

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)**

ITA No.79/Del/2017
Assessment Year: 2012-13

DCIT (International Taxation) Circle-II Dehradun	Vs	Schlumberger Asia Services Ltd. C/o. M/s. Nangia & Co. 3rd Floor, NCR Plaza, Municipal No.24A, New Cantt Road, Dehradun PAN No. AADCS1107J
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Salil Kapoor, Advocate Ms. Soumya Singh, Advocate
Respondent by	Dr. Prabha Kant, CIT

Date of hearing:	01/07/2021
Date of Pronouncement:	01/07/2021

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the CIT(A)-2, Noida dated 31.10.2016 pertaining to A.Y. 2012-13.

2. The grievance of the revenue read as under :-

(i) *Whether the CIT (A) has erred, on the facts and in the circumstances of the case, in holding that the amount received by the assessee on account of 'equipment lost in hole' is not includible in the gross revenue for the purpose of computation of profits under the presumptive provisions of section 44BB of the Act, when the said provisions are a complete code of taxation in themselves and do not distinguish between revenue and capital receipts having made allowance for expenditure including depreciation on capital assets to the extent of 90% of gross revenue.*

(ii) *Whether the CIT (A) has erred in not appreciating the fact that the amount received by the assessee on account of 'equipment lost in hole' is infact the reimbursement of expenses and hence includible in the gross revenue for the purpose of computation of profits as per the provisions of section 44BB of the Act in accordance with the spirit of the ratio of the judgment of Hon'ble Uttarakhand High Court in the case of CIT Vs. Halliburton offshore Services Inc. (300 ITR 265).*

(iii) *Whether the CIT (A) has erred in placing reliance on the order of Hon'ble Uttarakhand High Court in the case of assessee for the AY 1996-97, when the SLP filed by the Revenue against the said judgment is still pending before the Hon'ble Supreme Court.*

(iv) *Whether on the facts and in the circumstances of the case in law, the CIT (A) has erred in holding that receipts on account of services tax are not includible in gross revenue of the assessee for the purpose of computation of profits under the provisions of section 44BB of the IT Act, 1961.*

(v) *Whether the CIT (A) has erred in not appreciating the fact that section 44BB of the Act is self-contained code providing for computation of profit at a fixed percentage of gross receipts of the*

assessee and all the deductions and exclusions from the gross receipts are deemed to have been allowed to the assessee.

(vi) Whether the CIT (A) has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, there is no scope for computing or re-computing the profits by excluding any part of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a presumptive scheme of taxation u/s 44BB of the Act and obviating the need for maintaining accounts for individual receipts, payments etc.

(vii) Whether the CIT (A) has erred in ignoring the ratio of the judgment in the case of M/s Chowringhee Sales Bureau (P) Ltd. (82 ITR 542, SC) wherein the Hon'ble Apex Court has held that the Sales Tax collected by an assessee in the ordinary course of its business forms part of its business receipts. Owing to the inherent similarity in the nature of sales tax and service tax, the ratio of the judgment in the said case is directly applicable to the instant case.

(viii) The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time of or before the hearing of the appeal.

3. The grievance can be summarized in following two categories

:-

- (i) Whether the amount received by the assessee on account of 'equipment lost in hole' is not includible in the gross revenue for the purpose of computation of profits under the presumptive provision of section 44BB of the Act.
- (ii) Whether receipts on account of service tax are not includible in gross revenue.

4. At the very outset, the counsel for the assessee stated that the impugned issues are squarely covered in favour of the assessee and against the revenue by the decision of the Hon'ble Uttarakhand High Court which has been followed by the first appellate authority.

5. Per contra the DR could not bring any distinguishing decision in favour of the revenue.

6. We have given a thoughtful consideration to the orders of the authorities below qua issue.

7. The underlying facts in the first issue are that the AO has considered the receipts on account tools lost in hold as includible in the gross receipts. The case of the assessee is that the said receipt is of capital in nature and hence not chargeable to tax. This issue has been decided by the Hon'ble Uttarakhand High Court in assessee's own case which has been confirmed by the Hon'ble Supreme Court in 399 ITR 1. The relevant findings of the Hon'ble Supreme Court read as under :-

51. In this batch of appeals, Civil Appeal No. 3695 of 2012 is the solitary appeal which is preferred by the Director of Income Tax, New Delhi (Revenue) against the judgment of the High Court of Uttarakhand. The computation of income of the assessee was done under Section 44BB of the Act. However, the amount which was sought to be taxed was reimbursement of cost of tools lost in hole by ONGC. It is, thus, clear that this was not the amount which was covered by sub-section (2) of Section 44BB of the Act as ONGC had lost certain tools belonging to the assessee, and had compensated for the said loss by paying the amount in question. On these facts, conclusion of the High Court is correct. Even otherwise, the tax effect is Rs.15,12,344/-. Therefore, Civil Appeal No. 3695 of 2012 filed by the Revenue is dismissed.

NOTA

8. As the CIT(A) has followed the earlier order of this Tribunal which has been upheld by the Hon'ble Uttarakhand High Court and subsequently by the Hon'ble Supreme Court we do not find any error or infirmity in the findings of the CIT(A) grounds relating to the first issue are dismissed.

9. Facts relating to the second issue are that the assessee has claimed that service tax has no profit element in it and is collected on account of statutory requirement and, therefore, it is not taxable u/s.44 BB of the Act. The AO took the view that service tax has the profit element and, therefore, includible in the gross turnover of the assessee. This issue has also been considered by the Hon'ble Uttarakhand High Court in assessee's own case in 104 taxmann.com 353. The relevant findings read as under :-

45. Service tax is levied, under the Finance Act, 1994, on services. Service tax is, therefore, a tax on "service", and does not form part of the consideration paid for the services rendered, much less services rendered in connection with the prospecting, extraction or production of mineral oils. Reimbursement of service tax by the service recipient to the service provider, representing the amount of tax already paid by the service provider to the Government, would not constitute a part of the amount received for the services rendered by the service provider-assessee to the service recipient-ONGC, much less a part of the amount received for services rendered by the assessee in the prospecting for or the extraction or production of mineral oils.

(III) SECTION 44BB(3) : ITS SCOPE :

46. Sri H.M. Bhatia, learned Senior Standing Counsel for Income Tax, would submit that, assuming that there was no provision like Section 44BB in the Statute, the assessee would have shown reimbursement of service-tax as receipt in its financials, and would have claimed payment of service tax as expenses; the same option has been provided by Section 44BB(3) of the Act which specifies that, if the assessee claims an income less than 10% of the gross receipts, it should maintain books of accounts, and get it audited; and reimbursement of service-tax, received by the contractor, is includible in the gross receipts for the purposes of Section 44BB(1) of the Act.

47. On the other hand Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessee, would submit that the 'service tax' amount received from the customers is a 'pure reimbursement' without having any income element; such amount would not be liable to income tax in India; reimbursement does not have the character of income, both under the general Income Tax law and under Section 44BB; Section 44BB does not include amounts paid towards reimbursement as they are not on account of service and facilities; pure reimbursement, without any income element, cannot represent income under the general law; and, thus, such amount is not liable to income tax in India.

48. Section 44BB(3) of the Act also contains a non-obstante clause, and would prevail notwithstanding anything to the contrary in Section 44BB(1) of the Act. Section 44BB(3) enables an assessee to claim a lower income under the head profits and gains, than the deemed income specified in Section 44BB(1) and (2), if it keeps and maintains such books of accounts, and other documents, as are required under Section 44AA(2), and gets its accounts audited and furnishes a report of such audit as is required under Section 44AB. In case an assessee complies with these requirements, the assessing officer is, thereafter, required to 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.

49. In effect, Section 44BB(3) gives the assessee an option. Instead of having ten percent of the aggregate of the sum, specified in clauses (a) and (b) of Section 44BB(2), treated as its income from profits and gains from business, it is open to the assessee to comply with the conditions stipulated in Section 44BB(3) and, thereafter, claim lower income, under the head profits and gains, than the deemed income from profits and gains specified in Section 44BB(1). In case an assessee opts to be subjected to tax under sub-section (3) of Section 44BB, computation of its income, from profits and gains from business, will be made in accordance with the provisions specified in Sections 28 to 44DB, under the head (D) "Profits and gains from business or profession" in Chapter IV of the Act. In case the assessee exercises its option under Section 44BB (3), it is entitled to claim deduction under Section 43B (a) for the service tax paid by it to the Government, and add the amount received as reimbursement of service tax in its receipts. It is unnecessary for us to examine whether or not receipt of such an amount would constitute income as, in any event, it cannot be deemed to be the presumptive income of the assessee under Section 44BB, as the said amount has not been paid by the ONGC to the assessee for providing services in connection with the prospecting, extraction or production of mineral oils.

10. Since the issue is now well settled in favour of the assessee and against the revenue we do not find any reason to interfere with the findings of the CIT(A). The grounds relating to this issue are also dismissed.

11. In the result, the appeal filed by the revenue is dismissed.

12. Decision announced in the open court in the presence of both the representatives on 01.07.2021.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

NEHA

Date:-01.07.2021

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	01.07.2021
Date on which the typed draft is placed before the dictating Member	01.07.2021
Date on which the typed draft is placed before the Other member	01.07.2021
Date on which the approved draft comes to the Sr.PS/PS	01.07.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	01.07.2021
Date on which the fair order comes back to the Sr. PS/ PS	01.07.2021
Date on which the final order is uploaded on the website of ITAT	01.07.2021
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

