$~

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

27.

\+ **ITA 403/2013**

DIRECTOR OF INCOME TAX I ..... Appellant

Through Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Ms Shikha Garg, Advocate.

versus

MITCHELL DRILLING INTERNATIONAL PVT LTD. ..... Respondent

Through Mr Piyush Kaushik, Advocate.

AND

29.

\+ **ITA 384/2015**

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Ms Shikha Garg, Advocate.

versus

MITCHELL DRILLING INTERNATIONAL PVT. LTD. ..... Respondent

Through Mr Piyush Kaushik, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 28.09.2015

S. Muralidhar, J.

1. This Appeal by the Revenue is directed against the order dated 31st August, 2012 passed by the Income Tax Appellate Tribunal ('ITAT') in Appeal No. 698/DEL/2012 for the Assessment Year ('AY') 2008-09.

2. The Assessee is a company engaged in the business of providing equipment on hiring and manpower etc. for exploration and production of mineral oil and natural gas. The Assessee filed its income for the AY on 4th October 2008 declaring an income of Rs.49,31,260 as per provisions of Section 44BB (3) of the Income Tax Act, 1961 ('Act'). In computing the gross receipts for the purposes of determining the taxable income, the Assessee did not include a sum of Rs.2,09,24,553/- being the service tax received from its customers.

3. The Assessing Officer ('AO') by order dated 7th February 2011 rejected the contention of the Assessee and included the aforementioned sum collected by the Assessee as service tax in the gross receipts for computing the taxable income under Section 44BB of the Act.

4. The Assessee filed an appeal against the order of the AO, which was allowed by the Commissioner of Income Tax (Appeal) by an order dated 21st October 2011. The Appeal by the Revenue against the aforementioned

order of the CIT (A) has been dismissed by the ITAT.

5. While admitting this appeal on 28th May, 2014, the Court framed the following question of law:

> "Whether the amount of service tax collected by the Assessee from its various clients should have been included in gross receipt while computing its income under the provisions of section 44BB of the Act?"

6. It is submitted by Mr Kamal Sawhney, learned Senior Standing Counsel for the Revenue that Section 44BB is an instance of taxation of a presumptive income. According to him, the expressions "paid or payable to the assessee" occurring in Section 44 BB (2) (a) and "received or deemed to be received" by the Assessee occurring in Section 44 B (2) (b) have to payable to or received by Assessee on account of the service tax on the sum paid or payable for the services provided by the Assessee. He placed considerable reliance on the decisions of the Supreme Court in ***Chowringhee Sales Bureau Pvt. Ltd. v. Commissioner of Income-tax [1973] 87 ITR 542*** and ***George Oakes (P.) Ltd. v. State of Madras [1962] 2 SCR 570***. According to him, the decision of the Uttarakhand High Court in ***DIT v. Schlumberger Asia Services Ltd. (2009)317 ITR 156*** was distinguishable on facts since it related to payment of customs duty.

7. Mr Piyush Kaushik, learned counsel for the Assessee, on the other hand, submitted that CBDT Circular No. 4/2008, dated 28th April 2008 and CBDT Circular No. 1/2004, dated 13th January 2014 recognize that the gross sums on which tax was to be deducted at source whether Section 194 I or Section

194 J of the Act would not include service tax. He referred to the decision of the Bombay High Court in ***CIT v. Sudarshan Chemical Industries Ltd. 245 ITR 769 (Bom)*** where, after considering the decision in ***George Oakes (P.) Ltd.*** (*supra*), it was held that the 'turn over' for the purposes of Section 80HHCof the Act would not include sales tax and excise duty. He also referred to the decision of the Supreme Court in ***CIT v. Lakshmi Machine Works (2007) 290 ITR 667 (SC)*** where again the same question was considered and this time, the Supreme Court also took note of the earlier decision in ***Chowringhee Sales Bureau*** (*supra*). Mr. Kaushik also referred to the decisions in ***DIT v. Schlumberger Asia Services Ltd*** (*supra*), ***Sedco Forex International Inc. v. CIT 299 ITR 238 (Uttarakhand)*** and the decision of this Court in ***CIT Tax-XI v. M/s DLF Commercial Project Corporation 2015-TIOL-1609-HC-DEL-IT***.

8. Section 44BB (1) and (2) of the Act read as under:

> "44BB. (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 44DA 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."

9. Section 44BB begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under Section 44 BB. It introduces the concept of presumptive income and states that 10% credit of the amounts paid or payable or deemed to be received by 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 in India" shall be deemed to be the profits and gains of the chargeable to tax. The purpose of this provision is to tax what can be legitimately considered as income of the Assessee earned from its business and profession.

10. The expression 'amount paid or payable' in Section 44 BB (2) (a) and the expression 'amount received or deemed to be received' in Section 44 BB

(2) (b) is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and machinery.' Therefore, only such amounts which are paid or payable for the services provided by the Assessee can form part of the gross receipts for the purposes of computation of the gross income under Section 44 BB (1) read with Section 44 BB (2).

11. It is in this context that the question arises whether the service tax collected by the Assessee and passed on to the Government from the person to whom it has provided the services can legitimately be considered to form part of the gross receipts for the purposes of computation of the Assessee's 'presumptive income' under Section 44BB of the Act?

12. In ***Chowringhee Sales Bureau*** (*supra*) sales tax in the sum of Rs. 32,986 was collected and kept by the Assessee in a separate 'sales tax collection account'. The question considered by the Supreme Court was: 'Whether on the facts and in the circumstances of the case the sum of Rs. 32,986 had been validly excluded from the assessee's business income for the relevant assessment year?". However, there the Assessee did not deposit the amount collected by it as sales tax in the State exchequer since it took the stand that the statutory provision creating that liability upon it was not valid. In the circumstances, the Supreme Court held that the sales tax collected, and not deposited with the treasury, would form part of the Assessee's trading receipt.

13. The decision in ***George Oakes (P) Ltd.*** (*supra*) was concerned with the constitutional validity of the Madras General Sales (Definition of Turnover

and Validation of Assessments) Act, 1954 on the ground that the word turnover was defined to include sales tax collected by the dealer on inter-state sales. Upholding the validity of the said statute the Supreme Court held that "the expression 'turnover' means the aggregate amount for which goods are bought or sold, whether for cash or for deferred payment or other valuable consideration, and when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover." Since the tax collected by the selling dealer from the purchaser was part of the price for which the goods were sold, the legislature was not incompetent to enact a statute pursuant to Entry 54 in List II make the tax so paid a part of the turnover of the dealer.

14. In the considered view of the Court, both the aforementioned decisions were rendered in the specific contexts in which the questions arose before the Court. In other words the interpretation placed by the Court on the expression "trading receipt' or 'turnover' in the said decisions was determined by the context. The later decision of the Supreme Court in ***CIT v. Lakshmi Machine Works*** (*supra*) which sought to interpret the expression 'turnover' was also in another specific context. There the question before the Supreme Court was "whether excise duty and sales tax were includible in the 'total turnover' which was the denominator in the formula contained in Section 80 HHC (3) as it stood in the material time?" The Supreme Court considered its earlier decision in ***Chowringhee Sales Bureau*** (*supra*) and answered the question in the negative. The Supreme Court noted that for the purposes of computing the 'total turnover' for the

purpose of Section 80 HHC (3) brokerage, commission, interest etc. did not form part of the business profits because they did not involve any element of export turnover. It was observed: "just as commission received by an assessee is relatable to exports and yet it cannot form part of 'turnover', excise duty and sales-tax also cannot form part of the 'turnover'." The object of the legislature in enacting Section 80 HHC of the Act was to confer a benefit on profits accruing with reference to export turnover. Therefore, "turnover" was the requirement. "Commission, rent, interest etc. did not involve any turnover." It was concluded that 'sales tax and excise duty' like the aforementioned tools like interest, rent etc. 'also do not have any element of 'turn over''.

15. In ***CIT v. Lakshmi Machine Works*** (*supra*), the Supreme Court approved the decision of the Bombay High Court in ***CIT v. Sudarshan Chemicals Industries Ltd.*** (*supra*) which in turn considered the decision of the Supreme Court in ***George Oakes (P) Ltd.*** (*supra*). In the considered view of the Court, the decision of the Supreme Court in ***Lakshmi Machines Works*** (*supra*) is sufficient to answer the question framed in the present appeal in favour of the Assessee. The service tax collected by the Assessee does not have any element of income and therefore cannot form part of the gross receipts for the purposes of computing the 'presumptive income' of the Assessee under Section 44 BB of the Act.

16. The Court concurs with the decision of the High Court of Uttarakhand in ***DIT v. Schlumberger Asia Services Ltd*** (*supra*) which held that the reimbursement received by the Assessee of the customs duty paid on

equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44 BB of the Act.

17. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44 BB of the Act, the service tax collected by the Assessee on the amount paid t it for rendering services is not to be included in the gross receipts in terms of Section 44 BB (2) read with Section 44 BB (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 is only collecting the service tax for passing it on to the government.

18. The Court further notes that the position has been made explicit by the CBDT itself in two of its circulars. In Circular No. 4/2008 dated 28th April 2008 it was clarified that "Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of Service Tax. Therefore, it has been decided that tax deduction at source) under sections 194-I of Income Tax Act would be required to be made on the amount of rent paid/payable without including the service tax.' In Circular No. 1/2014 dated 13th January 2014, it has been clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act.

19. The question framed, is therefore, answered in the negative i.e. favour of the Assessee and against the Revenue.

20. The appeals are dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 28, 2015
pkv