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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 153/2024

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3

..... Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing Counsel.

versus

M/S UMW SHER (L) LIMITED ..... Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor and Ms. Soniya Dodeja, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 04.03.2024

CM APPL 13492/2024 (Exemption)

1. Allowed subject to all just exceptions.

2. The application stands disposed of.

CM APPL 13493/2024 (delay)

3. Bearing in the mind the disclosures made, the delay of 204 days in re-filing the appeal is condoned.

4. The application shall stand disposed of.

ITA 153/2019

5. The Commissioner assails the order dated 01 February 2023 passed by the Income Tax Appellate Tribunal [**'ITAT'**] and proposes the following questions of law for our consideration:-

"2.1 Whether on the facts and circumstances of the case, Ld. ITAT has erred in holding that the income of the Assessee is assessable at deemed profit rate of 10% u/s 44BB of the Income Tax Act, 1961 (the Act) on the revenue earned from Indian payer on account of drilling rights on hire (equipment rental) under contracts, as against the stand of the AO to bring the revenue to tax u/s 9(l)(vi) read with section 115A of the Act and Article 12 of the India-Malayasia DTAA?

2.2 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in allowing the appeal of the Assessee without appreciating the fact that the receipts in the hands of the non-resident is clearly not a business receipt in view of settled legal position as per the Hon'ble Supreme Court decision in the case of R.D. Aggarwal(56 ITR 20,24) and accordingly such receipts are not liable to be taxed under section 44BB of the Act?

2.3 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in not appreciating the fact that the definition of royalty income under clause (iva) to Explanation -2 of section 9(l)(vi) covers lease income from vessels being in the category of use or right to use of industrial, commercial and Scientific equipment as the receipt are not subject matter of taxation under section 44BB of the Act?

2.4 Whether on the facts circumstances of the case, Ld. ITAT erred in allowing the appeal of the assessee by ignoring the fact that in the instant case the Assessee, M/s UMW Sher (I) Ltd. is not engaged in prospecting the exploration of oil as the contract of such prospecting/exploration was not with it and therefore, is beyond the scope of section 44BB?

2.5 Whether on the facts circumstances of the case, Ld. ITAT erred in holding that the income of the assesse from non PSC partner was a business receipts earned in connection to mineral exploration whereas in the instant case, the receipts in hands of the non-resident is clearly not a business receipts and accordingly such receipt is clearly not a business receipt and accordingly such receipt are not liable to be taxed under section 44BB of the Act?"

6. We note from a reading of the impugned order that on facts the supply of machinery on a hire purchase / lease basis was not disputed. This is evident from the following observations as appearing in the order of the ITAT.

"5. We have heard at length learned Representatives appearing for the parties and perused materials on record. We have also applied our mind to the judicial precedents cited before us. As discussed earlier, the dispute between the parties is qua the nature of receipts

from hiring/leasing of rigs, whether to be treated as business profits under section 44BB of the Act as claimed by the assessee or royalty under section 9(l)(vi) read with section 115A and as per the definition of royalty under the treaty provision. As far as the factual aspect of the issue is concerned, it is established on record that the assessee has given on hire/lease rigs to an Indian entity, who intended to employ them for drilling and exploration of mineral oils in the North Eastern States in India, in pursuance to the contract entered with M/s. Oil India. Thus, it is beyond dispute, the amounts received by the assesse subject to tax in the impugned assessment years are towards leasing/giving on hire rigs to be used in the drilling/ exploration of mineral oils. It is a fact on record that the assessee has offered the income received from giving on hire/leasing of rigs as profits under section 44BB of the Act. While the Assessing Officer at the time of framing the draft assessment orders has treated it as FTS, learned DRP is of the view that the receipts are in the nature of royalty under section 9(1)(vi) of the Act."

7. It was in the aforesaid backdrop that the assessee appears to have contended that Section 44BB of the Income Tax Act, 1961 [**'Act'**] stood attracted. We note that Explanation 2 to Section 9(1)(vi) of the Act while defining the word "*royalty*" provides as under:-

"*Explanation 2*.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(*i*) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(*ii*) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(*iii*) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(*iv*) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

[(*iv-a*) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44-BB;]

(*v*) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting [* * *]; or

(*vi*) the rendering of any services in connection with the activities referred to in [sub-clauses (*i*) to (*iv*), (*iv-a*) and (*v*)]"

8. As would be manifest from clause (iv-a) of the Act, although the "*right to use any industrial, commercial or scientific equipment*" is otherwise covered under the expression '*royalty*', it makes a clear exclusion in respect of amounts which would be referable to Section 44BB of the Act.

9. In view of the aforesaid, we find no justification to interfere with the view as taken by the ITAT. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 04, 2024
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