only on the basis of a contractual understanding between the parties. There is no statutory basis for recovering this amount and whether or not a provider is able to recover the tax from the recipient makes no difference in so far as the tax authorities are concerned. Non-recovery of such tax from the recipient will not absolve the service provider from its liability, as it is open to the service provider to charge the amount to his customers or pay it from his own pocket. In case of any default, the provider would be subject to penalty and interest liabilities.

The taxable event in the case is rendering of taxable services for service tax purpose. In the present case, the invoices billed by the assessee to the customer include service tax/GST also. It is clear that assessee is collecting service tax / GST as part of its receipts on account of provision of services relating to transportation of goods in the shipping business. No service will be collectible if there are no services. Since assessee company has realized service tax on account of operation of ships and providing services relating to operation of ships, this receipt cannot be separated from other receipts. Since service tax/GST collected by the assessee is directly in connection with services provided and revenue earned related to operation of ship as spelt out in Sec 44B of the Act, this service tax/GST has to be considered as part of gross receipts for computation of profits u/s 44B of the Act.”

4. The ld. DRP upheld the action of the ld. AO. The majority view of 2:1 held that GST should be considered as part of the amounts paid or payable / amount received or deemed to be received for computing deemed income u/s.44B of the Act in view of provision of Section 44A(ii), whereas minority decision of one of the member was in favour of the assessee. Pursuant to the direction of the ld. DRP, ld. AO has passed the final assessment order considering GST at 7.5% as deemed income u/s.44B of Rs.7,23,56,182/-.

5. Before us the chequered history in the case of the assessee has been given wherein similar addition in respect of service tax while computing income u/s.44B made by the ld. AO right from A.Y.2007-08 to 2016-17 have been deleted by the tribunal. However, the Revenue's contention had been that, since department has preferred the appeal which is pending before the Hon'ble High Court, therefore to keep the issue alive this

addition is being made. Further, it has been brought on record that Id. DRP in A.Y.2018-19 decided this issue in favour of the assessee by majority view of 2:1; however, in A.Y.2020-21, this issue has been decided against the assessee by majority of 2:1 ratio principally on account of interpretation of Section 145A. The directions issued by Id. DRP in A.Y.2018-19, the key observations are summarized in the following manner:-

- i. The critical word/expression is on account of in section 44B(2)(1) and (ii) of the Act, which would decide the issue. Incidence of service tax/ GST arises 'on account of creation of taxability of the service under the relevant Parliamentary statute and not on account of the business activities mentioned in 448(2)(1) and (1) of the Act.
- ii. If it is considered that GST collected by the assessee is directly in connection with services provided and revenue earned in relation to operation of ships as provided under Section 44B then it would amount to charging 'Income Tax on Service Tax/GST' because, the assessee would never get an opportunity to claim it as deduction as its 'profits and gains' have been charged to tax on deeming basis. This incongruous operation of Section 44B could never have been intended by the legislature.
- iii. Reliance was placed on CBDT's Circular No. 04/2008 dated 28 April 2008 wherein CBDT clarified that service tax paid by the tenant doesn't partake the nature of 'Income of the landlord. The landlord only acts as a collection agency for Government for collection of service tax and thus TDS would

be required to be deducted on amount of rent paid/payable without including the service tax. This position is reiterated in subsequent Circular no. 1/2014 dated 13 April 2014 and Circular no. 23/2017 dated 19 July 2017.

- iv. The provisions of section 44B of the Act are 'special provision for computing profits and gains of shipping business in the case of non-residents'. Therefore, the provisions of section 44B of the Act would prevail over general provisions meant for computation of profits and gains of business or profession under the Act. Support was driven from rules of interpretation of statutes enunciating in legal maxim of 'Generalia specialibus non derogant'. The provisions of section 145A of the Act, whose heading is 'Method of accounting in certain cases and which starts with "For the purpose of determining the income chargeable under the head 'Profits and gains of business or profession', being a general provision, would not apply to the special provisions of section 44B of the Act.
- v. Bombay High Court ruling in the case of Knight Frank (India) (P.) Ltd. [2016] 72 taxmann.com 300 (Bombay) would not apply since the same dealt with the provisions of section 145A(a)(ii) which has replaced by the provisions of section 145A(ii) w.r.e.f. 01.04.2017 by the Finance Act 2018. This decision would also not apply to the case of assessee which is covered by special provisions of section 44B of the Act.

vi. DRP member with dissenting view stated that the ratio laid down by the Bombay High Court in the case of Boskalis International Dredging International CV. (Income Tax Appeal No. 55OF 2017 dated 25 March 2019) and other judicial precedents are no longer good due to introduction of Section 145A. He relied on the ruling of Knight Frank (India) Pvt. Ltd (Bombay High Court) [2016] 72 taxmann.com 300 (Bombay) and stated that the explanation under Section 145A seeks to clarify that taxes should be included for valuation of goods notwithstanding any right acquired to recover such taxes.

6. On the contrary in A.Y. 2020-21 i.e. impugned assessment year two DRP members have relied on amendment made to the provision of Section 145A and also interpreted the judgment of **Hon'ble Supreme Court in the case of Sedco Forex International Inc. v. CIT [2017] 87 taxmann.com 29 (SC)** to hold that GST is to be included for computing deemed income u/s. 44B. The observation and the reasoning given by the DRP is summarized in the following manner:-

- a. GST is on account of provision of relevant services (i.e. carriage of cargo). Had there been no provision of relevant services, the case of payment of GST by the assessee and indirect charge on the customer would not have arisen.
- b. Coinciding with the introduction of GST, the term 'Services' has been introduced vide Finance Act, 2018 with retrospective effect from 1 April 2017. Hence, the introduction of GST and amendment of section 145A to include 'Services'

indicate the legislative intention of inclusion of GST in the receipts of services under the Act.

- c. The service receipts and sales in the instant case are to be valued inclusive of taxes, as per ICDS guidelines. CBDT vide Circular No. 10/2017 dated March 23, 2017, has clarified that ICDS will be applicable on determination of turnover by non- corporate taxpayers covered under presumptive taxation like Sections 44AD, 44AE, 44ADA, 44B, 44B, 44BA, etc.
- d. In view of the binding ratio of judgement of Hon'ble Bombay High Court in the case of Knight Frank (India) Pvt. Ltd (Bombay High Court) [2016] 72 taxmann.com 300 (Bombay) (Page 493 to 498 of Legal Paper Book) and amendment in Section 145A, GST collected by the assessee cannot be excluded from the gross receipts while computing profits and gains from business chargeable to tax on presumptive basis under section 44B of the Act.
- e. A further exposition of how the *Generalis Specialibus non Derogant* rule is not applicable to Section 44B v. Section 145A is that Se. 44B leaves at 'the amount paid or payable received or deemed to be received', without any definition or interpretation of valuation of 'the amount'. While Section 145A provides a mandatory scheme for 'the valuation of purchase and sale of goods or services'. Therefore, Section 44B must necessarily be read with Section 145A, else Section 44B is an exercise in vacuum.
- f. Reliance was placed on decision of Hon'ble Supreme Court in case of Sedco Forex International Inc. v. CIT [2017] 87

taxmann.com 29 (SC) wherein it was held that if the amount paid or payable (whether in or out of India), or amount received or deemed to be received in India is covered by sub-section (2) of Section 44BB of the Act, by fiction created under Section 44f1B of the Act, it becomes 'income' under Sections 5 and 9 of the Act as well.

g. Circular No. 04/2008 dated 28 April 2008 (Page 576 of Legal Paper Book) is applicable for TDS on rent under Section 194-1. The base for Section 194-1 is "Income. Section 44B is a presumptive provision where the base of taxation is 'amount paid or payable and "amount received or deemed to be received. Further, Section 44B is meant to determine the 'income". while section 1941 acts upon the already determined 'income'. A section which strives and aims to determine "income ought not be subjected to prior determination of income.

7. However, the minority decision of one of the DRP member agreed with the objection raised by the assessee and was of the opinion that on the reasoning that the decision of the Hon'ble SC in the case of Sedco Forex International Inc. (supra), the assessing officer missed the point that the inclusion of mobilization fees in the receipt for the purposes of section 44BB of the Act, was before the Hon'ble SC and not service tax/ GST collected by the assessee under the respective laws and paid to the central govt. Rather, the decision/ ratio laid down in the Sedco case (supra) supports the objection by the assessee.

8. We have heard both the parties at length, perused the relevant materials referred to before us. The controversy before is whether GST is to be included while computing the deemed profit u/s 44B. Section 44B is a special provision for computing profits and gains of shipping business in the case of non-residents. Prior to insertion of Section 44B, taxable profits of foreign shipping enterprises were determined by suitably apportioning their global profits between their Indian business and foreign business or on the basis of "voyage accounts" which led to difficult and complicated issues in assessments. With a view to simplifying and rationalizing the assessments in such cases, Section 44B was inserted for computing profits and gains of shipping business in the case of non-residents at 7.5% of specified amounts. Insertion of Section 44B substituted computation as per normal provisions in which both debit of expenses and credit of income were considered. At this point, it will be relevant to incorporate the relevant provision of Section 44B of the Act.

1) Notwithstanding anything to the contrary contained in sections 28 to 43, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half 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"

2) The amounts referred to in sub-section (1) shall be the following, namely:-

(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.*

Explanation For the purposes of this sub-section, the amount referred to in clause (1) or clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature.

9. At the time of hearing our attention was drawn to Circular No.169 dated 23/06/1975 explaining the rationale of Section 44B and amendment in Section 172 by Finance Act, 1975. For the sake of ready reference same is reproduced hereunder:-

"37. Under the existing law, taxable profits of foreign shipping enterprises are determined by suitably apportioning their global profits between their Indian business and foreign business or on the basis of "voyage accounts". Difficult and complicated issues arise in such assessments, particularly in relation to depreciation (including unabsorbed depreciation of earlier years), the balancing charge/allowance and the apportionment of overhead expenses. With a view to simplifying and rationalizing the assessments in such cases, the Finance Act, 1975 has made a special provision in section 44B for computing profits and gains of shipping business in the case of non-residents. Under this provision, profits and gains of a non-resident from the business of operation of ships will not be calculated in accordance with the provisions of sections 28 to 434 but will instead be taken at 7.5 per cent of the aggregate of the following amounts, 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 carriage of passengers, livestock, mail or goods shipped at any port 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 carriage of

passengers, livestock, mail or goods shipped at any port outside India.

38.

39. *Section 172 makes a special provision for the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at a port in India. Under this provision an ad hoc assessment is made before the ship is allowed to leave the Indian port unless the non-resident shipping concern has an agent in India from whom the tax would be recoverable. For this purpose, one-sixth of the amount paid or payable for the carriage of passengers, livestock, mail or goods shipped at an Indian port is regarded as taxable income which is subjected to tax at the rate applicable in the case of foreign companies. The assessee has, however, the option to file subsequently a return of income and ask for a regular assessment to be made if his actual income is less than the above-mentioned amount of one-sixth of the freight, etc. Where tax already paid on the basis of an ad hoc assessment is found to be more than the tax determined on regular assessment, the excess is refunded*

Memorandum to Finance (No. 2) Bill, 1975

“.....

50. *With a view to simplifying and rationalising the assessments of non-resident shipping enterprises, the Bill seeks to provide that in the case of a non-resident, the profits and gains from the business of operation of ships will be taken at an amount equal to 7.5 per cent of the amount paid or payable to the taxpayer or to any other person on his behalf. on account of carriage of passengers, live-stock, mail or goods shipped at any Indian port, as also of the amount received, or deemed to be received, in India on account of the carriage of passengers, live-stock, mail or goods shipped at any port outside India.*

...”

Notes on Clauses

Clause 8 seeks to insert a new section 44 in the Income-tax Act. Under the new section, in the case of a non-resident, the profits and gains from the business of operation of ships will be taken at

amount equal to 71/2 per cent of the amount paid or payable to the assessee or to any other person on his behalf, on account of the carriage of passengers, live-stock, mail or goods shipped at any Indian port as also of the amount received, or deemed to be received, in India on account of the carriage of passengers, live-stock, mail or goods shipped at any port outside India.

This amendment will take effect from 1st April, 1976 and will accordingly apply in relation to assessment year 1976-77 and subsequent years.”

10. The entire controversy which now has risen in this year is the interpretation of Section 145A inserted by the Finance Act 2018 with retrospective effect from 01/04/2017 on the issue of applicability of income computation and disclosure standards.

The said provision of Section 145A reads as under:-

145A"For the purpose of determining the income chargeable under the head "Profits and gains of business or profession"

- (i) the valuation of inventory shall be made at lower of actual cost or net realizable value computed in accordance with the income computation and disclosure standards notified under sub-section (2) of section 145;*
- (ii) the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation;*

(iii)...

(iv)...

...

Explanation 1. – for the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any righty arising as a consequence to such payment.

11. CBDT Circular No.8 dated 26/12/2018 had explained amendment in the following manner:-

"Amendments in relation to notified Income Computation and Disclosure Standards

39.1 Section 145 of the Income-tax Act empowers the Central government to notify Income Computation and Disclosure Standards (ICDS). In pursuance to the above, the Central Government has notified ten such Standards effective from 1st April, 2017 relating to Assessment Year 2017-18 These are applicable to all assesses (other than an individual or a Hindu undivided family who are not subject to tax audit under section 44AB of the Income-tax Act) for the purposes of computation of income chargeable to income-tax under the head "Profits and gains of business or profession" or "Income from other sources"

39.2 In order to bring certainty in the wake of recent judicial pronouncements on the issue of applicability of ICDS-

....

(v) Section 145A of the Income-tax Act has been amended to provide that, for the purpose of determining the income chargeable under the head "Profits and gains of business or profession"-

(a) the valuation of inventory shall be made at lower of actual cost or net realizable value computed in the manner provided in the ICDS notified under Sub-Section (2) of section 145;

(b) the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation,

12. Ergo, amendment to Section 145A was to include taxes of cost of sales / services for valuation of inventory to align with ICDS-2 and nowhere it can be inferred that it tantamount to change the computation mechanism on presumptive basis of

taxation. Earlier Section 145A was inserted to bring clarity with the method of accounting for valuation of purchase and sale of goods and inventory, to determine business income. It in effect, provides that for inventory valuation, the amount actually paid or incurred by way of any tax, duty, cess or fees shall be included therein. Earlier there were various litigations whether the valuation of closing stock of the inputs, work-in-progress and finished goods must necessarily include the element for which MODVAT credit is available, and in order to ensure that the value of opening and closing stock reflect the correct value, the amendment was brought in Section 145A by the Finance Act, 1998. This was explained then by the CBDT Circular in the following manner:-

“Method of accounting in certain cases

52.1 The issue relating to whether the value of the closing stock of the inputs, work-in-progress and finished goods must necessarily include the element for which MODVAT credit is available, has been the matter of considerable litigation over the years.

52.2 Consistent with the other provisions of the Act, with a view to put an end to this point of litigation and in order to ensure that the value of opening and closing stock reflect the correct value, a new section 145A is inserted. This section provides that the valuation of purchase, sale and inventory shall be made in accordance with the method of accounting regularly employed by the assessee and such valuation shall be further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called, actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation

52.3 This amendment will take effect from 1st April, 1999 and will, accordingly, apply in relation to the assessment year 1999-2000 and subsequent years.”

13. Now by the Finance Act 2018, Section 145 of the amendment was given to ICDS and Section 145(2) empowered the Central Government to notify ICDS by this amendment, “services” were also brought into the scope of Section 145A. Now as per Section 145A(ii), the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation. Thus, Section 145A(ii) suggests inclusive method of accounting for computing 'profits and gains of business or profession' under the normal provisions of the Act and it will apply only when all the 3 elements i.e., purchase, sales and inventory are present together. Thus, while the taxes are included by adjusting the turnover and closing inventory, the same are reduced by adjusting the purchases and opening inventories, if paid, before the due date of filing tax return under Section 139(1) of the Act.

14. In case of presumptive taxation, deduction of expenses is not allowed i.e., purchase and inventory elements are to be ignored for computing deemed income under Section 44B, because the section starts with no-obstante clause overriding computation under sections 28 to 43. The deemed income has to be computed on specified amounts only and nothing more can be

added which is not within the scope of Section 44B of the Act because Section 44B provides that non-resident is engaged in the business of operation of ships, then sum equal to 7.5% of the amounts referred to Sub-section (2) has to be computed for the purpose of deemed profits. These amounts are *firstly*, the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at any port in India; and *secondly*, 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. Thus, what is relevant for computing the deemed income u/s.44B is the amount paid or payable or amount received or deemed to be received on account of carriage of passengers, etc.

15. Section 145A of the Act takes into consideration "valuation of sale or purchase of goods/services and of inventory", whereas Section 44B (2) considers specified amounts i.e. "amount paid or payable on account of the carriage of goods shipped at any port in India" and "amount received or deemed to be received on account of the carriage of goods shipped at any port outside India. The terms amount paid or payable' and 'amount received or deemed to be received mentioned under Section 44B cannot be replaced with the term 'valuation' in the absence of any specific enabling provisions under Section 44B or Section 145A of the Act or any other provisions of the Act. For instance, Section 50CA is a deeming provision which enables replacement

of consideration with 'fair market value' where the amount of consideration is less than the fair market value determined in a prescribed manner.

16. Thus, in our view adding GST component to the deemed income which has to be computed directly on specified amounts i.e. amount paid or payable on account of carriage of goods shipped which is revenue element only. For the earlier regime of service tax prior to GST, there were various judicial precedents which upheld exclusion of service tax while computing the provision u/s.44B or other similar provisions. For instance, following judgments have been brought to our notice before us wherein the Hon'ble Courts has approved the exclusion of service tax.

- i. *M/s Deepwater Pacific I Inc SLP (Civil) Dairy No(s). 47374/2023)*
- ii. *Vantage International Management Co. [2023] 156 taxmann.com 23*
- iii. *Transocean Offshore International Ventures Lad. [2023] 157 tasumann.com 203 (SC)*
- iv. *Schlumberger Asia Services Ltd. [2024] 158 taxfmann.com 267 (SC)*

Further, Hon'ble Bombay High Court in the case of **Pr. CIT(IT) v. Boskalis International Dredging International CV (Income Tax Appeal No. 55 OF 2017 dated 25 March 2019) (followed the decision of Delhi High Court and Mitchell Drilling International Pty Ltd. (ITA No.403/2013 and 384/2015) dated 28/09/2015** and held as under:

"3. Learned Counsel for the Assessee drew our attention to a decision of the Delhi High Court in the case of Director of Income-tax-1 Vs. Mitchell Drilling International (P.) Ltd 3 in which identical issue had come up for consideration. The High Court referred to the decision of this Court in the case of Sudarshan Chemicals Industries Limited (supra) which was approved by the Supreme Court in case of CIT Vs. Lakshmi Machine Works and also on the decision in the case of Schlumberger Asia Services Ltd. (supra) and held as under:

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

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 44BB of the Act.

The Court accordingly holds 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 is not to be included in the gross receipts in terms of Section 44BB(2) read with 44BB(I). 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."

4. We are in respectful agreement with this view expressed by the Delhi High Court in which identical question had arisen.

5. In the result, Income Tax Appeal is dismissed.

17. Full Bench of Hon'ble High Court of Uttarakhand in case of **DIT v. Schlumberger Asia Services Ltd. [2019] 414 ITR 1 (Uttarakhand) (FB)** held that service tax paid earlier by the assessee to Government of India is not on account of provision of services in connection with exploration and production of mineral oil, hence would not form part of aggregate taxable amount referred to in clauses (a) and (b) of sub-section(2) of section 44BB Relevant extract of the ruling is as under:-

"27. The word 'on account of has been defined in the Random House Dictionary of the English Language to mean "by reason of; because of, for the sake of. In the Reader's Digest Great Encyclopaedic Dictionary, "On account of is defined to mean on consideration of, because of. In Collins English Dictionary "On account of" is defined to mean as 'because of, by reason of. D. Ramanatha Aiyer: The Law Lexicon defines "on account of to mean "because of, by reason of, towards payment of (1) concerning (2) because of". It is only if the service tax reimbursed to them by the ONGC, which was paid by the assessee to the Government earlier, is held to be a payment in consideration of the services and facilities provided by the assessee, in connection with the prospecting. extraction and production of mineral oils in India, would it then fall within the ambit of sub-section (2) of Section 44BB.

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 (P.) 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).”

18. Apart from that in the case of the assessee itself the Tribunal have consistently has been holding that service tax being in the nature of statutory payment does not involve any element of profit therefore, cannot be included in the gross receipts.

19. The case of the department before us is that the judgments rendered in the context of service tax could not be applicable under the new GST. We find that though GST has replaced by erstwhile service tax law to provide a single tax of supply of goods and services right from manufacture to consumer. For the sake of ready reference Section 68 of erstwhile Service Tax law and Section 49 of CGST Act, the comparison is given herein below.

Service Tax		GST	
<i>Section 68 of Finance Act, 1994.</i>	<i>Section 68 relates to payment of service tax. Sub-section (1) thereof stipulates that every person, providing taxable service to any person, shall pay service tax at the rate specified in section 66B of Finance Act 2012 in</i>	<i>CGST Act, 2017</i>	<i>(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or NEFT or RTGS or by such other mode and subject to such</i>

	<p><i>such manner, and within such period, as may be prescribed.</i></p> <p><i>Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section [66B] and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service</i></p> <p><i>Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the</i></p>	<p><i>conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.</i></p> <p><i>(2)The input tax credit as self- assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.</i></p> <p><i>(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.</i></p> <p><i>(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act</i></p>
--	---	--

			<i>in such manner and subject to such conditions and restrictions within such time as may be prescribed.</i>
<i>Rule 3(1) of the Cenvat Credit Rules</i>	<i>provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.</i> <i>A manufacturer or producer of final products or a provider of output service shall be allowed to take credit of Service tax paid on any input service received</i>		

b. Service tax collected in excess (unjust enrichment)

Both under the Service Tax Law and GST Law, there are adequate provisions which requires timely deposit of taxes collected including excess taxes collected. Where the taxes collected and not deposited, there are provisions which enables recovery of taxes by the Government. Relevant extract of the provisions is reproduced hereunder:

<i>Service Tax</i>			
<i>Reference under the law, rules, etc.</i>	<i>Provisions</i>	<i>Reference under the law, rules, etc.</i>	<i>Provisions</i>
<i>Section 73A (1) and (2) - Finance Act, 1994.</i>	<i>Section 73A(1) stipulates that any person who is liable to pay service tax, and has collected any amount in</i>	<i>Section 76 of CGST Act, 2017</i>	<i>(1) Notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal</i>

	<p>excess of the service tax assessed or determined and paid on any taxable service, from the recipient of taxable service as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.</p> <p>Section 73A(2) stipulates that where any person, who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.</p>	<p>or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not. (2) Where any amount is required to be paid to the Government under sub-section (1), and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty</p>
--	--	--

			<i>equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.</i>
<i>Section 73A(3)- Finance Act, 1994</i>	<i>Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2), and the same has not been so paid, the Central Excise Officer shall serve on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.</i>		

c. Levy is an indirect tax which can be collected from the buyer / service recipient

Service Tax and GST both are an indirect tax and can be passed on by service provider to the service recipient. Relevant extract of the provisions is reproduced hereunder:

<i>Service Tax</i>			
<i>Reference under the law, rules, etc.</i>	<i>Provisions</i>	<i>Reference under the law, rules, etc.</i>	<i>Provisions</i>
<i>Section 83 – Finance Act, 1994</i>	<i>Section 83 makes certain provisions of the Central Excise Act applicable, and thereunder the provisions of, among others, sections 12A and 12B of the Central Excise Act shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise.</i>	<i>Section 49(9) Of CGST Act, 2017</i>	<i>Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.</i>
<i>Rule 4A of Service Tax Rules</i>	<i>Service provider shall issue an invoice which shall mention the amount of Service tax payable thereon.</i>		<i>Every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to</i>
<i>Section 12B of Central Excise Act, 1994</i>	<i>Section 12-B provides = that every person who has paid the duty of excise on any goods under the Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer</i>	<i>Section 15 Of CGST Act, 2017</i> <i>Rule 46 Of CGST Rules, 2017</i>	<i>the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not</i>

	<i>of such goods.</i>		
<i>Article 268A of Constitution of India</i>	<i>Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2)</i>	<i>Article 269A of Constitution of India</i>	<p><i>The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both the value of supply shall include any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act (i.e. GST)</i></p> <p><i>Taxable value and GST to be mentioned separately on invoice</i></p> <p><i>Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India</i></p>

20. On perusal of the comparison of the relevant provision of service tax law and GST law it can be seen that both are indirect

taxes and is recovered by the service provider on behalf of assessee and as an agent of the Government as such rates are specified and thus, the provision under the service tax law are similar to provision of GST law and therefore, in our opinion the judicial precedents delivered in respect of erstwhile tax law would apply *mutatis mutandis* to the GST laws also.

21. Otherwise also it would be quirk of a fate that tax collected on behalf of the customer is again to be held as part of taxable income of the assessee who is collecting GST. The assessee is taxable person under the GST laws and shows GST separately in the invoice raised on the customers. We have perused the copy of the sample invoice produced before us at our direction wherein, it is seen that service charge is indicated separately and CGST is levied on such service charge is also indicated separately. If the GST services have been indicated in the invoice separately then it cannot be included for purpose of taxation while computing the income. For instance there are various TDS provisions and CBDT has clarified through various circulars that if GST services are indicated separately in the invoice then no tax would be deducted at GST components. By way of illustration following circulars have been referred to before us under various Sections:-

Sr.No.	Circular No.	Relevant Section
1.	Circular No. 5 of 2023	Section 194BA
2.	Circular no. 20 of 2023	Section 194-O

