आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई।

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

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य एवं, संजय अरोड़ा, लेखा सदस्य के समक्ष

BEFORE SHRI I.P. BANSAL, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No.7986/Mum/2010
(**निर्धारण वर्ष** / Assessment Year :2004-05

A N D

आयकर अपील सं./I.T.A. No.5697/Mum/2012
(**निर्धारण वर्ष** / Assessment Year :2009-10

M/s. Marubeni Corporation, C/o Marubeni India Pvt. Ltd., 25, Mittal Chambers, 2nd Floor, Nariman Point, Mumbai-400 021		The DCIT (International Taxation) 4(1), 133 Scindia House, Ballard Pier, N.M. Road, Mumbai-400 038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACM 7682D		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ Appellant by: `	Shri V.K.Duggal
प्रत्यर्थी की ओर से/Respondent by :	Shri Ajay Shrivastava

सुनवाई की तारीख / **Date of Hearing :11.12.2013**
घोषणा की तारीख /**Date of Pronouncement :11.12.2013**

आदेश / O R D E R

PER I.P BANSAL, JM:

Both these appeals are filed by the assessee. They are directed against the two separate orders of the Ld. CIT(A)-11, Mumbai dt. 19.8.2010 and 28.6.2012 for A.Yrs 2004-05 and 2009-10 respectively.

2. Grounds of appeal in each of the year read as under:

ITA No. 7986/M/2010 –A.Y. 2004-05

1. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in rectifying the order u/s 154 by changing his opinion on rate of tax.*

2. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in passing non-speaking order dealing with all grounds of appeal.*

3. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in changing its opinion on tax rate while it applied its mind on deduction of TDS on interest on delayed income tax refund to assessee.*

4. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in relating interest to the permanent establishment in India.*

5. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in treating interest income effectively connected to permanent establishment in India.*

6. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in treating the interest earned on delayed payment in foreign currency which has no relation with permanent establishment in India and applying normal tax rate.*

7. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in not setting off the loss from project office first against interest income and then against the fee for technical services.*

8. *On the facts and in the circumstances of the case and in the law, the authorities below were not justified in applying tax rate of 41% on foreign interest income instead of tax rate of 20% as provided in the section 115(A)(ii) read with Explanation B.*

9. *On the facts and in the circumstances of the case and in the law, the DDIT was not justified in passing order without giving second opportunity to assessing to represent again on the matter.*

10. The above grounds of appeal are without prejudice to each other.

ITA No. 5697/M/2012 – A.Y. 2009-10

The learned Commissioner of Income Tax (Appeals) was not justified on facts and circumstances of the case and erred in law in sustaining ADIT Order for assessing the amount of service tax as receipts and consequently levying tax hereon.

2. The learned Commissioner of Income Tax (Appeals) was not justified on facts and erred in law in sustaining ADIT Order for applying tax rate of 42.23% on bank interest instead of tax rate of 20% as provided in the section 115(A)(ii) read with Explanation B.

3. Without prejudice learned Commissioner of Income Tax (Appeals) was not justified on facts and erred in law in sustaining ADIT Order for relating entire bank interest to the permanent establishment of assessee in India and in not apportioning it with due considering for the exchange currency risk and cost incurred by Head office on funds deployed.

4. The above 'Grounds of Appeal' are all independent and without prejudice to one and another. The Appellant craves leave to supplement, to cancel, amend, add and/or otherwise alter/modify any or all the grounds of the appeal stated hereinabove.

ITA No. 7986/M/2010 – A.Y. 2004-05

3. For assessment year 2004-05, the assessee has filed its return of income on 31.10.2004 declaring income of Rs. 3,89,35,032/- in which the following income was shown under the head 'Income from Other sources' which were shown to be liable for tax at the rate of 15%.

1)Interest income from banks and bothers	- Rs. 30,07,693/-
2)Interest on income tax refund from Income tax department	- Rs. 7,83,357/-
3) Interest income from banks	-Rs. 15,626/-
4)Interest for delayed payment on Foreign supply contract with PPN in Foreign currency	-Rs. 72,94,775/-
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Total	-Rs.1,11,01,452/-
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4. The claim of the assessee that the aforementioned income is liable to be taxed at 15% was accepted by the AO in the assessment order dt. 26th December 2006 passed under the provisions of Sec. 143(3) of the Act. Subsequently on 10.12.2008, the AO issued notice u/s. 154 of the Act to the assessee on the ground that the assessee was having Project office and was having a permanent establishment within the meaning of DTAA between India and Japan, therefore, the aforementioned interest income was liable to be taxed as per the normal provisions of the Income-tax Act in according with Article 11(6) of the Indo-Japan DTAA. The assessee did not reply to such notice issued by the AO. In absence of reply filed by the assessee, the AO taxed the said amount of Rs. 1,11,01,452/- @ 40% +surcharge @ 2.5%. This order u/s. 154 was passed by the AO on 28.1.2009. The aforementioned action of the AO was challenged in an appeal filed by the assessee before the Ld. CIT(A) which has been decided vide aforementioned impugned order dt. 19th August 2010.

4. The Ld. CIT(A) has held that there was a mistake in the order passed by the AO u/s. 143(3) of the Act whereby he directed to tax the aforementioned amount at the rate of 15% in accordance with DTAA between India and Japan. Subsequently, when he found that such income was liable to be taxed as per normal provisions of I.T. Act as per Article 11(6) of the treaty, an opportunity was given to the assessee to file the objection, if any. However, no compliance was made by the assessee. Ld. CIT(A) has held that the AO was right in passing the rectification order after giving reasonable opportunity of hearing to the assessee. Such mistake was apparent from record which can be rectified by the AO to

avoid loss of the Revenue. Therefore, he declined to interfere in the order passed by the AO.

5. The assessee is aggrieved and has raised the aforementioned grounds. It may also be mentioned here that the grounds of appeal which has been raised before us were also raised by the assessee before the Ld. CIT(A). However, Ld. CIT(A) did not adjudicate all the grounds raised by the assessee before him and he has simply dismissed the appeal filed by the assessee on the ground that Sec. 154 was rightly applied by the AO.

6. After narrating the facts, it was submitted by the Ld. AR that the subsequent action of the AO in invoking provisions of Sec. 154 was based on change of opinion, therefore power u/s. 154 was wrongly exercised.

7. On the other hand, it was the case of the Ld. Departmental Representative that there is no change of opinion by the AO as there was mistake in the assessment order passed by him. In the original assessment order, the AO accepted the claim of the assessee as per its return and no opinion was formed by the AO, therefore, Ld. DR pleaded that the order u/s. 154 cannot be held to be invalid simply on the basis of "change of opinion".

8. We have heard both the parties and their contentions have been carefully considered. The aforementioned income was considered to be liable for tax at the rate of 15% by the assessee itself in its return of income. No material has been brought on record to show that applicability of rate of 15% was examined by the AO during the course of original assessment proceedings. Even during the course of rectification

proceedings, the assessee did not submit any reply to the AO. It is also not the case of the assessee that AO did not give opportunity to explain that as to why 15% rate of tax was justified. In these circumstances, we are of the opinion that there was no "change of opinion" as has been argued by Ld. AR. The levy rate of tax has to be in accordance with the statutory provisions. If there is less levy, then it is liable for rectification. Accordingly, we hold that AO was not wrong in exercising his right u/s. 154 of the Act.

9. Now coming to the merits of the issue, it has already been pointed out that the impugned interest has three components namely (1) interest from bank (2) interest on income tax refund and (3) interest for delayed payment on Foreign supply contract with PPN in foreign currency. All these issues were stated to be covered as under:

i) Interest income from bank is covered in favour of the Revenue by the decision of the ITAT in assessee's own case which is dt. 28th August, 2013 in ITA No. 1087/M/2012 for assessment year 2007-08. The issue has been decided as under:

"Ground no. 6 & 7 pertains to attribution of and taxability of interest on FDRs. The CIT(A) held that interest is directly connected with the income of the PE. Though the AR argued that the HO takes care of all types of expenses and risks, therefore, the rate applicable should be 20% & not 41.82% as applied by the AO. It is a fact that the interest income pertains to deposits made by the PE on behalf of its parent, i.e. the assessee. Since the cost is attributable to the assessee, the assessee shall not be entitled to the preferential rate as claimed by the assessee, as per India Japan DTAA.

We have heard the arguments and we are of the considered view that there is no infirmity in the orders of the revenue authorities, which we sustain. Ground no. 6 & 7 are therefore rejected."

Therefore, so far as it relates to interest earned by the assessee from bank, it is held that the same is taxable at the rate of 40+2.5% as has been levied by the AO in order passed u/s. 154 of the Act.

(ii) Interest on Income tax refund. This is covered in favour of the assessee vide order of the Tribunal in assessee's own case dt. 8th August, 2013 in ITA No. 939/M/2012 for assessment year 2007-08. The relevant portion of the order of the Tribunal read as under:

2. "The only ground raised by the Revenue is as under:

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to tax the interest on Income Tax refund at a lower rate 10% as provided in the DTAA between India and Japan without considering the fact that interest receipt has nexus with assessee's PE."

3. The assessee is a company incorporated in Japan and it is having a Permanent Establishment (PE) in India. The assessee filed return of income showing nil income after adjusting the brought forward business loss and unabsorbed depreciation. The assessment was completed on income of ₹ 17,00,22,100/- by taxing various income including interest on Income Tax refund of ₹ 22,15,213/-. The AO taxed the said interest income as per the provisions of the Act which has been challenged by the assessee before the CIT(A) and claimed that the interest on Income Tax refund attract the tax rate as provided in Indo-Japan DTAA. The CIT(A) allowed the claim of the assessee by following the decision of Special Bench of this Tribunal in case of Clough Engineering Ltd. Vs ACIT 130 ITD 137 and directed the AO to tax the interest on Income Tax refund at lower rate as provided in the DTAA.

4. We have heard the Ld. DR as well as Ld. AR and considered the relevant material on record. At the outset we note that the issue is covered by the decision of Special Bench of this Tribunal in case of ACIT Vs Clough Engineering Ltd. (supra). We further note that the Co-ordinate Bench of *this Tribunal in case of Bechtel International Inc. Vs ADIT in ITA No. 5198/M/2010 and 6998/M/2011 vide order dated 8.2.2012 has also considered and decided the identical issue by following the decision of Special Bench in case of Clough Engineering Ltd. (supra) in para 10 as under:*

"10. We have given a careful consideration to the rival submissions. We are of the view that in the light of the commentary of Klaus Vogel on the reason for use of the word "attributable" in the US conventions, they are in no way different from the expression "effectively connected". US Model convention deviates from OECD and UN Model Conventions (MCs) because the term "effectively connected" is a technical term of US domestic tax law and that it is defined in detail in I.R.C. Sec.864(c) whereas "attributable", though used in US domestic tax law as well, is not defined. If US MC were to refer to "effectively connected", the question would arise whether that term would be required by Article 3(2) MC to be interpreted on the US side in accordance with its definition under US tax law, Use of the term "attributable" avoids that problem and that is the reason the expression "Attributable" is used in US Model Conventions. Therefore the term appearing in US Model Conventions have the same meaning as the expression "Effectively Connected". The expression "Attributable" as used in Article 11(5) of the India-USA DTAA has therefore to be construed as equivalent to "Effectively connected". The technical explanation referred to by the learned counsel for the Assessee whereby it has been observed that the term "Attributable" is to be given a narrower meaning than the expression "Effectively Connected", we find that the said technical explanation is in the context of attribution of profits of the PE and is relevant to taxation of an Indian enterprise having PE in USA. Nevertheless, the expression "attributable" even if held to be equivalent to the expression "effectively connected" in the light of the commentary by Klaus Vogel, referred to above, then the case of the Assessee would stand squarely covered in favour of the Assessee by the decision of the Special Bench in the case of Clough Engineering Ltd. (supra). Following the same, we hold that the interest income on income tax refund is to be charged to tax only under Article 11(2) of the Indo-USA DTAA and not under Article 11(5) thereof."

> *5. Following the decision of this Special Bench in case of Clough Engineering Ltd. as well as the Co-ordinate Bench of this Tribunal in case of Bechtel International Inc. we decide this issue in favour of the assessee. Accordingly the order of the CIT(A) qua this issue is upheld.*
>
> *6. In the result, the appeal of the revenue is dismissed."*

Accordingly, it is held that the interest on income tax refund is liable for lower rate of taxation as per DTAA.

(iii) Interest from delayed payments on foreign supply contract with PPN in foreign currency. For this component, it is the case of the assessee that this is liable for lower rate of taxation as per Sec. 115(a)(ii) r.w. Explanation-B. It is the case of the Ld. AR that this aspect, though raised before the Ld. CIT(A) has not been adjudicated by Ld. CIT(A). He submitted that it will be in the interest of justice, if the issue regarding this component of interest is restored back to the file of the AO with a direction to readjudicate the same after giving the assessee reasonable opportunity of hearing. He further submitted that ground No. 7 raised before ITAT was also raised before Ld. CIT(A) which has also not been adjudicated. The AO may be directed to adjudicate this issue if the matter is restored back to the AO.

10. On the other hand Ld. Departmental Representative relied upon the order passed by AO and Ld. CIT(A).

11. We have heard both the parties and their contentions have carefully been considered. The contention of the assessee is required to be examined on merits. This issue was raised by the assessee before the Ld. CIT(A). However, Ld. CIT(A) has not adjudicated the same. We consider it just and proper to restore this issue to the file of the AO with a direction to readjudicate this issue on merit after giving the assessee a

reasonable opportunity of hearing. So far as it relates to consideration of ground No. 7 which is alternative contention, as we are restoring the main issue to the file of the AO, this issue is also restored back to the file of the AO for adjudication as per law after giving the assessee a reasonable opportunity of hearing. We direct accordingly.

12. In view of the abovementioned discussion, the appeal filed by the assessee is considered to be partly allowed for statistical purpose in the manner aforesaid.

ITA No. 5697/M/2012-2009-10

13. At the outset , it was submitted by Ld. AR that Ground No. 1 is covered in favour of the assessee vide earlier order of the Tribunal in assessee's own case. Reference in this regard was made to the aforementioned decision dt. 28th August, 2013 in ITA No. 1087/M/2012 wherein similar was decided in favour of the assessee with the following observations:

> *"Ground no. 5 pertained to inclusion of service tax as part of the trading receipts.*
>
> *The AR explained that the AO while considering the receipts of the assessee as per TDS certificates has not allowed deduction for service tax collected because services tax, as such is not the income of the assessee, though it is included in the invoice. The fact is that the assessee has to collect the service tax and deposit the same on behalf of the vendor, therefore, service tax receipt is never the income of the assessee. The AR further submits that the issue is covered by the decision of the coordinate Bench in Mumbai in the case of ADIT v Haldor Topsoe A/c, ITA no. 4431/Mum/2005 & 6868/Mum/2007, wherein it was held,*
>
> > *"6. We have carefully considered the orders of authorities below and submissions of representatives*

of both the parties. We have also gone through the decision of Coordinate Bench of this Tribunal in the case of Veolia Ea-Compagnie (supra). We observe that in the said case, similar issue arose i.e. as to whether the service tax charged and collected by the assessee, which is a France based foreign company engaged in providing consultancy service to Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB), is its business receipts subject to tax on gross basis under section 115A r.w. 44D of the Act. The Tribunal vide para 8 has held that reimbursement of service tax could not form part of taxable income of the assessee. Fee for technical services is for the services rendered by the assessee and service tax would not form part of fee for technical services. That service tax is not expenditure incurred by the assessee and it is a statutory levy on the person who avail services from the assessee. It was held that it would have been a different case if the assessee had collected service tax and not paid the same to Government account but that was not the case and it was only reimbursement of service tax paid by the assessee to the Government account. Thus, the receipt cannot be treated as a trading receipt. Hence, reimbursement of service tax cannot form part of total income of the assessee. It was held that Section 44D provides for deduction from receipts in the nature of royalty and fee for technical services etc., which is chargeable @ 20% as per provisions of Section 115A(1)(b)(B) of the Income tax Act, if fee is charged pursuant to an agreement made after 31.5.1997 but before 1.6.2005. The amount in question is the amount of service tax collected by the assessee on which the Government has overriding right on the same, cannot be considered for levy of tax in the hands of the assessee. It is relevant to state that in the said case, ITAT also placed reliance on the decision of ITAT Hyderabad Bench in the case of ACIT vs. Louis Berger International Inc,(2010) 40 SOT 370(Hyd) and in the said case the decision of Hon'ble apex Court in the case of Chowringhee Sales Bureau (P) Ltd (supra) was also considered and distinguished. On behalf of

> *the department, no contrary decision was brought to our notice".*
>
> *The CIT(A), in his order mentions that no details had been provided and therefore, the AO was correct to not give any credit.*
>
> *The DR also placed reliance on the orders of the revenue authorities.*
>
> *After hearing the arguments, we are of the concerned view that the issue is squarely covered by the decision in the case of Haldor Topsoe. Respectfully following the same, we set aside the order of the CIT(A) on this issue and direct the AO to delete the addition made."*

14. However, Ld. Departmental Representative submitted that after passing the said order, Mumbai Tribunal in another decision that is in the case of China Shipping Container Lines (Hong Kong) Co. Ltd Vs ADIT vide its decision dt. 23rd August, 2013 in ITA No. 8516/M/2010 for assessment year 2007-08 has in the context of Sec. 44B has held that excise duty should be considered to be part of gross receipts while computing income on presumptive basis. He submitted that in view of the decision of the Tribunal in the case of China Shipping Container Lines (Hong Kong) Co. Ltd (supra), the decision rendered by the Tribunal in assessee's own case should not be followed and the order of the Ld. CIT(A) in this regard should be upheld.

15. In the rejoinder, it was submitted by Ld. AR that as per the decision of ITAT, Mumbai in the case of Islamic Republic of Iran Shipping Lines Vs DCIT (International Taxation) (2011) 11 Taxmann.com 349 (Mum) copy placed on record (and the same has already been given to Ld. DR), it has been held that the service tax which is a statutory liability, would not involve any element of profits and a

service provider is collecting the same from its customers on behalf of the Government and, accordingly, same cannot be included in the total receipts for determining the presumptive income. Therefore, the order of the DRP was to be set aside and the AO was to be directed not to include the amount of service tax in the total receipts for determining the income u/s. 44B of the Act. He further submitted that the provisions of Sec. 44B are not similar to the provisions of Sec. 44D which is applicable to the present case. Thus, he submitted that the decision rendered by Tribunal in assessee's own case should be followed.

16. We have heard both the parties and their contentions have carefully been considered. The decision relied upon by the Ld. DR is not applicable to the present case as the provisions considered in the said decision are different from the provisions applicable to the present case. The Co-ordinate Bench of the Tribunal, in assessee's own case has already adjudicated this issue in respect of assessment year 2007-08. As a matter of precedent, the Tribunal is bound to follow the decision rendered by the Tribunal in the case of the assessee in earlier year, unless there is a change in law, change in the facts and circumstances of the case; and the same is contrary to the decision rendered by the Jurisdictional High Court or Apex Court. In absence of any of such circumstances, the earlier decision of the Tribunal in assessee's own case has to be applied. Accordingly, we decided the issue raised in the present appeal in favour of the assessee. The relevant observations of the Tribunal from earlier order have already been reproduced in the above appeal of this order.

In view of above discussion, Ground No. 1 is allowed.

17. So far as it relates to ground No. 2 & 3, this issue is decided against the assessee as per our observations in para 9(i) of this order for A.Y.

2004-05 as in these grounds assessee is agitating the levy of tax rate @ 42.23% on bank interest in place of 20% claimed by it in its return of income. Accordingly, Ground Nos 2 & 3 are dismissed.

17. In the result, both the appeals filed by the assessee are partly allowed in the manner aforesaid.

Order pronounced in the open court on 11.12.2013

आदेश की धोषणा खुले न्यायालय में दिनांकः 11.12.2013 को की गई ।

Sd/-	Sd/-
(SANJAY ARORA)	(I.P. BANSAL)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 11/12 /2013

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai