

TAX FLASH NEWS

Service tax collected shall not be included in the gross receipt while computing presumptive income in connection with the business of exploration of mineral oils under Section 44BB of the Act

Background

Recently, the Delhi High Court in the case of Mitchell Drilling International Pvt Ltd.¹ (the taxpayer) held that the amount of service tax collected on account of rendering of services in connection with the business of exploration of mineral oils shall not be included in the gross receipt while computing presumptive income under Section 44BB of the Income-tax Act, 1961 (the Act). The service tax collected by the taxpayer does not have any element of income and therefore cannot form part of the gross receipt for the purposes of computing presumptive income under Section 44BB of the Act.

Facts of the case

- The taxpayer is a company engaged in the business of providing equipment on hiring and manpower, etc. for exploration and production of mineral oil and natural gas.
- The taxpayer filed its income-tax return for the relevant year, declaring its income as per the provisions of Section 44BB(3) of the Act. In computing the gross receipts for the purposes of determining the taxable income, the taxpayer did not include service tax received from its customers.
- However, the Assessing Officer (AO) included service tax in the gross receipts for computing the taxable income under Section 44BB of the Act.

High Court's ruling

- Section 44BB of the Act begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under it.
- It introduces the concept of presumptive income and states that 10 per cent credit of the amounts paid or payable or deemed to be received by the taxpayer on account of 'the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India' shall be deemed to be the profits and gains that are chargeable to tax.
- The purpose of this provision is to tax what can be legitimately considered as income of the taxpayer earned from its business and profession.
- 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.' Therefore, only such amounts which are paid or payable for the services provided by the taxpayer can form part of the gross receipts for the purposes of computation of gross income under Section 44BB(1) read with Section 44BB(2) of the Act.

¹ DIT v. Mitchell Drilling International Pvt Ltd [ITA 403/2013] (Del) – Taxsutra.com

- The decisions in the case of Chowringhee Sales Bureau² and George Oakes (P.) Ltd.³ were rendered in the specific contexts i.e. the interpretation was placed on the expression 'trading receipt' or 'turnover' in the said decisions.
- The Supreme Court's decision in the case of Lakshmi Machine Works⁴ in relation to Section 80HHC of the Act held that sales tax and excise duty, like interest, rent, etc. do not have any element of 'turnover'.
- Based on the decision of the Supreme Court in the case of Lakshmi Machine Works, the present appeal is decided in favour of the taxpayer. The service tax collected by the taxpayer does not have any element of income and therefore cannot form part of the gross receipts for the purposes of computing 'presumptive income' of the taxpayer under Section 44BB of the Act.
- In the present case, the High Court concurs with the decision of the Uttarakhand High Court in the case of Schlumberger Asia Services Ltd.⁵ which held that the reimbursement received by the taxpayer on account of the customs duty paid on the equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44BB of the Act.
- Accordingly, for the purposes of computing the 'presumptive income' of the taxpayer under Section 44BB of the Act, the service tax collected by the taxpayer on the amount paid to it for rendering services is not to be included in the gross receipts.
- Service tax is not an amount paid or payable, or received or deemed to be received by the taxpayer for the services rendered by it. The taxpayer is only collecting the service tax for passing it on to the government.
- This position has been made explicit by the Central Board of Direct Taxes (CBDT) through two of its circulars. In Circular No. 4/2008⁶, it was clarified that service tax paid by the tenant does 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. Therefore, Tax Deduction 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.
- In Circular No. 1/2014⁷, it has been clarified that service tax is not to be included in the fees for professional or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act.
- Accordingly, the amount of service tax collected by the taxpayer from its various clients shall not be included in the gross receipts while computing its income under the provisions of Section 44BB of the Act.

Our comments

The Delhi High Court's decision will be helpful to non-residents who are engaged in providing services/facilities in connection with the business of exploration, etc. of mineral oils and who opt for presumptive provisions of Section 44BB of the Act.

The Mumbai Tribunal in the case of Hanjin Shipping Company Limited⁸ held that service tax is a statutory liability, which does not involve an element of profit and that a service provider is collecting the same from its customers on behalf of the government. Accordingly, the same cannot be included in the total receipts for determining presumptive income under Section 44B⁹ of the Act.

This issue has also been dealt by the Uttarakhand High Court in the case of Halliburton Offshore Services Inc. This matter has been referred to the full bench of the Uttarakhand High Court¹⁰.

² Chowringhee Sales Bureau Pvt. Ltd. v. CIT [1973] 87 ITR 542 (SC)

³ George Oakes (P.) Ltd. v. State of Madras [1962] 2 SCR 570 (SC)

⁴ CIT v. Lakshmi Machine Works (2007) 290 ITR 667 (SC)

⁵ DIT v. Schlumberger Asia Services Ltd. [2009] 317 ITR 156 (Utt)

⁶ Circular No. 4/2008 dated 28 April 2008

⁷ Circular No. 1/2014 dated 13 January 2014

⁸ Hanjin Shipping Company Ltd. v. ADIT [ITA No.8672/Mum/2010; Assessment Year: 2007-08]

⁹ Special provision for computing profits and gains of shipping business in the case of non-residents

¹⁰ Halliburton Offshore Service Inc v. ACIT [ITA No. 41 of 2009] (Utt)

www.kpmg.com/in

Ahmedabad

Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru

Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala, Bangalore 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh

SCO 22-23 (1st Floor)
Sector 8C, Madhya Marg
Chandigarh 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai

No.10, Mahatma Gandhi Road
Nungambakkam
Chennai 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Delhi

Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurgaon, Haryana 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad

8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Kochi

Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata

Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata 700 091
Tel: +91 33 44034000
Fax: +91 33 44034199

Mumbai

Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida

6th Floor, Tower A
Advant Navis Business Park
Plot No. 07, Sector 142
Noida Express Way
Noida 201 305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune

703, Godrej Castlemaine
Bund Garden
Pune 411 001
Tel: +91 20 3050 4000
Fax: +91 20 3050 4010

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2015 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International Cooperative ("KPMG International").

This document is meant for e-communications only.

© 2015 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.