

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5864/Del./2013
(ASSESSMENT YEAR : 2010-11)**

Tidewater Marine International Inc., vs. ADIT,
C/o Nangia & Company, International Taxation,
Suite 4A, Plaza M – 6, New Delhi.
Jasola,
New Delhi – 110 025.
(PAN : AAAC7573Q)

**ITA No.5927/Del./2013
(ASSESSMENT YEAR : 2010-11)**

ADIT, vs. Tidewater Marine International Inc.,
International Taxation, C/o Nangia & Company,
New Delhi. Suite 4A, Plaza M – 6,
Jasola,
New Delhi – 110 025.
(PAN : AAAC7573Q)
(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Amit Arora, CA
REVENUE BY : Ms. Anupama Anand, CIT DR

Date of Hearing : 28.06.2016
Date of Order : 29.06.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The aforesaid cross appeals qua the assessment year 2010-11
are being disposed off with consolidated order to avoid repetition
of discussion.

2. The Appellant, Tidewater Marine International Inc., (hereinafter referred to as 'the assessee') in ITA No.5864/Del/2013 by filing the present appeal sought to set aside the impugned order dated 26.08.2013 passed by the Commissioner of Income-tax (Appeals)-II, New Delhi qua the assessment year 2010-11 on the ground that :-

“That the Ld. CIT (A) has erred on facts and in law in affirming the action of the A.O. in holding that the amount aggregating to Rs.37,198,378/- being the proportionate amount received by the appellant for demobilization of vessels outside Indian territorial waters is to be included in the gross receipts u/s 44BB of the Income Tax Act, 1961 as opposed to the claim of the appellant that the same does not constitute income chargeable to tax in India as per section 5 read with section 9 of the Income-tax Act, 1961.”

3. The Appellant, ADIT, International Taxation, Dehradun (hereinafter referred to as 'the revenue') in ITA No.5927/Del/2013 by filing the present appeal sought to set aside the impugned order dated 26.08.2013 passed by the Commissioner of Income-tax (Appeals)-II, New Delhi qua the assessment year 2010-11 on the grounds inter alia that :-

“1. Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in holding that no distinction can be made between receipts from production Sharing Participants ('PSC Partners') and Non-Production Sharing Participants ('Non-PSC Partners') and between services rendered by first-leg and second-leg vendors, ignoring the fact that the receipts from non-PSC partners on account of supplies of plant &

machinery on hire ('equipment rental') are in respect of contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, liable to tax u/s 9(1)(vi) / 9(1)(vii) read with section 44DA and not section 44BB of the IT Act, 1961 ('Act').

1 (a) The Ld CIT(A) has erred in holding that the receipts from non-PSC partners on account of supplies of plant & machinery on hire ('equipment rental') are not in the nature of Royalty u/s 9(1)(vii) of the Act, 1961 read with section 44DA of the Act eligible for treatment under presumptive provisions of section 44BB of the Act.

2. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in ignoring the distinct scheme of taxation of Fee for Technical Services and Royalty and disregarding the insertion of provisos in section(s) 44BB / 44DA / 115A and the rationale behind the introduction of said clarificatory provisions in the Finance Bill 2010 while holding that the income of the assessee company from equipment rental from Non-PSC partners was covered under the presumptive provisions of section 44BB.

3. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in not appreciating the fact that proviso to section 44DA brought about by the Finance Act 2010 was only clarificatory in nature and its application has to be read into the main provisions with effect from the time the main provision came into effect in view of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drilling v/s CIT.

4. Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in ignoring the decision of jurisdictional High court in the cases of a GC as Agent of Foramer France and M/s Rolls Royce Pvt Ltd [2007-TII-03-HC-UKHAND-INTL]

5. Whether on the facts and circumstances of the case, the Ld. CIT (A) has erred in reversing the action of the AO who, having held that the assessee revenues on

account of 'equipment rental' under contracts with Non-PSC partners are liable to be taxed u/s 44DA, rightly estimated the income by applying 25% rate of profit on gross receipts, in the absence of books of accounts and details of expenses incurred in providing the services."

4. Briefly stated facts of this case are : pursuant to the notices issued under section 143(2) and 142(1) of the Income-tax Act, 1961 (for short 'the Act') along with questionnaire during the scrutiny proceedings, Shri R.P. Easwaran, FCA along with Shri Hitesh Dodhi, CA put in appearance and filed written replies. During the year under assessment, assessee offered gross revenue of Rs.102,20,66,402/- and has computed the income by applying deemed profit rate at 10% u/s 44BB of the Act in respect of all the seven contracts entered into between the assessee and the other seven parties duly detailed in para 2 of the assessment order. Assessee offered an amount of Rs.5,68,000/- on account of interest income u/s 244A of the Act. AO observed from the computation of income and details filed by the assessee along with return that mobilization charges amounting to Rs.3,71,98,378/- has been reduced from the gross receipt for working out profit u/s 44BB of the Act. It is also observed from the detail filed in respect of query raised regarding mob-de-mob charges received that charges amounting to Rs.4,12,04,800/- has been received under the work

contract out of which assessee has only offered mob-demob charges amounting to Rs.40,06,422/- and accordingly, assessee was called upon to explain. Finding the explanation furnished by the assessee not tenable, AO came to the conclusion that by taking the gross receipt, it means that what is to be brought to tax is the total cost burden of the sub-contract given to the assessee plus its profit margin and since, in this case, the revenues are being assessed u/s 44BB reimbursement of the service-tax receipts of the assessee shall also be included in revenue taxable as per section 44BB, at deemed profit rate of 10% of the gross receipt. So, the amount received by assessee by way of mobilization are to be included in the gross receipt earned by the assessee and thereby made an addition of Rs.3,71,98,378/-.

5. AO further noticed that during the year under assessment, assessee has executed contract of hire of offshore supply vessels with three contractors/companies are with non-Production Sharing Contract Companies (non-PSC) not engaged in production and exploration of the activities itself and found the same to be a second leg contract. Total receipt in respect of aforesaid contract came to Rs.90,65,24,815/-. AO noticed second category of contracts where payments received by non-resident company from another non-resident (not a member of production sharing contract)

(PSC) for supplying plant and machinery on hire used or to be used by a third party for the activities specified in section 44BB (1) of the Act and found the same not eligible for claim under the provisions of section 44BB (1) as that would be against the mandate of section 44BB and observed that such receipt would constitute equipment royalty in terms of section 9(1)(vi) of the Act. AO came to the conclusion that benefit of section 44BB would not be applicable to those cases and computed the total income at Rs.25,14,61,030/-, later on rectified u/s 154 of the Act at Rs.19,14,54,330/-.

6. The assessee carried the matter before the Id. CIT (A) by way of challenging the assessment order who has partly allowed the appeal. Feeling aggrieved, both the revenue as well as assessee approached the Tribunal by way of filing separate appeals by challenging the impugned order passed by the Id. CIT (A).

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

ITA No.5864/Del/2013 (FILED BY THE ASSESSEE)

GROUND NO.1

8. By way of present appeal, assessee racked up the sole issue as to including the amount of Rs.3,71,98,378/- being the proportionate amount received by the assessee for demobilization of vessels outside Indian territorial waters to be included in the gross receipts u/s 44BB of the Act is against the claim of the assessee that this income is not chargeable to tax in India as per section 5 read with section 9 of the Act.

9. However, at the very outset, the ld. AR for the assessee fairly conceded that this issue has already been decided by the Hon'ble High Court in case of **Sedco Forex International Inc. vs. Commissioner of Income-tax [2008] 299 ITR 238 (Uttarakhand)** against the assessee, so the ld. CIT (A) has rightly held that mobilization charges constitute part of the gross receipts of the assessee as per provisions contained u/s 44BB. Consequently, ground no.1 is determined against the assessee.

ITA No.5927/Del/2013 (FILED BY THE REVENUE)

GROUNDS NO.1 TO 5

10. Ld. AR for the assessee contended that the issue raised in this appeal is covered in assessee's own case cited as **ADIT, Intl. Taxation vs. Tidewater Marine Intl.Inc. (ITA Nos.592, 746 & 1810/Del/2013 AYs 2004-05, 2009-10)** and **Tidewater Marine Intl.Inc. vs. ADIT, Intl. Taxation (ITA Nos.5289/Del/2010 AY**

2007-08 and ITA Nos.5775/Del/2011 AY 2008-09) and the judgment relied upon by the AO in case of Oil and Natural Gas Commission Ltd. have since been overruled by the Hon'ble Supreme Court.

11. Now, the sole question arises for determination in this case is:-

“as to whether revenue received by the assessee from non-Production Sharing Participants (non-PSC) Partners are in the nature of royalty pertaining to second leg contract and as such not eligible for treatment under presumptive provisions of section 44BB of the Act and chargeable to tax @ 25%?”

12. Identical issue stands decided by the coordinate Bench of the Tribunal in **assessee's own case qua AYs 2004-05, 2007-08, 2008-09 and 2009-10 (supra)** by answering the question in favour of the assessee and thereby dismissing the appeal filed by the revenue.

13. For facility of ready reference, operative paras no.22 to 26 are reproduced as under :-

“22. There is no dispute on applicability of this section to the business of the assessee. Only limited issue before us is whether supplying plant or machinery on hire to a company which in turns provides services or facility to the company which is engaged in the specified business is eligible for claim of concessional rate of taxation u/s 44BB of the act or not. This is in common parlance referred to as “ Second Leg” Contracts. The ‘plant’ supplied by the assessee are vessels and therefore they

cover in the definition of plant which is also not in dispute.

23. *Coordinate bench of ITAT in SBS Marine Limited v ADIT [ITA 107/Del/2012 dated 13.2.2015] after considering the decisions of honourable supreme court in case of UOI V Gosalia Shipping Pvt. Limited [113 ITR 307] & Poomphur Shipping corporation Limited V ITO [360 ITR 257], both of which are heavily relied by the revenue has decided this issue. Further this decision of Coordinate bench has also been upheld by honourable Uttarakhand High court vide order dated 6.8.2015 in ITA No 36/2015 applying judgement of Honourable Supreme court in case of Oil And natural Gas Corp. Limited V CIT [376 ITR 306 (SC)]. There is no contradictory decision of any high court placed before us. Therefore we are duty bound to follow the decision approved by Honourable Uttarakhand high court. Coordinate bench has held as under :-*

'23. Further, there is no requirement of a direct contract or agreement with the person actually engaged in prospecting for, or extraction or production of, mineral oils as canvassed by the revenue for the applicability of section 44BB. One may refer other provisions of the statute which insists on an agreement. For instance, section 42 deals with allowances allowable in computing the profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation which the Central Govt. has entered into an agreement. Section 80IA(4)(i)(b) provides that the enterprise carrying on the business of developing, operating and maintaining any infrastructure facility has to enter into an agreement with the Central Government of a State Govt. or a local authority etc. In the absence of any requirement in section 44BB that the person providing services, facilities or plant and machinery on hire should have directly entered into a contract or agreement with the person actually engaged in prospecting for or extraction or production of, mineral oils, one

cannot curtail the scope or applicability of section 44BB to second leg contractors whose contracts or agreements are with first leg contractors but whose services or facilities or plant and machinery are used in connection with prospecting for or extraction or production of, mineral oils as required under section 44BB. The Hon'ble Supreme Court in ICDS Ltd v CIT [2013] 350 ITR 527 held that the assessee leasing the vehicles to others who use the said vehicles in their business of running them on hire is entitled for higher rate of depreciation on the vehicles given on lease. It was held by the Hon'ble Supreme Court that the lessor need not himself use the vehicles in the business of running them on hire. The rationale of the aforesaid decision of the Supreme Court may be applied in the context of section 44BB in as much as section 44BB does not mandate that the assessee should directly enter into contract with the person engaged in the business of prospecting for or extraction or production of, mineral oils or the services or facilities or plant and machinery on hire should be directly provided to the said person alone. We have already given a finding of fact that the services and facilities provided by the assessee along with plant and machinery are used in offshore drilling operations i.e., the activity of prospecting for or extraction or production of mineral oils. Consequently, the requirements of section 44BB are satisfied in the present case.

24. In view of the above, there is no merit in the contentions of the revenue that the assessee is not an eligible assessee under section 44BB since it has not directly entered into contract with the ONGC and it is not undertaking the activities specified in section 44BB itself and being second leg contractors they are not eligible under section 44BB.'

24. Therefore in view of the decision of SBS Marine Limited V ADIT (Supra) we hold that even second leg

contracts are also eligible for the benefit of tax treatment provided u/s 44BB of the Act.

25. *Second Contention raised was that amendment in section 44BB and 44DA should be read as retrospective. Honourable uttarakhand High court in assessee's own case in 339 ITR 169 has held that*

“As stated earlier, the combined effect of the provisions of sections 44BB, 44DA and 115A of the Act will not have a bearing to the cases in hand inasmuch as the Explanatory Note to the Finance Bill, 2010 clearly indicates that the amendments proposed in section 44BB and 44DA of the Act would take effect from 1st April, 2011 and would apply in relation to the assessment year 2011-12 and subsequent years. The amendment is prospective in nature and would not apply to the cases in hand which is of the earlier assessment years.”

Hence we reject this argument of the revenue.

26. *As we have already held that receipt of the assessee is chargeable tax pertaining to second leg contracts also u/s 44BB of the Income tax act, consequently we reject the argument of the revenue that it is „equipment royalty“ chargeable u/s 9(1)(vi) of the and consequently liable to tax @ 25 % on gross basis u/s 115A of the Income tax Act.*

In view of above ground no (1) to (v) of appeal of revenue are dismissed.”

14. Since the issue racked up by the revenue in the present appeal treating the receipts from non-PSC Partners on account of supplies of plant and machinery on hire not eligible for treatment under presumptive provisions of section 44BB of the Act has already been determined in favour of the **assessee in its own case**

qua AYs 2004-05, 2007-08, 2008-09 and 2009-10 (supra) in ITA Nos.592, 746 & 1810/Del/2013 and ITA Nos.5289/Del/2010 and 5775/Del/2011 (supra), we find no illegality or perversity in the findings returned by the Id. CIT (A) reversing the order passed by the AO as to the holding the assessee's revenue on account of equipment rent under contract with non-PSC Partners taxed u/s 44DA of the Act. So, we are of the considered view that the contracts entered into between the assessee and other parties, known as second leg contracts are eligible for benefits of tax treatment u/s 44BB of the Act. Consequently, grounds no.1 to 5 are determined against the appellant / revenue.

15. In view of what has been discussed above, both the appeals filed by the assessee as well as revenue are hereby dismissed.

Order pronounced in open court on this 29th day of June, 2016.

**Sd/-
(N.K. SAINI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 29th day of June, 2016

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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-II, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**