3.	Circular no. 12 of 2022	Section 194R
4.	Circular no. 13 of 2022	Section 194S
5.	Circular no. 13of 2021	Section 194Q

22. If we accept the contention of the revenue, then it would lead to a situation where calculation of tax of reimbursement of taxes would tantamount to collection of tax on taxes. Section 44B(2) of the Act provides for deemed taxation on amount paid or payable / received on account of 'carriage' of goods, passengers, etc. Further, the Explanation thereto clarifies that the amounts in connection with the carriage would include 'demurrage charges', 'handling charges" and other amounts of a 'similar nature". Thus, what is sought to be included u/s 44B are the charges' recovered from the consignor of the cargo/ customer as a consideration for transportation from a port in India to outside India and vice versa.

23. GST being a mandatory 'statutory levy' cannot be said to be in the nature of 'charges' by the shipping Company towards the carriage. The incidence of GST is on account of taxability of services under the relevant parliamentary statute i.e., GST laws and not on account of the business activities as envisaged in Sections 44B(2)(i) and 44B(2)(ii) of the Act. Otherwise, including GST in gross receipts for purpose of section 44B would be akin to charging income tax on GST i.e., tax on tax, which would promote cascading effect which cannot be the intent of legislation.

24. Further, a service provider acts in a fiduciary capacity out of statutory obligation casted upon it, while collecting service tax/GST on the behalf of exchequer and the same is ultimately deposited with the exchequer, hence there cannot be any iota of doubt that the impugned GST is not in the nature of specified income under Section 44B.

25. Thus, reliance placed by the Hon'ble DRP members in the case of Sedco Forex International Inc. (supra) to treat 'GST similar as 'reimbursement of mobilization charges is misplaced and incorrect. In the case of Sedco Forex International Inc. fixed mobilization charges were agreed between the parties, which could be more or less than the actual expenditure. Thus, 'reimbursement of mobilization charges' cannot be equated with pure reimbursement which has no element of income.

26. The core argument of the department before us and by the ld. DRP is that amendment in the provisions of Section 145A of the Act brought by Finance Act 2018, since it includes "services" within its code therefore, income has to be computed in accordance with Section 145A and any taxes levied under services is included and for that heavy reliance has been placed on the judgment of Hon'ble High Court of Bombay in the case of Knight Frank (India) Pvt. Ltd (Bombay High Court) [2016] 72 taxmann.com 300 (Bombay). However the Hon'ble Court held that Section 145A restricts its ambit only to valuation of purchase and sale of goods in inventory and would not apply to service tax billed on rendering of service as service tax billed has

no relation to any goods nor does it have anything to do with bringing goods to a particular location. Section 145A which is for the method of accounting which starts with **'for the purpose of determining the income chargeable under the head 'Profits and gains of business or profession'**, being a general provision, would not apply to the special provisions of section 44B of the Act. Further, the words *"For the purpose of determining the income chargeable under the head "Profits and gains of business or profession..."* in section 145A signifies that the essence of section is to compute income under the head profits and gains of business or profession which is computed as per provisions of Section 29 of the Act. On the contrary, provisions of Section 44B (1) starts with a non obstante clause **"Notwithstanding anything to the contrary contained in sections 28 to 43A..."**. Since Section 44B overrides the provisions of Section 29 of the Act, therefore in our opinion Section 145A is not applicable for computing deemed income under Section 44B.

27. Thus, the decision of the Hon'ble Bombay High Court will not be applicable in this case same was not rendered in the context of Section 44B and in any case in so far as the observation of the Hon'ble High Court that any tax or levy cannot be part of turnover receipts unless it is not paid, is not applicable in the case of the assessee. It has been brought to record that assessee discharged its GST liability of Rs.96,51,49,085 through payment of tax to the Government Treasury and input tax credit

and this has been demonstrated from the copies of form GSTR 9 and annual GST re-conciliation statement.

28. Further, ld. DRP members also relied on CBDT Circular No. 10/2017 dated March 23, 2017 which discusses on the applicability of ICDS on determination of turnover by non-corporate taxpayers covered under presumptive taxation like Sections 44AD, 44AE, 44ADA, 44B, 44BB, 44BBA, etc. and stated that the service receipts and sales in the instant case are to be valued inclusive of taxes, as per ICDS guidelines. Relevant extract of Circular is hereunder:-

"Question 3: Does ICDS apply to non-corporate taxpayers who are not required to maintain books of account and/or those who are covered by presumptive scheme of taxation like sections 44AD, 44AE, 44ADA, 44B, 44BB, 44BBA, etc. of the Act?"

Answer: ICDS is applicable to specified persons having income chargeable under the head Profits and gains of business or profession' or 'Income from other sources. Therefore, the relevant provisions of ICDS shall also apply to the persons computing income under the relevant presumptive taxation scheme. For example, for computing presumptive income of a partnership firm under section 44AD of the Act, the provisions of ICDS on Construction Contract or Revenue recognition shall apply for determining he receipts or turnover, as the case may be."

29. Thus, reliance placed by the DRP on the aforesaid Circular is not valid since **Delhi High Court in the case of Chamber of Tax Consultants v. Union of India [2017] 87 taxmann.com 92 (Delhi)** held that the aforesaid Circular was ultra vires the provisions of the Act and liable to be struck down. Also, the

amendment was introduced vide Finance Act 2018 to bring certainty on the issue of applicability of ICDS and not to validate the circular. Even otherwise, in the aforesaid Circular, CBDT has also clarified that where there is a conflict between ICDS which is a general provision and specific provisions, specific provision shall prevail.

30. Before us, the plea was taken that if GST is to be added to the amounts paid on account of taxes, then deduction of such GST is also required to be given u/s.43B. Though the provision of Section 44B overrides Section 28-43A of the Act, but other sections including Section 43B are not specifically over ridden by Section 44B. This issue has been decided by the Hon'ble Uttarakhand High Court in the case of DIT v. Schlumberger Asia Services Ltd. [2019] 414 ITR 1 (Uttarakhand) (FB) wherein it has held that the benefit of deduction of tax can be claimed by the assessee in view of section 43B(a), while computing its income under section 28, and the provisions of section 43B would prevail notwithstanding anything contained in, among others. Thus, it has been stated that invoking the provisions of Section 43B under Section 44B shall force the assessee to prepare a memorandum account wherein the specified amounts are credited and adjusted by GST due to Section 145A and correspondingly, GST discharged before the due date of filing of tax return specified under Section 139 of the Act is debited to such account. However, preparation of such memorandum account is neither required under the Act nor can replace the express provisions of Section 44B of the Act. We therefore, find

merits in such contention of the Id. Counsel that if it is held that Section 145A are applicable for computing deemed income u/s.44B and GST is added to the specified amounts and provisions of Section 29 are invoked, then deduction of GST paid should be allowed while computing income under the head 'profits and gains' of business or profession as per Section 43B. Even otherwise also Section 44B over rights Section 28-43A and 43B and therefore, in case if department seeks to add GST on the turnover for the purpose of calculating the profit u/s.44B, then, deduction u/s.43B has to be allowed if it is paid on or before the due date and similarly it can be disallowed once GST has not been paid within the due date. However, this is purely academic, contention which has been raised because we have already held that for the purpose of Section 44B only specified amount mentioned in the sub-Section 2 of Section 44B alone is the subject matter of computation of profit @7.5% and Section 145A has no applicability. Thus we hold that while computing income u/s.44B, GST cannot be included and all the judgments relied upon by the assessee by the Hon'ble High Court and Hon'ble Supreme Court and the Tribunal will apply in this year also. Thus, in our opinion, the minority view of the single member of the DRP is to be upheld that GST cannot be included while computing deemed income u/s.44B, accordingly, this issue is decided in favour of the assessee.

31. In the result, ground No.3 is allowed.

32. Ground No.4 relates to computing of book profit u/s.115JB. Since assessee has offered income of operation of ships to tax under the deemed provisions of Section 44B r.w.s.90(2) and Article 8 of India-Hong Kong Tax Treaty. Thus, in view of the Explanation 4A to Section 115JB(1), the provisions of Section 115JB are not applicable to the assessee. Accordingly, ground No.4 is allowed and the book profit computed by the ld. AO is deleted.

33. With regard to short grant of tax deducted at source and credit of advance tax as raised by ground No.5 & 6, it has been stated that assessee has filed rectification application before the ld. AO which has not been disposed of. Accordingly, we direct the ld. AO to examine this issue and decide accordingly.

34. The other ground raised relating to erroneous levy of interest and fee, the same is held to be consequential.

35. In the result, appeal of the assessee is allowed.

Order pronounced on 24th October, 2024.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 24/10/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai