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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Nov-01-2001

Judge : K Singhal, Jm, R Syal

Appellant : Saipem S.P.A.

Respondent : Dcit (Asstt.) Spl. Range-i

Judgement :

1. The only issue arising out of this appeal is whether the sum of 9,50,000 US \$ received by the assessee in Indian currency can be included in the total receipt while computing the income under Section 44BB.2. The assessee is a non resident company having its registered office at Milano Corso, Venezia-16. It carried on the business in the field of exploration of mineral oils etc. It entered into an agreement with ONGC in 1984 for offering one land drilling rig on charter hire for exploratory drilling in the Krishna Godawari Bassein area. Under the agreement, the assessee was to receive a fixed sum of 9,50,000 US \$ towards mobilisation and transportation of the drilling rig from Sharjehan, UAE to Vishakhapatnam Port. It was claimed before the AO that the amount received was in the nature of reimbursement charges which were not taxable in view of Section 5 read with Section 9. This contention of the assessee was rejected by the AO since in his view Section 44BB covered all payments whether in the form of reimbursement or in the nature of other payments. Accordingly, this amount was brought to tax under Section 44BB.3. The matter was carried before the CIT(A) before whom the same contention were raised on behalf of the assessee. On

behalf of the AO it was submitted that the issue was covered in favour of the revenue by the decision of the Tribunal Delhi Bench in ITA No. 3413/Del/88 dated 20.6.90 wherein it was held that mobilisation and demobilisation charges were taxable under Section 44BB. Following the said decision of the Tribunal, the CIT(A) confirmed the order of the AO on this aspect.

Aggrieved by the same, the assessee is in appeal before the Tribunal.

4. The learned counsel for the assessee Mr. Vohra has vehemently assailed the order of CIT(A) by contending that the mobilisation charges cannot be brought within the net of taxation in view of Section 5(2) in as much as this amount was neither received in India nor accrued or had arisen to the assessee in India during the year under consideration. At the direction of the Bench, the counsel for the assessee has furnished evidence to the effect that the ONGC had paid the amount to the assessee outside India, that is, in Italy. In support of his contention, he has relied on the order of the Tribunal, Mumbai Bench dated 30th April, 1998 in the case of Jindal Drilling Leasing (ITA No. 6452/Bom/91) wherein it has been held that mobilisation charges in respect of voyage outside the territorial water of India are not taxable in view of Section 5 read with Section 9. The copy of the order is placed on the record. On the other hand, the Id. DR has strongly supported the order of the CIT(A) by relying on the decision of Tribunal, Delhi Bench referred to by the CIT(A).

5. Rival contentions of the parties have been considered carefully. The decision of the Tribunal, Delhi Bench relied upon by the Id. DR, in our view, does not help the revenue. In that case, the AO did not include the receipt towards mobilisation charges in the total income of the assessee. The order of the assessment was considered to be erroneous and pre-judicial to the interest of revenue by the CIT under Section 263 and accordingly directed the AO to include the same under Section 44BB. The matter was carried before the ITAT wherein it was held that such payments arose out of the contract and, therefore, were directly connected with the business of the assessee. Further there was profit element in as much as the fixed amount had been received by the assessee irrespective of the expenditure incurred. Accordingly, it was held that the mobilisation charges were

taxable in the hands of the assessee under Section 44BB read with Section 28(iv). The issue with which we are concerned was neither raised before nor considered by the Tribunal. Therefore, the ratio of that case cannot be applied to the present case.

6. On the other hand, the issue before us is squarely covered by the decision of the Tribunal, Mumbai Bench relied upon by the assessee's counsel wherein it has been clearly held that mobilisation charges in respect of transportation of rig outside the territorial water of India were not taxable in view of Section 5 read with Section 9.

Consequently, it was also held that only the mobilisation charges in respect of transportation of the rig in the course of India water were taxable under Section 44BB. According to the Bench, the entire receipts could not be brought in the net of taxation. The relevant observations of the Bench are being reproduced for the benefit of this order: "On a close reading of Sections 44BB, 4 and 5(2), it is evident that what is taxable in India in the case of a non-resident is the income which is accrued or has arisen whether actually or is deemed under the statute or which is received in India. This concept is, in fact, adopted for arriving at the total earning of a non-resident by Sub-section (2) of Section 44BB, which, as aforesaid, takes in its ambit only those receipts which are paid or payable either in India or elsewhere for services rendered in India and in case the services are rendered outside India, the receipt by the non-resident in India. The terms "paid" or "payable" are used with reference to payer's point of view, but if these are translated into the recipients point of view they are to be read as received or receivable for the services rendered in India. In other words, it is the hire charges which are received by the non-resident or which are accrued or arisen to him for the services rendered in India. Nothing is received by the assessee in India as stated by the learned counsel of the assessee before the Assessing Officer and which is not controverted by the revenue. We have, therefore, to see whether anything had accrued or has become payable to the assessee for services rendered in India. As stated above, the ship was given on hire by the assessee in U.S.A. It had a voyage from USA to India and as held by the CIT(A), only 385 nautical miles out of 11998 nautical miles was the voyage in India. Income from transporting the rig has

accrued to the assessee or has arisen to it only when the transportation has taken place and that transportation was both in India as well as outside India. Accrual of income in India would, therefore, be only for that portion of the voyage which pertained to the travel in India. The balance amount would accrue and is payable to the non-resident for the transportation outside India and, therefore, the receipts thereof would not be covered by the provisions of Section 44BB of the Act.

6. We can look at the issue from a different angle also. Let us examine the case that the entire income on hire charges has accrued or has become payable to the assessee when the goods are delivered in India. Of course, the entire accrual of the charges in that case would be in India and has to be taken as part of consideration for computing the 10 per cent of the income under Section 44BB of the Act. But the assessee, being a non-resident, can be assessed only on that portion of the income which relates to the operations carried out in India. The Explanation to Section 9(1) provides for leasing the mechanism, though it is applicable only in a case where the income is deemed to accrue to a non-resident under Section 9 and may not be strictly applicable to the income actually accrued under Section 5(2) of the Act. But as held by the Supreme Court in the case of *Anglo French Textile Co.* (25 ITR 27) that the apportionment of income, profits or gains between those arising from business operations carried on in the taxable territories and those arising from business operations carried on without the taxable territories is based not on the applicability of Section 42(3) of the 1922 Act (corresponding to Section 9 of the 1964 Act), but on general principles of apportionment of income, profits or gains depending whether the income, profits or gains could be said to arise or accrue. Therefore, in these circumstances, in our opinion, even though the entire receipts by the assessee may be subject to the determination of 10 per cent profit under Section 44BB of the Act, the taxable portion thereof would have to be the amount that relates to the proportionate operations carried out in India and that, as aforesaid, would be relating to the voyage of 140 nautical miles out of the 11990 nautical miles for which the hire charges were received by the assessee. In these circumstances, in our opinion, the CIT(A) was justified in directing that only the proportionate income i.e.

185/11990 would be taxable in India. The order of the CIT(A), therefore, does not call for any interference and is accordingly upheld." 7. In view of the above discussion, we hold that mobilisation charges in respect of the transportation of rig outside the territorial water of the India are not taxable. The order of the CIT(A) is, therefore, set aside and the AO is directing to include in the total income only that portion of the profit which is relatable to the receipts attributable to the transportation of rig in the territorial water of India while computing the income under Section 44BB.1. I have carefully perused the order passed by my learned brother in which he has directed the AO to include in the total income only that portion of the profit which is relatable to the receipts attributable to the transportation of rig in the territorial water of India while computing the income under Section 44BB. I find myself unable to concur with this view. Despite discussion I could not convince him on my line of reasoning. As such, I am constrained to make a separate order. Facts of the case and arguments have been mentioned at paras 1 to 4 of the proposed order which need not be repeated for the sake of brevity.

2. Precisely the issue raised in this appeal relates to the taxability of US \$ 9,50,000 received by the assessee on account of mobilisation and transportation charges from Sharjah, U.A.E. to Vishakapatnam Port in India. The AO held the entire amount liable to be included in the receipts for the purposes of taxation under Section 4498. The Id.CIT(A) echoed the action of the AO relying on the order of Delhi Bench in the case of M/s. Nippon Kokan KK and Ors. in ITA No. 3413/Del./88.

The assessee is aggrieved against this order in the present appeal.

3. The main plank of the marathon arguments of the Id. counsel for the assessee was that Section 44BB is only a computation section and the scope of total income is to be determined only in accordance with the provisions of Section 5(2). Taking the Bench through the provisions of Section 5(2) the Id. counsel contended that it has two clauses, namely, (a) & (b). It was submitted that Clause (a) deals with the inclusion of only that income in total income of the non-resident which is received or deemed to be received in India. Evidence was placed on record to the effect

that the amount in question was paid by ONGC in Italy. It was, therefore, submitted that Clause (a) of Sub-section (2) was not applicable to the facts of the present case. Coming to the Clause (b) of Section 5(2), the Id. counsel contended that the income which accrues or arises or is deemed to accrue or arise in India is liable to be included in the total income of the non-resident. He stated that the case of the assessee could, at the most, be considered to be falling under Clause (b) of Sub-section (2). The attention of the Bench was drawn towards Section 9(1) which deals with the incomes which are deemed to accrue or arise in India. It was urged that Explanation (a) to Section 9(1)(i) provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. Placing reliance on this Explanation, the Id. counsel for the assessee urged that only that part of the profit which is relatable to the receipts attributable to the transportation of rig in the territorial water of the India could be included in the total income, while computing the income under Section 44BB. For this proposition, the Id. counsel placed reliance on the order of the Mumbai Bench 'E' in the case of Jindal Drilling Leading in ITA No.6452/Bombay/91, a copy of which was placed at pages 18 to 24 of the paper book. The Id. counsel contended that the order of the CIT(A) was based on the decision of the Delhi Bench of Tribunal In ITA No.3413/Del./88 (supra) which was not relevant to the issue under consideration. The copy of the said order of Delhi Bench was placed at pages 25 to 37 of the paper book. The sum and substance of the submissions advanced on behalf of the assessee was that Section 44BB is controlled by Section 5(2) read with Section 9 and even though the entire receipts were subject to the determination of 10% provided under Section 44BB, the taxable amount was only that portion thereof which related to the proportionate operations carried out in India.

4. In the opposition the Id. DR supported the order of the CIT(A) and his submissions were reiteration of the reasons received by the CIT(A) for dismissing assessee's appeal. In particular, the Id. DR stated that Section 44BB is special provision and Section 5 read with Section 9 has no role to play when the income is computed under Section 44BB. It was further pointed out that the decision of the Delhi Bench of Tribunal, which was relied upon by the Id. CIT(A), was squarely

applicable to the facts of the case for the reason the identical issue was involved therein as is in the present appeal.

5. Having heard the rival submission and perused the relevant material in the light of precedents cited at the Bar, it is clear that there is no controversy about the applicability of Section 44BB on the assessee in respect of mobilisation charges. The dispute centres only around the extent of such mobilisation charges which would be put to tax. Whereas the case of the assessee is that Section 44BB cannot be read in isolation and it has to be construed in the light of Section 5(2) read with Section 9 and if so read only that portion of the profit which is relatable to receipts attributable to the transportation of rig in the territorial water of India is taxable while computing the income under Section 44BB. On the other hand the plea of the department, in this regard, is that the entire amount of mobilisation charges is liable to be included while computing the income under Section 44BB and is accordingly chargeable to tax and further Section 5(2) read with Section 9 had nothing to do and can't be considered to be applicable when the income is computed under Section 44BB. So the first thing to be decided is as to whether Sections 5(2) read with 9 are applicable to Section 44BB or not. For that it is necessary to consider the provisions of Section 5(2) which are as under:- "(2) 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." 6. There is no dispute about the fact that ordinarily the income of a non resident is to be computed according to the mandate of Section 5 which provides that the income which is received or is deemed to be received in India and also the income which accrues or arises or is deemed to accrue or arise in India is liable to be included in the total income of the non-resident. But the question arises that would Section 5(2) hold the field even if any special/deeming provision has been enacted such as Section 44BB in the Act? The answer to this question can be found from the language of Section 5(2) itself which starts with the expression "subject to the provisions of this Act". It ergo shows that Section 5(2) does not have an overriding effect over other sections of the Act and it has to be harmoniously construed in conjunction with other special

provisions. It is worthwhile to mention at this juncture that the expression "subject to the provisions of the Act" came up before Kerala High Court in CIT v. Fertilisers and Chemicals (Travancore) Ltd. (1987) 166 ITR 823 (Kerala) and their Lordships held that it was the special provision which should be adhered to while assessing the income earned by a non resident. It was laid down as under:- "However, it is pertinent to note that the total income is determined "subject to the provisions of the Income-tax Act". The charge in respect of the total income is expressly declared to be "in accordance with and subject to the provisions of this Act".

These expressions "in accordance with" and "subject to the provisions of this Act" make it clear that the assessment of the income of a non-resident accrued or arisen in India through an agent, shall be subject to and in accordance with the provisions contained in Chapter XV of the Income-tax Act. They are special provisions and, therefore, they should be adhered to while assessing the income earned by a non-resident through an agent, in the hands of the agent." 7. The inevitable conclusion that follows is that the special provisions such as Section 44-BB in question are not controlled or hit by Section 5. If any special provisions have been enacted, obviously, Section 5 would lean in favour of such other special provisions.

8. The next issue which arises for consideration is as to whether Section 44BB contains any special provision or not. For this it is necessary to advert to the provisions of Section 44BB as under:- 44BB (1) Notwithstanding anything to the contrary contained in Section 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 provisions 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.

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business; 9. On dissection of this section, the necessary ingredients, which are relevant for the purpose, as contained in Sub-section (1) are as under:- (ii) a sum equal to 10% of the aggregate of the amounts specified in Sub-section (2).

(iv) chargeable to tax under the head "profits and gains of business or profession".

Similarly the important components of Sub-section (2), relevant for the purpose, are as follows:- (vi) on account of the provisions of services and facilities in connection with or supply of plant and machinery on hire, and (vii) used or to be used in the prospecting for or extraction or production of mineral oils in India.

10. When these parts of Section 44BB are analysed, it becomes explicitly clear that Section 44BB contains special provisions, in as much as it deems 10% of the amount specified in Sub-section (2) to be the profits and gains of such business (ii and iii above), which are to be charged to tax (iv above). As regards the aggregate of the amount liable to be included for application of 10% rate, it is made clear that it would be the amount due to the assessee whether in or out of India (v above) for supply of plant and machinery on hire to be used for extraction of oil in India (vi & vii above). From the above it becomes patent that the amount liable to be considered for Sub-section (2) is one which is received or receivable on account of supply of plant and machinery which is to be used in India. The condition for inclusion in the aggregate amounts under Section 44BB(2) is the end destination, namely, the place where such plant and machinery is to be used. If it is to be

ultimately used in India, then the entire hire charged for the plant and machinery are includible. There is no stipulation in Sub-section (2) to the effect that only that portion of the mobilisation charges is includible for charging to tax which covers the distance covered in India. It has also been made explicitly clear that in order to be included in Sub-section (2), it is totally irrelevant that the amount is paid to the assessee in or out of India. It is the admitted position, as is clear from the written submissions also, that the assessee hired out its drilling rig to ONGC for exploratory drilling in India only. It, therefore, boils down that Section 44BB contains special provisions by virtue of which 10% of the qualifying amounts are deemed to be profits of the business which are chargeable to tax.

