IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, DEHRADUN

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 4645/Del/2017 : Asstt. Year : 2013-14

Transocean Offshore International Venture Ltd., C/o Nangia & Co., A-109, Sector 136, Noida-201304	Vs	DCIT(Intl. Taxation), Circle-2, Dehradun-248001
(APPELLANT)		(RESPONDENT)
PAN No. AABCT7361B		

ITA No. 4652/Del/2017 : Asstt. Year : 2013-14

DCIT(Intl. Taxation), Circle-2, Dehradun-248001	Vs	Transocean Offshore International Venture Ltd., C/o Nangia & Co., 3rd Floor, NCR Plaza, Municipal No. 24A, New Cantt. Road, Dehradun
(APPELLANT)		(RESPONDENT)
PAN No. AABCT7361B		

Assessee by : Sh. Amit Arora, Adv.
Revenue by : Sh. N. S. Jangpangi, CIT DR

Date of Hearing: 09.11.2021		**Date of Pronouncement: 10.02.2022**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee and the Revenue against the orders of ld. CIT(A)-2, Noida dated 09.05.2017.

2. In ITA No. 4645/Del/2017, following grounds have been raised by the assessee:

> *"1. On the facts and circumstances of the case, the ld. CIT(A) has erred in holding that the receipts on account of reimbursements of expenses amounting to Rs.38,817,150/- are includible in the revenue chargeable to tax u/s 44BB of the Income Tax Act, 1961 as opposed to the claim of appellant that the*

same is devoid of any profit element and hence not chargeable to tax.

2. On the facts and circumstances of the case, the ld. CIT(A) has erred in holding that the proportionate receipts on account of mobilization activities carried outside Indian Territorial Waters amounting to Rs.83,386,009/- are includible in the revenue chargeable to tax u/s 44BB of the Income Tax Act, 1961 as opposed to the claim of the appellant that the same is not chargeable to tax."

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Reimbursement of expenses:

3. The assessee company is engaged in the business of providing offshore drilling services in relation to exploration and exploitation of mineral oil and gas in India.

4. Brief facts of the case are that the assessee has shown receipts on account of reimbursement of expenses of Rs.3,88,17,150/- and claimed that the same cannot give rise to income for taxation purposes. The Assessing Officer has held that since this particular receipt is on account of reimbursement of expenses, the same are to be included under the gross receipts chargeable u/s 44BB of the Income Tax Act, 1961.

5. The issue of chargeability of reimbursement u/s 44BB has now been settled in favour of the revenue by the judgment of Hon'ble Uttrakhand High Court in the case of CIT Vs. Halliburton Offshore Services Inc. 300 ITR 265.

6. It was held as under:

"*To answer this question we directly go to section 44BB which reads as under:*

"Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.—(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, 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 of, mineral oils, 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 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 (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 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.

(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.

Explanation—For the purpose 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."

***5.** Section 44BB provides that the deemed profits and gains under sub-section (1) shall be at the rate of 10 per cent of the aggregate amount specified in sub-section (2). We proceed to analyze sub-section (2). Clause (a) of sub-section (2) refers to the amounts, (A) paid to the assessee (whether in or out of India) 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) payable to the assessee (whether in or out of India) 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. Clause (b) of sub-section (2) refers to the amounts, (A) received by assessee in India 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, and (B) deemed to be received by the assessee in India 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.*

***6.** Thus, it is clear from the perusal of section 44BB that all the amounts either paid or payable (whether in India or outside India) or received or deemed to be received (whether in India or outside India) are mutually inclusive. This amount is the basis of determination of deemed profits and gains of the assessee at the rate of 10 per cent. Therefore, in our view, the Tribunal fell into error in not appreciating the difference between the amount and the income. Amount paid or received refers to the total payment to the assessee or payable to the assessee or deemed to be received by the assessee, whereas income has been defined under section 2(24) of the Income-tax Act and section 5 and section 9 deal with the income and accrued income and deemed income. Section 4 is the charging*

section of the Income-tax Act and definition as well as the incomes referred in sections 5 and 9 are for the purpose of imposing the income-tax under section 143(3). Section 44BB is a complete code in itself. It provides by a legal fiction to be the profits and gains of the non-resident assessee engaged in the business of oil exploration at the rate of 10 per cent of the aggregate amount specified in sub-section (2). It is not in dispute that the amount has been received by the assessee-company. Therefore, the Assessing Officer added the said amount which was received by the non-resident company rendering services as per provisions of section 44BB to the ONGC and imposed the income-tax thereon.

7. *Accordingly, for the reasons recorded above, we set aside the judgment and order of the Tribunal and order of the CIT(A). The order of Assessing Officer is confirmed. The question is answered in favour of revenue and against the assessee."*

7. Since, the decision of the revenue authorities is in consonance with the judgment of the Hon'ble Jurisdictional High Court as mentioned above, we decline to interfere with the order of the ld. CIT(A).

