

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R. S. SYAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A .No. 573/DEL/2006(A.Y 2002-03) &
I.T.A .No. 2486/DEL/2006(A.Y. 2003-04)**

ACIT (OSD), Range-1, Aayakar Bhawan, Dehradun (APPELLANT)	Vs	M/s Landmarks Graphics Corp, USA Dehradun (RESPONDENT)
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I.T.A .No. 2952/DEL/2007 (A.Y 2004-05)

DCIT (OSD), Range-1, Dehradun (APPELLANT)	Vs	M/s Landmarks Graphics Corp, USA Dehradun (RESPONDENT)
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I.T.A .No. 4615/DEL/2007 (A.Y 2005-06)

DDIT International Taxation, Dehradun (APPELLANT)	Vs	M/s Landmarks Graphics Corp, USA Dehradun (RESPONDENT)
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I.T.A .No. 1180/DEL/2012 (A.Y 2006-07)

I.T.A .No. 1179/DEL/2012 (A.Y 2008-09)

ADIT (Intl. Taxation) Dehradun (APPELLANT)	Vs	M/s Landmarks Graphics Corp, USA C/o. Nangia & Co., 75/7, Rajpur Road, Dehradun AABCL1012F (RESPONDENT)
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Appellant by	Sh. Anuj Arora, CIT DR
Respondent by	Sh. Tapas Ram Misra, Adv Sh. Shashank Sharma, Adv & Karonjot Singh, CA Sh. Amit Arora, CA

Date of Hearing	07.07.2017
Date of Pronouncement	12.07.2017

ORDER

PER SUCHITRA KAMBLE, JM

These appeals are filed by the Revenue for Assessment Year 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 and 2008-09.

2. The Ld. AR submits that for Assessment Year 2004-05 & 2008-09 (ITA No. 2952/Del/2007 & 1179/Del/12) filed by the Revenue, the tax effect is less than Rs. 10 lacs. Therefore, as per the CBDT Circular No. 21/15 dated 10/12/2015 revised the monetary limit of Rs. 10 lacs for not filing the appeal before the Tribunal. These instructions are operative retrospectively to the pending appeals. Keeping in view the CBDT Circular dated 10/12/2015 & also the provisions of Section 268A of Income-tax Act 1961, and considering the submissions of the Ld. AR, the Revenue is also in agreement with the same subject to file M.A if in case Tax Effect is more than Rs. 10 lacs. The appeals for A.Y. 2004-05 and 2008-09 being ITA No. 2952/DEL/2007 and 1179/DEL/2012 are dismissed.

3. However, dismissal of these two appeals will not hold as precedent in earlier or subsequent proceedings as the issues involved and agitated by the Revenue in these appeals are common to the appeals filed for preceding and subsequent Assessment Years.

4. The assessee company is incorporated in the United States of America and for the purpose of the DTAA between India & USA, it is a tax resident of the USA. The assessee is in the business of providing software solutions to the oil and gas industry throughout the world and had sold certain software to purchasers in India. It is engaged in the business of supply, installation and commissioning, maintenance, consultancy and training of softwares which are used in connection with the prospecting for production exploration and extraction of mineral oils.

A.Y. 2002-03

5. During the assessment year under considerations, the Respondent had supplied its software to various Indian companies. The Respondent had also rendered services in relation to installation and commissioning and providing training to the employees of the Indian companies to use the software. The provision of services was inextricably linked to the sale of software. However, in respect of certain contracts, the training services were provided on stand-alone basis (i.e. the contract for training was separate from the supply of software).

