

# NEWSFLASH

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Larger Bench of the Hon'ble High Court of Uttarakhand holds that 'service tax reimbursements' made by customer, is not includible in 'gross receipts' while computing taxable income of non-resident service providers u/s 44BB of the Income Tax Act, 1961



## Larger Bench of the Hon'ble High Court of Uttarakhand holds that 'service tax reimbursements' made by customer, is not includible in 'gross receipts' while computing taxable income of non-resident service providers u/s 44BB of the Income Tax Act, 1961

### Brief facts:

- ❖ Hearing before Larger Bench of Hon'ble High Court of Uttarakhand took place in a batch of appeals in cases of various non-resident Assesseees, all of them being service providers engaged in providing services/ facilities/ equipment on hire in connection with exploration, extraction or production of mineral oil.
  - ❖ The Assesseees entered into agreements with M/s Oil and Natural Gas Corporation (hereinafter referred to as 'ONGC'/ 'Customer') for providing such services/ facilities/ equipment on hire in connection with exploration, extraction or production of mineral oil in India.
  - ❖ The Assesseees filed their return of income declaring income u/s 44BB in respect of their revenues from providing services/ facilities/ charter hire of the rig / plant and machinery to be used in extraction or production of, mineral oils in India. While computing taxable income under section 44BB of the Act, amounts received by Assesseees towards reimbursement of service tax (paid by non-resident Assesseees to the Government of India and recovered from ONGC) was excluded.
  - ❖ During course of assessment proceedings, the Assessing Officer held that the amount of service tax received by the non-resident Assesseees should be included in gross receipts u/s 44BB of the Act. Accordingly, additions were made to taxable income of non-resident Assesseees.
- ❖ Travelling through the Appellate route, the matter reached before the Hon'ble Delhi Tribunal, wherein in maximum cases, following decision of Hon'ble Delhi High Court in case of Mitchell Drilling International Pvt. Ltd. (2016) 380 ITR 130 (Delhi), the Tribunal decided the issue in favour of Assesseees. However, in some of the cases, the Tribunal had earlier decided in favour of Income tax department.
  - ❖ The matter finally reached before High Court of Uttarakhand in various appeals filed by the Income tax department and also by Assesseees in some cases, where Hon'ble High Court of Uttarakhand decided to form a Larger Bench of 3 judges, to decide the issue.

### Assessee's Submissions before the High Court

- ❖ The service tax collected by the assessee did not have any element of income and, therefore, could not form part of gross receipts for the purpose of computing 'presumptive income' of the assessee under section 44BB of the act.
- ❖ It is a statutory duty imposed on the assessee which it collects from the ONGC and pay it to the government, it does not fall within the "amount for provision of services/ facilities" stipulated in Section 44BB(1) of the Act.
- ❖ Even the Income Tax Department acknowledged and accepted that 'service tax' could not form part of 'taxable income', and therefore it issued various circulars for TDS purposes, wherein Assesseees were required to deduct TDS only on service fee/ contractual payments/ rent, excluding 'service tax'.

- ❖ The Tribunal did not commit any error in following decision of Hon'ble Delhi High Court in case of Mitchell Drilling (supra), which was a jurisdictional High Court for Delhi Tribunal and its decision was binding on Delhi Tribunal.
- ❖ The income tax department did not challenge decision of Hon'ble Delhi High Court in case of Mitchell Drilling (supra) on the same issue, and it was not open to the Department to challenge the correctness of this decision before another High Court, in the case of another Assessee, without just cause.

### Revenue's Submissions

- ❖ The phrase used in Section 44BB(2) is "on account of"; this phrase has a much wider connotation as it includes, within its ambit, 'any amount' received by the assessee by reason of, or as a consequence of, the services rendered by it.
- ❖ That payment of service tax by the service recipient to the service provider is not a statutory obligation, but it is purely contractual payment. If the service provider does not receive/ charge service tax from his customer, it cannot say that it would not pay service tax to the Government and the service provider is obligated to pay service tax irrespective of whether or not it is charged from customers.

### Judgment of Hon'ble High Court

- ❖ The Larger Bench of Hon'ble High Court, in a detailed judgment, concurred with the arguments placed on behalf of the Assesseees and held that 'service tax reimbursements' will not form part of gross receipts for the purpose of computing taxable income under section 44BB of the Act.
- ❖ The High Court held that Service tax levied under the Finance Act, 1994, is a tax on "service", and does not form part of the consideration paid for the services rendered,

much less services rendered in connection with the prospecting, extraction or production of mineral oils.

- ❖ The High Court further held that 'a provision in a fiscal statute, such as Section 44BB, should be literally construed, and no other aid of interpretation can be resorted to. It must interpret the Statute as it stands and, in case of doubt, in a manner favourable to the taxpayer and not the one that imposes a burden on him'.
- ❖ Finally, the High Court held that the amount reimbursed by the ONGC, towards service tax paid by Assesseees to the Government, is not an amount paid to the Assesseees towards services provided by the Assesseees in connection with the prospecting, extraction or production of mineral oils. Therefore, it is not required to be included in the amounts specified in clauses (a) and (b) of Section 44BB(2).

### NANGIA'S TAKE

***This is landmark decision, where, after considering relevant statutory provisions under the Service tax laws, specific provisions of Section 44BB of the Act, various CBDT circulars on TDS and various other decisions of Hon'ble Supreme Court and various High Courts, the Hon'ble Larger Bench has held that 'service tax reimbursements' will not form part of gross receipts for the purpose of computing taxable income under section 44BB of the Act. This will provide relief to a large number of Assesseees facing similar addition made by the Income tax authorities in their cases.***

***Further, while discussing the binding nature of decision of Hon'ble Delhi High Court in case of Mitchell Drilling (supra), the Hon'ble Larger Bench has also upheld an important principle that if the income tax department did not challenge decision of one High Court on the same issue, and it was not open to the Department to challenge the correctness of this decision before another High Court, in the case of another Assessee, without just cause.***

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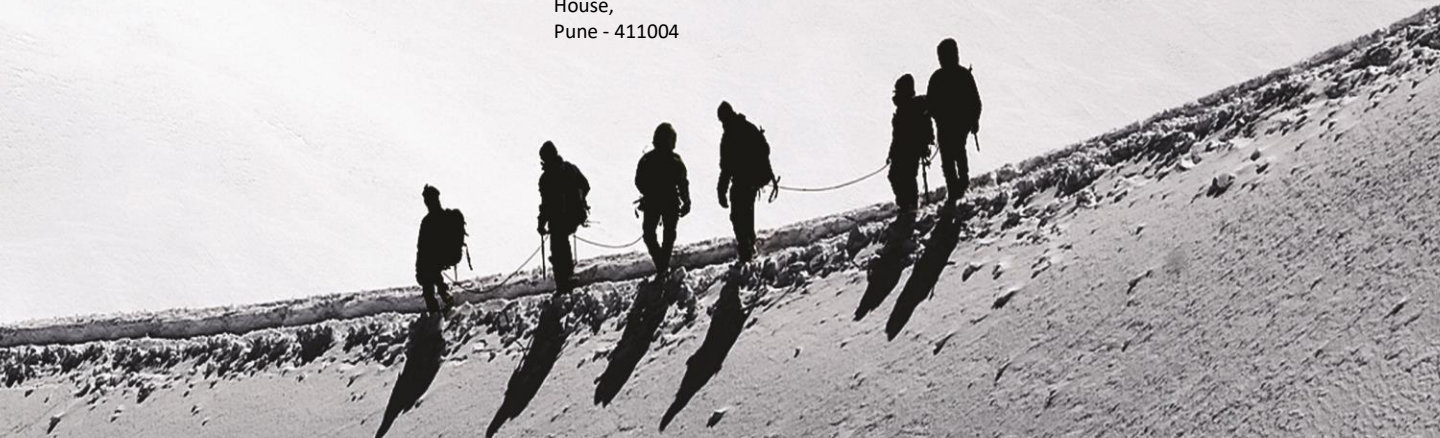
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