Mobilization Advance:

8. The relevant part of the order of ld. CIT(A) is as under:

"5.8 The contention of the Appellant in this ground is that the AO has erred in holding that the revenue of Rs.8,33,86,009/- earned was includible in the gross receipts for the purpose of determination of income under section 44BB of the Act, since it was not taxable under the provisions of the Act, being amount towards demobilization for the activities carried outside India.

Submission

"On a combined reading of sections 4, 5, 9 and 44BB, the income of a non- resident that is chargeable to tax in India is the amount which accrues or arises or is deemed to accrue and arise to the

appellant in India. In this case as the income from the business activity as a whole can be apportioned on a reasonable basis as that being from business carried on in and outside India, therefore the mobilization fees received outside India cannot be regarded as deemed to be received in India and thus not chargeable to tax under section 4. Section 5 clarifies under sub-section 2 as follows-

Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which.

(a) is received or is deemed to be received in India in such year by or on behalf of such person: or
(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1: Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2: for the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

Reliance has been placed on the decision in the following case-

- *In Saipem SpA vs. DCIT, Assessee, a non- resident company, was to receive a specified sum towards mobilization and transportation of drilling rig from Sharjah, UAE to Vishakhapatnam port under an agreement with ONGC. The same was brought to tax under Section 44BB.*

It was held that the same is not justified as Section 5 is the charging section and no income can be brought to tax unless it falls

within the scope of said section. Provisions of section 44BB are only meant to replace the system of computation of income earlier envisaged by application of the provisions of Sections 28 to 41, 43 and 43A. Provisions of Section 5 would remain intact and by no maxim of interpretation would be superseded by the provisions of Section 44BB. Therefore, mobilization charges, received by the non-resident appellant outside India, were not chargeable to tax neither under s. 44BB nor under Section 5(2).

Similar decision was given in the cases of:-

- *Carboradum Company vs. CIT (1977) reported in 108 ITR 335 (SC)*
- *CIT vs. Toshoku Limited (1980) reported in 125 ITR 525 (SC)*

Thus, only a reasonable proportion of taxable mobilization revenue as pertains to transportation of the rig in Indian territorial waters should be taxed in India."

Adjudication

5.9 I have considered the submission of the appellant, the arguments of the assessing officer and the judgments cited by the appellant and assessing officer on this issue.

5.10 It is noted from the facts of the case that during the previous year the Appellant claimed that revenue amounting to Rs. 8,33,86,009/-, received on account of demobilization charges, is in respect of activities carried outside India and, therefore, does not constitute income that accrues or arises to it in India. Accordingly, the amount was claimed as not chargeable to tax in India.

5.11 The Appellant has relied upon the case of Carborandum Company vs. CIT(1977) reported in ITR335(SC) and CIT vs. Toshoku Limited (1980) reported in 125 ITR 525 (SC) decided by the Apex Court and Saipem SpA vs. DCIT (Asst.) decided by the ITAT Delhi to argue that Section 5 is the charging section and no income can be

brought to tax unless it falls within the scope of a said section. It has been argued that the provisions of Section 44BB provide a system of computation of income and provision of section 5 would remain intact and cannot be superseded by the provisions of Section 44BB.

5.12 The contention of the Appellant along with the cases cited by it has been carefully examined. It is noted that the case of Carborandum Company vs. CIT does not relate to interpretation of 44BB of the Act, rather it relates to taxation of technical service fee and its taxability under the provisions of section 42 of 1922 Act. It was held in that case that since no part of activity or operation was carried on by the Assessee in India, technical service fee received by Assessee from an Indian company during the Assessment Year 1957-58 did not accrue or arise in India nor could it be deemed to have accrued or arise in India. The case of CIT vs. Toshoku Limited was related to the fact that if business operation is not carried out by the non-residents in taxable territories, no income can be deemed to accrue or arise in India. In that case, the Apex Court noted that non-resident Assessee did not carry on any business operations in the taxable territories and acted as selling agents outside India. It was held that the commission amounts which were earned by the non-resident Assessee for services rendered outside India, cannot, be deemed to be income which have either accrued or arisen in India.

5.13 The above two cases were decided by the Apex Court in different context. The issues and facts before the Hon'ble Court were also different and the provisions of Section 44BB under Income Tax Act, 1961 were not under examination. The decision in the case of Saipem SpA vs. DCIT (Asst.) decided by the ITAT Delhi bench and relied Upon by the Appellant has been considered by the Jurisdictional High Court of Uttarakhand in the case of CIT Vs. Anr. Vs. Sundowner Offshore International (Bermuda) Ltd. cited in 183 Taxman 365 and the Jurisdictional High Court has considered entire

amount of mobilization whether in or outside India as taxable under Section 44BB of the Act.