5.1 The Assessing Officer observed that the software supplied by the Respondent is available off the shelf for any person and accordingly held that supply of software is not considered to be in the nature of 'royalty' as defined in Article 12 of India-US DTAA. The Assessing Officer further observed that the title of goods (being software) was to pass outside India. However, owing to the fact that the installation and commissioning of the software was required to be carried in India, it was held that a part of the income from supply of software along with income from installation and training from software (calculated on notional basis) was taxable in India. The Assessing Officer held that 5% of the contract value (or actual value of installation, if separately quantified in the contract) pertains to installation and commissioning of software and accordingly brought it to tax @ 15% as 'fee for included services' as provided in

Article 12 of India-US DTAA. It was further held that 10% of the contract value of the software (or actual value of installation, if separately quantified in the contract) was in relation to the training of employees of the Indian customers and same was brought to tax at the rate of 15% as 'fee for included services' under Article 12 of India USA DTAA. It was also held that 2% of the contract value of the software represented the business income of the Respondent which ought to be taxed in India and same was brought to tax in India at the corporate tax rate applicable to a foreign company in the assessment year. These incomes were brought to tax by the Assessing Officer on account of the fact that the software was installed and commissioned in India. The Assessee also entered into independent contract for training employees of its Indian customer to use the software supplied by it. The Assessing Officer held that the entire income from training employees of the Indian company was in the nature of 'fee from included services' and the same was brought to tax at the rate of 15% as provided in Article 12 of India-US DTAA. The Assessee had also received a sum of Rs. 30,86,293/- from Halliburton Offshore Services Inc. As the Assessee could not produce the contract or invoice in relation to this receipt, the Assessing Officer held the entire receipt from Halliburton Offshore Services Inc. was in the nature of 'fee from included services' as provided in Article 12 of India-US DTAA and taxed such receipt at the rate of 15%.

Accordingly, the assessment for the Assessment Year 2002-03 was completed with following additions:

Taxable income as per Return of Income	NIL
Add:	
Income from sale of software (2% of contract value) (taxed at corporate tax rate applicable to a foreign company)	Rs. 24,08,514/-
Income from fee from included services -Installation and commissioning as a part of sale of software (5% of contract value) -Training as part of sale of software (10%	Rs.67,80,495 Rs.28,88,131/-

of contract value)	Rs.17,24,616/- Rs. 30,86,293/-
Training (standalone contract) -Income from HOS	
Total Taxable Income as per A.O	Rs. 1,69,88,049/-
Tax Liability -Tax on income from software @48% - Tax on income from fee from included services @15%	Rs.11,56,087/- Rs.21,86,930/-
Total Tax Liability	Rs.33,43,017/-

5.2 The CIT (A) observed that the Assessing Officer had brought to tax the income from sale of software without examining the fact as to whether the Respondent had a PE in India. **The CIT (A) observed that the Assessee did not have any office in India and that its activities are not covered by the deeming fiction of Article 5(2) of India-US DTAA.** Accordingly, it was held by the CIT (A) that **the** Assessee did not have a PE in India and in the absence of PE, the business profits from sale of software could not be brought to tax in India. The CIT (A) also relied on the judgment of Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh: [2004] 271 ITR 401 and that of Delhi Bench of ITAT in the case of Motorola Inc. vs DCI: 95 1TD 269 and held that the sale of software by the assessee was in the nature of sale of goods. The CIT (A) thereafter held that since the goods were sold by the Assessee outside India, income from such sale could not be brought to tax in India. The addition of Rs. 24,08,514/- made by the Assessing Officer as income from sale of software was therefore deleted. The CIT (A) cited the provisions of Article 12(5)(a) of India-US DTAA and held that where the installation and commissioning and **training** services were inextricably linked to the sale of goods other than **property** described in Para 3(a), of DTAA, the income from these services could not be included within the ambit of 'fee for included services'. **Accordingly, the** CIT (A) deleted the addition of Rs. 67,80,495/- which was added by A.O as income from installation and commissioning of

software provided along with supply of software and Rs. 28,88,131 which was added as income from training provided for use of software along with supply of software by the AO. The CIT (A) however, held that income from training provided without supplying software will not get the benefit of Article 12(5)(a) of India-US DTAA. The CIT (A) held that income of Rs. 17,24,616/- was taxable in India. However, the CIT (A) relied on the Instruction No. 1862 issued by CBDT and held that the income from training provided without supplying software ought to be taxed under section 44BB of the Income-tax Act, 1961 and not at the rate of 15% as taxed by the AO. Thus, the addition of Rs. 17,24,616/- in respect of standalone training contracts was confirmed by the CIT (A). However, it was held that income from such services ought to be taxed under section 44BB of the Act and not **at** the rate of 15% as levied by the AO. Income earned by the Assessee from contract with Halliburton Offshore Services Inc. was not pressed by the Assessee before the CIT(A) and addition to the tune of Rs. 30,86,293/- was accordingly, confirmed by the CIT (A).

5.3 The Ld. DR relied upon the Assessment Order. The Ld. DR also submitted that the arguments submitted for A.Y. 2003-04 may be taken into consideration.

5.4 The Ld. AR relied on the order of CIT (A) and submitted that the arguments for A.Y. 2003-04 may be taken into consideration and the appeal of the Revenue may be dismissed.

A.Y. 2003-04

6. During the assessment year under consideration, the Assessee had also rendered services similar to that of the Assessment Year 2002-03. In addition, the Assessee had also provided its software to Indian companies on rental basis in this particular year.

6.1 At the time of completing assessment for the Assessment Year 2003-04, the Assessing Officer made similar additions to that of previous Assessment Year on the services rendered in relation to installation and commissioning and providing training to the employees of the Indian companies to use the software. The Assessing Officer held that income from providing software on rental basis is in the nature of 'fee for included services' as provided in Article 12 of India-US DTAA and taxed income from renting of software at the rate of 15%.

Accordingly, the assessment for the A.Y. 2003-04 was completed with following additions:

Taxable income as per Return of Income	NIL
Add:	
Income from sale of software (2% of contract value)	Rs.16,25,444/-
Income from fee from included services (taxed at corporate tax rate applicable to a foreign company)	Rs.75,34,373/-
-Installation and commissioning as a part of sale of software (5% of contract value)	Rs.1,00,63,623/-
-Income from training services (included with sale of software)	Rs.1,04,48,070/-
-Income from training service (standalone contract)	Rs.20,55,260/-
-Income from rental of software	1,45,38,153/-
-Income from HOS	
Total Taxable Income as per A.O	Rs.4,62,64,920/-
Tax Liability	

-Tax on income from software @42%	Rs.6,82,686/-
-Tax on income from fee from included services @15%	Rs.66,95,922/-
Total Tax Liability	Rs.73,78,608/-

6.2 The CIT (A) has given similar findings as given for Assessment Year 2002-03 by the then CIT(A) and held that the sale of software by the Assessee was in the nature of sale of goods. The CIT (A) thereafter held that since the goods were sold by the Assessee outside India, income from such sale could not be brought to tax in India. The addition of Rs. 16,25,444/- made by the AO as income from sale of software was therefore deleted. The CIT (A) observed that renting of software was akin to renting of a machine or equipment. It was therefore held by the CIT (A) that income from renting of software is not in the nature of 'fee from included services'. The CIT (A) also held that since the software rented was used for exploration and extraction of mineral oils, the income from renting of software ought to be taxed under section 44BB of the Income-tax Act, 1961. The addition of Rs. 20,55,260/- in respect of income from rental of software was therefore confirmed. Therefore, the CIT (A) held that such income was to be taxed at the presumptive rate provided in section 44BB of the Act instead of 15% as levied the order of the AO. **The CIT (A) deleted the addition of Rs. 75,34,373/- which was added as income from installation and commissioning of software provided along with supply of software by the AO and Rs. 1,00,63,623/- which was added as income from training provided for use of software along with supply of software by the AO on the similar findings as given in the appellate order for A.Y. 2002-03.** The CIT (A) held that income from training provided without supplying software will not get the benefit of Article 12(5)(a) of India-US DTAA. The CIT (A) held that income of Rs. 1,04,48,070/- was taxable in India. The addition of Rs. 1,04,48,070/- in respect of standalone training contracts was

confirmed by the CIT (A). However, it was held **that** income from such services ought to be taxed under section 44BB of the Act and not at the rate of 15% as levied by the AO. Income earned by the Assessee from contract with Halliburton Offshore Services Inc. was not pressed by the Assessee before the CIT(A) and addition to the tune of Rs. 1,45,38,153/- was accordingly, confirmed by the CIT (A).

6.3 The Ld. DR heavily relied upon the assessment order. The Ld. DR further submitted that in Assessment Year 2006-07, in contract with Precision Drilling, the receipts for rental of proprietary software have been held by the CIT(A) (page 6-8 of CIT(A)'s order), after giving elaborate reasons, to be royalty receipts. The assessee has not challenged such decision of the CIT(A) in Assessment Year 2006-07, it is therefore prayed by the Ld. DR that the rental receipts in this Assessment Year 2003-04 (as well as in other AYs where applicable) be held to be taxable as royalty. The Ld. DR submitted that three relevant contract for rental income are at para 2.2, 2.6 and 2.7 of the Assessment Order for this Assessment Year 2003-04. The Ld. DR further submitted that it is undisputed that the assessee is supplying computer software that is used for prospecting and/or exploration and/or production of mineral oil in India. The CIT(A) has held certain revenues such as training simpliciter when such training is not coupled with sale of software to be taxable u/s 44BB of the Act. The assessee itself has argued before the A.O that if certain receipts are to be brought to tax, these are to be brought to tax u/s 44BB of the Act. Such submissions of the assessee have been referred by the A.O in the Assessment order for this Assessment Year 2003-04 at Para 2.1 & 2.2 (Page 2), Para 2.6 & 2.7 (page 4), Para 2.10 (page 6), Para 2.12 (page 7), Para 2.14 (page 8). The Ld. DR submitted that the assessee has relied upon the case law ONGC Ltd. Vs. CIT, [2015] 376 ITR 306 (S.C). In this case law ONGC Ltd. Vs. CIT(Supra), the Hon'ble Supreme Court has, inter alia, in Para 13 tabulated activities which are to be covered by the benefit of low rate (profit

deemed at @ 10% of 'aggregate' receipts) u/s 44BB (as against the claim of Revenue of taxability as FTS at a higher rate). In the said table, the entries at serial nos. 43 and 44 state following activities as being covered by S. 44BB of the Act:

- i. Serial NO. 43: "Supply supervision and installation of Software which is used for analysis of flow rate of mineral oil to determine reservoir conditions."*
- ii. Serial No. 44: "Supply, installation and familiarization of software for processing seismic data."*

The Hon'ble Supreme Court has proceeded from the specifics of the entries in the said table to broad generalized principle by stating the following right below the said table:

"The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assesseees or foreign companies under the said contract is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act."

The Ld. DR submitted that the word "familiarization" highlighted above with reference to serial no. 44 in the said table is equivalent to "training" provided by the assessee to its customers in India. For the sake of abundant clarity it also is pointed out that "training" is specifically stated at serial nos. 37 to 41 as

quoted in the judgment of ONGC by the Hon'ble Supreme Court. Further, as stated earlier, "training" would in any case be covered since the Hon'ble Supreme Court has broadened the scope by emphasizing "pith and substance" and "ancillary works." Thus it is clear that the entire scope of work/activity of the assessee, viz supply of software, its installation & commissioning which is in India, training of the customers for use of software wherein the training of the customers for use of software wherein the training is also in India, rental receipts from software rented out to Indian concerns, are all covered by the said judgment (supra) of the Hon'ble Supreme Court. Therefore, the Ld. DR prayed that the entire receipts of the assessee be brought to tax u/s 44BB. In any case, and without prejudice, all the services rendered in India, including that of installation & commissioning and training be brought to tax u/s 44B.

The Ld. DR further submitted that in Roxar Maximum Reservior Performance WLL, In re [2012] 207 Taxman 293/21 Taxmann. Com 128 (AAR), the applicant, a company of Bahrain, entered into a contract with ONGC for supply, installation and commissioning of manometer gauges for carrying out operations title to the goods passed outside India; that the payment therefore was received outside India; and therefore, the transaction of sale was not taxable in India. As per the ruling of the AAR in this case even the supplies are to be brought to tax under u/s 44BB at 10% specified under that Section.

6.4 The Ld. AR relied on the order of CIT (A) and submitted that the Assessee does not have a PE in India. The contracts of supply of software required the Respondent to be in India for a very short duration, usually ranging from 10-15 days. Further, the Revenue has not brought anything on record to suggest that the Assessee has a PE in India. The Ld. AR submitted that the Ld. DR during the hearing dated 20th April 2017 did not press the ground relating to presence of Assessee's PE in India. Thus, the Ld. AR submitted that in light of the fact that the supply of software has happened outside India and that the Assessee did not have any fixed place at its disposal in India during the year, the ground No.1 of the Revenue may be dismissed. The Ld. AR further

submitted that the income from training services provided to a company engaged in exploration, extraction and productions of mineral oils is eligible for getting taxed at the presumptive rates provided in section 44BB of the Act. The law in this regard is no more *res Integra*. Hon'ble Supreme Court in the case of ONGC Ltd. Vs. CIT [SC], [2015] 376 ITR 306 (SC) had provided a list of services which are eligible for getting taxed under section 44BB of the Act in Para 13 of its judgment. A perusal of this list will highlight that the services provided by the Assessee are covered within the service. The Ld. AR further submitted that ground no. 2 raised by the Revenue is erroneous to the extent that it has been stated that the CIT(A) had held that the installation and commissioning services are taxable under section 44BB of the Act. As is evident from the order of the CIT (A), the installation and commissioning services being intrinsically linked to the supply of software were held to be not taxable by virtue of Article 12(5)(b) of India-US DTAA. Thus, the Ld. AR submitted that the ground to this extent may be deleted. Further, the Ld. AR submitted that the training and software rental services provided under a standalone contract are eligible for getting taxed at the rate provided under section 44BB of the Act as confirmed by the Hon'ble Supreme Court in the case of ONGC Limited (*supra*), ground no. 2 of the Revenue be dismissed. The Ld. AR further submits that the Revenue has contended, for the first time in the written submission, that the entire receipts of the Assessee including that of supply and installation etc., of software which is not taxable in India in view of India-US DTAA, should be taxed under section 44BB of the Act. It is submitted that where the income of a resident of a contracting state is not taxable due to application of DTAA, the same income cannot be brought to tax by applying provisions of the domestic law. It is only when income is taxable under the provisions of domestic law read with DTAA, then the more beneficial taxing provisions (whether DTAA or domestic law) applies to that income. Since income from supply and installation etc., of software is not taxable for the reason that the Respondent has no Permanent Establishment in India, such income cannot be taxed by invoking provisions of section 44BB of the Act. Further, the Ld DR has raised

an issue which was not even the AO's case, nor was it raised as a ground to challenge the impugned order of the CIT(A) in any year. Besides, the Advance Ruling cited in the written arguments (Roxar Maximum Reservoir Performance WLL: 21 taxmann.com 128) is rendered in the peculiar facts of that case. Such ruling, as per section 245S of the Act is binding only on the Applicant, in respect of that particular transaction, and on the Principal Commissioner or Commissioner and Income-tax authorities subordinate to him, in respect of the applicant and the said transaction. The Ld. AR pointed out that in the context of this judgment relied by the Ld DR, that the Applicant before AAR was a resident of Bahrain, a country with which India has no DTAA. This ruling is thus not applicable to the Assessee's case at all.

A.Y. 2005-06

7. During the assessment year under consideration, the similar additions was made by the Assessing Officer to that of Assessment Year 2002-03.

7.1 Accordingly, the assessment for the Assessment Year 2005-06 was completed with following additions:

Taxable income as per Return of Income	NIL
Add:	
Income from fee from included services	
-Installation and commissioning as a part of sale of software (5% of contract value)	Rs.31,48,770/-
- Income from training services (included with sale of software)	Rs.1,64,71,730/-
-Income from training service (standalone contract)	Rs.33,41,061/-
Total Taxable Income as per A.O	Rs.2,29,61,561/-
Tax Liability	
- Tax on income from fee from included services @15%	Rs.34,44,234/-

Total tax Liability	Rs.34,44,234/-
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7.2 The CIT(A) deleted the addition of Rs. 1,64,71,730/- which was added as income from installation and commissioning of software provided along with supply of software by the AO. In regards to the addition of Rs. 33,41,061/- for standalone training contracts confirmed by the CIT(A), it was held that income from such services ought to be taxed under section 44BB of the Act and not at the rate of 15% as levied by the AO.

7.3 The Ld. DR emphatically relied upon the Assessment Order. The Ld. DR also submitted that the arguments submitted for A.Y. 2003-04 may be taken into consideration.

7.4 The Ld. AR relied on the order of CIT(A) and submitted that the arguments for Assessment Year 2003-04 be taken into consideration.

A.Y. 2006-07

8. During the assessment year under consideration, the additions was made as per earlier Assessment Year 2003-04 including that of providing software to Indian Companies on rental basis.

8.1 Accordingly, the assessment for the 2006-07 was completed with following additions:

Taxable income as per Return of Income	NIL
Add:	
Income from fee from included services	
-Installation and commissioning as a part of sale of	Rs.11,75,946/-

software (5% of contract value)	
-Income from training services (included with sale of software)	Rs.73,83,647/-
-Income from training service (standalone contract)	Rs.23,65,267/-
Income from royalty (providing software on rental basis)	Rs.45,89,056/-
Total Taxable Income as per A.O	Rs.1,55,13,920/-
Tax Liability	
-Tax on income from fee from included services and royalty @15%	Rs.23,27,088/-
Total tax liability	Rs.23,27,088/-

8.2 The CIT(A) followed the appellate orders for A.Y. 2003-04 and A.Y. 2005-06 and held that where the installation and commissioning and training services were inextricably linked to the sale of goods other than property described in Para 3(a), the income from these services could not be included within the ambit of fee for included services. **Accordingly, the CIT (A) deleted the addition of Rs. 11,75,946/- which was added as income from installation and commissioning of software provided along with supply of software by the AO.** The CIT(A) held that income of Rs. 23,65,267/- from standalone training contracts was taxable in India. However, it was held that income from such services ought to be taxed under section 44BB of the Act and not at the rate of 15% as levied by the AO.

8.3 The Ld. DR relied upon the Assessment Order. The Ld. DR also submitted that the arguments submitted for A.Y. 2003-04 may be taken

into consideration.

8.4 The Ld. AR relies on the order of CIT(A) and submitted that the arguments for Assessment Year 2003-04 be taken into consideration.

9. We have heard both the parties and perused the records. The assessee filed its return of income claiming that it is not taxable in India by virtue of the Double Taxation Avoidance Agreement (DTAA) between India & USA as it does not have any permanent establishment in India as defined under Article 5(2). As per the records and the submissions before us by the Ld. AR, the assessee has not participated in the activities for a period more than 10 to 15 days in India. The same was not refuted by the Ld. DR at any point of time while arguing about the status of permanent establishment of the Assessee. The CIT(A) also held that admittedly the assessee does not have any office in India and its activities are not covered by the deeming fiction of Article 5(2) of the Indo-US DTAA which is to be considered project-wise. The CIT(A) further observed that the Assessing Officer has not considered the issue as to whether the assessee had or did not have a permanent establishment. Therefore, the CIT(A) for the Assessment Year 2002-03 held that the assessee did not have a permanent establishment in India during the previous year relevant to Assessment Year 2002-03. Accordingly, the CIT(A) held that in terms of Article 7(1) of the Indo-US DTAA the sale of software which are "off the shelf" software, are not taxable in India. Thus, the assessee has succeeded in establishing that there is no permanent establishment.

10. The assessee has engaged in installation and commissioning of software and training to the employees of the Indian entities as well as rental of software. For payment made on account of software supply to the foreign company the CIT(A) relied on ITAT Delhi Bench in case of Motorola Inc Vs. DCIT 95 ITD 269 wherein it is held that the payment made on account of

software supply to the foreign company cannot be taxed as royalty. Thus, the CIT(A) deleted the addition made by the Assessing Officer. For software related to training which was provided by the assessee, the CIT(A) held that the software facilitates the exploration/extraction of mineral oils. As per the Instruction No. 1862 of the Board, the CIT(A) held that on account of provision for training to employees on software was held taxable u/s 44BB. It is pertinent to note that the issue related to taxability of Revenue pertaining to supply of software in India for Assessment Year 2002-03, 2003-04 the issue is squarely covered as supply of software is not royalty as per Article 12 of the DTAA and also the decision of Special Bench in case of Motorola Inc Vs. DCIT (2005) 95 ITD 269 which was subsequently affirmed in cases of DIT Vs. Nokia Networks (2013) 358 ITR 259 (Delhi), DIT Vs. Ericsson AB, New Delhi (2012) 343 ITR 470, DIT Vs. Infracsoft Ltd. (2014) 220 Taxman 273, Data mine International Vs. Addl DIT (2016) 48 ITR (Trib.) 229. The issue that of contract for training is covered by decision of the Hon'ble Supreme Court in case of ONGC Ltd. Vs. CIT (2015) 376 ITR 306. In this particular case, the assessee claimed that these services have been provided in connection with the exploration, and the extraction of mineral oils in India and these revenues should be tax in terms of provisions of Section 44BB of the Income Tax Act, 1961. Though the CIT(A) deleted the additions made by the Assessing Officer and held that the said additions should be as per the provisions of Section 44BB of the Act, but since there is no Permanent Establishment in India, the assessee cannot be taxed in India at least in A.Y. 2002-03. This issue has not arose in subsequent years wherein the CIT(A) has rightly held that the same should be taxed as per provisions of Section 44BB of the Act. As regards to the rental of software which was in connection with the exploration/extraction of mineral oils in India, the Assessing Officer was not right by applying 15% of rate by applying decision of Advance Authority Ruling in case of Ishikawajima Harima Heavy Industries Co. Ltd Vs. DIT 271 ITR 193 as the facts of the said case is different from that of the present appeals. Thus, for subsequent years the issue of permanent establishment is not in question and hence the

applicability of the judgment of ONGC is very much necessary as all these activities which assessee took are coming under the purview of Section 44BB. The Assessing Officer is therefore, directed to tax the income of the assessee as per Section 44BB for A.Y. 2003-04, 2004-05, 2005-06, 2006-07 and 2008-09. Needless to say the assessee be given the opportunity to hear before the Assessing Officer.

14. In result, appeal of the Revenue being ITA No. 573/DEL/2006 is dismissed and ITA No. 2486/DEL/2006, ITA No. 2952/DEL/2007, ITA No. 4617/DEL/2007, ITA No. 1180/DEL/2012 and ITA No. 1179/DEL/2012 are partly allowed for statistical purpose.

Order pronounced in the Open Court on 12th July, 2017.

Sd/-

(R. S. SYAL)
VICE PRESIDENT

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 12/07/2017
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	20/04/2017	PS
2.	Draft placed before author	21/04/2017	PS
3.	Draft proposed & placed before the second member	.2017	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	12.07.2017	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	13.07.2017	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		