INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.6723/Del/2015
Asstt. Year: 2014-15

Oil and Natural Gas Corporation Ltd. DGM-Head, Corp.Tax, Oil and Natural Gas Corporation Ltd., Room No. 244, Old Secretariat Building, Tel Bhawan, Dehradun 248003 PAN AAACO1598A	Vs.	ITO, International Taxation Aayakar Bhawan, 13-A, Subhash Road, Dehradun 248001
(Appellant)		**(Respondent)**

Assessee by:	Shri Gaurav Jain, Ms. Manisha Sharma, Advocate
Department by :	Smt. Naine Soin Kapil, Sr. DR
Date of Hearing	13/12/2018
Date of pronouncement	19/12/2018

O R D E R

PER O.P. KANT, A.M.

This appeal by the assessee is directed against order dated 09/11/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-2, Noida [in short the Ld. CIT(A)] for assessment year 2014-15 in relation to order under section 195(2) of the Income Tax Act, 1961 (in short the Act) passed by the Assessing Officer. The grounds of appeal raised by the assessee are reproduced as under:

1. *"The Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in rejecting the contention of the appellant regarding non-taxability of the receipts of DeGolyer and MacNaughton, USA.*

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 rejecting the alternate contention of the appellant regarding taxability of receipts of DeGolyer and MacNaughton, USA u/s. 44BB of the Income-tax Act, 1961.*

3. *The Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in not directing that the tax deposited by the appellant on sums payable to DeGolyer and MacNaughton, USA, be refunded to it.*

4. *The appellant craves permission to add, alter and /or amend any ground(s) of appeal before or at the time of hearing. "*

2. Briefly stated facts of the case are that the assessee credited a sum of USD 5,62,500/-to the account of DeGolyer and MacNaughton, USA (non-resident) towards third-party certification of Ultimate Reserves and Reserves of 68 fields of ONGC. The assessee applied for an order under section 195(2) of the Act to the Income Tax Officer (International Taxation), Dehradun (in short the 'Assessing Officer') for allowing it to release payments to the non-resident i.e. DeGolyer and MacNaughton, USA without deduction of tax at source therefrom. However, the Assessing Officer vide order dated 28/12/2013, directed the ONGC to deduct tax @ 15% (inclusive surcharge and education cess) on the gross contractual payment as per the India-USA Double Tax Voidance Agreement (DTAA). On further appeal before the Ld. CIT(A), the assessee claimed that services availed were not in the

nature of technical services as defined under the India-USA DTAA. According to the assessee, no technical knowledge was made available by way of the services and therefore, the conditions of article 12(4)(b) of the Indian USA DTAA are not fulfilled. Alternatively, the assessee claimed that services rendered by the non-resident company falls under the provision of section 44 BB of the Act and in absence of any Permanent Establishment of the non-resident in India, no income was taxable in the hands of the non-resident.

3. The Ld. CIT(A) analysed the provisions of 44 BB, 44D, 44DA and 115A of the Act and observed that w.e.f. assessment year 2011-12 the fee for technical services rendered in connection with prospecting for or extraction or production of mineral oil having business PE or fix place of profession would be taxable under 44DA and fee for technical services rendered in connection with prospecting for or extraction or production of mineral oil without having business PE or fixed place of profession would be taxable under section 115A of the Act. The relevant finding of the Ld. CIT(A) is reproduced as under :

> *"6.27 It is also noteworthy that section 44BB is a special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils. Section 44D applicable for agreements before 1.4 .2003 and 44DA applicable for agreements after 1.4.2003, are also special provisions for computing income by way of royalties and fee for technical services. Section 44BB is a special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils and applies to 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. Section 44D, as a special provision, is*

applicable to an assessee, being a foreign company, earning royalty income or fees for technical services engaged in any kind of business. There is a non obstante clause in section 44D which makes-the provisions of section 28 to 44C inoperative. Thus, section 44 BB seems to be not applicable once section 44 D is applicable. Proviso to section 44 DA also makes section 44 BB inapplicable for the purpose of that section. Under section 44BB, the non-obstante clause is restricted in application only in respect of sections 28 to 41 and sections 43 and 43A. Thus, section 44D has not been made inoperative by section 44BB. Further, proviso to section 44 BB excludes applicability of section 42, section 44 D, section 44 DA and section 115A and section 293A."

4. The Ld. CIT(A) also examined the articles of the DTAA with reference to the technical knowledge, experience, skill know-how or process etc. provided by the non-resident to the assessee. The relevant part of the order of the Ld. CIT(A) is reproduced as under:

"6.32 It is noted that the scope of the work and work plan contained in the contract states that it is technical work and is a service contract which is carried out by the non-resident as a contractor.

6.33 The contract under which payment have been released to the non-resident relates to third party certification of ultimate reserve and reserves of 68 fields of ONGC. The contract was made and entered into 15.1l.20 13. The scope of work is third party certification of Proved (IP), Proved+Probable (2P) and Proved +Probable + Possible (3P) Ultimate Reserves and Reserves of oil, condensate.

6.34 The scope of work, the work plan and report description interalia contained in the contract is as under:-

".... Scope of Work

«The estimation of the reserves will be, as necessary, on a field/reservoir/pool/block basis, as of October I, 2013. Reporting of the reserves will be on a field basis.

The consultant will, as necessary, review the wire line logs, conventional cores, PVT, analysis results, pressure-production history, geological correlations/ cross-sections and other related reservoir engineering, geological and production Performance data.

As necessary for each field, the Consultant will review geological, petrophysical data, reservoir engineering and production data will certify the following in IP, 2P and 3P categories:

Estimated Ultimate Reserves (EUR) and Reserves for

- *Oil and condensate*
- *Gas Cap Gas*
- *Solution Gas*
- *Free Gas (Non-associated gas)*

The Consultant will estimate oil and gas reserves in all categories including Proved Developed. Proved Undeveloped Probable, and Possible etc. as per the 2007 PRMS approved definitions.

Any variation (greater than 10-percent) in the estimates with. respect to ONGC estimates is to be brought out clearly with detailed break-up and justification for reasonableness of such variation.

TECHNICAL WORK PLAN FOR THIRD PARTY CERTIFICATION OF ULTIMATE SERVES AND RESERVES OF 68 FIELDS OF ONGC BY M/s D&M, USA:

<u>Work Plan and Operation</u>

M/s D&M, USA will manage the assignment by activating a dedicated and integrated team, and will establish internal and external milestones to provide the project deliverables required by ONGC. The project manger will be responsible for all official communications and transmittals between M/ s D&M, USA and ONGC, while the individual team members will occasionally interface with ONGC on specific technical issues in full coordination with the project manager. Each team member will be in communication by e-mail, telephone and telefax. Utilizing the data and information management systems in D&M's various offices in Dallas and elsewhere, any member of the team can transmit large blocks of data through use of secure FTP sites and laptop computers while maintaining uncompromised confidentially. Professionals of M/s D&M, USA are well experienced in reserves evaluation and classification and are specifically familiar with several of ONGC's assets.

A summary-level report (certificate) is to be prepared for use in filing with financial or regulatory agencies."

6.35 Since the contract above is a service contract, the service provided are technical in nature and the recipient himself is not engaged in activity of mining (mineral oil), under domestic law, therefore, the services provided by the non-residents become taxable under section 9(1)(vii)of the Act.

6.36 The question then arises is whether the services are also taxable within Article 12 of under India-USA DTAA, a question which leads to point of determination whether the technical services provided by the non-resident are also resulting into making available certain technical knowledge, experience, skill, know-how or processes.

6.37 In this regard, it is important to turn 10 the contractual document again. It stipulates as below;

"Report Description

Upon completion of this study M/ s: D&M, USA will prepare a final report that presents the results obtained from the study. The final report will contain specific information as follows:

1) Appropriate definitions for the classification of the reserves;

2) Discussions of the methodology used in estimating reserves;

3) Pertinent discussions and tables supporting the reserves. "

6.38 From above it is noted that the non-resident is also providing descriptions of the methodology used in estimating reserves. Methodology is a body of methods, rules, and postulates employed by a discipline, a particular procedure or set of procedures. It is a collection of methods, practices, procedures and rules used by these who work in some field. Merriam Webster dictionary defines it as a set of methods, rules, or ideas that are important in a science or art: a particular procedure or set of procedures. A methodology is also a much broader concept than a process. A methodology

is a body of knowledge comprising the principles, guidelines, best practices, methods and processes relating to a particular discipline. Methodology aims at the employment of the correct procedures/processes to find out solutions or answers to problems in any discipline or field. It requires skill sets which can be used by anyone in possession of the same for its own purpose.

6.39 Thus, it can be said that the non-resident is making available the methods, practices, process, procedures and rules which Appellant can later utilize. ONGC is made aware of the methodology and process used in estimation of reserves. It can utilise 'it for estimation of reserves on its own later on. The services of the non-resident also involve preparation of technical work plan which is made available to ONGC. The non-resident is also making available definitions for classification of reserves and other discussions supporting the reserves. Once the methodology, definition and process is made available, the services get covered under Article 12 of Indo US, DTAA as taxable category of services within the meaning of Fee for included services which specifically mentions that typical categories of services that generally involve either the development and transfer of technical plants or technical designs, or making technology available include exploration or exploitation of mineral oil or natural gas and Geological surveys.

7. In view of foregoing, it is held that services of the non-resident are exigible to tax as fee for technical services within section 9 (1) (vii) and fee for included services within

Article 12 of Indo-USA DTAA. The order of AO is accordingly upheld. The first ground is adjudicated accordingly."

5. Aggrieved with the above findings of Ld. CIT(A), the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

6. Before us, the Ld. Counsel of the assessee drawn our attention to the order of the Tribunal in ITA No. 1522/Del/2012 in the case of the assessee and same non-resident for assessment year 2012-13 and submitted that the issue in dispute is squarely covered by the said order. He also submitted that subsequent to the impugned order passed by the Ld. CIT(A), the Tribunal in the case of the assessee itself for assessment year 2011-12 in ITA No. 1332 /Del/2016 has also allowed the identical issue in dispute in favour of the assessee. The Ld. Counsel submitted that no technical knowledge has been provided to the assessee by way of services rendered by the non-resident and thus payment made by the assessee does not fall under fee for technical services in terms of DTAA between the India and the USA.

7. The Ld. DR on the other hand relied on the order of the Ld. CIT(A) and submitted that Ld. CIT(A) has specifically examined the services rendered by the non-resident and observed that technical knowledge has been provided to the assessee and thus payment for the services rendered falls under the definition of fee for technical services provided in the Indo USA DTAA, and accordingly the assessee was liable for deduction of tax at source on the payment made under section 195(2) of the Act.

8. We have heard the rival submissions and perused the relevant material on record including the orders of the Tribunal in the case of the assessee itself for assessment year 2012-13 and assessment year 2011-12 on the issue of deduction of tax at source in the case of the same non-resident.

9. We find that the Tribunal in ITA No. 1600/Del/2012 for assessment year 2012-13 in the case of the assessee in respect of the services rendered from the non-resident company i.e. Degolyer and MacNaughten, USA has observed as under:

> *"7. The Ld. CIT(A) held as follows: "It is seen that the NRC Is providing an independent certification of oil reserves in 62 fields managed by M/s. ONGC. This activity would not amount to passing on any technical knowledge or experience or skill to ONGC for the activity to qualify as FTS. What emerges most clearly on a reading of the contract is that the services provided by the NRC to ONGC are to be used exclusively for the purposes of prospecting for or exploration of mineral oils. Thus section 44BB of the Act applies squarely on the facts of this case. This also simultaneously puts this case out of purview of section 9(1)(vii) of the Act, since the activities pertain to "mining". Since it is held that that services are as defined u/s 44BB of the Act, the judgment in the case of R & B Falcon Drilling Co. reported in 181 Taxman 62 (UK) has to be followed as in para 6 of this judgment. It has been laid down that ""the sum paid or payable, whether in or outside India to the assessee or to any person on his behalf on account of provisions of services and facilities In connection with ". This case follows the ruling given in the case of Sedco Forex IntI. Inc. Reported in 299 ITR 238 (UK). Furthermore, in a case before the AAR [Western Geco Inti. Ltd. reported In 201 Taxman 101 (AAR-Dethl) It has been held, following the two case law of the Hon'ble Uttarakhand High Court, that once an assessee opts to come u/s 44BB(1) of the Act, the provision Itself deems Its profits and gains as 10% of aggregate of amounts specified in sub-section 2 of section 44BB of the Act, i.e. amount payable or paid whether in or out of India. In view of these rulings, the entire payments by ONGC to the NRC may be subjected to tax @ 10% of the gross payments as mandated u/s 44BB of the Act.*
>
> *This decision that the Ld. CIT(A) is challenged by the revenue. Before going into the merits of the revenue in appeal, we take up the assessee's appeal.*
>
> *8. It is not in dispute that the services in question were rendered outside India. The payment in question cannot be construed as fees for technical services under India-USA*

DTAA, as no technical knowledge, skill, know how etc. was made available to the assessee. The issue in question is no more res integra in view of the following judgments :-

1. *DIT vs. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504*
2. *CIT vs. De Beers India Minerals (P) Ltd. 346 ITR 467*

9. Thus the amount paid by ONGC to the NRC can be brought to tax only under article 7 of the Indo-USA DTAA as business profit, provided the NRC has a Permanent Establishment (PE) in India and the profit in question is attributable to such PE. Admittedly NRC does not have PE in India. Under these circumstances the receipt of the non resident cannot brought to tax in India under the Indo-USA DTAA. Hence this ground of the assessee has to be allowed."

10. Thus the Tribunal has decided that no technical knowledge, skill, know-how etc was made available to the assessee and thus the payment in question cannot be termed as fee for included services under India USA DTAA.

11. In assessment year 2011-12 in ITA No. 1332/del/2016, also the Tribunal in its order dated 29/06/2018 following the finding of the Tribunal in assessment year 2012-13(supra), allowed the appeal of the assessee.

12. In view of the above, we find that issue is squarely covered in favour of the assessee. Thus respectfully following the finding of the Tribunal (supra), we allow the ground Nos.1 and 3 the appeal of the assessee.

13. Since we have allowed the ground No. 1 in favour of the assessee on the issue of non-taxability of the receipts as fee for technical services, we are not required to adjudicate the alternative ground preferred by the assessee to decide whether the services rendered by the non-resident taxable under section 44 BB of the Act.

14. In the result, the appeal of the assessee is allowed,

This decision was pronounced in the Open Court on 19th December, 2018.

sd/-	sd/-
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 19/12/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

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ITAT, New Delhi