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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Sep-14-2004

Judge : N B Sanker, A Jain

Appellant : Mc Dermott Etpm Inc.

Respondent : The Dcit

Judgement :

"1. The learned Commissioner of Income-tax (Appeals), Bombay, erred in law and on facts in holding that the services rendered by your appellant are covered by the provisions of the Notification GSR 304 (E), dated 31st March, 1983.

2.1 The learned CIT(A) erred in law and on facts in holding that the entire activity for which consideration was received was performed in India and was taxable at the deemed profit rate of 10% under Section 44BB. 2.2 Without prejudice to above, only part of mobilization / de-mobilization work which is attributable to the operations carried out in India is taxable in India." 2. The assessee is a Company, incorporated under the laws of Panama. It is engaged in the business of designing, fabrication, construction and installation of platforms, decks, pipelines, jackets and various other similar activities. A part of the said work consists of mobilization / de-mobilization and transportation of marine spread to off-shore India (this work is done by the assessee outside India) and the installation of structures and pipelines at Bombay High Oilfield, which is located beyond 12 nautical miles, i.e., in the Continental Shelf and / or Exclusive Economic Zone of India, which is the work carried on by the assessee "inside India".

3. During the assessment year under consideration, the assessee had received monies in respect of contract with Scandia Essar Ple. Ltd., Singapore. The Assessing Officer held that the receipts for work carried out by the assessee were assessable to tax in India. In doing so the Assessing Officer rejected the assessee's submissions vide letter dated 15.11.1994, that the activities carried on by the assessee as sub-contractor to the main contractor are neither covered under nor similar to the activities specified in the Notification - GSR.304 (E) (5147)/F. No. 188-(7)/82-TPL, dated 31.3.1983. issued by the Government of India, which extends the provisions of the Income-tax Act to the Continental Shelf and Exclusive Economic Zone of India with effect from 1.4.1983. As per the assessee. the said Notification applies only to any of the following activities : (a) The prospecting for, or extraction or production of, mineral oils in the Continental Shelf of India or the Exclusive Economic Zone of India; (b) The provision of any services or facilities or supply of any ship, aircraft, machinery or plant (whether by way of sale or hire) in connection with any activities as referred to in Clause (a); and (c) The rendering of services as an employee of any person engaged in any of the activities referred to in Clause (a) or (b).

4. The assessee had submitted before the Assessing Officer in the aforesaid letter that its income from work carried out in the Continental Shelf and the Exclusive Economic Zone of India was not covered under the said Notification since that Notification relates to the activities of prospecting for exploration and / or production of mineral oil which the assessee were not engaged in. However, the Assessing Officer was of the view that the assessee's business consists of provision of services / facilities, as referred to in Section 44BB of the Income-tax Act. It was also submitted on behalf of the assessee before the Assessing Officer that in respect of income from the work done outside India, only 1% of the gross receipts in respect of such work, i.e., 10% of 10% of the gross receipts from such work, could be taxable in India, since the Explanation to Section 9(1)(i) of the Income-tax Act provides that in the case of business in which all operations are not carried out in India, the income from such¹ business deemed to arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.

5. The existence of C.B.D.T. Circular, issued in 1987, clarifying that in case of work carried out outside India, only 1% of the gross receipts would be attributable to the activity in India, was also brought to the notice of the Assessing Officer. However, ignoring the same, the Assessing Officer assessed 10% of the gross receipts of the work carried out by the assessee outside India, as taxable in India.

6. Vide the impugned order, the learned CIT(A) observed, inter alia, that the C.B.D.T. Circular relied on by the assessee expressly states that it is operative for three years only and that period had long elapsed. Nothing had been brought before him {the learned CIT(A)} to suggest that a fresh Circular or instruction had been issued extending the life of the directions contained in that Circular. Quoting various articles contained in the contract entered into by the assessee, the learned CIT(A) observed that these articles indicate that the assessee was itself aware of the fact that it was covered by the provisions of the Income-tax Act. The case laws relied on by the assessee were held to be distinguishable on facts. Resultantly the appeal was dismissed.

7. Before us, it has not been denied that the activities under the Notification in question, i.e.. Notification dated 31.3.1983 are - (a) the prospecting for, or extraction or production of, mineral oils in the Continental Shelf of India or the Exclusive Economic Zone of India; (b) the provision of any services or facilities or supply of any ship, aircraft, machinery or plant (whether by way of sale or hire) in connection with any activities as referred to in Clause (a); and (c) the rendering of services as an employee of any person engaged in any of the activities referred to in Clause (a) or (b).

8. It is also not denied that the activities carried on by the assessee comprise none of the above activities. The assessee is engaged in the business of designing, fabrication, construction and installation of platforms, decks, pipelines, etc. It is not engaged in exploration and / or production of mineral oil nor in providing services / facilities in connection with exploration/ production of mineral oil.

9. The Authorities have held that the business of the assessee consists of provision of services / facilities as referred to in Section 44BB of the Income-tax Act, 1961. Section 44BB of the Act reads as follows : "(1) Notwithstanding

anything to the contrary contained in Sections 28 to 44 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 or (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.

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business; 10. Thus, income of a non-resident Indian, which is taxable in India, is his income accrued or arisen or deemed to have arisen or received in India. The scope of Section 44BB encompasses only receipts paid or payable either in India or abroad, for services rendered in India, and where the services are rendered outside India, the receipt by the non-resident in India. The assessee's contention all through has been that it is a sub-contractor for the Companies which are engaged in the activity of providing services or facilities or supplying ships, aircraft, machinery or plant in connection with any activity for prospecting for or extraction or production of mineral oil. Moreover, it is sub-contractor activities, which are not covered under the Notification in question, which are carried out by the assessee beyond 12 nautical miles from the Indian Coastal Line. Therefore also, these activities are not

covered under the Income-tax Act. There is no direct or immediate nexus between the work carried on by the assessee and the activities of the main contractors. That being so, the Notification is not applicable to the assessee. Once that is not so, no tax can be levied on the assessee under the Act, so far as regards the income of the assessee from such contracts. Besides, a part of the assessee's income, which is taxable in India in the assessment of the main contractor, is passed on to the assessee under such sub-contracts. No tax can be levied once again on the same income in the hands of the assessee. Only 1% of the gross receipts from the work of mobilization / de-mobilization and transportation might be subjected to tax in India.

In holding that the entire gross receipts from the work carried out by the assessee outside India, is taxable as per Section 44BB, the provisions of the Explanation to Section 9(1)(i) have been contravened.

As per C.B.D.T. Circular / Instruction No. 1766 also, 10% of such gross receipts as attributable to activities inside India, is taxable in accordance with Section 44BB of the Act.

11. The contention of the Department before us has been that the case of the assessee is directly covered by the decision of the Mumbai Bench of the Tribunal in the case of *Micoperi S.p.A. Milano v. DCTT*, reported in 82 ITD 369. In that case, the only source of income of the assessee was the prospecting of or extraction or production of mineral oil. It was held that that being so, the income earned by that assessee had directly emerged from the prospecting of or extraction or production of mineral oil. Therefore, the same had been derived from the main source of income. There was a direct connection of the services rendered by the assessee and the income earned. The services had been rendered for the only source of income, i.e., prospecting of or extraction or production or production of mineral oil. There was no other source from which it could be said that the income had been directly derived from.

It was in these facts that the Tribunal held that the income had been directly derived from the said three activities. The issue was, as such, decided against the assessee and in favour of the Revenue. Such, evidently, are not the facts before

us. Here, the assessee is a sub-contractor of the main contractor, whose income is, such as could be said to have a direct and immediate nexus with the said three activities, and not the income of our present assessee. Our assessee is engaged in mobilization / de-mobilization and transportation, but merely as a sub-contractor, under the contract. Therefore, the quoted case does not apply hereto.

12. The learned Departmental Representative has also contended that the agreement was signed in India. The income has been received in India.

So, it is deemed income. However, we are not able to agree with this averment. The Explanation to Section 9(1)(i) of the Act is the guiding principle applicable. Income deemed to accrue or arisen in India has been dealt with in Section 9 of the Act. Section 9(1)(i) provides as under : "9(1) The following incomes shall be deemed to accrue or arise in India : (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any in India, or through the transfer of a capital asset situate in India." in the case of 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." 14. That the assessee can be charged only in accordance with Section 9, is undisputed. And as per the said Explanation (a) to Section 9(1)(i), where part of the operations of business are carried out outside India, only part of the income reasonably attributable to operations carried out in India shall be deemed to accrue or arise in India. The use of the word 'shall' in the said Explanation is unequivocally indicative of the legislative mandate contained therein. The Explanation, in no uncertain terms envisages only such type of income to be deemed to accrue or arise in India, under Section 9(1)(i). Thus the income presently under consideration cannot be said to be deemed income just because either the agreement was signed in India or the income has been received in India. The requirements of the Explanation to Section 9(1)(i) having not been met, the income is not deemed income.

15. Reliance has been placed on behalf of the assessee, on the decision of the Hon'ble Bombay High Court in the case of ACIT v. Jindal Drilling Leasing, of Tern

Companies, in ITA.No. 6452/Bom/1991 vide order dated 30.4.1998, copies whereof have been placed on record. In similar circumstances, the issue was dear, in favour of the assessee, holding to be not covered by the provisions of Section 44BB. It was held that even though the entire receipts by the assessee might be subjected to the determination of 10% 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. The appeal of the Revenue was dismissed. No decision contrary to the above has been cited before us by the Department.

16. The learned counsel for the assessee has also placed reliance on the Third Member decision of the Delhi Tribunal in the case of Saipem S.P.A. v. DCIT. It was held therein, inter alia. that Section 44AB.being a special provision, it cannot 'replace', 'supercede' or 'lean' in favour of Section 5. which is the charging section, whereby the scope of total income of an assessee, whether it be of a resident or it be of a non-resident is worked out. It would be necessary in every case whether either of a resident or of a nonresident, to first of all decide as to whether a particular receipt or an item of income is liable to be included in the total income vis-a-vis Section 5 and if it is to be so included, then the question would arise as to how the taxable part thereof is to be computed and at this stage Section 44BB steps in. The provisions of Section 44BB vis-a-vis the legislative intent only mean that these replace the system of computation of income earlier envisaged by application of the provisions of Sections 28 to 41 and Sections 43 and 43A but the provisions of Section 5. which is the charging section would remain intact and these by no maxim of interpretation, would be superseded by the provisions of Section 44BB.17. It is in respectful consonance with the aforesaid ratio laid down by the said Third Member decision of the Tribunal, that we hold that since the income in question cannot even be construed to be deemed income of the assessee. there is no taxable income to be computed and so Section 44BB is inapplicable.

18. In the above circumstances, the order of the learned Commissioner (Appeals) is not sustainable in the eye of law. It is hereby cancelled.

Only part of mobilization / demobilization work, which is attributable to the operations carried out by the assessee in India, is taxable in India. The services rendered by the assessee are not covered by the Notification, bearing No. GSR-304 (E), dated 31.3.1983.

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