

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

**BEFORE SHRI N.S.SAINI, ACCOUNTANT MEMBER
&
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.-1334/Del/2016
(Assessment Year: 2011-12)**

ONGC as representative assessee of Asset Management Solutions Inc., USA DGM-Head, Corporate Tax, Oil and Natural Gas Corporation Ltd. Room No. 244, Old Secretariat Building, Tel Bhawan Dehradun PAN : AAACO1598A	vs	DCIT (International Taxation) Circle-II, Aayakar Bhawan, 13-A, Subhash Road Dehradun
Assessee by		Mohd. Farid, CA(AR)
Revenue by		Shri Shailesh Kumar, Sr. DR

Date of Hearing	12.12.2018
Date of Pronouncement	13.12.2018

ORDER

PER N.S.SAINI, ACCOUNTANT MEMBER :

This is an appeal filed by the assessee against the order of Commissioner of Income Tax (Appeals)-2, Noida dated 15.01.2016 for assessment year 2011-12.

2. The assessee has raised following grounds of appeal :-

“1. The Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in holding that the receipts of Asset Management Solutions Inc., USA, from ONGC are

taxable as “fees for technical services” and in not holding that the same are taxable u/s 44BB of the Income-tax Act, 1961.

2. Without prejudice to the preceding ground, the Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in upholding the AO’s action to apply a deemed profit of 25% for computing the total income.”

3. At the outset, the AR (Mohd. Frid, CA) of the assessee argued that the issue involved in this appeal is that the CIT(A) erred in confirming the addition made by the Assessing Officer. The Assessing Officer held that the services provided by the non-resident company to the assessee are covered u/s 44DA of the Act while estimating income @ 25%. On appeal the CIT(A) confirm the action of the AO by observing that in absence of maintenance of any books of accounts and audit thereof, estimation of expenditure or allowance which is wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India is not feasible. Therefore, action of the AO in estimating profit at the rate of 25% does not seem to be unreasonable.

4. The Authorised Representative submitted that the issue is now covered in favour of the assessee and against the revenue by the order of Delhi ‘E’ Bench of the Tribunal in the case of the assessee itself by the consolidated order dated 23.06.2016 passed in ITA no. 4998, 4652, 4654/Del/2013 for assessment years 2009-10 and 2010-11.

5. The Ld. Departmental Representative, Shri Shailesh Kumar, Sr. DR agreed with the above submission of the Ld. Authorised Representative.

6. We find that the Tribunal vide its order dated 23.06.2016 in the consolidated order for the assessment year 2009-10 and 2010-11 has held as under :-

“4.3 We have perused the orders passed by the authorities below, arguments advanced by both the side and the decision passed by Hon'ble Supreme Court in the assessee's own case. The assessee has received services for the purpose of activities relating to prospecting for or exploration of mineral oils. The only issue that arises from the grounds of appeal filed by the Revenue is in respect of the taxability of the amount paid to the non- resident / foreign companies under the contract was to be assessed u/s 44BB or 44DA of the Act.

4.4 Hon'ble Supreme Court has dealt with the substantial question of law relating to the assessability of the amounts paid to the non-resident u/s 44BB and have answered the questions in favour of the assessee and held as under:

"1. The Income-tax Act does not define the expressions 'mines' or 'minerals'. The said expressions I.T.A.Nos/4652 & 4654/Del/2013 are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act, 1948. While construing the somewhat pari-materia expressions appearing in the Mines and Minerals (Development and Regulation) Act, 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which the Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation, i.e., Oil Fields (Regulation and Development) Act, 1948. Reading section 2 (j) and 2W) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development)

Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation.

2. The facts 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 contracts is more appropriately assessable under the provisions of section 44BB and not section 44D.

4.5 Respectfully following the same, we dismiss the grounds raised by the Revenue in this appeal. Accordingly, the appeal filed by the Revenue for Assessment Year 2010-11 stands dismissed.”

7. It is not in dispute that the facts in the year under appeal are identical to the facts which were before the Tribunal in the assessment years 2009-10 and 2010-11. The Ld. Departmental Representative could not show any good reason to not to follow the above quoted order of the Tribunal. He also could not bring any material on record to show that the above quoted order of the Tribunal was varied in appeal by any higher forum. Therefore, respectfully following the order of the Tribunal quoted above, we set aside the orders of the lower authorities and hold that the payments made to non-resident / foreign companies under the contract is to be assessed u/s 44BB of the Act and not u/s 44DA of the Act. Thus, the grounds of the appeal of the assessee are allowed.

8. In the result, the appeal of the assessee is allowed.
Order pronounced in the open court on 13.12.2018

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(N.S.SAINI)
ACCOUNTANT MEMBER

Dated: 13.12.2018
BR

Copy forwarded to:

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

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ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	12.12.2018
Date on which the typed draft is placed before the dictating Member	12.12.2018
Date on which the typed draft is placed before the Other Member	12.12.2018
Date on which the approved draft comes to the Sr. PS/PS	13.12.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	13.12.2018
Date on which the fair order comes back to the Sr. PS/PS	13.12.2018
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