Deeming provisions create a fiction by assuming a particular state of affairs. The law is trite and no authority is needed to be cited for the proposition that the deeming provisions override the general provisions. Seen in this light, it is difficult to digest the contention of the Id. counsel for the assessee that even though the entire receipts by the assessee may be subject to the determination of 10% profits under Section 44BB but the taxable portion would be only that amount which relates to the distance covered in India, for the simple reason that Section 44BB contemplates that 10% of the aggregate receipts would be deemed to be the profits and gains of such business CHARGEABLE TO TAX under the head "Profits and gains of business or profession".

11. As Section 44BB is a special provision, I am of the considered opinion that it is not controlled by the provisions of Section 5(2) which section itself is "subject to the provisions of this Act" and hence Section 5(2) cannot restrict or expand the scope of Section 44BB. Once it is held that Section 5(2) is not applicable to Section 44BB, the contention of the Id. AR regarding the applicability of explanation (a) to Section 9(1)(i) itself fails because Section 5(2) specifies, inter-alia, the inclusion of "income deemed to accrue or arise in India" in the total income of the non resident and Section 9, in turn, deems certain incomes to accrue or arise in India. To put it differently Section 9 only explains the meaning of one of the expressions used in Section 5 and therefore only supplements it and is not a separate provisions independent of Section 5. If Section 5 itself is held to be inapplicable, there cannot be any question of considering the applicability of Section 9 separately.

12. Now I will proceed to deal with the contention of the learned AR to the effect that the order of the Delhi Bench of Tribunal in M/s. Nippon Kokan (Supra), which formed the basis of the impugned order, is on a different issue and hence is not relevant to the issue under consideration. In that case the AO framed assessment without segregating the mobilisation and de-mobilisation charges. The CIT while exercising his revisionary power under Section 263 held the order of the AO to be erroneous and prejudicial to the interests of the revenue, inter-alia, on this issue also. The Tribunal upheld the order of the CIT by observing that since profits in its case were to be determined by application of net profit rate, the receipts for mobilisation of rigs or vessels from place of its origin outside India to the ONGC's location at the offshore in Bombay High were required to be included in the total receipts of the non-resident company before applying net profit rate. Vide para 9 of its order it was held:- "9. The only point that requires our consideration is mobilisation and demobilisation fees/reimbursement of expenses. In our opinion, there is error in the order passed by the assessing officer in not considering these receipts. The CIT has clearly pointed out in the impugned order that agreement with Geo Physical Services Inc. shows that there was clear indication that ONGC would pay fees or lumpsum for mobilisation or demobilisation charges or such charges at the moving rate. Similarly, the agreement with Dowell Schlumberger SA show that the ONGC had undertaken to clear from the port/airport authorities customs of equipment and spares etc. imported into India for ONGC's work and that cost incurred by the non resident company for transportation of equipment in India from point of origin to ONGC's location and back to point of origin would be reimbursed by ONGC".

From the above extracted finding of the Tribunal's order it is clear that the entire mobilisation charges from the point of origin outside India to the ONGC's location in India were held to be includible in the receipts for applying the profit rate as per the prescription of Section 44BB. The facts of the instant case are on all fours with the order passed by the Delhi Bench, relied upon by the CIT(A), and I am unable to find out even a single distinguishing feature. Hence it is manifest that the submission of the Id. counsel that the aforesaid order of the tribunal is not applicable is sans merits and deserves the fate of rejection.

13. There are number of orders of the Delhi Benches available on this issue. The recent order in this sequence is that of "B" Bench of Delhi Tribunal dated 27.11.2001 in ITA No. 1426 to 1430/D/95 in the case of M/s. Sedco Forex International Drilling Inc. for assessment years 1989-90 to 1992-93 where this issue was discussed in paras 20 to 23 by holding that 10% of the entire mobilisation charges, including the portion towards the travel outside India were liable to be taxed. In this case the application of the provisions of Section 4 & 5 vis-a-vis Section 44BB was also considered by the Bench. This order in the case of Sedco Forex is based on the earlier tribunal order of the same assessee dated 23.3.99 for assessment year 1988-89 in ITA No. 4582/D/91 wherein this issue was exhaustively dealt with. The facts of that case are identical with the facts of the instant case under consideration.

In that case, the assessee (hereinafter called SFI) was paid fee by ONGC for mobilisation of drilling unit from their location outside India, namely, Setubal, Portugal, to the location designated by ONGC, namely, Offshore Bombay or other drilling unit of ONGC (Kandla or Bombay). Payment was made to SFI outside India. The AO held the entire mobilisation fee received by SFI as includible for determining its income under Section 44BB. The first appellate authority confirmed AO's action. It was contended on SFI's behalf before the Tribunal that even if entire mobilisation charges were held to be includible in the amount of gross receipts for the purpose of computing 10% profits under Section 44BB, only a reasonable proportion of that 10% profit could be included as attributable to services rendered in India. Reliance was placed on circular No. 1767 dated 1.7.87 and the provisions of Section 4 & 5 read with Section 9. The Tribunal, in an elaborate decision, confirmed the order of the CIT(A) and finally held as under:-

"2.18 In view of the aforesaid facts and circumstances, we are of the considered opinion that the mobilisation fee paid by ONGC to the appellant company has rightly been included in the aggregate amount of payments received by the appellant company from ONGC for the purposes of computing the profit @ 10% chargeable to tax under the head Profits and Gains of business under Section 44-BB of the Act.

The inclusion of such amount of mobilisation fee for computing income under Section 44-BB does not in any manner go beyond the charging Section 4 and 5 of the Act. A special provisions, namely, Section 44-BB has been introduced for determination of taxable income of the non-residential tax payers engaged in such business.

The presumptive income of 10% on the aggregate payments made under such agreements cannot be said to be beyond the scope of charging Section 4 and 5. The various judgments relied upon by the Id. counsel for the assessee does not in any manner, support such a contention, where only 10% of the aggregate payments are deemed to be income chargeable to tax under the head "Profits & Gains of business" by virtue of such special provisions of Section 44-BB of the Act. We are also unable to accept the assessee's contention that only a reasonable portion of 10% income determined under Section 44-BB in relation to mobilisation fee should be taxed, as income attributable to services rendered in India in the process of mobilisation of drilling unit is very small. Reliance placed by the Id. counsel on the circular issued by the Board does not in any manner support his contention. The said circular does not relate to Section 44-BB but it relates to determination of taxable income of a foreign contractor engaged in the execution of turnkey project involving part of the work to be carried out in India as well as outside India, for a lump sum consideration. The said circular cannot authorise the AO to adopt a different mode of determination of taxable income in the case of a non resident tax payer, which arises from agreements specifically covered by the specific provisions contained in Section 44-BB of the Act." In reaching this conclusion the Tribunal noted that similar view was taken in earlier orders of the Tribunal in ITA No. 3310/D/88, ITA Nos.

3413, 3414, 3488 dated 20 June 1990 and ITA No. 3366/D/88 dated 30 June 1990 by holding that the entire mobilisation fees was includible for computing the profits @ 10% chargeable to tax under Section 44BB of the Act.

14. In view of the legal position discussed above, I do not find any infirmity in the order of the CIT(A) because he has followed the view of the Delhi Bench of the Tribunal. The judicial discipline requires that while sitting at Delhi, the consistent

view of Delhi Bench should be followed. I am of the considered opinion that the contention of the Id. counsel for the assessee that the mobilisation charges in respect of transportation of the rig outside the territorial waters of India are not taxable, is devoid of merits. I, therefore, hold that the total amount of hire charges of US \$ 9,50,000 towards mobilisation of drilling rigs are includible in the receipts under Section 44BB and accordingly chargeable to tax.

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