IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH `E' : NEW DELHI)
BEFORE SHRI U.B.S. BEDI, JUDICIAL MEMBER AND
SHRI J.S. REDDY, ACCOUNTANT MEMBER

ITA No.698/Del./2012
(Assessment Year : 2008-09)

DDIT, Circle 3(2), New Delhi.	**Vs.**	**M/s Mitchell Drilling International Pty. Ltd., C/o Nangia & Co., Suite-4A, Plaza, M6 Jasola, New Delhi-110025. (PAN/GIR No.AADCM9904H)**
(Appellant)		**(Respondent)**

Assessee by : Shri Amit Arora, CA
Revenue by : Shri Vijay Babu Vasanta, Sr.DR

ORDER

PER U.B.S. BEDI, J.M.

This appeal of the Revenue is directed against the order passed by the CIT(A)-XXIX, New Delhi, dated 21.10.2011, relevant to assessment year 2008-09, whereby action of the Ld.CIT(A) in holding that service tax is not part of the gross receipts that is to be computed for the purposes of taxation u/s 44BB of the I.T. Act, 1961 has been challenged..

2. Facts indicate that the assessee is a company incorporated in Australia. It was engaged in the business of providing equipment on hiring and manpower etc. for exploration and production of mineral oil and natural gas. During the year under appeal. the assessee received following amounts from its various customers:

S.No..	Particulars	Amount (in Rs.)
1.	Income from Drilling Operations	13,95,28,845
2.	Income from exploration of Mineral Oil	2,40,33,727
3.	Reimbursement of mobilization expenses	1,00,86,965

3. The assessee offered its income to tax on gross basis under sub-section (1) of section 44BB and 10% of the gross receipts was deemed to be the income chargeable to tax. It, however, did not include the amount of Rs.2,09,24,553/- in the gross receipts, being service tax received from its customers, while computing its total income. However, the Assessing Officer rejected the contention of the assessee and added the amount of service tax collected by the assessee to its gross receipts to compute its total income.

4. Assessee took up the mater in appeal and submitted before first appellate authority that service tax is levied and collected by the service provider as an agent of the Government and it is held by him in trust, as custodian/trustee for the Government, therefore same could not be added in the total receipt for the purposes of determination of presumptive profit u/s 44BB of the Act. Since service tax is levied and collected by the service provider as an agent of the Government which he holds in trust as custodian/trustee for the Government, Service Tax is collected by the service provider and paid to the Govt. Thus the service provider is a conduit/mechanism for collecting service tax from the service recipient. The same does not become the income of the service provider. In other words, the service provider acquires no title to the receipts by way of service tax. There is no element of income, much less profits accruing to the service provider from the levy and collection of service tax. The same is a statutory levy mandated by law. Therefore, it cannot be included in the total receipts for determining presumptive profit u/s 44BB of the Act.

5. Ld.CIT(A) while considering and accepting the plea of the assessee has concluded to allow the appeal of the assessee giving elaborately the basis and reasoning as per paras.5 to 5.9 of his order.

6. Aggrieved by this order of CIT(A), department has come up in appeal and while relying upon decision of Authority for Advance Ruling in the case of Siem Offshore Inc., In re, (2011) 337 ITR 207 (AR) dated 25.7.2011, has pleaded for reversal of the order passed by the CIT(A) and restoring that of the Assessing Officer. Since service tax is part of receipt, therefore, for presumptive income, same has rightly been added by the

Assessing Officer and reliance was also placed in the case of Technip Offshore Contracting BV (2009) 29 SOT 33 (Del.) and so far as Uttrakhand High Court judgment is concerned, which has been relied upon by the CIT(A), it was submitted that the same is not with regard to service tax, but relating to custom duty, therefore, distinguishable on facts. As such order of CIT(A) needs reversal which may be reversed.

7. Ld.Counsel for the assessee while relying upon ITAT, 'G' Bench decision, which is directly on the point that service tax is to be excluded for computing presumptive income u/s 44BB of the Act, and in that decision various earlier decisions have been considered including that of Hon'ble Uttrakhand High Court decision. Therefore, it was pleaded for confirmation of the impugned order.

8. We have heard both the sides, considered the material on record and find that similar issue arose before 'G' Bench of the tribunal in the case of Sedco Forex International Drilling Inc. vs. Addl. DIT (International Taxation) in ITA No.5284/Del./2011, has decided the issue in favour of the assessee and relevant portion of the decision, which has been dealt with by the tribunal in its order as under:

> 4. ……..Regarding reimbursement of service tax, the ld. AR pointed out that though the ITAT Delhi Bench in their decision in the case of DIT (International Taxation) Vs. Technip Offshore Contracting BV,29 SOT 33(Delhi) concluded that service tax collected by the assessee being directly in connection with services or facilities or supply specified u/s 44BB of the Act provided by the assessee to ONGC, have to be included in the total receipts for the purpose of determination of presumptive profit u/s 44BB, subsequently, Hon'ble Uttarakhand High Court decision dated 24th July, 2009 in the case of DIT & Anr. Vs. Schlumberger Asia Services Ltd. ,317 ITR 156(Uttarakhand) concluded that reimbursement of custom duty paid by the assessee could not form part of amount for the purpose of deemed profits u/s 44BB unlike the other amounts received towards reimbursement. Following the view in this decision, Mumbai Bench in their decision dated 20.4.2011 in I.T.A. no.8845/Mum/2010 in the case of Islamic Republic of Iran Shipping Lines Vs. DCIT,2011-TOII-77-MUM-INTL, held that service tax being a statutory liability, would not involve any element of profit and a service provider having collected the amount on behalf of the Government, accordingly, the same could not be included in the total receipts for determining the presumptive income, the ld. AR added. On the other hand, the ld. DR supported the findings of the AO.

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions relied upon by the ld. AR.. We find that Hon'ble jurisdictional High Court in their aforesaid decision Halliburton Offshore Services Inc. (supra) while adjudicating an identical issue relating to reimbursement of freight & transport charges in respect of equipment, concluded as under:-

> "5. Sec. 44BB provides that the deemed profits and gains under sub-s. (1) shall be @ 10 per cent of the aggregate amount specified in sub-s. (2). We proceed to analyze sub-s. (2). Clause (a) of sub-s. (2) refers to the amounts, (A) paid to the assessee (whether in or out of India) 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) payable to the assessee (whether in or out of India) 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. Clause (b) of sub-s. (2) refers to the amounts, (A) received by assessee in India 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, and (B) deemed to be received by the assessee in India 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.
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> 6. Thus, it is clear from the perusal of s. 44BB that all the amounts either paid or payable (whether in India or outside India) or received or deemed to be received (whether in India or outside India) are mutually inclusive. This amount is the basis of determination of deemed profits and gains of the assessee @ 10 per cent. Therefore, in our view, the Tribunal fell into error in not appreciating the difference between the amount and the income. Amount paid or received refers 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 s. 2(24) of the IT Act and s. 5 and s. 9 deal with the income and accrued income and deemed income. Sec. 4 is the charging section of the IT Act and definition as well as the incomes referred in ss. 5 and 9 are for the purpose of imposing the income-tax under s. 143 (3). Sec. 44BB is a complete code in itself. It provides by a legal fiction to be the profits and gains of the non-resident assessee engaged in the business of oil exploration @ 10 per cent of the aggregate amount specified in sub-s. (2). It is not in dispute that the amount has been received by the assessee company. Therefore, the AO added the said amount which was received by the non-resident company rendering

services as per provisions of s. 44BB to the ONGC and imposed the income-tax thereon.

5.1 In the light of view taken by the Hon'ble jurisdictional High Court in their aforesaid decision, especially when the ld. AR accepted the position that the issue is squarely covered by the aforesaid decision while no other contrary decision was brought to our notice nor the ld. AR placed any material before us, controverting the aforesaid findings of the DRP and the AO, we have no hesitation in upholding the findings of the AO in the light of directions of the DRP in para 3.2 of their order dated 2nd September, 2011 in respect of reimbursement of amount on account of fuel recharge. In view thereof, ground no. 2 in the appeal is dismissed.

6. As regards reimbursement of amount in respect of service tax, as pointed out by the ld. AR, the ITAT Delhi Bench in their decision in Technip Offshore Contracting BV(supra) concluded that service tax collected by the assessee being directly in connection with services or facilities or supply specified u/s 44BB of the Act provided by the assessee to ONGC, have to be included in the total receipts for the purpose of determination of presumptive profit u/s 44BB of the Act. It is well established that section 44BB of the Act is a special provision, treating 10 per cent of the aggregate amount specified in sub-s. (2) of s. 44BB as deemed profits and gains of such non-resident assessee who is engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils. The amount referred in sub-s. (2) of s. 44BB are the amounts (a) paid to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, (b) payable to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, (c) received by the assessee in India on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India and (d) deemed to be received by the assessee in India on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India. The service tax is a statutory liability like custom duty. Hon'ble Uttarakhand High Court in their decision in Schlumberger Asia Services Ltd.(supra) concluded that reimbursement of custom duty paid by the assessee could not form part of amount for the purpose of deemed profits u/s 44BB unlike the other amounts received towards reimbursement. Following the view in this decision, Mumbai Bench in their decision in Islamic Republic of Iran Shipping Lines(supra)held that service tax being a statutory liability, would not

involve any element of profit and accordingly, the same could not be included in the total receipts for determining the presumptive income. In the light of view taken by the Mumbai Bench, especially when the ld. DR did not place any material before us, controverting the aforesaid findings of the ld. CIT(A) so as to enable us to take a different view in the matter nor brought to our notice any contrary decision, we are of the opinion that service tax paid by the assessee could not form part of amount for the purpose of deemed profits u/s 44BB unlike the other amounts received towards reimbursement……."

9. Since this issue is cov ered by earlier decision of ITAT, 'G' Bench, Delhi, which is on similar point and no contrary or any higher courts' precedent has been cited, therefore, while following the said decision, we uphold the order of Ld.CIT(A) and dismiss the present appeal.

10. As a result, the appeal filed by the department is dismissed.

Order pronounced in open court on 31.08.2012.

Sd/-	Sd/-
(J.S. REDDY)	**(U.B.S. BEDI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : Aug. 31, 2012
SKB
Copy of the order forwarded to:-

1. **Appellant**
2. **Respondent**
3. **CIT**
4. **CIT(A)-XXIX, New Delhi.**
5. **CIT(ITAT)**

Deputy Registrar, ITAT