5.14 The AO has relied upon the case of Sedco Forex Intl. Drilling Inc. (299 ITR 238) decided by the jurisdictional High Court of Uttrakhand to support that the amount received towards mobilization/demobilization activities are includible under section 44 BB of the Act irrespective of the fact whether the activities have been carried out in India or outside India.

5.15 It is noted that in the case of Sedco Forex International Inc. (supra), it has been held by the jurisdictional High Court of Uttarakhand that revenues on account of mobilization/demobilization are to be brought to tax in India and thus the reliance of the AO on the same is not misplaced.

5.16 In the case in Appeal before me, the Appellant has received amount towards mobilization during the relevant assessment year. The amount is linked to the operation to be carried out in India by the Appellant. The Assessing officer has given its findings that the receipts were inextricably linked to the service/work rendered by the Appellant. Demobilization/Mobilization is integral part of the contract and without the activity of mobilization/demobilization, the execution of the contract in India was not possible. As such the receipts/revenues earned by the Appellant are in connection with the activities carried out in India. I find merit in the order of the Assessing Officer that the amounts towards mobilization are includible in the total amount received by the Appellant against its work. The Jurisdictional High Court of Uttarakhand in the case of Sedco Forex International Drilling Inc (299 ITR 238), Atwood Oceanics Pacific Limited (338 ITR 156) and R&B Falcon Drilling Co. v. Addl. CIT, Appeal No. ITA No. 29 of 2008 has laid down that section 44 BB is a complete code in itself. It has also been held that for the purpose of taxability under section 44 BB of the Act, it makes no difference whether the amount was paid or payable in or outside India. On a reading of the provisions of section 44 BB of the

Act, it is discernible that the provisions do not contain or envisage the word "'income" for calculating the aggregate amount to calculate profit of 10%. The jurisdictional High Court in case of CIT vs Halliburton offshore services Inc. (300 ITR 265) has distinguished the terms 'income' and 'amount' as used in section 4,5 and 9 on one hand and section 44BB(2) on the other.

5.17 The reading of provisions of aforesaid section would make it clear that under this section the emphasis is not on income" but "amount" and that too the amount specified in sub-section (2) to section 44 BB of the Act. The sub-section 2 clearly states that 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 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 would be part of the amount to be deemed to be profit and gains of business of such Assessee or a person. In case, any Assessee claims and intends to offer lower profit and gains than the deeming income of 10%, it is required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get its accounts audited and furnish a report of such audit as required under section 44AB.

9. Since, the decision of the ld. CIT(A) is based on the ratio of the Hon'ble Jurisdictional High Court and the Hon'ble Apex Court, we decline to interfere with the order of the ld. CIT(A).

ITA 4652/Del/2017

10. Following grounds have been raised by the Revenue:

> *"(i) Whether on the facts and in the circumstances of the case and in law, the CIT (A) has erred in holding that receipts service tax are not includible in gross revenue of the assessee for the purpose of*

computation of profits under the presumptive provisions of section 44BB of the I.T. Act, 1961.

(ii) Whether the CIT (A) has erred in not appreciating the fact that section 44BB of the Act is a 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 income are deemed to have been allowed to the assessee.

(iii) 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 element 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.

(iv) 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."

Service Tax u/s 44BB:

11. The assessee has filed return of income on 28.11.2013 declaring total income of Rs.72,99,63,400/- which has been assessed at Rs.82,20,52,781 /-. Out of the total receipts, the assessee reduced the receipts on account of service tax and offered the net receipts to tax u/s 44BB of the Income Tax Act, 1961 applying dividend profit rate of 10%. The AO made addition on account of service tax and treated them as part of the gross receipts.

12. The AO held that the receipts on account of service tax is in the nature of royalty/FTS u/s 9(1)(vi)/9(1)(vii). We have examined the issue of inclusion of service tax with reference to the provisions of Section 44BB in the light of the judgment of Hon'ble Delhi High Court in the case of Pr. CIT Vs. Mitchell Drilling International Pvt. Ltd. 380 ITR 130 which held as under:

"that for the purposes of computing the presumptive income of the assessee for the purposes of Section 44BB the service tax collected by the assessee on the amount paid to it for rendering services was not to be included in the gross receipts in terms of Section 44BB(2) read with Section 44BB(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 only collected the service tax for passing it on to the Government."

13. Since, the decision of the ld. CIT(A) was in consonance to the established jurisprudence, we decline to interfere with the order of the Assessing Officer on this issue.

14. In the result, the appeal of the assessee is dismissed and the appeal of the Revenue is dismissed.

Order Pronounced in the Open Court on 10/02/2022.

Sd/-	Sd/-
(Amit Shukla)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 10/02/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR