IN THE INCOME TAX APPELLATE TRIBUNAL
DEHRADUN BENCH, DEHRADUN

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5337/Del/2018 : Asstt. Year : 2015-16

ACIT(Intl. Taxation), Circle-1, Dehradun-248001	Vs	Baker Hughes Singapore Pte., C/o Nangia & Co., 1st Floor, IDA, 46, EC Road, Dehradun-248001
(APPELLANT)		(RESPONDENT)
PAN No. AAACB8516F		

CO No. 165/Del/2018 : Asstt. Year : 2015-16

Baker Hughes Singapore Pte., C/o Nangia & Co., 1st Floor, IDA, 46, EC Road, Dehradun-248001	Vs	ACIT(Intl. Taxation), Circle-1, Dehradun-248001
(APPELLANT)		(RESPONDENT)
PAN No. AAACB8516F		

Assessee by : Sh. Amit Arora, Adv.
Revenue by : Sh. N. S. Jangpangi, CIT DR

Date of Hearing: 11.11.2021		**Date of Pronouncement: 08.02.2022**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue and Cross Objection by the assessee against the order of ld. CIT(A)-2, Noida dated 25.04.2018.

2. Following grounds have been raised by the Revenue:

"(i) Whether on the facts and in the circumstances of the case and in law, the CIT (A) has erred in holding that receipts on account of VAT & Service tax are not includible in gross revenue of the assessee for the purpose of computation of profits under the

presumptive provisions of section 44BB of the I.T. Act, 1961.

(ii) Whether the CIT (A) has erred in not appreciating the fact that section 44BB of the Act is a self-contained code providing for computation of profit at a fixed percentage of gross receipts of the assessee and all the deductions and exclusions from the gross receipts are deemed to have been allowed to the assessee.

(iii) Whether the CIT (A) has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, there is no scope for computing or re-computing the profits by excluding any part of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a presumptive scheme of taxation u/s 44BB of the Act and obviating the need for maintaining accounts for individual receipts, payments etc.

(iv) Whether the CIT (A) has erred in ignoring the ratio of the judgment in the case of M/s Chowringhee Sales Bureau (P) Ltd. (82 ITR 542, SC) wherein the Hon'ble Apex Court has held that the Sales Tax collected by an assessee in the ordinary course of its business forms part of its business receipts. Owing to the inherent similarity in the nature of sales tax and service tax, the ratio of the judgment in the said case is directly applicable to the instant case."

3. The assessee has filed return of income on 01.10.2015 declaring total income of Rs.64,01,97,160/-. Out of the total receipts of Rs.7,08,22,98,205/-, the assessee reduced the receipts on account of service tax & VAT and offered Rs.6,40,19,71,000/- to tax u/s 44BB of the Income Tax Act, 1961 applying dividend profit rate of 10%. The AO made addition on account of service tax and VAT to be treated as part of the gross receipts.

VAT & Service Tax u/s 44BB:

4. The AO held that the receipts on account of service tax and VAT are in the nature of royalty/FTS u/s 9(1)(vi)/9(1)(vii). We have examined the issue of inclusion of service tax and VAT with reference to the provisions of Section 44BB in the light of the judgment of Hon'ble Delhi High Court in the case of Pr. CIT Vs. Mitchell Drilling International Pvt. Ltd. 380 ITR 130 which held as under:

"that for the purposes of computing the presumptive income of the assessee for the purposes of Section 44BB the service tax collected by the assessee on the amount paid to it for rendering services was not to be included in the gross receipts in terms of Section 44BB(2) read with Section 44BB(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 only collected the service tax for passing it on to the Government."

5. Since, the decision of the ld. CIT(A) is based on the established jurisprudence, we decline to interfere with the order of the ld. CIT(A) on this issue.

CO No. 165/Del/2018

Interest Income:

6. The AO taxed the interest on Income Tax Return @40% whereas the assessee pleaded that it should be taxed @15% in terms of Article 11 of Indo-USA DTAA.

7. Brief facts of the case on this issue are that appellant has received interest income of Rs. 21,416,478/- on income tax refund in the relevant year under consideration. The Assessing Officer has held that the interest income received by the appellant on account of income tax refund is taxable at Maximum Marginal Rate of 40 per cent.

8. Before us, the ld. AR submitted that it is a tax resident of United States of America and entitled to benefits of the Double Tax Avoidance Agreement ("DTAA") between India and United States. The interest received on the income-tax refund was claimed to be chargeable in terms of Article 11 of the Indo-US DTAA. It was argued that under the Act, the assessee was liable to be taxed on the amount under the residuary head and not under the business head. In view thereof, it was argued that the indebtedness cannot be said to be effectively connected with the business carried on by the PE. Since the domestic law was equally applicable to the assessee, therefore, it cannot be said, that the indebtedness was connected with the PE of the assessee. It was argued that the assessee was entitled to the beneficial provision of or interpretation under the domestic law in view of the provision contained in section 90(2) of the Act. Therefore, the PE was not the creditor of the income-tax department. Accordingly, the indebtedness was not effectively connected with the PE. It was further mentioned that a debt-claim in respect of which interest was paid will be effectively connected with the PE and will form part of its business assets, if the economic ownership of the debt-claim, was allocated.

9. The ld. DR argued that the assessee was carrying on business through its Permanent Establishment in India and

since interest income was not covered by the provision contained in section 44BB of the Act, he held that the AO was right in taxing the interest income as business income. It was argued that the interest had not arisen out of the business transactions, and it was received in the course of the business of the PE and, therefore, there was a direct nexus of the indebtedness with the assets of the business. It was submitted that if the assessee opted to be taxed under the DTAA, the classification of income was not required to be done under the five heads. In fact, no head of income had been prescribed under the treaty. Therefore, it cannot be said that the provisions contained in paragraph no. 2 of Article XI were analogous to the provisions contained in the Act regarding computation of income under the residuary head. It was argued that the expression used was to the effect that indebtedness was effectively connected with the PE and not that the interest income was effectively connected with the PE.

10. Heard the arguments of both the parties and perused the material available on record.

11. As per the provisions of Sec 90(2), in a case where the provisions of the DTAA apply to an assessee, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. Although the words "more beneficial" has not been elaborated upon by any of the contending parties, it is clear that application of the provision can be made after ascertaining- (i) tax payable by the assessee under the DTAA, and (ii) tax payable by the assessee under the Act. If tax payable under the Act is lesser than the tax payable under the treaty, it can be concluded that the provisions of the Act are more beneficial to the assessee. However, if the tax payable by

the assessee under the treaty is lesser than the tax payable under the Act, the assessee shall have the benefit of the DTAA. If we compute the income of the assessee under the head "other sources", the net income by way of interest received from the income-tax department shall amount to Rs. 21,416,478/-. This amount will be taxed at the rate applicable to a foreign company, which is more than 15%. Therefore, on making the assessment of tax under the treaty and the under the Act, it will be found that tax payable under the Act is more than the tax payable under the treaty. Accordingly, the aforesaid provision will come to the aid of the assessee to come to an automatic conclusion, without exercise of any option, that it should get the benefit under the DTAA. No other consideration is material for this purpose as ultimately what is to be seen is whether the provisions of the Act are more beneficial to the assessee or not. Accordingly, it can be held that the assessee is entitled to the benefit under the treaty.

12. Article VII deals with taxation of business profits and also provides for mechanism to compute the profits of the business. Paragraph no. 4 relieves the source State from the rigors of paragraphs nos. (1) and (2) in case the interest is found to be effectively connected with the PE, even if it is not in the nature of business income of the assessee but is effectively connected with the PE. If interest is the business income as a matter of fact, such income falls automatically within the ambit of Article VII without even taking recourse of paragraph no. 4. Therefore, this paragraph contemplates a different condition upon whose satisfaction interest becomes taxable under Article VII. It is an accepted canon of interpretation that no part of the statute should be rendered null and void by interpretation. Therefore,

some meaning has to be placed on the contents of this paragraph.

13. Interest income need not be necessarily business income in nature for establishing the effective connection with the PE because that would render provision contained in paragraph 4 of Article XI redundant Thus, there may be cases where interest may be taxable under the Act under the residuary head and yet be effectively connected with the PE. The bank interest in this case is an example of effective connection between the PE and the income as the indebtedness is closely connected with the funds of the PE.

14. The relevant Article of Indo-US DTAA with regard to interest are as under:

"ARTICLE 11 - Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed : (a) 10 per cent of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company) ; and (b) 15 per cent of the gross amount of the interest in all other cases.

3. Notwithstanding the provisions of paragraph 2 of this Article, interest arising in a Contracting State : (a) and derived and beneficially owned by the Government of the other Contracting State, a political sub-division or local authority thereof, the Reserve

Bank of India, or the Federal Reserve Bank of the United States, as the case may be, and such other institutions of either Contracting State as the competent authorities may agree pursuant to Article 27 (Mutual Agreement Procedure) ; (b) with respect to loans or credits extended or endorsed (i) by the Export Import Bank of the United States, when India is the first-mentioned Contracting State ; and (ii) by the EXIM Bank of India, when the United States is the first-mentioned Contracting State ; and (c) to the extent approved by the Government of that State, and derived and beneficially owned by any person, other than a person referred to in sub-paragraphs (a) and (b), who is a resident of the other Contracting State, provided that the transaction giving rise to the debt-claim has been approved in this behalf by the Government of the first mentioned Contracting State ; shall be exempt from tax in the first-mentioned Contracting State.

4. The term "interest" as used in this Convention means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities, and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds, or debentures. Penalty charges for late payment shall not be regarded as interest for the purposes of the Convention. However, the term "interest" does not include income dealt with in Article 10 (Dividends)."

15. On going through the above, it can be concluded that interest on income tax refund is not effectively connected with the PE either on the basis of asset-test or activity-test. Hence, it is taxable as per the provisions in the Para No. 2 of Article 11 of Indo-US DTAA.

16. In the result, the appeal of the Revenue is dismissed and the Cross Objection of the assessee is allowed.

Order Pronounced in the Open Court on 08/02/2022.

Sd/-	Sd/-
(Amit Shukla)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 08/02/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR