IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.5277/M/2014
Assessment Year: 2010-11

M/s. Hanjin Shipping Company Ltd., C/o. Hanjin Shipping India Pvt. Ltd. (Agent of Hanjin Shipping Co. Ltd.), 402, Vedanta, 779, Makwana Road, Off. Andheri Kurla Road, Marol Village, Andheri (East), Mumbai – 400 059 **PAN: AAACH 3759G**	Vs.	Deputy Director of Income Tax (International Taxation) – 3(1), Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Paras Savla, A.R. & Ms. Priyanka Gada, A.R.
Revenue by : Shri Rahul Raman, D.R.

Date of Hearing : 23.03.2016
Date of Pronouncement : 13.05.2016

O R D E R

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 24.06.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The assessee has taken the following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) - 10 ('CIT(A)-10') has grossly erred in confirming the actions of the Assessing Officer of making addition of Rs.11,34,14,190/- being the amount of Service Tax to the total revenue for the computation of profit under Section 44B of the Income-tax Act, 1961 ('the Act').

2. On the facts and in the circumstances of the case, the learned CIT(A) - 10 has legally erred in not following the order of Income Tax Appellate Tribunal (ITAT) in appellants own case for A.Y.2008-09 and A.Y.2007-08.

3. On the facts and in the circumstances of the case, the learned CIT(A) - 10 has legally erred in not granting reasonable and adequate opportunity to the Appellant to present its case before passing the order and the said order is being passed in violation of principle of natural justice is liable to be quashed.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of pa herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

3. The facts in brief are that the assessee company is a foreign company incorporated under the law of Korea. The assessee has opted that its income from operation of shipping be taxed under section 44B of the Income Tax Act on presumptive basis at the rate of 7.5% of the aggregate amount as per the provisions of section 44B of the Act read with Article 9 of the DTAA between India and Korea. The controversy involved in this appeal is as to whether the service tax collected during the year should be a part of the gross receipts for the purpose of the computation of income or the gross receipts are to be taken exclusive of sales tax receipts. The Assessing Officer (hereinafter referred to as the AO) while relying upon the Authority of Advance Ruling (AAR) in the case of "Siem Offshore Inc" reported in (2011) 337 ITR 027 observed that the gross receipts should be taken inclusive of the service tax for the purpose of computation of income of the assessee under section 44B of the Act. While holding so, the AO also relied upon the decision of the Delhi Bench of the Tribunal in the case of "DDIT (International Taxation) vs. Technip Offshore Contracting BE" ITA No.4613/Del/2007 vide order dated 16.01.09 wherein the Delhi Tribunal has held that since the service tax collected by the assessee was directly in connection with the services and facilities as spelt out in section 44BB(2), hence, the amount of service tax collected by the assessee is to be included in the total receipts for determining the presumptive profit under section 44BB.

4. Being aggrieved by the above action of the AO, the assessee filed appeal before the Ld. CIT(A). The Ld. CIT(A), relying upon the decision of the co-

ordinate bench of the Tribunal in the case of "M/s. China Ship Container Lines (Hong Kong) Company Ltd." in ITA No.8516/M/10 dated 23.08.13, upheld the action of the AO in including the service tax receipt in the gross receipts taken for computing the presumptive profits of the assessee. Being aggrieved, the assessee has come in appeal before us.

5. At the outset, the Ld. A.R. of the assessee has stated that the very issue has already been dealt with and decided by the Tribunal in the earlier assessment years in the own case of the assessee. He, in this respect, has relied upon the decisions of the Tribunal in the own case of the assessee for A.Y. 2007-08 and 2008-09 and further upon the assessment order for A.Y. 2012-13 wherein the AO, while giving effect to the directions of the DRP, has not included the service tax in the gross income of the assessee for the purpose of calculation of presumptive profits under section 44B of the Act. The copy of the DRP directions dated 24.11.15 for A.Y. 2012-13 have also been placed on file. The assessee has also relied upon the decision of the Hon'ble Delhi High Court in the case of "DIT vs. Mitchell Drilling International Pvt. Ltd." (2015) 62 Taxman.com 24 (Delhi).

On the other hand, the Ld. D.R. has relied upon the finding of the lower authorities.

6. We have heard the rival contentions and have also gone through the records. We find that the co-ordinate bench of the Tribunal in the own case of the assessee in earlier assessment year A.Y. 2007-08 vide order dated 31.10.12 has observed that the decision of the Delhi Bench of the ITAT in the case of "Technip Offshore Contracting BE" (supra) has already been considered by the Mumbai Bench of the Tribunal in the case of "Islamic Republic of Iran Shipping Lines vs. Dy. Director of Income Tax" 11 taxman.com 349 wherein it has been held that the service tax since has been collected by the assessee on behalf of the government which is a statutory liability and does not involve any

element of profits and accordingly the same cannot be included in the total receipts for determining the presumptive income. The co-ordinate bench of the Tribunal, thus, in the own case of the assessee has decided the issue in favour of the assessee. Following the said decision, the co-ordinate bench of the Tribunal, in the own case of the assessee for A.Y. 2008-09, has again observed that the issue is covered in the assessee's own case for A.Y. 2007-08 and thus has upheld the order of the Ld. CIT(A) holding that the service tax since is a statutory liability and does not involve an element of profit and the same being collected by the service provider from his customers on behalf of the government, accordingly cannot be included in the total receipts for determining the presumptive income under section 44B of the Act. Similar view has been taken by the DRP in the own case of the assessee for A.Y. 2012-13. The co-ordinate bench of the Tribunal in the case of "Islamic Republic of Iran Shipping Lines vs. Dy.DIT" ITA No.4877/M/2014 for A.Y. 2010-11 vide order dated 17.02.16 has observed that though the co-ordinate bench of the Tribunal in the case of M/s. China Ship Container Lines (Hong Kong) Company Ltd." (supra) has decided the issue in favour of the Revenue, however, the Hon'ble Delhi High Court, which is a higher authority, in the case of "DIT vs. Mitchell Drilling International Pvt. Ltd." (supra) has decide the issue in favour of the assessee. The co-ordinate bench of the Tribunal has further observed that since the issue under consideration has already been decided in the own case of the assessee and further that the Mumbai Bench of the Tribunal in the case of "Marubeni Corporation vs. DCIT" (2014) 44 Taxman.com 22 (Mum.) has held that as a matter of precedent the Tribunal is bound to follow the decision rendered by the Tribunal in the own case of the assessee in earlier year, unless, there is a change in law, change in facts and circumstances of the case or the same is contrary to the decision rendered by a jurisdictional high court or apex court. In the absence of any of such circumstances, the earlier decision of the Tribunal in assessee's own case has to be applied. In view of the ratio of law laid down by the co-ordinate bench

of the Tribunal in the case of "Marubeni Corporation vs. DCIT" (supra) which has been further followed by the Tribunal in the case of "Islamic Republic of Iran Shipping Lines" for A.Y. 2010-11 (supra) and in the light of decision of the Hon'ble Delhi High Court in the case of "DIT vs. Mitchell Drilling International Pvt. Ltd." (supra), we hold that service tax collected by the assessee and paid to the government account having no profit element, cannot be included in the gross receipts for computation of income under section 44B of the Act. This issue is accordingly decided in favour of the assessee.

7. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on 13.05.2016.

Sd/-	**Sd/-**
(Rajesh Kumar)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 13.05. 2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.