

**IN THE INCOME TAX APPELLATE TRIBUNAL 'L' BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

आयकर अपील सं./ I.T.A. No. 2060/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2012-13)

| | | |
|--|----------------------|--|
| Production Testing Services Inc. C/o. Madhav Joshi & Associates A-1, Koteshwar Niwas, Gr. Floor, Subhash Road, Ville Parle (E), Mumbai – 400 057 | बनाम/ Vs. | DCIT (IT), 3(3)(2)Floor, Sindia House, Ground Floor, Ballard Estate, Mumbai – 400 038. |
| स्थायीलेखासं ./ जीआइआरसं ./ PAN/GIR No. | | AAF5834R |
| (अपीलार्थी/Appellant) | : | (प्रत्यर्थी / Respondent) |

| | | |
|---|----------|------------------------------|
| अपीलार्थी की ओर से/ Appellant by | : | Sh. R.V. Shah, A.R. |
| प्रत्यर्थी की ओर से/ Respondent by | : | Sh. Shishir Dhamija, CIT D.R |

| | | |
|--|----------|------------|
| सुनवाई की तारीख/ Date of Hearing | : | 29/01/2018 |
| घोषणा की तारीख / Date of Pronouncement | : | 02/02/2018 |

आदेश / ORDER

PER RAVISH SOOD, JUDICIAL MEMBER

The present appeal filed by the assessee is directed against the order passed by the Assessing Officer (for short 'A.O') under Sec. 143(3) r.w.s 144C(13), dated. 04.01.2016, wherein the latter had given effect to the directions given by the Dispute Resolution Panel-III, Mumbai (for short 'DRP'), vide its order dated 14.12.2015,

which in itself was passed pursuant to the objections filed by the assessee to the additions/variations made by the A.O in his draft assessment order passed under Sec. 143(3) r.w.s 144C(1) of the Income Tax, 1961 (for short 'Act'), dated 20.03.2015. The assessee assailing the order of the A.O had raised before us the following grounds of appeal:

“1. The ld. Assessing Officer has erred in holding that income received by Appellant constitutes fees for technical services and covered under section 115A of the Income tax Act, 1961 instead of applying the provisions of section 44BB of the Income-tax Act, which is a special provision for computing profits and gains in connection with the business of exploration etc of mineral oils.

2. Without prejudice to the above Appellant submits that A.O has erred in holding that BJ services has given a sub contract to the Appellant who has agreed to perform the services indirectly for ONGC and wrongly stated that the payments are made by ONGC to Appellant. These observations are factually incorrect and further contrary to the various judicial decisions which were cited by the Appellant, therefore the said order is bad in law and deserves to be quashed.

3. Without prejudice to the above Appellant submits that learned Assessing officer has failed to appreciate that sec. 44BB of the Income tax act overrides all other provisions of the Income tax act, being a special provision specifically for the purpose of assessee engaged in the business of prospecting for, or extraction or production of mineral oils.

4. Without prejudice to the above, Appellant submits that Appellant is a non resident company and provides services to another non resident company. Hence, provisions of sec. 115A are not applicable to the facts instead sec. 44BB is applicable in the Appellants case. Appellant therefore prays that order deserves to be set aside.

5. Without prejudice to the above, Assessing officer overlooked that sec. 115A is applicable only when income for technical fees is received from Government or an Indian concern. In the Appellant companys case, income is not received from an Indian concern nor from the Government. Appellant assessee therefore prays that provisions of Section 115A are not applicable.

6. Without prejudice to the above, Assessing Officer has not considered the decision of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs.CIT (2015) 59 taxman.com 1 (SC)

though the same was cited and discussed at length. The Assessing Officer has not even distinguished the said case law and neither have commented on the said case law. The appellant therefore, prays that the provisions of Sec. 44BB are applicable and eligible to claim deduction under Sec.44BB of the Income tax Act, 1961.

7. Appellant company submits that the Assessing Officer has not construed the law and judicial pronouncements on the subject. Hence, the Appellant company prays that assessment be made u/s 44BB of the Income-tax act, 1961.

8. Appellant craves leave to add, alter, amend, modify or omit any of the aforesaid grounds as the occasion may arise or demand.”

2. Briefly stated, the facts of the case are that the assessee, viz. Production Testing Services Inc., Texas, USA is a Foreign company incorporated in USA and is engaged in providing Fracturing Flow Back Services to oil companies. The assessee had e-filed its return of income for A.Y. 2012-13 on 07.09.2012, declaring total income at Rs. 27,97,930/-.

3. The issue involved in the present case lies in a narrow compass. That one B.J Services Company (Middle East) Ltd., a company incorporated in Scotland and having a project office in Mumbai was awarded a contract for Fracturing Flow Back Services by Oil and Natural Gas Commission (for short 'ONGC'). B.J Services Company (Middle East) Ltd. in turn sub-contracted the work to the assessee, vide agreement dated. 15.07.2007. That as per the terms of the contract the assessee received an amount of Rs. 2,79,79,273/- from B.J Services Company (Middle East) Ltd. The assessee as per the provisions of Sec. 44BB offered an amount of Rs. 27,97,927/-(10% of the total receipts of Rs. 2,79,79,273/-) for tax during the year under consideration. That out of the tax deducted at source of Rs. 29,48,539/-under Sec. 194J and 194C on the aforesaid amount, the assessee after adjusting its tax liability claimed a refund of Rs.

17,95,792/- . However, the A.O during the course of the assessment proceedings, being of the view that as B.J Services Company (Middle East) Ltd. was carrying out Fracturing Flow Back Services and various operations at the Oil rigs pursuant to the contract with ONGC, therefore, the assessee who was sub-contracted the said work by B.J Services Company (Middle East) was indirectly performing the services for ONGC. The A.O further held a conviction that Fracturing Flow Back Services were technical services that were provided by the assessee for prospecting extraction or production of mineral oil. The A.O observed that the certificates issued under Sec. 197 clearly provided for deduction of tax at source @10%/15% on the gross amount payable by B.J Services Company (Middle East) Ltd to the assessee in respect of fees for professional/technical services. The A.O further took note of the fact that even the TDS certificates filed by the assessee pertained to deduction of tax at source on fees for technical fees under Sec. 194J.

4. The A.O in the backdrop of the aforesaid facts called upon the assessee to show cause as to why the amount of Rs. 2,79,79,273/- received from B.J Services Company (Middle East) Ltd may not be treated as fees for technical services and brought to tax as per the provisions of Sec. 115A of the Act. The assessee submitted before the A.O that the provisions of Sec. 44BB were clearly applicable in its case. However, the A.O after deliberating on the explanation of the assessee did not find favour with the same. The A.O primarily driven by the facts, viz. (i). that as B.J Services Company (Middle East) Ltd was carrying out Fracturing Flow Back Services and various operations at the Oil rigs pursuant to the contract with ONGC, therefore, the assessee who was sub-contracted the said work by B.J Services Company (Middle East) Ltd was indirectly performing the services for ONGC; (ii). that the certificates issued under Sec. 197(1)

clearly provided for deduction of tax at source @10%/15% under Sec. 194J on the gross amount payable by B.J Services Company (Middle East) Ltd to the assessee in respect of fees for professional/technical services; and (iii). that even the TDS certificates filed pertained to deduction of tax at source as per the provisions of Sec. 194J on account of fees for technical fees, therefore, vide his Draft assessment order passed under Sec. 143(3) r.w.s 144C(1) brought the amount of Rs. 2,79,79,273/- to tax under Sec. 115A as amount received by the assessee by way of 'Fees for technical services'.

5. Aggrieved with the adjustments/variations made by the A.O in the draft assessment order, the assessee filed its objections with DRP-II, Mumbai. The assessee assailed the draft assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(1), on the ground that the amount of Rs.2,79,79,273/- received from B.J Services Company (Middle East) Ltd had rightly been offered for tax under Sec. 44BB of the Act. The DRP taking cognizance of the fact that a similar issue was adjudicated upon by the DRP in the immediately preceding year, viz. A.Y 2011-12, against the assessee, therefore, by taking support of the observations recorded by the DRP was not persuaded to accept the contentions of the assessee. The DRP referring to the nature of services involved in Fracturing Flow Back Services provided by the assessee, observed that the same were highly technical services. That after examining at length the process involved in extraction or production of mineral oil the DRP concluded that the payments received by the assessee for rendering of the Fracturing Flow Back Services to the oil companies could safely be characterized as fees for technical services. The DRP further agreed with the view of the A.O that as the certificates under Sec. 197(1) as well as the TDS certificates furnished during the course of the assessment proceedings were for deduction of tax at source in respect of fees for technical

services under Sec. 194J which were consistently accepted by the assessee, therefore, the view that the amounts received by the assessee were in the nature of fees for technical services stood fortified. The DRP further being of the view that the contention of the assessee that as it had carried out Fracturing Flow Back Services on behalf of B.J Services Company (Middle East) Ltd, therefore, the same was not to be construed as being in the nature of payments from Government or Indian concern and were thus not covered by the provisions of Sec. 115A did not merit acceptance. The DRP observed that as the source of payments received by the assessee had originated from ONGC, which had thereafter been distributed between the assessee and B.J Services Company (Middle East) Ltd, as the sub-contractor and contractor, respectively, therefore, it could safely be concluded that the assessee had indirectly received the payment from ONGC. The DRP further held that even if the version of the assessee that it had not done any work for ONGC was to be accepted, even then, the amount received by the assessee was clearly in the nature of fees for technical services. The DRP further concluded that as per *Explanation 2* to Sec. 9(1)(vii), as the technical services rendered by a non-resident has been used and utilized in India, therefore, the same was assessable as fees for technical services as per *Explanation* below Sec. 115A(1)(b) of the 'Act'. Thus, in the backdrop of its aforesaid observations the DRP upheld the findings of the A.O.

6. The A.O giving effect to the directions of the DRP framed the assessment vide his order passed under Sec. 143(3) r.w.s 144C(13), dated. 04.01.2016. The A.O following the directions of the DRP brought the amount of Rs. 2,79,79,273/- received by the assessee from B.J Services Company (Middle East) Ltd for rendering of Fracturing Flow Back Services to tax as per the provisions of Sec. 115A of the 'Act'.

7. Aggrieved, the assessee had assailed before us the order passed by the A.O under Sec. 143(3) r.w.s 144C(13). The ld. Authorised representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the issue involved in the present appeal was squarely covered by the order of the Tribunal in the assessee's own case for A.Y 2011-12 in **Production Testing Services Inc. Vs. DCIT (IT), ITA No. 1782/Mum/2016, dated 27.10.2017** (copy placed on record). It was submitted by the ld. A.R that the Tribunal in the aforementioned case after deliberating at length on the amount received by the assessee from B.J Services Company (Middle East) Ltd for rendering of Fracturing Flow Back Services by the assessee in connection with extraction or production of mineral oil, had concluded that the same was squarely covered by the provision of Sec. 44BB of the Act. It was submitted by the ld. A.R that the Tribunal in its aforesaid order had clearly held that the provisions of Sec. 115A and Sec. 44DA would not be applicable to the case of the assessee. The ld. Departmental Representative (for short 'D.R') fairly conceded to the factual position as was so averred by the ld. A.R.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present case has been sought to adjudicate as to whether the amount received by the assessee from M/s B.J Services Company (Middle East) Ltd for rendering of Fracturing Flow Back Services at the oil rigs would fall within the purview of Fees for Technical Services and thus liable to be brought to tax as per Sec. 115A of the Act, or would be covered by the special and specific provisions contemplated under Sec.44BB for computing the profit and gains of a non-resident engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the

prospecting for, or extraction or production of mineral oils. We are persuaded to be in agreement with the Ld. A.R that the issue involved in the present case is squarely covered by the order of the Tribunal in the assessee's own case for A.Y 2011-12, viz. **Production Testing Services Inc Vs. DCIT, 3(3)(2), Mumbai, ITA No. 1782/Mum/2015, dated 27.10.2017**. The Tribunal after deliberating at length on the issue under consideration had in the aforesaid case observed as under:-

“9. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the assessee, viz. Production Testing Services Inc., Texas, USA, which is a Foreign company incorporated in USA, is engaged in providing fracturing flow back services to oil companies. We find that B.J Services Company (Middle East) Ltd., a company incorporated in Scotland and having a project office in Mumbai was awarded a contract for Fracturing Flow Back Services by Oil and Natural Gas Commission (for short 'ONGC'). That B.J Services Company (Middle East) Ltd. in turn awarded the contract to the assessee, vide agreement dated. 15.07.2007. We find that the assessee pursuant to the sub-contract awarded by B.J Services Company (Middle East) Ltd. had rendered Fracturing Flow Back Services and various operations at the Oil rigs. We have deliberated on the terms of the contract between ONGC and B.J Services Company (Middle East) Ltd., and after perusing Page 23-24 – Para 35 of the said contract find that the contractor, viz. B.J Services Company (Middle East) Ltd. was solely responsible for the manner in which the work assigned to it was performed. We are persuaded to be in agreement with the ld. A.R that as the contents of the aforesaid contract clearly stated that if any Sub-contractor was engaged by the contractor for performing the contract, then he shall be under the complete control of the contractor and there shall be no contractual relationship between any such Sub-contractor and the company, viz. ONGC. We thus, are of the considered view that in the backdrop of the aforesaid clear terms of the contract, now when the assessee who was engaged as a Sub-contractor by B.J Services Company (Middle East) Ltd had nothing to do with the company, viz. ONGC, therefore, the A.O/DRP were wrong in concluding that the amount received by the assessee from B.J Services Company (Middle East) Ltd for rendering Fracturing Flow Back Services were indirectly received from ONGC. We thus set aside the aforesaid observations of the A.O/DRP and hold that the amount under consideration was received by the assessee from B.J Services Company (Middle East) Ltd.

10. We further find that pursuant to the judgment of the Hon'ble Supreme Court in the case of ONGC Vs. CIT (2015) 376 ITR 306 (SC), it stands settled as on date that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec. 9(1)(vii), and would rather be covered by Sec. 44BB of the 'Act'. We are of the considered view that after the aforesaid judgment of the Hon'ble Supreme Court, the issue that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec.

9(1)(vii) stands settled and is no more found to be res integra. We are of the considered view that Sec. 115A(b) clearly presupposes existence of 'fees for technical services', which further as per the Explanation (a) contemplated therein refers to Explanation 2 of Sec. 9(1)(vii). That now when pursuant to the judgment of the Hon'ble Supreme Court in the case of ONGC vs. CIT (2015) 376 ITR 306 (SC), the issue that prospecting for or extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec. 9(1)(vii), therefore, it can safely be concluded that the payments received by the assessee from rendering of Fracturing Flow Back Services for extraction or production of mineral oil would not fall within the realm of 'fees for technical services'. We thus, are of the considered view that as the precondition for invoking of Sec. 115A is in itself found to be missing, therefore, the same would not be attracted to the case of the assessee. We have further given a thoughtful consideration to the contention of the assessee that as it had received the amounts for rendering the services of Fracturing Flow Back Services from B.J Services Company (Middle East) Ltd., which itself was a foreign company, viz. a company incorporated in Scotland, therefore, the said sums not having been received by the assessee from Government or an Indian concern, therefore, for the said reason also excluded the applicability of the provisions of Sec. 115A and Sec. 44DA. We are of the considered view that as observed by us hereinabove, the assessee had received the amount from B.J Services Company (Middle East) Ltd. and not from ONGC, therefore, the aforesaid contention of the ld. A.R carries substantial force. We thus, also on the said count that the assessee had not received the amount for rendering of services of Fracturing Flow Back Services in extraction or production of mineral oil from the Government or an Indian concern, therefore, hold that the applicability of the provisions of Sec. 115A and Sec. 44DA to the facts of the case of the present assessee would stand excluded.

11. We thus, in the backdrop of our aforesaid observations set aside the order of the A.O assessing the amount of Rs. 2,65,46,753/- received by the assessee from B.J Services Company (Middle East) Ltd. for rendering of Fracturing Flow Back Services at the oil rigs to tax as per the provisions of Sec. 115A of the 'Act'. We are persuaded to be in agreement with the ld. A.R that now when Sec. 44BB contemplates special and specific provisions for computing profits and gains of a non-resident in connection with the business of providing services or facilities in connection with or supplying plant and machinery on hire used or to be used in the prospecting for or extraction or production of mineral oils, therefore, the Fracturing Flow Back Services rendered by the assessee in connection with extraction or production of mineral oil would squarely be covered by the provisions of Sec. 44BB. We thus, set aside the order of the A.O and direct him to assess the amount of amount of Rs. 2,65,46,753/- received by the assessee from B.J Services Company (Middle East) Ltd as per the provisions of Sec. 44BB."

We thus are of the considered view that the issue involved in the present case is squarely covered by the order passed by the Tribunal in the assessee's own case for A.Y 2011-12, wherein it was concluded that the amount received by the assessee from rendering of Fracturing

Flow Back Services from M/s B.J Services Company (Middle East) Ltd was rightly offered by the assessee for tax as per the provisions of Sec. 44BB of the Act. We thus finding ourselves to be in agreement with the view taken by the Tribunal and finding no reason to take a different view, therefore, conclude that the assessee had rightly offered the amount of Rs. 2,79,79,273/- for tax under Sec. 44BB of the Act. We thus in the backdrop of our aforesaid observations set aside the order passed by the A.O under Sec. 143(3) r.w.s. 144C(13) of the Act.

9. The appeal of the assessee is allowed.

Order pronounced in the open court on 02.02.2018

Sd/-
(G.S. Pannu)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 02.02.2018
PS. Rohit Kumar

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

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai

