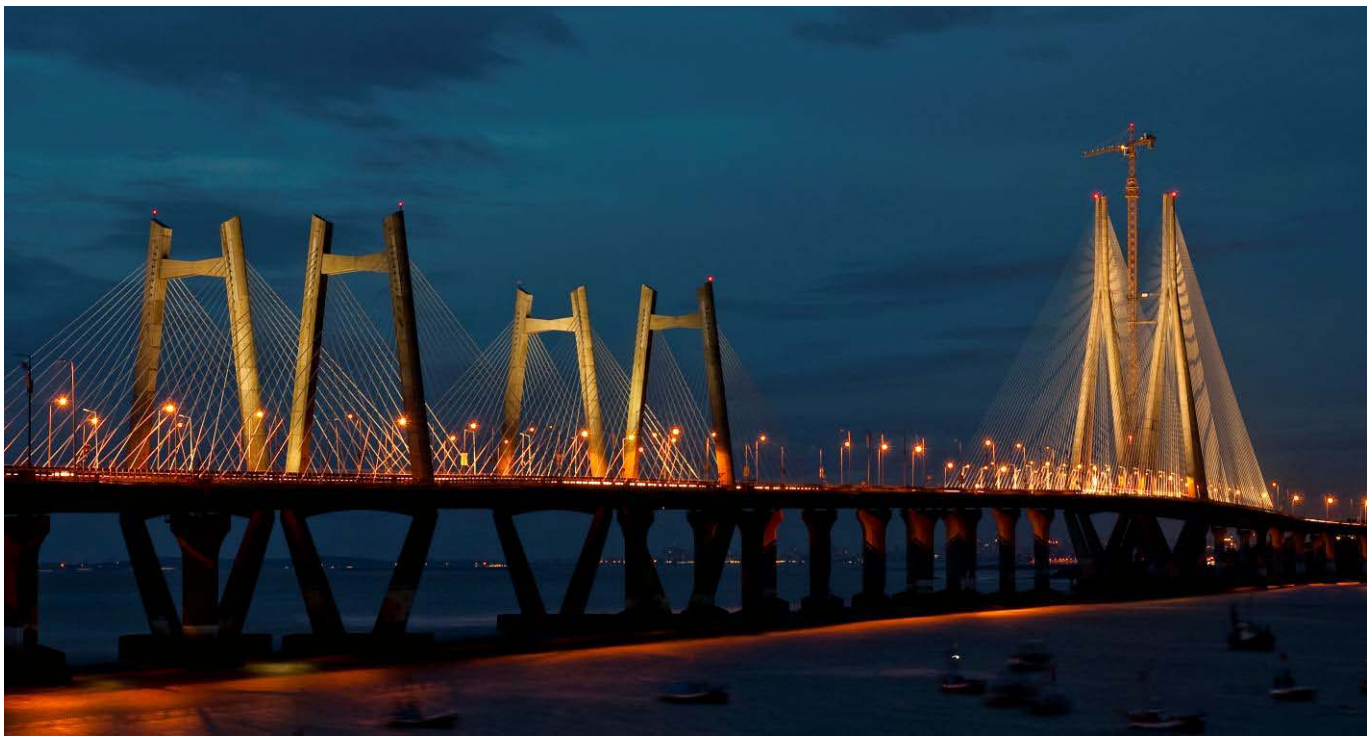
Service tax shall not form a part of total receipts for computing profits from the business of exploration, etc. of mineral oils under the presumptive provisions of Section 44BB of the Income-tax Act

21 September 2012



Background

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Mitchell Drilling International Pty. Ltd.[1] (the taxpayer) held that service tax paid by the taxpayer cannot form part of the amount arrived at for the purpose of computing deemed profits in connection with business of exploration, etc., of mineral oils under Section 44BB of the Income-tax Act, 1961 (the Act).

The Tribunal relied on the decision of of Sedco Forex International Drilling Inc.[2] wherein the Delhi Tribunal relying on various decisions 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 'amount' (total receipts) for determining the presumptive income.

Facts of the case

- The taxpayer 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. The taxpayer received amounts by way of income from a) drilling operations, b) exploration of mineral oil and c) reimbursement of mobilisation expenditure.

- The taxpayer offered its income to tax on gross basis under Section 44BB(1) of the Act dealing with computation of profits of the business of exploration, etc, of mineral oils and 10 percent of the gross receipts was deemed to be the income chargeable to tax. The taxpayer, however, did not include the amount of INR 20.9 million in the gross receipts, being service tax received from its customers, while computing its total income. The Assessing Officer (AO) added the amount of service tax collected by the taxpayer to the gross receipts to compute the total income.

[1] DDIT v. Mitchell Drilling International Pty. Ltd. (ITA No.698/Del./2012)
[2] CIT v. Sedco Forex International Drilling Inc. (ITA No.5284/Del./2011)

- The Commissioner of Income-tax Appeals [CIT(A)] allowed the appeal of the taxpayer on the submission that since service tax is levied and collected by the service provider as an agent of the Government and it is held by the taxpayer in trust, as custodian/trustee for the Government, therefore the same could not be added in the total receipt for the purposes of determination of presumptive profit under Section 44BB of the Act. Further, it was contended before the CIT(A) that 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 statutory levy mandated by law.

- The CIT(A) relied upon the decision of Uttrakhand High Court in case of Schlumberger Asia Services Ltd.[3]

Issue before the Tribunal

Whether the amount of service tax received by a service provider shall form a part of the 'amount' received for the purpose of arriving at the presumptive income under Section 44BB of the Act?

Tax department's contention

The tax department contended that since service tax is a part of receipt, therefore, for presumptive income, same has rightly been added by the AO. The tax department in its contention relied upon the decision of Siem Offshore Inc.[4], Technip Offshore Contracting BV[5] and distinguished decision of Uttrakhand High Court on the facts stating that decision was with respect to customs duty and not on service tax reimbursements.

Taxpayer's contention

The taxpayer contended that the service tax is to be excluded for computing presumptive income under Section 44BB of the Act. The taxpayer relied on the decision of the Delhi Tribunal in the case of Sedco Forex International Drilling Inc., which had held that service tax is to be excluded from 'amount' considered for presumptive tax. Further, the Delhi Tribunal considered decisions of Schlumberger Asia Services Ltd, Technip Offshore Contracting BV and Islamic Republic of Iran Shipping Lines while ruling in favour of the taxpayer.

Tribunal's ruling

The Delhi Tribunal relying on the decision of of Sedco Forex International Drilling Inc. ruled in favour of the taxpayer by upholding order of CIT(A) and dismissing appeal filed by the tax department to hold that the service tax should not be considered as 'amount' (total receipts) for the purpose of computing presumptive income under Section 44BB of the Act. The ruling affirms the ratio of earlier ruling that the issue is covered by earlier decision of the Delhi Tribunal which is on similar point and no contrary or any higher courts' precedents has been cited.

Our comments

The decision of the Delhi Tribunal will have a favourable impact on non-resident Oil and Gas service providers who are engaged in providing services/facilities in connection with business of exploration, etc., of mineral oils and who opt for presumptive provisions of Section 44BB of the Act.

The Delhi Tribunal relied on various decisions viz. Sedco Forex International Drilling Inc., Schlumberger Asia Services Ltd and Islamic Republic of Iran Shipping Lines, to hold that Service tax will not form a part of total receipts for computing profits under Section 44BB of the Act. However, the Tribunal did not rely on the ruling in case of Technip Offshore Contracting BV which was relied on by the tax department.

[3] DIT v. Schlumberger Asia Services Ltd [2009] 317 ITR 156 (Uttarakhand)
[4] Siem Offshore Inc.,In re, [2011] 337 ITR 207 (AAR)
[5] DDIT v. Technip Offshore Contracting BV, [2009] 29 SOT 33 (Del)

www.kpmg.com/in

Ahmedabad
Safal Profitaire
B4 3rd Floor, Corporate Road,
Opp. Auda Garden, Prahlad Nagar
Ahmedabad – 380 015
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bangalore
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 (Ist 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
4/F, Palal Towers
M. G. Road, Ravipuram,
Kochi 682 016
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata
Infinity Benchmark, Plot No. G-1
10th Floor, Block – EP & GP,
Sector V Salt Lake City,
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

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

© 2012 KPMG, an Indian 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.