IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)

BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1405/Del./2014
(ASSESSMENT YEAR : 2009-10)

Pride Foramer SAS, C/o S.P. Puri & Co., CAs 4 / 18, Asaf Ali Road, New Delhi – 110 002.	vs.	Addl. Director of Income-tax, (International Taxation), Dehradun.

(PAN : AACCP1572D)

ITA No.1634/Del./2014
(ASSESSMENT YEAR : 2009-10)

Addl. Director of Income-tax, (International Taxation), Dehradun.	vs.	Pride Foramer SAS, C/o S.P. Puri & Co., CAs 4 / 18, Asaf Ali Road, New Delhi – 110 002.

(PAN : AACCP1572D)

ITA No.2225/Del./2014
(ASSESSMENT YEAR : 2009-10)

Addl. Director of Income-tax, (International Taxation), Dehradun.	vs.	Pride Offshore International LLC, C/o S.P. Puri & Co., CAs 4 / 18, Asaf Ali Road, New Delhi – 110 002.

(PAN : AAECP6665P)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Vidur Puri, CA
REVENUE BY : Shri Anuj Arora, CIT DR

Date of Hearing : 27.07.2016
Date of Order : 29.07.2016

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since identical question of fact and law has been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, Pride Foramer SAS (hereinafter referred to as 'the assessee'), by filing the aforesaid appeal being ITA No.1405/Del/2014, sought to set aside the impugned order dated 23.12.2013 passed by Dispute Resolution Panel-II, New Delhi qua the assessment year 2009-10 on the ground inter alia that :-

> "The learned Assessing Officer and Hon'ble DRP erred in law and on facts in denying the claim of non-taxability of the reimbursement of service tax of Rs.13,82,40,973/- in computing income u/s 44BB of the Act."

3. The appellant, Addl. Director of Income-tax, International Taxation, Dehradun (hereinafter referred to as 'the revenue'), by filing the aforesaid appeal being ITA No.1634/Del/2014, sought to set aside the impugned order dated 23.12.2013 passed by Dispute Resolution Panel-II, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

> "1. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel 'DRP') has erred in directing the Assessing Officer to exclude an

amount of Rs.89,57,794/- received by the assessee on account of "equipment lost in hole" from gross revenues received from M/s ONGC Limited for the purpose of computation of profits under the presumptive provisions of section 44BB of the Income Tax Act, 1961 ("The Act").

2. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel C DRP') has erred in directing the Assessing Officer to exclude an amount of Rs. 5,09,7941- received by the assessee on account of "Communication Immersat Charges" from gross receipts received from M/s ONGC Limited for the purpose of computation of profits under the presumptive provisions of section 44BB of the Act.

2.1 Whether the Hon'ble DRP has erred in observing that no further appeal has been filed by the Department against the order of the Hon'ble ITAT in assessee's own case for Assessment Year 2002-03 reported in [(2008) 22 SOT 204] wherein the above issue has been decided in favour of the assessee, ignoring the fact that the said order was not accepted by the Department on merits and appeal against the said order was not filed solely on account of the tax-effect being below the threshold monetary limit prescribed in terms of the internal instructions of the Department.

2.2 Whether the Hon'ble DRP has erred in not applying the ratio of the decision in the case of M/s BJ Services Co. Middle East [2008] 170 TAXMAN 286 (UTTARAKHA D) wherein receipts on account of supply of spare parts have been held to be includible as receipts u/s 44BB, particularly in view of the fact that the nature of receipts in the aid case was essentially similar to those involved in the present case.

3. Whether the Hon'ble DRP has erred in not appreciating the fact that the provisions of section 44BB are a self-contained code providing for computation of profits at a fixed percentage of gross receipts of the

assessee and all the deductions and exclusions from income are deemed to have been allowed to the assessee.

3.1 Whether the Hon'ble DRP has erred in not appreciating the fact that once the receipts are offered to tax u/s 44BB of the Act which provides for computation of profits on gross basis, there is no scope for computing or re-computing the profits by excluding any element of the receipts from the total turnover as the same would amount to defeating the very purpose of providing for a scheme of simpler mode of computation of profits u/s 44BB of the Act and obviating the need for accounting for individual receipts and payments etc.

3.2 Whether the Hon'ble DRP has erred in not applying/extending the ratio of the judgment of the Hon'ble Uttarakhand High Court in the case of CIT Vs. Halliburton Offshore Services Ins. (300 ITR 265) to the receipts on account of "equipment lost in hole" and "Communication Immersat Charges."

4. The appellant, Addl. Director of Income-tax, International Taxation, Dehradun (hereinafter referred to as 'the revenue'), by filing the aforesaid appeal being ITA No.225/Del/2014, sought to set aside the impugned order dated 27.12.2013 passed by Dispute Resolution Panel-II, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

"1. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in directing the Assessing Officer to apply the deemed profit rate of 10 % u/s 44BB of the Income Tax Act, 1961 ('The Act') on the revenues earned by the assessee from a non- resident company, M/s Pride Foramer (a French Company), on account of provision of

offshore drilling rig on hire for executing contracts with M/s ONGC.

2. Whether on the facts and in the circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in holding that the amount received by the assessee from M/s Pride Foramer, on account of the provision of drilling rig under charter agreement was not in the nature of Royalty as defined u/s 9(1)(vi) of the Act and was not taxable under the provisions of section 44DA r.w.s. 115A of the Act.

3. Whether on the facts and in the circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in holding that the revenues earned by the assessee on account of provision of drilling rig on hire to a non-resident company were in connection with prospecting etc of mineral oil and hence eligible for treatment u/s 44BB of the Act, without adjudicating the aspect of eligibility in terms of second limb of the exclusionary proviso (Explanation to section 9(1)(vii) of the IT Act, 1961) i.e. "for a project undertaken by the recipient" in terms of the proposition confirmed by Hon'ble Delhi High Court in DIT Vs. Rio Tinto Technical Services [2012-TII-OI-HC-DEL-INTL].

4. Whether on the facts and in the circumstances of the case the Hon'ble Dispute Resolution Panel ('DRP') has erred in not appreciating the fact in the present case the drilling rig was not provided on hire by the assessee directly to an entity (M/s ONGC) which is engaged in prospecting etc of mineral oil and is directly a member of the Production Sharing Contract.

5. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in holding that no distinction can be made between receipts from Production Sharing Participants (PSC Partners) and Non-Production Sharing Participants (Non-PSC Partners) and between plant and equipment provided on hire by first-leg and second-leg vendors, ignoring the fact that the receipts from second- leg are in respect of

contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, are liable to tax u/s 9(1)(vi)/9(l)(vii) read with section 44DA and not section 44BB of the IT Act, 1961.

6. Whether on the facts and circumstances of the case the Hon'ble Dispute Resolution Panel ('DRP') has erred in its interpretation of the legislative intent behind the scheme of taxation envisaged in 9(1)(vi) read with sections 44DA and 44BB ignoring the decisions in the cases of M/s Rolls Royce Pvt. Limited [2007-TII-03-HC-UKHAND-INTL] and M/s ONGC as agent of M/s Foramer France [(2008) 299 ITR 438 Uttarakhand] .

6.1 The Hon'ble DRP has erred in not applying the ratio laid down in the case of Foramer France (Supra), not appreciating the broad proposition laid down in the case that once the receipts answer the definition of Royalty or FTS under the Act, the same cease to qualify for treatment u/s 44BB of the Act.

7. Whether on the facts and circumstances of the case the Hon'ble Dispute Resolution Panel (' DRP') has erred in ignoring the distinct scheme of taxation of Royalty / Fees For Technical Services and disregarding the insertion of provisos in section 44BB/44DA/115A and the rationale behind the introduction of said clarificatory proviso in the Finance Bill 2010 in holding that the income of the assessee company was covered under the provisions of section 44BB.

8. Whether on the facts and in the circumstances of the case the Hon'ble Dispute Resolution Panel ('DRP') has erred in not appreciating that since sections 44DA/115A are special provisions for taxation of income in the nature of royalties and FTS and if a special provision is made respecting a certain matter that matter is excluded from the general provision under the rule of "Generallia S pecialibus non Derogant".

9. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has

erred in holding that the provisions of section 44BB of the Act are more special provisions which shall prevail over the provisions of section 9(1)(vi) read with sections 44DA and IISA of the Act, not appreciating the fact that both set of provisions are special in nature which operate in their own clearly defined spheres and therefore, once a particular receipt or income takes on the character of Royalty as defined in section 9(1)(vi), it cannot be considered for treatment u/s 44BB of the Act.

10. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in holding that sections 44DA and section 115A apply only to cases where the income by way of Royalty or FTS is earned by a non-resident from Government or an Indian entity and that the provisions of section 44DA/11l5A do not apply where an income is received by a non-resident from another non-resident.

11. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in not appreciating that proviso to section 44BB is not inserted 'per majorem cautelam' but explains and clarifies the main provision as the terms services or facilities used therein are not defined and the two terms used are too general in nature and thus once the payments take the character of royalty u/s 9(1)(vi) they go outside the purview of section 44BB and have to be taxed as royalty at rates prescribed for Royalty income under the Act and/or DTAA.

12. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in directing the AO to bring to tax the proportionate amount not appreciating the fact that proviso to section 44DA brought about by the Finance Act 2011 was only clarificatory in nature and its application has to be read into the main provisions with effect from the time the main provision came into effect in view of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drilling Vis CIT.

13. The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

Brief facts of ITA Nos.1405/Del/2014 and 1634/Del/2014

5. Briefly stated the facts necessary to decide issue in controversy in the aforesaid cross appeals are : the assessment order under section 143(3) / 144C(13) of the Income-tax Act, 1961 (for short 'the Act') was passed at total income of Rs.46,62,77,770/-. The assessee has earned a sum of Rs.89,57,794/- on account of equipment lost in well, Rs.5,09,404/- on account of immersat charges, a sum of Rs.13,82,40,973/- on account of reimbursement of service-tax and a sum of Rs.63,62,945/- on account of catering during the year under assessment. Assessee was called upon to show cause as to why the sum received by assessee on account of reimbursement should not be included in the amounts referred in section 44BB and included in the gross receipt to tax accordingly. Finding the reply by the assessee not tenable, AO came to the conclusion that the reimbursement is intricately linked to the service/work rendered by the assessee and arises due to the related receipts and as such, it is to be treated as part of taxable gross receipts and thereby assessed the total income of the assessee at Rs.45,08,70,660/-.

6. Assessee carried the matter before the Dispute Resolution Panel-II, New Delhi who has partly accepted the objections raised by the assessee and directed the AO to correct the figures for computation stated to have been added twice. Feeling aggrieved, the assessee has come up before the Tribunal by way of challenging the order passed by AO as well as DRP denying the claim of non-taxability of reimbursement of service tax of Rs.13,82,40,973/- in computing the income u/s 44BB of the Act and the revenue also filed the appeal against the order of the DRP.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

Brief facts of ITA No.2225/Del/2014

8. Briefly stated fact of this case are : draft assessment order dated 10.02.2014 was passed u/s 143(3) / 144C(13) of the Act assessing the total income at Rs.13,71,51,706/-. Pursuant to the scrutiny proceedings initiated against the assessee, necessary details were filed by the assessee through Shri Prashant Kochar, CA and Shri Sunny, CA.

9. Assessee company is incorporated in USA and is in the business of providing services and facilities in connection with the prospecting, production and extraction of mineral oil. Assessee company entered into a contract with Pride Foramer for rental of Oil Drilling Rig Pride Hawaii on lease for offshore drilling operations relating to mineral oil in India and the contract was only for the purpose of hiring/charter of oil drilling offshore rig pride Hawaii. Income has been offered on the basis of terms and conditions of the contract detailed in the invoice but no books of account were maintained for this purpose. Assessee claimed that such agreement are taxable u/s 44BB and not taxable as royalty u/s 9(1)(vi) of the Act or under Indo US Treaty. Finding the submissions made by the assessee not tenable, AO came to the conclusion that the payment received by assessee from leasing of "Oil Drilling Rig" Pride Hawaii is not covered under section 44BB and treated the rental receipts of the assessee as royalty u/s 9(1)(vi) of the Act. After complying with the directions issued by DRP vide order dated 27.12.2013, AO assessed the total income of the assessee at Rs.13,17,51,706/-.

10. Assessee carried the matter before the Dispute Resolution Panel-II, New Delhi who has came to the conclusion that amount

received by the assessee during the year under consideration on account of hire charges of the drilling rig be brought to tax by applying deemed profit ratio of 10% u/s 44BB of the Act. Feeling aggrieved, the assessee has come up before the Tribunal by way of challenging the order passed by DRP.

11. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

ITA NO.1405/DEL/2014 & ITA NO.1634/DEL/2014

12. Ld. AR for the assessee challenging the impugned order passed by AO/DRP contended that the issue in controversy is covered by the order passed by ITAT, Delhi Bench in assessee's own case cited as **Pride Foramer SAS vs. Addl. Commissioner of Income-tax, International Taxation – (2014) 43 taxmann.com 381 (Delhi – Trib.)**. However, on the other hand, ld. DR challenging the impugned order qua excluding the amount of Rs.89,57,794/- received by the assessee on account of "equipment lost in hole" from gross revenue received by the assessee for the purpose of computation of profit and excluding an amount of Rs.5,09,794/- received by the assessee on account of

"Communication Immersat Charges" from gross receipts received from M/s. ONGC Ltd. for the purpose of computation of profit under the presumptive provisions of section 44BB of the Act by the DRP relied upon the draft order passed by AO.

GROUND NO.1 OF ITA NO.1405/DEL/2014

13. Now, the question arises for determination in this case is :-

> ***"as to whether reimbursement of service-tax amounting to Rs. 13,82,40,973/- is required to be excluded in computing the income u/s 44BB of the Act as alleged by the assessee."***

14. Identical issue in assessee's own case has already been dealt with by the Tribunal in case cited as **Pride Foramer SAS vs. Addl. Commissioner of Income-tax** (supra) qua AY 2008-09 and returned the finding in favour of the assessee by relying upon the case decided by the Tribunal in case of **Sedco Forex Drilling Inc. 139 ITD 188**.

15. For ready reference, operative part of the order passed by the coordinate Bench of the Tribunal in assessee's own case cited as **Pride Foramer SAS vs. Addl. Commissioner of Income-tax** (supra) qua AY 2008-09 is reproduced as under :-

> "11. As regards ground No.4 regarding receipt of service tax issue, this issue has been examined by the Tribunal in the case of Sedco Forex Drilling Inc. 139 ITD 188 wherein it has been held that service tax

being a statutory liability cannot form part of gross receipts for the purpose of deemed profit u/s 44BB. The relevant findings of the Tribunal are reproduced below:-

> "As regards reimbursement of amount in respect of service tax, as pointed out by the ld. AR, the ITAT Delhi Bench in their decision in Technip Offshore Contracting BV(supra) concluded that service tax collected by the assessee being directly in connection with services or facilities or supply specified u/s 44BB of the Act provided by the assessee to ONGC, have to be included in the total receipts for the purpose of determination of presumptive profit u/s 44BB of the Act. It is well established that section 44BB of the Act is a special provision, treating 10 per cent of the aggregate amount specified in sub-s. (2) of s. 44BB as deemed profits and gains of such non-resident assessee who is engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils. The amount referred in sub-s. (2) of s. 44BB are the amounts (a) paid to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, (b) payable to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, (c) received by the assessee in India on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of,

mineral oils outside India and (d) deemed to be received by the assessee in India on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India. The service tax is a statutory liability like custom duty. Hon'ble Uttarakhand High Court in their decision in Schlumberger Asia Services Ltd.(supra) concluded that reimbursement of custom duty paid by the assessee could not form part of amount for the purpose of deemed profits u/s 44BB unlike the other amounts received towards reimbursement. Following the view in this decision, Mumbai Bench in their decision in Islamic Republic of Iran Shipping Lines(supra) held that service tax being a statutory liability, would not involve any element of profit and accordingly, the same could not be included in the total receipts for determining the presumptive income. In the light of view taken by the Mumbai Bench, especially when the ld. DR did not place any material before us, controverting the aforesaid findings of the ld. CIT(A) so as to enable us to take a different view in the matter nor brought to our notice any contrary decision, we are of the opinion that service tax paid by the assessee could not form part of amount for the purpose of deemed profits u/s 44BB unlike the other amounts received towards reimbursement. Therefore, ground no.3 in the appeal is allowed."

12. Therefore, following the above, we also hold that service tax received by the assessee cannot form part of gross receipts for the purpose of calculation of deemed profit. In view of the above ground No. 4 is decided in favour of the assessee. In nutshell, the appeal filed by the assessee is partly allowed."

16. Ld. DR for the revenue has not placed before us any material to depart from the view taken by the coordinate Bench in the case of cited as **Pride Foramer SAS vs. Addl. Commissioner of Income-tax** (supra). So, following the order passed by coordinate Bench, we hereby hold that the service tax received by the assessee cannot be included in the gross receipt for the purpose of computation of deemed profit. Consequently, this ground is determined in favour of the assessee.

GROUND NOS.1, 2 & 2.1 of ITA NO.1634/DEL/2014

17. Now, the first question arises for determination in this case is:-

> ***"as to whether reimbursement of loss of equipment in the well are includible in the gross revenue received from M/s. ONGC Limited for the purpose of computation of profits under the presumptive provisions of section 44BB of the Act as alleged by the revenue?***

18. At the very outset, ld. AR for the assessee fairly conceded that this issue has already been decided against the assessee in assessee's own case cited as **ACIT vs. Pride Foramer France SAS** (supra) qua AY 2002-03 wherein it is categorically decided that reimbursement of the loss of equipment in hole/well amounting to Rs.89,57,794/- forms the part of gross receipts and as such falls within the presumptive provisions of section 44BB of the

Act for the purpose of computation of profit. So, consequently ground no.1 is determined in favour of the revenue.

19. The next question arises for determination in this case is :-

> ***"as to whether amount of Rs.5,09,794/- received by the assessee on account of "Communication Immersat Charges" are required to be included for the purpose of computation of profit under the presumptive provision of section 44BB of the Act as alleged by the revenue?"***

20. This issue has already been dealt with by the coordinate Bench of the Tribunal in assessee's own case cited as **ACIT vs. Pride Foramer France SAS – (2008) 22 SOT 204 (Delhi)** qua AY 2002-03 and decided in favour of the assessee by returning the following findings :-

> 20. No doubt that section 44BB is a code in itself and it starts with non obstantive clause which excludes application of sections 28 to 41 and sections 43 and 43A of the Act but at the same time, to assess any sum under that section, the activity must fall within the activity described in sub-section (2) of section 44BB of the Act. Supply of Dry Fruits and recovery of communication expenses specifically do not find mentioned in sub-section (2) of section 44BB as these activities have nothing to do with the activity of prospecting for or extraction or production of, mineral oils in India or outside India. So as it relates to reimbursement of cost of equipment, the same also does not fall within the ambit of section (2) of section 44BB as the same apply on supply of plant and machinery on hire and the equipment, 75 per cent cost of which is reimbursed, was not machinery on hire being used in such activity. There is no material on record to show that the said equipment was used on hire either by the assessee or the contractee.

Therefore, the reimbursement payments received by the assessee being not coming within the scope of section 44BB of the Act have rightly been' held to be excludible by ld. CIT (A). The case law relied upon by ld. DR have no application to the facts of present case as the non-substantive clause of section 44BB is held to be applicable only in respect of activities refer to in section 44BB(2) of the Act. The reimbursement of expenses is also not taxable under other provisions of the Act as there is no material on record to show that any element of profit was embedded in the reimbursement received by the assessee. In absence of element of pro fit in the amount received by the assessee as reimbursement, no income can be assessed under other provisions of the Act. Therefore, we find no force in the arguments which have been submitted by ld. DR. Rather it will be useful to refer to the following observations from the decision of Hon'ble Uttaranchal High Court in the case of Sedco Forex International Inc. (supra) :-

> "In the present case, a finding has been recorded by the ITAT that it was not in dispute before the Tribunal that the payment was made to the appellant company outside India and the mobilization fee as claimed by the assessee was paid to the appellant by ONGC has no nexus with the actual amount incurred by the appellant company for transportation of drilling units of rigs to the specified drilling locations in India. Hence, the mobilization fee is not the reimbursement of expenditure. ONGC was liable to pay a fixed sum as stipulated in the contract regardless of actual expenditure which may be incurred by the assessee company for the purpose. In view of the fictional taxing provision contained under section 44BB, the Assessing Officer was right in adding the amount of Rs.99,04,000 for the assessment year 1986-87 and amount worth Rs.64,64,530 for the assessment year 1987-88 received by the assessee towards mobilization charges for the purpose of imposing income-tax and CIT(A) and ITAT were

> also right in upholding the order of the Assessing Officer.' [Emphasis supplied]
>
> 21. From the above observations it is clear that mobilization fee was not considered reimbursement on the ground that this was not in the nature of reimbursement; therefore, the same could not be brought to tax under the provisions of section 44BB of the Act. Their lordships in the said case have considered section 44BB, section 4, section 5(2) and section 9 and section 98 also and after analyzing of these sections it has been concluded that mobilization fees was to be considered under section 44BB on the ground that ONGC was liable to pay a fixed sum, as stipulated in the contract regardless of actual expenditure which may be incurred by assessee company for the purpose. It is, therefore, the mobilization fee was considered liable for taxation under section 44BB. In the present case, payments received by the assessee were not a fixed sum as stipulated in the contract. It was based on actual expenditure which has been incurred by the assessee for that very purpose. There was no element of profit. Therefore also provisions of section 44BB could not be applied for present case."

21. Ld. DR has not brought on record any material to depart from the findings returned by the coordinate Bench in assessee's own case cited as **ACIT vs. Pride Foramer France SAS** qua AY 2002-03 and as such, we hold that reimbursement of Communication Immersat Charges amounting to Rs.5,09,794/- are not in the nature of reimbursement and as such are not liable to be taxed under the provisions contained u/s 44BB of the Act.

22. Remaining grounds no.2.2, 3, 3.1 & 3.2 are general in nature and as such need no discussion.

GROUND NOS.1 TO 13 OF ITA NO.2225/DEL/2014

23. Identical issue as to whether assessee is eligible for benefit of section 44BB of the Act and is entitled to treat the payment received by the assessee from leasing of oil drilling rig as royalty; that there is no distinction between receipt from production sharing participants (PSC Partners) and non-production sharing participants (non-PSC Partners) and between plant and equipment profit on hire by first leg and second leg vendors and the receipt from second leg are not liable to tax u/s 9(1)(vi) and 9(1)(vii) read with section 44DA and not section 44BB of the Act have already been decided by the coordinate Bench of the Tribunal in assessee's own case cited as **Pride Offshore International LLC vs. Addl.DIT, International Taxation, Dehradun in ITA No.5406/Del/2012 qua AY 2008-09 dated 22.05.2015** in favour of the assessee.

24. Operative part of the findings returned by the coordinate Bench of the Tribunal in case cited as **Pride Offshore International LLC vs. Addl.DIT, International Taxation** (supra) are reproduced as under for ready reference :-

> "13. Besides, the Ld. DRP in the case of assessee itself for the Asstt. year 2009-10 following decisions of Mumbai Bench of the Tribunal in the case of Micoperi S.P.A. Milano (supra), the Hon'ble Authority of Advance

Ruling in the case of Wavefield Inseis ASA (supra) and Bourbon Offshore Asia Pte Ltd., In re [2011] 337 ITR 122/200 Taxman 408112 taxmann.com 232 (AAR- New Delhi), Hon'ble Jurisdictional High Court in the case of OHM Ltd. (supra) as well as the decision of authority for advance ruling in the case of Spectrum Geo Ltd., In re [2012]209 Taxman 397/346 ITR 422/25 taxmann.com 77 (AAR - New Delhi) has come to the conclusion that the amounts received by the assessee during the year under consideration on account of hire charges of the drilling rig should be brought to tax by applying the deemed profit ratio of 10% u/s 44BB of the Act. The Ld. DRP has accordingly directed the AO to decide the issue as such while allowing the objection raised by the assessee. The learned CIT(DR) has reproduced the relevant para No. 12 of the decision of the Hon'ble Authority of Advance Ruling in the case of Spectrum Geo Ltd. (supra) as under :-

> "12. The inquiry now is whether the income derived by the applicant from performing its contract with the UAE Company would be assessable to tax as, fees for technical services under section 440, 44DA, or 115A of the Act. Admittedly, the income derived by the applicant Is from a UAE company and not from the Government or an India concern. In other words, income derived by the applicant is from a non-resident company of foreign company. On the wording of these sections, the income cannot be brought within their purview, because they only speak of Income by way of fees for technical services received from Government or an Indian concern. On this short ground, the contention of the Revenue that the Income derived by the applicant Is independently assessable under section 115A or 44DA of the Act, has to be rejected. Since, income derived by the applicant, is from an activity in connection with the prospecting for mineral oils and from a foreign company, the applicant would be entitled to claim to be assessed under section 44BB(1) of the Act. The ruling;

therefore, on question no 3 is that the Income derived by the applicant are to be computed in accordance with the provisions of section 44 BB (1) of the Act." (Emphasis Supplied).

14. As discussed above, the Hon'ble Delhi Bench of the ITAT in the case of Louis Dreyfus Armateures SAS (supra) has decided an identical issue in favour of the assessee has observed that if the legislature intention as contended by the Revenue was to restrict the benefit of sec. 44BB of the Act only to the main contractor or ONGC then the words after "the assessee engaged in the business of supplying plants and machinery on hire" or "providing services or facilities" ought to have been omitted. Hence, where the provision does not create any discrimination between the person who actually does the activity of prospecting for or extraction or production, and the person who supplies the plants and machinery, the narrow interpretation of the provisions is thus not permitted. It has been held that the basic condition to be satisfied in the said provision is that the plant or machinery supplied or lented on hire by the assessee, a non-resident should be used in the prospecting for or extraction or production of mineral oils or where equipment has been supplied, such equipment should have been used for the purposes of prospecting for or extraction or production of mineral oils. The ITA T thus came to the conclusion that the fetter assumed by the authorities below while interpreting the provisions of sec. 44BB of the Act are manifestly absent and there is nothing in the said provisions so as to disentitled a sub-contractor from invoking the said provisions. The ITA T thus did not find any fault in the claim of the assessee that Revenue received under the chartered agreements with CGG for providing two seismic survey vessels are in consideration with prospecting for extraction or production of mineral oils and, therefore, taxable under sec. 44BB of the Act.

15. We, however, find that the decision dated 09.07.2014 of Hon'ble Delhi High Court in the case of PGS Geophysical AS (supra) has not been cited before

the ITAT in the case of Louis Dreyfus Armateures SAS (supra). Hon'ble Delhi High Court in the case of PGS Geophysical AS (supra) vide para No. 20 of the judgment has been pleased to hold that the receipt of the assessee can be taxed under sec. 44BB of the Income-tax Act, 1961 only (i) if the assessee has a PE in India during the relevant period and (ii) the contract entered into by the assessee in India was effectively connected with that PE in India. In the present case before us, the Assessing Officer at page No.4 para No.5 had himself noted that the assessee had got PE in India, thus, first condition of getting benefit under sec. 44BB of the Act as laid down by the Hon'ble High Court in the above cited case is fulfilled. So far as the second condition that the contract entered into by the assessee in India was effectively connected with that PE in India is concerned, the dispute in this regard remained that the assessee being sub-contractor as per the Authorities below was not eligible for the benefit of section 4BB of the Act. The Delhi Bench of the ITA T in the case of Louis Dreyfus Armateures SAS (supra) after discussing the issue in detail has held that the provision does not create any discrimination between the persons who actually does the activity of prospecting for or extraction or production and the person who supplies the plants and machinery, the arrow interpretation of the provisions is thus not permitted. It has been held that the basic condition to be satisfied in the said provision is that the plant or machinery supplied or lented on hire by the assessee, a non-resident should be used in the prospecting for or extraction or production of mineral oil or where equipment has been supplied, such equipment should have been used for the purpose of prospecting for or extraction or production of mineral oil. Thus, we find that there is no dispute that the contract entered into by the assessee in India was effectively connected with that PE in India and the dispute as to whether letting out drilling rig, services and facilities by the assessee in connection with prospecting production and extraction of mineral oil under the contract with Pride Foramer as accepted by ONGC is a sub-contract and hence the assessee is not entitled to have benefit of taxability under sec. 44BB of

> the Act has been decided in favour of the assessee by the Co-ordinate Bench of the ITA T in the case of Louis Dreyfus Armateures SAS (supra). Since both the conditions as pointed out by the Hon'ble Delhi High Court in the case of PGS Geophysical AS (supra) have been fulfilled in the present case, we are of the view that the assessee is very much eligible for the benefit available under sec. 44BB of the Act towards the hire charges of the drilling rig by applying the deemed profit ratio of 10% under the said provisions. It is held accordingly with direction to the Assessing Officer to compute the tax as such by allowing the benefit of the provisions laid down under sec. 44B of the Act. Ground No.1 is accordingly allowed."

25. Ld. DR for the revenue has not brought on record any material to depart from the view taken by the coordinate Bench in assessee's own case cited as **Pride Offshore International LLC vs. Addl.DIT, International Taxation** (supra) qua AY 2008-09. Even otherwise in the identical facts and circumstances "rule of consistency" is also applicable.

26. So, by following the findings returned by the coordinate Bench of the Tribunal in assessee's own case cited as **Pride Offshore International LLC vs. Addl.DIT, International Taxation** (supra), grounds raised by the revenue by way of present appeal are not sustainable and the findings returned by the DRP directing the AO to apply the deemed profit rate of 10% u/s 44BB of the Act on the revenue earned by the assessee from a non-resident company, M/s Pride Foramer on account of provision of

offshore drilling rig on hire for executing contracts with M/s. ONGC; and treating the amount received by the assessee from M/s. Pride Foramer on account of the provisions of drilling rig under Charter Agreement not in the nature of royalty as defined u/s 9(1)(vi) of the Act and not taxable under the provisions contained u/s 44DA read with section 115A of the Act and that DRP has rightly not applied the distinct scheme of taxation of royalty/fee for technical services while entering the provisions contained u/s 44BB / 44DA / 115A, hence appeal filed by the revenue is hereby dismissed.

27. In view of what has been discussed above, appeal bearing ITA No.1405/Del/2014 filed by the assessee is hereby allowed, appeal bearing ITA No.1634/Del/2014 filed by the revenue is partly allowed and appeal bearing ITA No.2225/Del/2014 filed by the revenue is dismissed.

Order pronounced in open court on this 29th day of July, 2016.

Sd/-	**sd/-**
(J.S. REDDY)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 29th day of July, 2016
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.