IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA
आयकर अपीलीय अधीकरण, न्यायपीठ – **"C"** कोलकाता,

BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA.420/Kol/2023
&
ITA Nos.466 & 467/Kol/2023
Assessment Years: 2016-17 to 2018-19

Cathay Pacific airways Limited Plot Y-14, Block-EP, Salt Lake, Kolkata-700091. (PAN: AABCC5644E)	Vs.	Assistant Commissioner of Income Tax (IT), Circle-1(1), Kolkata.
(Appellant)		**(Respondent)**

&
ITA.419/Kol/2023
Assessment Year: 2016-17

Hong Kong Dragon Airlines Ltd. Plot Y-14, Block-EP, Salt Lake, Kolkata-700091. (PAN: AABCH6226M)	Vs.	Assistant Commissioner of Income Tax (IT), Circle-1(1), Kolkata.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Pratyush Jhunjhunwala, Advocate
Respondent by : Shri Abhijit Kundu, CIT

Date of Hearing : 03.01.2024
Date of Pronouncement : 09.01.2024

O R D E R

PER BENCH:

All these appeals by the assessee are directed against the separate orders of Ld. CIT(A)-22, Kolkata vide 28.02.2023 (for AY 2016-17), 31.03.2023 (for AYs 2017-18 & 2018-19) and dated 28.02.2023 (for A.Y. 2016-17 arising out of assessment orders passed u/s. 143(3) r.w.s. 144C(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act')

by ACIT (International Taxation), Circle-1(1), Kolkata dated 26.01.2019, 24.01.2020, 10,06,2021 and 26.01.2019 respectively.

2. Shri Pratyush Jhunjhunwala, Advocate appeared on behalf of the assessee. Shri Abhijit Kundu, CIT, DR appeared on behalf of the revenue.

3. In all these four appeals, common issue is raised by the assessee which relates to whether service tax forms part of the gross receipts of the assessee for the purpose of computing its total income on presumptive basis in terms of sec. 44BBA of the Act. Since the issue involved is common, we dispose of all these four appeals by this consolidated order by taking facts from the appeal for AY 2016-17 in ITA No. 420/Kol/2023 in the case of Cathay Pacific Airways Ltd. Observations and findings arrived at in this appeal shall apply *mutatis mutandis* to all the three other appeals before us.

4. Brief facts of the case as culled out from records are that assessee is a non-resident company engaged in the business of airlines service for passengers and cargo. Assessee filed its original return of income on 29.09.2016, reporting total income of Rs.93,53,53,230/- computed on presumptive basis u/s. 44BBA of the Act. A revised return was furnished on 16.11.2017 reporting total income at Rs.1,02,61,34,310/-. In the course of assessment proceedings, Ld. AO sought explanation in respect of gross receipts as disclosed in the revised return and the gross receipts disclosed in the service tax return for which necessary details and explanation were furnished by the assessee.

4.1. However, in respect of exclusion of service tax from the gross receipts, Ld. AO did not accept the claim of the assessee and held that "*amount of service tax paid as service provider to the tune of*

Rs.1,05,33,47,264/- is treated as part of Turnover." Accordingly, the income of the assessee was assessed and computed at Rs.107,88,01,670/- being 5% of gross receipts (including the service tax component referred herein).

5. Aggrieved, assessee went in appeal before the Ld. CIT(A). Before him, detailed and exhaustive submissions were made by the assessee wherein it was contended that service tax collection is not includible in the gross receipts for computing the 'deemed taxable income' since there is no profit element embedded in the service tax collection as the same is collected in a fiduciary capacity (i.e. intrust for the Central Government).

5.1 It was submitted that assessee is engaged in airlines operation in India and pays tax in India on presumptive basis as per section 44BBA of the Act, according to which, 5% of the gross receipts earned by the non-resident airlines operator is deemed as the profits of its business which are taxed in India. At the time of computation of such presumptive income, assessee has considered the receipts from the sale of tickets, excluding the amount of service tax collected from the customers and paid to the Government. It was further submitted that service tax is a statutory levy which is collected by the assessee from its customers for and on behalf of the Central Government on the tickets booked by it. It was submitted that the service tax so collected does not form part of the receipts of the assessee on which income accrues or arises to the assessee as assessee merely acts as a collection agent for and on behalf of the Central Government and after collection, deposits the service tax so collected into the treasury of the Central Government.

5.2 Reliance was also placed by the assessee on several decisions which are listed below:

(i) DIT Vs. Mitchell Drilling International Pvt. Ltd. (2016) 380 ITR 130 (Del.) ;

ii) Islamic Republic of Iran Shipping Lines Vs. DCIT (2011) 46 SOT 101 (Mum. Trib.);

iii) DIT Vs. M/s. Schlumberger Asia Service ltd. (2009) 317 ITR 156 (Uttarkhand HC);

iv) Sundowner Offshore International (Bermuda) Ltd. Vs. ADIT (2015) 70 SOT 656 (Delhi Trib.);

v) Orient Overseas Container Line Ltd. Vs. ADIT (2013) 60 SOT 196 (Mum. Trib.);

vi) ACIT Vs. Transocean Offshore Deep Water Drilling Inc. (2009) 176 Taxman 122 (Delhi)(MAG);

vii) Hanjin Shipping Company Ltd. Vs. DDIT (ITA No. 5277/Mum/2014 dated 13.05.2016)(Mum. Trib.);

viii) Veolia Eau-Compagnie Generale Des Eaux Vs. Addl. DIT (2011-TII-105-ITAT-MAD-INTL), (Chennai Trib.)

6. It was also contended by the assessee that it is liable to pay tax on the income embedded in only those receipts which are at its disposal. In the present case, it is submitted that the service tax collected by it is not at the disposal of the assessee but is a liability which is to be discharged by way of depositing the same with the exchequer of the Government and, therefore, the service tax collection cannot be included in the gross receipts for computing the deemed taxable income u/s. 44BBA of the Act.

6.1. After considering the submissions made by the assessee, Ld. CIT(A) did not agree with the contentions raised by the assessee to hold that service tax forms part of the turnover as referred to in section 44BBA(1). He also noted that the Settlement Commission (Income Tax & Wealth Tax), Additional Bench, Kolkata by an order dated 24.05.2017

relating to AYs 2009-10 to 2014-15 had decided the issue in favour of the assessee. Revenue authorities have filed the writ petition again the said order of the Settlement Commission before the Hon'ble jurisdictional High Court of Calcutta. According to him, since the department has not accepted the interpretation by the Settlement Commission and, therefore, he did not agree with the submissions made by the assessee.

7. Aggrieved, assessee is in appeal before the Tribunal. Before us, Ld. Counsel for the assessee reiterated the submissions made before the authorities below. Ld. Counsel pointed out that the issue in the present four appeals is squarely covered by the decision of the coordinate bench with the same constitution in assessee's own case for AY 2015-16 in ITA No. 2468/Kol/2018 dated 06.09.2022. On a specific query by the bench in respect of this order of the coordinate bench as to status of appeal, if any, preferred by the department before the Hon'ble High Court, Ld. Counsel submitted that department has preferred an appeal which has been admitted. However, no stay has been granted by the Hon'ble High court on the order of the coordinate bench. Ld. CIT, DR affirmed the submission made by the Ld. Counsel to this effect.

7.1. Ld. Counsel further submitted that coordinate bench had considered the decision of Hon'ble High Court of Uttarakhand in the case of DIT Vs. Schlumberger Asia Services Ltd. 414 ITR 1, which in turn has been considered by the same Hon'ble court in the case of CIT Vs. B. J. Services Co. ME Ltd. in (2022) 145 taxmann.com 430 (Uttarakhand) wherein it was held that reimbursement of service tax cannot be included in aggregate of amounts specified in clauses (a) and (b) of section 44BB(2) as it is not an amount received by assessee on

account of services provided by them in prospecting the instruction or production of mineral oils. Revenue had filed SLP before the Hon'ble Supreme Court against the judgment in B. J. Services Co. ME Ltd. (supra) which was dismissed vide order dated 30.10.2023 reported in (2023)156 taxmann.com 23 (SC).

7.2. Ld. Counsel further submitted that coordinate bench in assessee's own case for AY 2015-16 had categorically noted in para 9 that the provisions of section 44BB of the Act dealt with by the Hon'ble High Court are *pari materia* to the provisions of section 44BBA which is before the Hon'ble Tribunal.

7.3. Ld. Counsel referred to para 7 of the decision of Hon'ble High Court of Uttarakhand in the case of B. J. Services (supra) where in judgment in the case of Full Bench of the Hon'ble Uttarakhand High Court in the case of Schlumberger Asia Services Ltd. (supra) was quoted which is reproduced as under:

> *"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). DIT v. Mitchell Drilling International Pvt. Ltd. (2015) 62 taxmann.com 24/234 Taxman 818/(2016) 380 ITR 130 (Delhi). 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."

8. Ld. CIT, DR placed reliance on the orders of lower authorities and fairly submitted that the issue is covered by the decision of coordinate bench in assessee's own case for AY 2015-16 which even though is in appeal before the Hon'ble High court but no stay has been granted thereon.

9. We have heard the rival submissions and perused the material available on record. Admittedly, it is a fact on record that assessee has collected and deposited service tax component of Rs.105,33,47,264/- as a service provider. The moot point before us for adjudication is whether this service tax component is includible in the gross receipts for computing the deemed taxable income u/s. 44BBA of the Act. In the present case before us, notably, assessee is a non-resident engaged in the business of operation of airlines and is subjected to income tax under the Act on presumptive basis in terms of section 44BBA of the Act.

9.1 Provisions of section 44BBA are reproduced as under:

"Section-44BBA: Computing profits and gains of business of operation of aircraft in the case of non-residents.

44BBA. (1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of aircraft, a sum equal to five 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".

(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 carriage of passengers, livestock, mail or goods from any place 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 carriage of passengers, livestock, mail or goods from any place outside India."

10. We find that the issue before us is squarely covered by the decision of the coordinate bench with the same constitution as undersigned below, in assessee's own case for AY 2015-16, there being no change in material facts and circumstances of the case. The relevant observations and findings are given in the said decision are extracted below for easy of reference:

"9.From perusal of the above provisions, we note that where an assessee who is a non-resident and is engaged in the business of operation of aircraft, a sum equal to 5% of the aggregate of amount paid or payable to the assessee on account of carriage of passengers, live stock material or goods from any place in India and the amount received or deemed to be received in India by or on behalf of the assessee on account of carriage of passengers, live stock material or goods from any place outside India, shall be deemed to be the profit and gains of such business chargeable to tax. We also note that the expression "amount paid or payable" in section 44BBA(2)(a) and the expression "amount received or deemed to be received" in section 44BBA(2)(b) is qualified by the words "on account of the carriage of passengers, live stock material or goods from any place in India/outside India". Therefore, in our considered understanding, only such amounts which are paid or payable for the service provided by the assessee can form part of the gross receipts for the purpose of computation of gross total income u/s. 44BBA(1) of the Act.

9.1 We also note and agree with the submission made by the Ld. Counsel for the assessee that service tax collected by the assessee does not have any element of income, it is collected by the assessee from its customers for and on behalf of the Central Government on account of a statutory levy and, therefore, it does not form part of the receipts of the assessee on which income accrues or arises to it. We are in agreement with the contention of the Ld. Counsel for the assessee that assessee merely acts as a collection agent for and on behalf of the Central Government and after collection, deposits the service tax so collected into the treasury of the Central Government.

9.2 On perusal of the decision of Hon'ble High Court of Delhi in the case of DCIT Vs. Mitchell Drilling International Pvt. Ltd. (supra) on which Ld. CIT(A) has based his finding and decision, we note that the substantial question framed on the issue was as under:

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

9.3 While answering the above substantial question of law, Hon'ble High Court considered various decisions including the decision of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau Pvt. Ltd. Vs. CIT (1973) 87 ITR 592 (SC), CIT Vs. Lakshmi Machine Works (2007) 290 ITR 667 (SC), DIT Vs. Schlumberger Asia Services Ltd. (2009) 317 ITR 156 (Uttarakhand) and Sedco Forex International Inc. Vs. CIT (2008) 299 ITR 238 (Uttarakhand). The Hon'ble High Court also referred to the Circular issued by CBDT vide Circular No. 4/2008 dated 28.04.2008 and Circular No. 1/2014 dated 13.01.2014 wherein CBDT clarified that service tax paid by the tenant does not partake the nature of 'income' of the landlord. The landlords only acts as a collecting agency for the Government for collection of service tax and, therefore, CBDT decided that tax deduction at source u/s. 194 of the Act will be required to be done without including the service tax. Similar stand was taken by the CBDT in Circular No. 1/2014 where it was clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the service tax component. Accordingly, in the conclusion, Hon'ble High Court held that for the purpose of computing the presumptive income of the assessee u/s. 44BB, service tax collected by the assessee on the amount paid to it for rendering the services is not to be included in the gross receipts in terms of section 44BB(2) read with section 44BB(1) of the Act. Hon'ble High Court also held that service tax is not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it, the assessee is only collecting the service tax for passing it on to the Government account. Thus, the question framed was answered in favour of the assessee and against the revenue. We also not that the provisions of section 44BB of the Act dealt with by the Hon'ble High Court of Delhi (supra) are pari materia to the provisions of section 44BBA of the Act which is before us for consideration.

10. Ld. CIT, DR had referred to the decision of Hon'ble Supreme Court in the case of Sedco Forex International Inc. (supra). On perusal of the said decision, we note that Sedco Forex International Inc. (supra) was paid mobilization fees from ONGC which was included by the Ld. AO as part of gross receipts for the purpose of section 44BB. Hon'ble Supreme Court has observed that mobilization fees is a fixed amount that might be less or more than the actual expenses incurred and contract in question being indivisible one, held that amount received by the assessee as mobilization fee was to be included in gross receipts for computing the deemed profits u/s. 44BB of the Act. Thus, the facts of this case are distinguishable from the facts in the present case before us since Hon'ble Supreme Court dealt with the issue of inclusion of mobilization fees arising out of the commercial terms, in the gross receipts whereas in the present case before us, the issue relates to inclusion of service tax component in the gross receipt which is a statutory levy collected for and on behalf of the Central government by the assessee. Further, Ld. CIT, DR has contended that deduction of expenses is not available from the receipts u/s. 44BBA which in

our considered understanding is not tenable since assessee has not claimed service tax component as an expenses deduction.

11. Considering the facts on record, provisions of section 44BBA of the Act, the decision of Hon'ble High Court of Delhi in Mitchell Drilling International Pvt. Ltd. (supra) as well as the position clarified by CBDT in its two circulars cited (supra), we do not find any reason to interfere with the finding and decision given by the Ld. CIT(A) and accordingly, dismiss the ground taken by the revenue on the issue under consideration. Accordingly, the appeal of the revenue is dismissed.

11. We also take note of the fact that revenue is in appeal before the Hon'ble High court but no stay has been granted on the operation of the said decision and, therefore, has no bearing on its applicability in the present case. We thus, allow the appeal of the assessee taking into consideration the decision of the coordinate bench as referred above in assessee's own case as well as submissions made by the Ld. Counsel on the subsequent developments in reference to decision of Hon'ble High court of Uttarakhand and dismissal of SLP by the Hon'ble Supreme Court in the said case. Therefore, appeal of the assessee is allowed.

12. Since similar issue is involved in the other three appeals dealt by in this consolidated order, our observations and findings apply *mutatis mutandis* on all the three appeals, which are also allowed in terms of our above observations and findings.

13. In the result, all the appeals of the assessee are allowed.

Order is pronounced in the open court on 9th January, 2024.

Sd/- Sd/-

(SONJOY SARMA) **(GIRISH AGRAWAL)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 09.01.2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. The CIT(A)-22, Kolkata.
4. The CIT , Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata