Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 40 of 2012

Director of Income Tax International Taxation ……Appellant

Versus

M/s Schlumberger Asia Services Ltd. …….Respondent

With

Income Tax Appeal No. 44 of 2014

Director of Income Tax International Taxation ……Appellant

Versus

M/s Pride Foramer Ltd. …….Respondent

With

Income Tax Appeal No. 60 of 2014

M/s Smith International Inc. ……Appellant

Versus

Addl. Director of Income Tax International Taxation …….Respondent

With

Income Tax Appeal No. 62 of 2014

M/s Baker Hughes Singapore PTE ……Appellant

Versus

Addl. Director of Income Tax International Taxation …….Respondent

With

Income Tax Appeal No. 14 of 2015

Commissioner of Income Tax International Taxation ……Appellant

Versus

M/s Transocean Offshore International Ventures Ltd.

…….Respondent

With

Income Tax Appeal No. 15 of 2015

Commissioner of Income Tax International Taxation ……Appellant

Versus

M/s Transocean Offshore International Ventures Ltd.

…….Respondent

With
Income Tax Appeal No. 44 of 2015

M/s Baker Hughes Singapore PTE ……Appellant

Versus

Additional Director of Income Tax …….Respondent

With
Income Tax Appeal No. 18 of 2016

Commissioner of Income Tax International Taxation ……Appellant

Versus

M/s Sedco Forex International Drilling Inc. …….Respondent

With
Income Tax Appeal No. 33 of 2016

Commissioner of Income Tax ……Appellant

Versus

M/s Halliburton Offshore Services Inc. …….Respondent

With
Income Tax Appeal No. 36 of 2016

Commissioner of Income Tax ……Appellant

Versus

M/s Halliburton Offshore Service Inc. …….Respondent

With
Income Tax Appeal No. 37 of 2016

Commissioner of Income Tax ……Appellant

Versus

M/s Halliburton Offshore Service Inc. …….Respondent

With
Income Tax Appeal No. 38 of 2016

Commissioner of Income Tax ……Appellant

Versus

M/s Halliburton Offshore Service Inc. …….Respondent

With
Income Tax Appeal No. 39 of 2016

Commissioner of Income Tax ……Appellant

Versus

M/s Halliburton Offshore Service Inc. …….Respondent

With
Income Tax Appeal No. 54 of 2018

Commissioner of Income Tax ……Appellant

Versus

Triton Holdings Ltd. …….Respondent

With
Income Tax Appeal No. 57 of 2018

Commissioner of Income Tax ……Appellant

Versus

Dolphin Drilling Ltd. …….Respondent

Mr. Porus Kaka, Senior Advocate assisted by Mr. P.R. Mullick, Mr. Manish Kant and Mr. Shailesh Kumar, Advocates for the assessees.
Mr. Chetan Joshi, Advocate for the appellant in ITA No. 60 of 2014.
Mr. H.M. Bhatia, Senior Standing Counsel for the Income Tax Department.

Judgment Reserved: 26.02.2019
Judgment Delivered: 12.04.2019

Chronological list of cases referred:

1. (2008) 300 ITR 265 (Uttarakhand)
2. (2009) 317 ITR 156
3. ITA No. 41 of 2009 (Uttarakhand High Court)
4. (2017) 399 ITR 1 (SC)
5. (2007) 7 SCC 422
6. (2015) 10 SCC 241
7. (1984) Supp SCC 196
8. (2005) 9 SCC 129
9. AIR 1964 SC 207
10. (2005) 2 SCC 145
11. 1953 SCR 1
12. 1957 SCR 837
13. 1884 (9) AC 448
14. AIR 1953 SC 333
15. (1986) 1 SCC 465
16. AIR 1985 SC 870
17. AIR 1988 SC 587
18. (1996) 4 SCC 76
19. (2003) 11 SCC 632
20. 1951 (2) All ER 587 (HL)
21. AIR 1989 SC1371
22. (1996) 6 SCC 185
23. AIR 1966 SC 719
24. AIR 1966 SC 870
25. 2004 (5) Supreme 29

26. (2006) 3 SCC 1
27. (1921) KB 64
28. AIR 1970 SC 1173
29. (1936) 19 Tax Cases 490
30. 1945 (2) ALL ER 499
31. 1948 (1) ALL ER 616
32. Judgment in TRC No.153 of 2004 & Batch dated 05.10.2005
33. 1901 AC 102
34. (1976) 3 SCC 800
35. (1869) 4 H.L. 100
36. (1990) 2 SCC 231
37. (1999) 4 SCC 197
38. (2007) 3 SCC 794
39. (2006) 7 SCC 714
40. 2006 (13) SCALE 27
41. (1973) 4 SCC 200
42. AIR 1989 SC 501
43. (1967) 4 SCC 92
44. (1973) 1 SCC 442
45. (1970) 2 SCC 192
46. AIR 1961 SC 607
47. AIR 1958 SC 341
48. (2016) 380 ITR 130 (Delhi)
49. (2007) 7 SCC 527
50. (2011) 23 STR 213 (Delhi)
51. (1999) 6 SCC 418
52. (2006) 4 STR 14 (Madras)
53. (2007) 160 Taxman 404 (SC)
54. (2009) 1 SCC 540
55. (2005) 139 STC 116 (Gujarat H.C.)
56. (1990) 78 STC 198 (Guj)
57. (1978) 1 SCR 338
58. (1997) 5 SCC 536
59. (2003) 263 ITR 706
60. (2001) 252 ITR 1 (SC)
61. (1981) 131 ITR 597 (SC)
62. (1965) 56 ITR 198 (SC)
63. (1971) 82 ITR 913 (SC)
64. (1999) 237 ITR 889
65. Judg in Income Tax Appeal No. 235 of 2011 and batch dated 01.07.2013
66. (2004) 266 ITR 99 (SC)
67. (2001) 249 ITR 219 (SC)
68. 254 ITR 606 (SC)
69. (2002) 257 ITR 59 (SC)
70. (2009) 308 ITR 161 (SC)
71. (2000) IIL LJ 603 SC;
72. (2008) 304 ITR 61 (SC)
73. (1993) 204 ITR 866 (Guj)
74. (1992) 195 ITR 227 (Guj)
75. (1994) 210 ITR 419 (Guj)

Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Sudhanshu Dhulia, J.
Hon'ble Alok Singh, J.

Ramesh Ranganathan, C.J.

In **Halliburton Offshore Inc.**[1], the assessee, a non-resident company, was rendering service to the ONGC, in terms of Section 44BB of the Act; and the amount reimbursed by the ONGC to the assessee, towards

freight and transportation charges actually incurred by the assessee in respect of equipment, was added by the assessing officer to the total income of the assessee, in arriving at its profits and gains at 10 per cent, under Section 44BB of the Act. On its jurisdiction being invoked, a Division Bench of this Court held that the ITAT had fallen in error in not appreciating the difference between "amount" and "income"; the amount paid or received referred 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; Sections 5 and 9 dealt with income, accrued income, and deemed income; Section 4 was the charging Section of the Act; the definition, as well as the incomes referred in Section 5 and 9, were for the purpose of imposing income-tax under Section 143(3); Section 44BB was a complete code in itself; it provided, by a legal fiction, for the profits and gains of a non-resident assessee, engaged in the business of oil exploration, @ 10 per cent of the aggregate amount specified in sub-section (2); it was not in dispute that the amount had been received by the assessee company; and the assessing officer had, therefore, added the said amount, which was received by the non-resident company rendering services as per the provisions of Section 44BB to the ONGC, and had imposed income-tax thereon.

2. In **M/s Schlumberger Asia Services Ltd.**[2], the respondent-assessee –M/s Schlumberger Asia Services Ltd had filed its return declaring its income; the assessing officer had added the amounts, received by the assessee towards reimbursement of customs duty, in assessing its income. On its jurisdiction being invoked, a Division Bench of this Court held that reimbursement towards custom duty paid earlier by the assessee, being statutory in nature, could not form part of the amount for the purposes of deemed profits, unlike the other amounts received towards reimbursement; and the said amount, received by the assessee, was to be excluded in computing profits under Section 44BB of the Act.

3. In **Halliburton Offshore Service Inc Vs. Astt. Commissioner of Income Tax, Range-I, Dehradun**[3]**,** the appeal before the Division Bench of

this Court (in ITA No. 41 of 2009) was against the order passed by the Income Tax Appellate Tribunal for the assessment year 2004-05. The ONGC, to whom the assessee provided services, had reimbursed certain amounts to the assessee representing: (i) service tax paid by the assessee to the Government; (ii) cost of tools lost in the hole by the ONGC; (iii) repair of machinery; and (iv) airfare from RIL. The counsel for the assessee had conceded before the Tribunal that the issue regarding reimbursement of service tax had to be decided against the assessee in the light of the earlier decision of the Tribunal in ITA No. 4163/Del/07 dated 16.01.2009; and reimbursement towards repair of machinery, and airfare from RIL, should also be included in the total income liable to tax under Section 44BB of the Act in the light of the decision of this Court in **Halliburton Offshore Services Inc.**[1]. In view of the concession of the learned counsel for the assessee, the Tribunal held that these three receipts were liable to be included, and to be subjected to tax, under Section 44BB of the Act. With regards reimbursement of the cost of tools lost in the hole, for which the assessee was reimbursed by the ONGC as per the contract, the Tribunal held that the matter was not ***res integra***; reimbursement for loss of tools was a capital receipt; in Schlumberger Asia Services Ltd.[2], the Division Bench of this Court had held that capital receipts were not required to be taken into account while computing the assessee's income under Section 44BB of the Act; and the said amount could not be subjected to tax under Section 44BB of the Act.

4. In its order in ITA No. 41 of 2009 dated 26.12.2013, a Division Bench of this Court observed that Section 44BB of the Income Tax Act, dealt with amounts paid or payable; it did not contemplate reduction of the amount paid or payable on account of any liability to be incurred by the payee for the same, statutory or otherwise; in Schlumberger Asia Service Ltd.[2] it was held that the payment made excluded the amount of customs duty payable; and, accordingly, that part of the payment would not come under Section 44BB of the Act. The Division Bench, in Halliburton Offshore Service Inc Vs. Astt. Commissioner of Income Tax, Range-I, Dehradun[3], not being able to persuade itself to accept the earlier

pronouncement in Schlumberger Asia Services Ltd.[2], referred the matter to a Larger Bench.

5. ITA No. 41 of 2009, along with other connected appeals (ITA No. 40 of 2012, ITA No. 44 of 2014, ITA No. 60 of 2014, ITA No. 61 of 2014, ITA No. 62 of 2014, ITA No. 14 of 2015, ITA No. 15 of 2015, ITA No. 44 of 2015, ITA No. 18 of 2016, ITA No. 33 of 2016, ITA No. 36 of 2016, ITA No. 37 of 2016, ITA No. 38 of 2016, ITA No. 39 of 2016, ITA No. 54 of 2018 and ITA No. 57 of 2018), were listed before us on 26.02.2019. We had, by our order dated 26.02.2019, dismissed ITA No. 41 of 2009 as the assessee had conceded before the Income Tax Appellate Tribunal that the issue was to be decided against the assessee in the light of the earlier decision of the Tribunal. We had opined that, having conceded before the Tribunal that the issue should be held against them, the assessee could not, thereafter, question the order by way of an appeal under Section 260A of the Income Tax Act. While dismissing ITA No.41 of 2009, we heard the other appeals which were directed to be listed before the Full Bench along with ITA No. 41 of 2009.

6. The assessees, in the appeals before us, are all companies incorporated outside India, and are non-residents within the meaning of Section 6 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). They execute contracts all over the world, including in India, in connection with exploration and production of mineral oils. They entered into agreements with the Oil and Natural Gas Corporation (hereinafter referred to as 'ONGC'), and gave them rigs on hire. The assessees filed their returns declaring income from charter hire of the rig / plant and machinery, to be used in the extraction or the production of mineral oils in India, and offered to pay tax under Section 44BB(1) read with 44BB(2) of the Act. While doing so, the assessees did not include the amounts reimbursed to them by the ONGC, (towards the service tax paid by them earlier to the Government of India), in their gross revenues for computing their income under Section 44BB of the Act. The assessing authority included the said amount in the assessees gross receipts, and subjected it to tax under Section 44BB of the

Act. After the assessees invoked the jurisdiction of the CIT (Appeals), the jurisdiction of the Tribunal was invoked against the order passed by the CIT (Appeals), and there against the jurisdiction of this Court, under Section 260-A of the Act was invoked. On the Division Bench expressing its inability to agree with the opinion of the earlier Division Bench in **Schlumberger Asia Services Ltd.**[2], the question referred to the Full Bench for its opinion is:-

> ***"Whether the amount reimbursed to the assessee by ONGC, representing the service tax paid by the assessee to the Government of India, should be included in computing the aggregate amount referred to in sub-section (2) of Section 44BB of Act?"***

7. Elaborate submissions were put forth by Mr. Porus Kaka, learned Senior Counsel assisted by Mr. Pullack Raj Mullick, Mr. Manish Kant and Mr. Shailesh Kumar, learned counsel for the assessees; and Mr. Chetan Joshi, learned counsel for the appellant in ITA Nos. 60 and 61 of 2014. Written arguments were also submitted on behalf of the assessees. Mr. Hari Mohan Bhatia, learned Senior Standing Counsel for the Income Tax Department, has also put forth his oral and written submissions on behalf of the Revenue. It is convenient to examine the rival submissions, put forth by learned Senior Counsel and learned counsel on either side, under different heads.

(I) SECTION 44BB(1) & (2) : ITS SCOPE :

8. Sri H.M. Bhatia, learned Senior Standing Counsel for Income Tax, would submit that the phrase used in Section 44BB(2) is "on account of"; this phrase has a much wider connotation as it includes, within its ambit, any amount received by the assessee by reason of, or as a consequence of, the services rendered by them; if the intention of the legislature was to confine its meaning purely to the consideration received for the services part only, the word "for", or any such word, would have been used instead of " on account of"; sub-section (1) of Section 44BB does not refer to Section 43B of the Income Tax Act; clause(a) of Section 43-B refers to tax, which would include "service tax"; and, consequently, reimbursement of service

tax must be included in the aggregate sum, 10 per cent of which is liable to tax under the head “profits and gains of business or profession.

9. On the other hand Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessees, would submit that service tax collected/ received by the assessee from its customers is not on account of the provision of services and facilities; it is a tax, levied on the value of taxable services, collected by the assessee from its customer, and deposited with the Government of India; service tax, collected by the assessee, does not fall within the scope of the amount received on account of ‘provision of services and facilities’, as specified in sub-section (2) of Section 44BB; since reimbursement of service-tax is not on account of services rendered, but is a statutory duty imposed on the assessee which it collects from the ONGC, it does not fall within the “amount” stipulated in Section 44BB(1) of the Act; the assessees only collects service-tax from ONGC, and pay it to the govt; such reimbursement does not contain any element of profit or income in it; and presumptive income, under Section 44BB(1), cannot be determined on the said amount.

10. The Indian Income Tax Act follows a territorial system of taxation wherein that part of the income of a non-resident is taxable in India which is attributable to operations within the territory of India. It must, therefore, be ascertained whether a particular income arises or accrues or is deemed to arise or accrue within India. (**Sedco Forex International Inc.[4])**. Section 2(24) of the Act, which defines ‘Income’, is an inclusive definition. It brings within its ambit clauses (i) to (xviii) thereunder, and in clause (i) are included profits and gains, and in clauses (v) to (ve) any sum chargeable to tax under Section 28 or 41. Section 4 of the Act relates to charge of income tax. Section 5 relates to the scope of total income and Section 9 relates to income deemed to accrue or arise in India. Section 9 creates a legal fiction and requires income accruing or arising, whether directly or indirectly, through or from any business connection in India, to be deemed to accrue or arise in India. The explanation thereto defines **‘business connection’**.

11. Chapter IV of the Act relates to computation of total income. Section 14, thereunder, classifies all income, for the purposes of charge of income-tax and computation of total income, under five heads i.e. A.- Salaries; C.- Income from house property; D.- Profits and gains of business or profession; E.-Capital gains; and F.-Income from other sources. Under head D.-Profits and gains of business or profession are Sections 28 to 44DB of the Act. Section 28 stipulates that the income, referred to in clauses (i) to (viii) thereunder, shall be chargeable to income-tax under the head **"Profits and gains of business or profession"**. Section 29 stipulates that the income referred to in Section 28, (i.e. income from profits and gains of business or profession), shall be computed in accordance with the provisions contained in Sections 30 to 43D.

12. Chapter IV of the Act also contains provisions for presumptive taxation of business income in certain cases as prescribed in Sections 44B, 44BB, 44BBA and 44BBB of the Act. In the scheme of presumptive taxation, the assessee is presumed to have earned income at the rate of a certain percentage of his total turnover or gross receipts. If the assessee agrees to be taxed on presumed income, he is not required to maintain books of accounts. If, however, he claims that his income is less than the presumed figure, he is required to support his claim by producing books of accounts. **(Hyundai Heavy Industries Co. Ltd.[5])**. Where the assessee is a non-resident, and is engaged in the business of exploration etc. of mineral oil, a special mechanism is provided in Section 44BB of the Act for computation of profits and gains, on which the tax is charged. It however gives a choice to such non-resident assessees to opt for computation in terms of the formula provided under Section 44BB (i.e. either in terms of sub-section (1) & (2), or in terms of Section 44BB (3) to be covered by the normal computation mechanism contained in Sections 28 to 41, 43 and 43A of the Act). (**Sedco Forex International Inc.[4])**.

13. Section 44BB, with which we are concerned in the present appeals, reads as under :

"**44BB. 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 nonresident, 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.

(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that subsection, 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 purposes 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."

14. While, ordinarily, income chargeable to tax under the head **"profits and gains of business or profession"**, must be computed in accordance with Sections 28 to 43-D, Section 44BB carves out an exception thereto. Section 44BB is a special provision for computing profits and gains in connection with the business of exploration of mineral oils. Its purpose was explained (by the Department vide its Circular No. 495 dated September 22, 1987), to be to simplify the computation of taxable income as number of complications were involved for those engaged in the business of providing 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, minerals etc. Instead of going into the nitty-gritties of such computation, as per the normal provisions contained in Sections 28 to 41 and Sections 43 and 43A of the Act, the Legislature has simplified the procedure by providing that tax shall be paid @10% of the '**aggregate of the amounts specified in Sub-Section (2)';** and those amounts are 'deemed to be the profits and gains of such business chargeable to tax. **(Sedco Forex International Inc.[4])**.

15. When income is computed under the head 'profits and gains of business or profession', the rate of tax payable on the said income is much higher. However, the Legislature provided a simple formula, namely, by treating the amounts paid or payable (whether in or out of India), and amount received or deemed to be received in India, as mentioned in Sub-section (2) of Section 44BB, as the deemed profits and gains. Thereafter, on such deemed profits and gains (treating the same as income), a concessional flat rate of 10% is charged to tax. **(Sedco Forex International Inc.[4])**.

16. Once Section 44BB applies then two conclusions follow. The first is that 10% of the receipts by the foreign resident is chargeable to tax, and the other is that 90% of the receipts of that foreign resident as well as receipts/gains, other than those mentioned in Section 44BB, is not chargeable to tax. **(Hyundai Heavy Industries Co. Ltd.[5])**. A concessional rate of 10% is charged as tax, which is much less than the normal tax rate payable on profits and gains of business or profession. However, this tax

@10% is on the aggregate of the amounts, specified in sub-section (2), which are "deemed" profits and gains of such business. Profits and gains of the business under Section 44BB of the Act, on which 10% tax is payable, are computed on a fictional basis by adopting the formula laid down in sub-section (2). Sub-section (2) mentions those amounts, aggregate whereof is to be treated as deemed profits and gains of such a business. **(Sedco Forex International Inc.[4])**.

17. Section 44BB starts with a non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of Sections 28 to 41 and Sections 43 and 43A of the Act. **(Sedco Forex International Inc.[4])**. A “non obstante clause” is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment, that is to say, to avoid the operation and effect of all contrary provisions. **(Laxmi Devi[6]; G.M. Kokil[7])**. It is equivalent to saying that, inspite of the provisions mentioned in the non-obstante clause, the provision following it will have full operation, or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. **(Bihar Rajya M.S.E.S.K.K. Mahasangh[8]; Secretary, Board of Revenue, Trivandrum[9])**. Use of such an expression is another way of saying that the provision, in which the non-obstante clause occurs, would wholly prevail over the other provisions of the Act. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of any of the other provisions of the Act in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. **(Bihar Rajya M.S.E.S.K.K. Mahasangh[8]**; **Iridium India Telecom Ltd.[10])**. While interpreting a provision containing a non-obstante clause, it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in any other provision which is inconsistent with the Section containing the non-obstante clause. (**Aswini**

Kumar v. Arabinda Bose[11]; **A.V.Fernandez**[12]**)**. Section 44BB (1) would, therefore, prevail notwithstanding anything to the contrary laid down in Sections 28 to 41, 43 and 43-A of the Act.

18. A legal fiction is created by sub-section (1) of Section 44BB and a sum equal to 10 percent of the aggregate of the amounts, specified in sub-section (2), is deemed to be the profits and gains of such business. When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion, and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate, **(Levy, Re, ex p Walton. Hill v. East and West India Dock Co.**[13]**; Shanmugha Vilas Cashewnut Factory**[14]**; American Home Products Corpn.**[15]**; Vallabhapuram Ravi**[16]**; S. Appukuttan**[17]**; Parayankandiyal Eravath Kanapravan Kalliani Amma**[18] and **Ali M.K. v. State of Kerala**[19]**)**, for if you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it and having done so, you must not cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs. **(East End Dwellings Co. Ltd. v. Finsbury Borough Council**[20]). When the law creates a legal fiction, such fiction should be carried to its logical end. (**Builders' Assn. of India**[21]). In interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction, it is not to be extended beyond the purpose for which it is created, or beyond the language of the Section by which it is created. (**Mancheri Puthusseri Ahmed**[22]**; CIT v. Shakuntala**[23]; **CIT v. Moon Mills Ltd.**[24]**; Sadan K. Bormal**[25]).

19. The fiction in Section 44-BB(1) operates to deem what is merely a receipt, and is not otherwise income, as income from "**profits and gains from business or profession**" i.e. 10% of the amount paid or payable to the assessee, or the amount received or deemed to be received by the assessee in India, on account of the provision of services or facilities in connection with the prospecting for, or extraction or production of, mineral oils in India, must be presumed to be the income of the assessee chargeable to tax under the head 'Profits and Gains of Business or Profession', even if it is, but for the legal fiction, not to be treated as income. (**Bharat Sanchar Nigam Ltd.**[26]).

20. The dispute, in these cases, revolves around the question whether or not reimbursement of service tax, by the ONGC to the assessees, forms part of the aggregate amount specified in sub-section (2) of Section 44BB, for it is only if it does, would 10 per cent of the amount received by the assessee, as reimbursement of service tax, be liable to tax, as profits and gains of business and profession of the assessee, under Section 44BB(1) of the Act. The aggregate of the amounts, chargeable to tax under Section 44BB(1), is the amount paid or payable to the assessee on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India.

21. In examining this question, it must be borne in mind that a provision in a fiscal statute, such as Section 44BB, should be literally construed, and no other aid of interpretation can be resorted to. If the language is unambiguous, it must be enforced. It is, normally, not the concern of Courts to examine its reasonableness or consider its consequences or whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous. There is no equity about a tax. There is no intendment. There is no presumption as to a tax (**Cape Brandy Syndicate v. IRC**[27]). The subject is not to be taxed by inference or by analogy, but only by the plain words of the statute applicable to the facts and circumstances of his case. (**J.K. Steel Ltd.**[28]**; Inland Revenue Commissioners**[29]). If the meaning of the provision

is reasonably clear, Courts have no jurisdiction to mitigate harshness. **(Canadian Eagle Oil Co. Ltd v. R[30]; IRC v. Ross & Coulter (Bladnock Distillery Co. Ltd.)[31]** and **M/s Gouri Shankar Modern Rice Mill[32])**. If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to mischievous results. **(Cooke v. Charles A. Vogeler Co.[33]** and **M/s Gouri Shankar Modern Rice Mill[32])**.

22. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by trying to probe into the intention of the legislature and by considering what was the substance of the matter. **(Diwan Bros.[34]; A.V. Fernandez[12]**). The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. (**Partington v. Attorney-General[35]** and **J.K. Steel Ltd.[28]**). Artificial and unduly latitudinarian rules of construction, which have the tendency to 'give the taxpayer the breaks', are out of place where the legislation has a fiscal mission. (**Keshavji Ravji & Co.[36]** and **M/s Gouri Shankar Modern Rice Mill[32]**). A fiscal statute should be interpreted on the language used therein. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. (**M/s.Gouri Shankar Modern Rice Mill[32]** and **Orissa State Warehousing Corporation[37])**.

23. While dealing with a taxing provision, the principle of 'strict interpretation' should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. When two interpretations are possible, ordinarily the Court

would interpret the provisions in favour of a tax-payer, and against the Revenue. In case of doubt or dispute, the construction should be made in favour of the taxpayer and against the Revenue. **(Manish Maheshwar[38]; Sneh Enterprises[39]; J. Srinivasa Rao[40]; Naga Hills Tea Co. Ltd.[41]; Petron Engineering Construction (P) Ltd.[42]; Madho Pd. Jatia[43]; Vegetable Products Ltd.[44];** and **Kulu Valley Transport Co. (P) Ltd.[45])**. In interpreting a fiscal statute, the Court cannot proceed to make good deficiencies if there be any. It must interpret the Statute as it stands and, in case of doubt, in a manner favourable to the taxpayer, **(C.A. Abraham v. ITO, Kottayam[46]; J.K. Steel Ltd.[28])**, and not the one that imposes a burden on him. **(Central India Spg., Wvg. & Mfg. Co. Ltd.[47])**.

24. Bearing these principles in mind, let us now examine the scope of sub-section (2) of Section 44BB. While clause (a) thereof mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of the amount paid or payable under clause (a) of Sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received should be in India. **(Sedco Forex International Inc.[4])**. Section 44BB(2) requires certain receipts to be deemed as income for the purposes of taxation. Aid of this provision should be taken to determine whether a particular amount will be "income" within the meaning of Section 5 of the Act. Section 44BB(2) also acts as a guide in determining whether a particular income is attributed as income in India. While Section 44BB of the Act is a special provision, that does not mean that, in computing the income under this provision, Sections 4, 5 and 9 of the Act should be given a go-by or be side tracked. **(Sedco Forex International Inc.[4])**.

25. Once it is found that the amount paid or payable (whether in or out of India), or the amount received or deemed to be received in India, is covered by sub-section (2) of Section 44BB of the Act, by the fiction created under Section 44BB(1) of the Act, it becomes 'income' under Sections 5 and 9 of the Act. **(Sedco Forex International Inc.[4])**. As Section 44BB would prevail, notwithstanding anything to the contrary contained in the Sections

mentioned therein, ten per cent of the aggregate amounts specified in Section 44BB(2) must straightway be deemed to be the profits and gains of business chargeable to tax; and the mode of computation, stipulated in Section 28 to 41 and 43 to 43A, need not be resorted to, except in cases where an assessee chooses to exercise its option under sub-section (3), the scope of which we shall examine later.

26. In terms of clauses (a) and (b) of Section 44BB(2), it is only if the amount paid to the assessee is on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India, would it then form part of the aggregate of the amounts, ten percent of which would be chargeable to tax under the head "profits and gains of business and profession". The question which would necessitate examination is whether the amount reimbursed to the assessee towards service tax is "**on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, minerals in India.**"

27. The word 'on account of' has been defined in the Random House Dictionary of the English Language to mean "**by reason of; because of; for the sake of"**. In the Reader's Digest Great Encyclopedic Dictionary, **"On account of"** is defined to mean '**in consideration of**; **because of**'. In Collins English Dictionary "On account of" is defined to mean as '**because of**; **by reason of**'. D. Ramanatha Aiyer : The Law Lexicon defines "on account of" to mean "**because of, by reason of, towards payment of (1) concerning (2) because of**". It is only if the service tax reimbursed to them by the ONGC, which was paid by the assessee to the Government earlier, is held to be a payment in consideration of the services and facilities provided by the assessee, in connection with the prospecting, extraction and production of mineral oils in India, would it then fall within the ambit of sub-section (2) of Section 44BB.

28. As the expression **'amount paid or payable'** in Section 44BB(2)(a), and the expression **'amount received or deemed to be received'** in Section 44BB(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, it is only such amounts, paid or payable for the services provided by the assessee, which can form part of the gross receipts for the purposes of computation of gross income under Section 44BB(1) read with Section 44BB(2). **(Mitchell Drilling International Pvt. Ltd.[48])**. On its literal construction, Section 44BB(2) would only be the amount paid by the ONGC to the assessee on account of (i) provision of services in connection with or (ii) supply of plant and machinery on hire used in, the prospecting, extraction and production of mineral oils. As the amount reimbursed by the ONGC, towards the service tax paid by assessee earlier to the Government, is not an amount paid to the assessee towards the services provided by the latter in connection with the prospecting, extraction or production of mineral oils, it is not required to be included in the amounts specified in clauses (a) and (b) of Section 44BB(2).

29. As shall be elaborated later in this order, service tax is a tax levied on services, and cannot be treated as the Service itself. It is difficult, therefore, to accept the submission of the revenue that the amount reimbursed by the ONGC, towards service tax paid earlier by the assessee to the Government, should be included in the amount paid to the assessee on account of provision of services and facilities. Even otherwise, it is not every amount paid on account of provision of services and facilities which must be deemed to be the income of the assessee under Section 44BB. It is only such amounts, which are paid to the assessee on account of the services and facilities provided by them, in the prospecting for or extraction or production of mineral oils, which alone must be deemed to be the income of the assessee. On a plain and literal reading of clauses (a) and (b) of Section 44BB of the Act, it is clear that reimbursement of service tax ought not to be included in the aggregate of the amounts specified in clauses (a) and (b) of Section 44BB(2), as it is not an amount received by the assessee on account of services provided by them in the prospecting, extraction or production of mineral oils.

30. Section 43B, (on which reliance is placed by Mr. H.M. Bhatia, learned Senior Standing Counsel for the Income-Tax), provides for certain deductions to be made only on actual payment and, thereunder, notwithstanding anything contained in any other provision of the Act (which would include Section 44BB), a deduction, otherwise allowable under the Act, in respect of (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him. Explanation (2) of Section 43B provides that, for the purposes of clause (a), as in force at all material times, "any sum payable" means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

31. In terms of clause (a) of Section 43B, an assessee can claim deduction, towards tax or duty, only in the previous year in which it is actually paid. The assessee can claim deduction, under Section 43B(a), only on actual payment of tax and duty, in computing its income under Section 28. As noted hereinabove, Section 44BB would prevail notwithstanding anything to the contrary contained in, among others, Section 28 which refers to income chargeable to tax under the head **"profits and gains of business or profession"**. In view of the legal fiction created by Section 44BB(1), ten percent of the aggregate of the amounts referred in Section 44BB(2) should be deemed to be the income chargeable to tax under the head **"profits and gains of business or profession**", without resorting to the mode of computation prescribed under Sections 28 to 41 and Section 43A of the Act. Section 29 stipulates that the income, referred to in Section 28, shall be computed in accordance with the provisions contained in Sections 30 to 43D (evidently including Section 43-B) which, among others, are the permissible deductions in computing the income referred to in Section 28. All that Section 43-B(a) stipulates is that no deduction can be claimed on account of

any tax, unless the tax is paid in the said previous year. In effect, the assessee cannot claim the benefit of deduction of tax, in computing its income from profits and gains of business, unless it has paid the tax to the Government.

32. As noted hereinabove, Section 44BB does not permit any deduction. 10% of the aggregate amount paid to the assessee, as consideration for the services rendered by it and the facilities provided by it in the prospecting or extraction or production of mineral oils in India, is straightaway required to be treated as income from profit and gains of business of the assessee without any amount being deducted therefrom. The question is not whether reimbursement of service tax, paid by the assessee to the Government earlier, can be claimed by it as a deduction in computing its income under the head "Profit and gains of business or profession" (since Section 44BB would prevail notwithstanding anything to the contrary under Sections 28 to 41 and 43 and 43A), but whether the amount, reimbursed by the service-recipient-ONGC to the assessee-service provider, paid earlier by the assessee as service tax to the Government, would form part of the amount paid to the assessee on account of services and facilities in connection with, or supplying plant and machinery on hire used, in the prospecting for, or extraction or production of, mineral oils. As shall be elaborated later in this order, reimbursement of service tax is not the amount paid to the assessee on account of services and facilities provided in terms of Section 44BB, and such an amount cannot be included in computing the deemed income of the assessee. Since the benefit of deduction of tax can be claimed by the assessee in view of Section 43B(a), only in computing its income under Section 28, and the provisions of Section 44BB would prevail notwithstanding anything contained in, among others, Section 28 also, Section 43B(a) has no application in computing the presumptive income under Section 44BB of the Act.

(II) **CAN SERVICE TAX BE PASSED ON TO THE SERVICE RECEPIENT :**

33. Sri H.M. Bhatia, learned Senior Standing Counsel for Income Tax, would submit that service-tax is a duty levied on the services rendered,

and on the service provider; payment of service-tax is linked to the provision of services; if there is no service, there would be no service-tax; a service provider is required to pay service tax, to the Central Government, on the gross value of the services provided by him; the service tax paid by him to the government is a statutory payment; he is allowed to recover the same from his customers; the amount paid by the customer to the service provider, against service tax, is however not a statutory payment; it is purely contractual; if the service provider does not receive or charge service tax from his customer, he cannot say that he would not pay service tax to the Government; he is obligated to pay service tax irrespective of whether or not he charges it from his customers; the Finance Act, 1994 fastens liability to pay service tax on the service provider; and the service provider is not discharged of his obligation to pay the tax, merely because the service receiver does not pay it to him.

34. On the other hand Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessees, would submit that, under the contract with the ONGC, the asseessees were paid a daily hire rate for hire of the rig; service tax is a levy which is statutorily imposed under the Finance Act, 1994; it is a separate and independent amount payable to the Government of India; it is not beneficially payable to the assessee as a charge for its services / hire; the service tax recovered by the assessee from the ONGC was as a trustee/ agent for and on behalf of the Government; it should not be considered as part of the receipts on account of provision of service; the service tax collected by the assessee from the other contracting party (i.e. ONGC), and paid to the government, is not the amount paid to the assessee for rendering services in India; under the service tax law in India, the charge of service tax is always on the services rendered; the amount collected as service tax cannot, therefore, form part of the total receipt/revenue of the assessee for the purpose of Section 44BB of the Act; service tax is a species of indirect tax and can be recovered from the recipient; the charge is on the service being provided, and the service provider merely collects the same from the service recipient to be passed on to the Government; the amounts collected can never be retained; the service provider has the right to recover

service tax from the service recipient; it is not disputed that the assessee has paid service tax to the Government of India; and even if the service tax collected by the assessee, and paid to the government, is considered a reimbursement to the assessee, it is not an amount paid to the assessee on account of the services and facilities being provided by the assessee to the ONGC.

35. The primary source of revenue for the State are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is a tax on imports. **(All India Federation of Tax Practitioners[49]; Pearey Lal Bhawan Association[50]).** The Central Government derived its authority, from the residuary Entry 97 of the Union List, to levy tax on services. The legal backup for the Finance Act, 1994 was provided by the introduction of Article 268A in the Constitution by the Constitution (Eighty-eighth Amendment) Act, 2003 which stated that tax on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax. **(All India Federation of Tax Practitioners[49])**.

36. Tax falls on the activity which is the subject-matter of service tax. Under the Act, the taxable event is each exercise undertaken by the service-provider. The principle of equivalence equates 'service tax' to Central Excise Duty, one taxes the provision of services, and the other production of goods. **(All India Federation of Tax Practitioners[49])**. Just as excise duty is a tax on the value addition on goods, service tax is on the value addition by rendition of services. Broadly 'services' fall into two categories, namely, property based services and performance based services. **(All India Federation of Tax Practitioners[49])**. Service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals, etc. **(Pearey Lal Bhawan Association[50]; All India Federation of Tax Practitioners[49])**.

37. Chapter V of the Finance Act, 1994 and Chapter VA of the Finance Act, 2003 relate to Service Tax. Section 64(3) therein stipulates that Chapter V shall apply to taxable services provided on or after the commencement of this Chapter. Section 65(7) defines "assessee" to mean a person liable to pay service tax, and includes his agent. Section 66, as substituted by the Finance Act, 2007 w.e.f. 01.06.2007, relates to the charge of service tax and stipulates that there shall be levied a tax at the rate of twelve per cent of the value of taxable services referred to in the sub-clauses of clause (105) of Section 65 and shall be collected in such manner as may be prescribed. A proviso was inserted thereto by the Finance Act, 2012 w.e.f. 01.06.2012. In terms thereof, the provisions of Section 65 shall not apply with effect from such date (01.07.2012) as the Central Government may, by notification, appoint.

38. Section 66B, inserted by the Finance Act, 2012 w.e.f. 01.07.2012, relates to the charge of service tax on and after the Finance Act, 2012. The said Section provides that there shall be levied a tax at the rate of fourteen per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another, and collected in such manner as may be prescribed. Section 68 relates to payment of service tax. Sub-section (1) thereof stipulates that every person, providing taxable service to any person, shall pay service tax at the rate specified in section 66B in such manner, and within such period, as may be prescribed. Section 69 relates to registration, and sub-section (1) thereof provides that every person, liable to pay service tax under Chapter V or the Rules made thereunder, shall, within such time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise. Section 70 relates to furnishing of returns, and sub-section (1) thereof stipulates that every person, liable to pay service tax shall himself assess the tax due on the services provided by him, and shall furnish to the Superintendent of Central Excise a return in such form and in such manner and at such frequency as may be prescribed.

39. Section 73A(1) stipulates that any person who is liable to pay service tax, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service, from the recipient of taxable service as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government. Section 73A(2) stipulates that where any person, who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government. Section 73A(3) stipulates that where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2), and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government. Section 83 makes certain provisions of the Central Excise Act applicable, and thereunder the provisions of, among others, Sections 12A and 12B of the Central Excise Act shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise.

40. Service tax is a value added tax which, in turn, is a general tax which applies to all commercial activities involving provision of services. It is also a destination based consumption tax leviable on services provided within the country. **(All India Federation of Tax Practitioners[49])**. Service Tax is not a charge on the business, but on the consumer, and it is leviable only on services provided within the country. **(All India Federation of Tax Practitioners[49])**. Service tax is levied by reason of the services which are offered. The imposition is on the person rendering the service. As it is an indirect tax, it may be passed on to the customer, but as far as the levy and assessment is concerned it is the person rendering the service who alone can be regarded as an assessee and not the customer. **(Laghu Udyog Bharati[51])**.

41. If the overall object of the levy is taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized. **(Pearey Lal Bhawan Association[50])**. The charge of tax, under the Finance Act, is on the person who is responsible for collecting the service tax. He is the person who provides the service. **(Laghu Udyog Bharati[51])**. Section 68 does not alter or change the charge of service tax levied under Section 66, which is on the person responsible for collecting service tax. **(Laghu Udyog Bharati[51])**.

42. As noted hereinabove Section 83 relates to the application of certain provisions of the Central Excise Act, which include Sections 12A and 12B. Section 12-A of the Central Excise Act provides that, notwithstanding anything contained in the Act, or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Section 12-B provides that every person who has paid the duty of excise on any goods under the Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Although there is no explicit provision to that effect, enabling the service provider to pass on the service tax component, there is sufficient internal indication in the Act, through Section 83 of the Finance Act read with Section 12A and Section 12B of the Central Excise Act, suggesting that the levy is an indirect tax, which can be collected from the user. **(Pearey Lal Bhawan Association[50])**.

43. The provider of the service, i.e. the assessee, can collect service tax from the users of the service as contemplated under Sections 12A and 12B of the Central Excise Act, 1944. **(All India Tax Payers Welfare Association[52]**; **Pearey Lal Bhawan Association[50])**. Like excise duty and sales tax, service tax is also an indirect tax and is recovered by the assessee

on behalf of, and as the agent of, the Government **(Lakshmi Machine Works[53])** at such rates as are specified. Neither the State nor the agent is entitled to collect tax at a rate higher than that specified. **(M/s Saraswati Abharansala[54])**. When an assessee recovers indirect tax (such as excise duty, sales tax or service tax), it is required to pay the such tax to the appropriate Government within the stipulated time. In the meanwhile, the assessee holds the money not as the owner, but in trust for the Government. **(Core Healthcare Ltd.[55]; Vijay Mills Co. Ltd.[56])**.

44. The aforesaid provisions of Chapter V of the Finance Act obligate the assessee (a service provider registered under the Act) to pay service tax on the amount received as consideration for the services rendered by them to the service recipient. Since service tax, an indirect tax, can be passed on by a service provider to the service recipient, reimbursement thereof, by the service recipient to the service provider, cannot be treated as the presumptive income, of the service provider under Section 44BB of the Act. Cases where the service provider does not pay service tax to the Government, though it has received certain amounts from the service recipient styled as “reimbursement of service tax”, would stand on a different footing as retention of such amounts by the service provider would not only attract the penal provisions of Chapter V of the Finance Act, but would also amount to unjust enrichment. In such cases, the service provider is penalized by casting a no-fault or absolute liability to ‘cough up’ to the State the total 'unjust' taking snapped up and retained by him ‘by way of tax’ where tax is not so due from him. **(R.S. Joshi Vs. Ajit Mills[57];** and **Mafatlal Industries Ltd.[58])**.

45. Service tax is levied, under the Finance Act, 1994, on services. Service tax is, therefore, a tax on “service”, and does not form part of the consideration paid for the services rendered, much less services rendered in connection with the prospecting, extraction or production of mineral oils. Reimbursement of service tax by the service recipient to the service provider, representing the amount of tax already paid by the service provider to the Government, would not constitute a part of the amount received for

the services rendered by the service provider-assessee to the service recipient-ONGC, much less a part of the amount received for services rendered by the assessee in the prospecting for or the extraction or production of mineral oils.

(III) **SECTION 44BB(3) : ITS SCOPE :**

46. Sri H.M. Bhatia, learned Senior Standing Counsel for Income Tax, would submit that, assuming that there was no provision like Section 44BB in the Statute, the assessee would have shown reimbursement of service-tax as receipt in its financials, and would have claimed payment of service tax as expenses; the same option has been provided by Section 44BB(3) of the Act which specifies that, if the assessee claims an income less than 10% of the gross receipts, it should maintain books of accounts, and get it audited; and reimbursement of service-tax, received by the contractor, is includible in the gross receipts for the purposes of Section 44BB(1) of the Act.

47. On the other hand Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessee, would submit that the 'service tax' amount received from the customers is a 'pure reimbursement' without having any income element; such amount would not be liable to income tax in India; reimbursement does not have the character of income, both under the general Income Tax law and under Section 44BB; Section 44BB does not include amounts paid towards reimbursement as they are not on account of service and facilities; pure reimbursement, without any income element, cannot represent income under the general law; and, thus, such amount is not liable to income tax in India.

48. Section 44BB(3) of the Act also contains a non-obstante clause, and would prevail notwithstanding anything to the contrary in Section 44BB(1) of the Act. Section 44BB(3) enables an assessee to claim a lower income under the head profits and gains, than the deemed income specified in Section 44BB(1) and (2), if it keeps and maintains such books of accounts, and other documents, as are required under Section 44AA(2), and

gets its accounts audited and furnishes a report of such audit as is required under Section 44AB. In case an assessee complies with these requirements, the assessing officer is, thereafter, required to 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.

49. In effect, Section 44BB(3) gives the assessee an option. Instead of having ten percent of the aggregate of the sum, specified in clauses (a) and (b) of Section 44BB(2), treated as its income from profits and gains from business, it is open to the assessee to comply with the conditions stipulated in Section 44BB(3) and, thereafter, claim lower income, under the head profits and gains, than the deemed income from profits and gains specified in Section 44BB(1). In case an assessee opts to be subjected to tax under sub-section (3) of Section 44BB, computation of its income, from profits and gains from business, will be made in accordance with the provisions specified in Sections 28 to 44DB, under the head (D) "Profits and gains from business or profession" in Chapter IV of the Act. In case the assessee exercises its option under Section 44BB (3), it is entitled to claim deduction under Section 43B (a) for the service tax paid by it to the Government, and add the amount received as reimbursement of service tax in its receipts. It is unnecessary for us to examine whether or not receipt of such an amount would constitute income as, in any event, it cannot be deemed to be the presumptive income of the assessee under Section 44BB, as the said amount has not been paid by the ONGC to the assessee for providing services in connection with the prospecting, extraction or production of mineral oils.

(IV) **CIRCULARS ISSUED BY THE CBDT: ITS EFFECT**:

50. Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessee, would submit that the Delhi High Court in **Mitchell Drilling International (P) Ltd.**[48], has noted that, qua service tax obligations and provisions, the position has been made explicit by the CBDT itself in two of its circulars i.e. **Circular No. 4/2008 dated 28th April 2008,** and **Circular**

No. 1/2014 dated 13th January 2014; and Circulars issued by CBDT are binding on the tax authorities, and should be followed and respected by the tax department.

51. Section 119 of the Act empowers the CBDT to issue such orders, instructions and directions to other income-tax authorities, "as it may deem fit for proper administration of the Act". Such authorities, and all other persons employed in the execution of the Act, are bound to observe and follow such orders, instructions and directions of the CBDT. The powers of the CBDT are wide enough to enable it to grant relaxation from the provisions of several Sections of the Act. **(Azadi Bachao Andolan[59])**. The circulars and instructions, issued by the CBDT, have statutory force, are binding on every income-tax authority **(Anjum M.H. Ghaswala[60]; Azadi Bachao Andolan[59])**, and are in the nature of contemporanea expositio furnishing legitimate aid to the construction of the Act. **(K.P. Varghese[61];** and **Azadi Bachao Andolan[59])**.

52. Circulars of the CBDT, issued in the exercise of its powers under Section 119, are legally binding on the revenue, and this binding character attaches to the circulars even if they are found not to be in accordance with the correct interpretation. **(K.P. Varghese[61]; Azadi Bachao Andolan[59]**; **Navnit Lal C. Javeri[62]; Ellerman Lines Ltd.[63];** and **UCO Bank, Calcutta[64])**. The benefit of such circulars is admissible to the assessee even though the circulars might have departed from the strict tenor of the statutory provision. **(Keshavji Ravji and Co.[36]** and **UCO Bank, Calcutta[64])**.

53. The CBDT has the power to tone down the rigour of the law, and ensure a fair enforcement of its provisions, by issuing circulars in the exercise of its statutory powers under Section 119 of the Income Tax Act. The authority, which wields the power for its own advantage under the Act, is given the right to forego the advantage when required, and to wield it in a manner it considers just by relaxing the rigour of the law or in any other permissible manner as laid down in Section 119. The power is given for the

purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal laws so that undue hardship may not be caused to the assessee, and the fiscal laws may be correctly applied. **(UCO Bank[64]; Keshavji Ravji and Co.[36]; Azadi Bachao Andolan[59];** and **Ellerman Lines Ltd.[63])**. Bearing these aspects in mind let us now examine the effect of Circulars dated 28.04.2008 and 13.01.2014 issued by the CBDT in the context of deduction of tax at source under Sections 194-I and 194-J of the Act respectively.

54. Section 194-I of the Act relates to rent, and thereunder any person, who is responsible for paying to a resident any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, deduct income-tax thereon at the specified rate. In its Circular No.04 of 2008 dated 28.04.2008, the CBDT noted that representations had been received seeking clarification as to whether the TDS provisions, under Section 194-I of the Act, would be applicable on the gross rental amount payable (inclusive of service tax) or net rental amount payable (exclusive of service tax). The CBDT then referred to the definition of "rent" and observed that, as per the provisions of Section 194-I, tax was deductible at source for income by way of rent paid to any resident; service tax paid by the tenant did not partake the nature of "income" of the landlord; the landlord only acts as a collecting agency for the Government for collection of service tax; and tax deducted at source (TDS), under Section 194-I of the Act, would be required to be made on the amount of rent paid/payable without including the service tax.

55. Section 194-J of the Act relates to fees for professional or technical services and, under sub-section (1) thereof, any person, who is responsible for paying to a resident any sum by way of (a) fees for professional services, or (b) fees for technical services, or (d) any sum referred to in clause (va) of Section 28, shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or

by issue of a cheque or draft or by any other mode, deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein. By its Circular No. 01 of 2014 dated 13.01.2014, the CBDT issued a clarification on the question whether TDS, under Chapter XVII-B of the Act, should be made on the service tax component comprised of payments made to residents. The CBDT held that representations/letters had also been received seeking clarification whether such principles laid down in Circular No.04 of 2008 dated 28.04.2008 could be extended to other provisions of the Act also; its attention had also been drawn to the judgment of the Rajasthan High Court in **Rajasthan Urban Infrastructure**[65], holding that if, as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately, and is not included in the fees for professional services or technical services, no TDS is required to be made on the service tax component under Section 194-I of the Act; and, in the exercise of its powers under Section 119 of the Act, it had decided that wherever, in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/payable without including such service tax component.

56. Tax is required to be deducted at source, under Section 194-I of the Act, with respect to income paid by way of rent. Likewise tax is required to be deducted at source under Section 194-J by the service recipient when fees are paid towards professional or technical services rendered by the service provider. It is only because service tax, on such payment, was not "income" has the CBDT, in its Circulars dated 28.04.2008 and 13.01.2014, directed that tax should be deducted at source only on the net amount, paid towards rent or as fees for services rendered by the service provider, i.e. the total amount paid less service tax. The Circulars issues by the CBDT reflect its understanding that service tax paid by the assessee is not "income". While it is true that, unlike "income" computed in terms of Sections 28 to 43D under Chapter IV of the Act, Section 44BB(2) is a special provision and requires ten percent of the gross receipts to be treated as income, the

amount so determined is nonetheless the presumptive income of the assessee and should be deemed to be its income in terms of Sections 4, 5 and 9 of the Act. The circulars issued by the CBDT does support the submission, urged on behalf of the assessee, that service tax would not form part of the amounts referred to in clauses (a) and (b) of Section 44BB(2) of the Act.

(V) FAILURE OF THE DEPARTMENT TO PREFER AN APPEAL AGAINST THE JUDGMENT OF THE DELHI HIGH COURT: ITS CONSEQUENCES:

57. Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessees, would submit that the Income Tax Appellate Tribunal, in ITA 18 of 2018, has followed the binding judgement of the jurisdictional Delhi High Court in **Mitchell Drilling International (P.) Ltd.**[48]; the Tribunal, under the territorial limits of Delhi, is bound by the judgment of the Delhi High Court, and has not committed any error in law in following the same; it has also been accepted that the Department did not appeal against the decision of the Delhi High Court in **Mitchell Drilling International (P.) Ltd.**[48]; as the Revenue has not challenged the law laid down by the Delhi High Court, and has accepted it, it is not open to it to the challenge the correctness of this decision before another High Court, in the case of another assessee, without just cause.

58. If the Revenue has not challenged the correctness of the law laid down by the High Court, and has accepted it in the case of one assessee, it is not then open to the Revenue to challenge its correctness in the case of other assessees, without just cause. **(Berger Paints India Ltd.**[66]**; Kammudini Narayan Dalai**[67]**; Narendra Doshi**[68]**;** and **Shivsagar Estate**[69]**)**. Save just cause, the Revenue cannot file an appeal in one case while deciding not to file an appeal in another. **(J.K. Charitable Trust**[70]**; Karamchari Union Vs. Union of India**[71]**; Kaumudini Narayan Dalal**[67] and **Shivsagar Estate**[69]**)**.

59. That does not, however, mean that merely because, in some cases, the revenue has not preferred an appeal, it is barred from preferring an appeal in another case where there is just cause for doing so, or it is in public

interest to do so, or when divergent views are expressed by different High Courts. **(J.K. Charitable Trust[70]; and C.K. Gangadharan[72])**. There may be cases where, because of the small amount of revenue involved, no appeal is filed. Likewise policy decisions are taken not to prefer appeals where the revenue involved is below a certain amount. Similarly, where the effect of the decision is revenue neutral, there may not be any need for preferring an appeal. All these certainly provide the foundation for making a departure. **(J.K. Charitable Trust[70])**. Where different High Courts have taken different views, and some of the High Courts have decided in favour of the revenue, the same is a just cause for the revenue to prefer an appeal. **(C.K. Gangadharan[72]; J.K. Charitable Trust[70])**. If the fact situation changes then the revenue can certainly prefer an appeal notwithstanding that, for some years, no appeal was preferred. However if the fact situation is the same, then no appeal can be preferred. **(C.K. Gangadharan[72])**.

60. In **Kaumudini Narayan Dalai[67]**, the Supreme Court held that, if the Revenue did not accept the correctness of the judgment in **Pradip Ramanlal Sheth[73]**, it should have preferred an appeal thereagainst; and it was not open to the Revenue to accept that judgment in the case of the assessee in that case, and challenge its correctness in the case of other assessees without just cause. In **Narendra Doshi[68]**, the Supreme Court observed that the Tribunal, whose decision the High Court had affirmed, had relied upon the decision of the Gujarat High Court in **D. J. Works[74]**, which had been followed by the same High Court in **Chimanlal S. Patel[75]**; the Revenue had not challenged the correctness of the two decisions of the Gujarat High Court; and they must, therefore, be bound by the principles laid down therein.

61. In **Mitchell Drilling International Pvt. Ltd.[48]**, the question which arose for consideration was whether service tax, collected by the assessee from the person to whom it had provided services, and which was passed by them on to the Government, could 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? The

Division Bench of the Delhi High Court held that the decision of the Supreme Court in **Lakshmi Machines Works**[53] was sufficient to answer the question in favour of the assessee; the service tax collected by the assessee did not have any element of income and, therefore, could not form part of the gross receipts for the purposes of computing 'presumptive income' of the assessee under Section 44BB of the Act; the Division Bench of the Uttarakhand High Court, in **M/s Schlumberger Asia Services Ltd.**[2], had 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 computing 'presumptive income' of the assessee under Section 44BB of the Act; service tax collected by the assessee, on the amount paid to it for rendering services, is not to be included in the gross receipts in terms of Section 44BB(2) read with Section 44BB(1); service tax was not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it; and the assessee was only collecting service tax for passing it on to the government. No appeal has, admittedly, been preferred by the Revenue to the Supreme Court against the Division Bench judgment of the Delhi High Court in **Mitchell Drilling International Pvt. Ltd.**[48].

62. Except to state that the said judgment needs re-consideration, no justifiable cause has been shown as to why this Court should take a view different from that of the Delhi High Court, in **Mitchell Drilling International Pvt. Ltd.**[48], more so when the Division Bench of the Delhi High Court has taken a view similar to that of a Division Bench of this Court in **M/s Schlumberger Asia Services Ltd.**[2]. As the revenue has not been able to show just cause for this Court to take a different view, we see no reason to differ with the Division Bench judgment of the Delhi High Court that reimbursement of service tax is not an amount paid to the assessee on account of providing services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India.

(VI) **OTHER CONTENTIONS**:

63. As we have, for reasons aforementioned, held in favour of the assessee and against the Revenue, it is unnecessary for us to examine the submission of Sri Poras Kaka, learned Senior Counsel appearing on behalf of the assessee, that the Income Tax Act, being a Central / Federal law, warrants consistency in interpretation and approach to be adopted; and the view adopted by one High Court in India should be followed by all other High Court also.

(VII) **CONCLUSION :**

64. We answer the reference in favour of the assessee, and against the Revenue, holding that the amount reimbursed to the assessee (service provider) by the ONGC (service recipient), representing the service tax paid earlier by the assessee to the Government of India, would not form part of the aggregate amount referred to in clauses (a) and (b) of sub-section(2) of Section 44BB of the Act.

65. We direct all these appeals to be listed before the Division Bench, hearing appeals under Section 260-A of the Act, for its disposal in terms of this order.

(Alok Singh, J.) **(Sudhanshu Dhulia, J.)** **(Ramesh Ranganathan, C.J.)**
12.04.2019 **12.04.2019** **12.04.2019**

Rahul