IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI
BEFORE SHRI G.D. AGARWAL, VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.5863/Del/2010
Assessment Year: 2007-08

ONGC Rep.Ass of Shell International Exploration & Production BV Netherlands, Dy. GM (F&A), Corporate Tax Division, ONGC Ltd., Room No.244, Old Secretariat Building, Dehradun PAN: AAACO1598A	vs	**ADIT, International Taxation, Dehradun.**

ITA No.5864/Del/2010
Assessment Year: 2007-08

ONGC Rep.Ass of J.P. Kenny Pty Ltd., Australia, Dy. GM (F&A), Corporate Tax Division, ONGC Ltd., Room No.244, Old Secretariat Building, Dehradun PAN: AAACO1598A	vs	**ADIT, International Taxation, Dehradun.**

ITA No.441/Del/2012
Assessment Year: 2008-09

ONGC Rep.Ass of National Mining Research Centre, Russia, DGM- Head, Corporate Tax Division, ONGC Ltd., Room No.244, Old Secretariat Building, Dehradun PAN: AAACO1598A	vs	**ADIT, International Taxation, Dehradun.**

ITA No.4982/Del/2011
Assessment Year: 2006-07

ADIT, International Taxation, Dehradun.	**VS**	**ONGC Rep.AssM/s Boot & Coots Intl., Well Control Intl. ONGC Ltd., Room No.244, Old Secretariat Building, Dehradun PAN: AAACO1598A**

Appellant Respondent

Assessee by	**Shri Ajay Vohra, Advocate Shri Gaurav Jain, Advocate Ms Manisha Sharma, Advocate**
Revenue by	**Ms Rinku Singh, Sr. DR**

Date of Hearing	**12.12.2018**
Date of Pronouncement	**11.01.2019**

ORDER

PER BENCH:

Challenging the impugned orders passed by the learned DRP/learned Commissioner of Income Tax (Appeals), three appeals, being ITA Nos.5863 & 5864/Del/2101 and 441/Del/2012, are filed by the Oil and Natural Gas Corporation (ONGC) (hereinafter referred to as the assessee) and ITA No.4982/Del/2011 is filed by the revenue.

2. Common issue involved in all these appeals relates to taxability of the receipts of non-resident in India as fees for technical services as per the provisions of the DTAA with respective countries or as per the provisions of

section 44 BB of the Income-tax Act, 1961 (for short "the Act"). We therefore find it just and convenient to dispose of these matters by way of this common order.

3. Facts, in brief, are that the assessee made certain payments to the non-residents, namely, Shell International Exploration & Production BV (Netherlands), J.P.Kenny Pty. Ltd (Australia), Boots & Coots International Well Control Inc (USA) and National Mining Research Centre (Russia) in relation to the business of prospecting, exploration and production of mineral oil carried out by the assessee, and the receipts were claimed to be exempt from tax under the relevant provisions of the DTAA existing between India and the respective foreign country while filing the return of income. In the alternative and without prejudice to the claim of being governed by the DTAA with respect to foreign country, the receipts were claimed to be taxable under section 44BB of the Act.

4. The authorities below treated the aforesaid payments as in the nature of 'Fee for Technical Services' (FTS) within the meaning of section 9(1)(vii) of the Act read with section 115A of the Act and held that such payments were taxable in India and on that basis they held that the aforesaid payments were taxable as FTS under section 115A of the Act and the same are outside the purview of presumptive taxation under section 44BB of the Act in view of the proviso thereto.

5. On these facts, argument of the Ld. AR is two-fold. Firstly, in cases where trade is applicable, which contains the condition of 'make available' under article dealing with 'Fee for Technical Services' (FTS), the impugned 'Fee for Technical Services' (FTS) would be taxable in India only if the non-resident recipient'make available'the technology/skill/know-how to the recipient,

which is ONGC in the present case, enabling the ONGC to apply such knowledge in future. For this proposition he placed reliance on the decisions in DIT vs. Guy Carpenter& Co. Ltd 346 ITR 504; CIT vs. De Beers India minerals (P.) Ltd 346 ITR 467; DDIT RSS ONGC in ITA No. 4989/mum/2012; KPMG vs. ACIT in ITA No. 6286/mum/2012; ACIT vs. BSR and company 70 taxman.com 69.

6. He further submitted that in the case of ONGC, the vendor had only provided services mainly in the nature of survey report/feasibility study reports to the ONGC and did not make available the skill/know-how used in rendering such services and on that ground such services did not satisfy the condition of 'make available' contained in the relevant article of the treaty. Basing on this, he submitted that in the options of services satisfying the condition of 'make available', fee for such services will not be taxable in India as per the relevant articles of the treaty relating to 'Fee for Technical Services' (FTS) under the treaty, and accordingly in the absence of non-resident having permanent establishment in India, the fee for it would not be taxable in India as business income, as is held by a decision of the Mumbai bench of the tribunal in the case of DDIT vs ONGC (ITA No. 4989/Mum/2012).

7. The alternative argument of the Ld. AR is that the contention of the authorities below that the impugned payments are in the nature of FTS within the meaning of section 9(1)(vii) of the Act and consequently, not taxable under section 44BB of the Act, has clearly been covered by the decision of the Hon'ble Apex court in the case of ONGC vs. C.I.T. 376 ITR 306, wherein it has been held that the services rendered in relation to prospecting, extraction or production of mineral oil fall within the meaning of mining, which is excluded from the purview of FTS under proviso to Explanation 2 to section 9(1)(vii) of

the Act and discovered within the scope of presumptive taxation under section 44BB of the Act. It is also brought to our notice that following the aforesaid decision of the Hon'ble Apex Court, various benches of the tribunal in assessee's own case in ITA 4998/del/2013 (ADIT vs ONGC) and ITA No.4989/Mum/2012 (DDIT vs ONGC), as a representative assessee of various non-residents and decided the issue in favour of the assessee.

8. Per contra, it is the argument of the Ld. DR that the factual matrix has to be seen in every case and the decision of the Hon'ble Apex Court in ONGC cannot be applied to every case without looking into the factual matrix. She further submitted that the technical report submitted by the vendors is available with the ONGC so that the ONGC is enabled by the know-how to tackle similar situations with the help of the techniques that applied and depicted in the reports. In that way the 'make available' clause is satisfied and the authorities below are justified in bringing the receipts to tax under section 9(1)(vii) of the Act read with section 115 A of the act.

9. In this background and common facts and keeping in mind the general submissions on either side, now we shall proceed to look into the peculiarity of facts involved in each case and decide the justifiability of the authorities below in bringing the receipts to tax under section 9(1)(vii) of the Act read with section 115 A of the act.

ITA 5863/Del/2010:

10. In this matter ONGC had entered into tax protected contract dated 20/7/2005 with the Shell International exploration and production BV, Netherlands for advise and support services relating to BHN well platform accident investigation and the non-resident was engaged to advise and for

support services relating to BHN well platform accident investigation. An agreement was signed for the above consultancy and advice and support services in connection with investigation and analysis of an accident at BHN-S Suraksha on ONGC's platform. The assessee was to advise ONGC on the aspects like,-

i. dynamic positioning and diving,
ii. physical effects modelling,
iii. incident analysis, and
iv. emergency response.

11. For the above referred services, they have received an amount of Rs.54,60,710/-from ONGC. As the contract tax was tax protected, the ONGC filed the return of income as a representative assessee of the non-resident on 22/10/2007 claiming the receipt of the assessee is not taxable in India as per article 7 of DTAA with Netherlands.

12. Learned assessing officer, however, observing that the services rendered by the assessee are in the nature of FTS and on that ground the revenue earned by the assessee amounting to Rs.54,60,710/-is taxable in India as per the provisions of Section 9(1)(vii) of the Act and 115 A of the Act as also as per DTAA between India and Netherlands.

13. When the assessee filed objections, learned DRP-II, New Delhi rejected the contentions of the assessee that bringing to tax the receipts of the non-resident as fee for technical services as per provisions of DTAA of Netherlands or that such receipts could not have been brought to tax by ignoring the provisions under section 44 BB of the Act and thereby confirmed the findings of the Ld. Assessing officer.

14. We have gone through the provisions of the double taxation avoidance agreement between India and Netherlands. Article 7(6) thereof reads that where profits include items of income which are dealt with separately in other articles of this convention, then the provisions of those articles shall not be affected by the provisions of this article; and that article 5 (7) reads that the fact that a company which is a resident of one of the states controls or is controlled by a company which is a resident of other state, or which carries on business in that other state (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other. Article 12 thereof deals with royalties and fees for technical services. Article 12 (1) says that royalties and fees for technical services arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state, whereas sub article (5) says that for the purpose of this article 'Fee for Technical Services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services (a) are ancillary and subsidiary to the application for enjoyment of the right, property, or information for which a payment described in paragraph 4 of this article is received; or (b) 'make available' technical knowledge, experience, skill know-how or processes, and consist of the development and transfer of a technical plan or a technical design.

15. At the outset, we find it difficult to agree with the submissions of the Ld. DR that in this case Article 12(5)(a) of the DTAA between India and Netherlands is applicable but not article 12(5)(b) of the DTAA thereof, inasmuch as the services obtained by the ONGC from the rent or are not ancillary and subsidiary to the application for enjoyment of the right, property

or information for which a payment described in paragraph 4 of article 12 was made. The question of applicability of Article 12(5)(b) of the DTAA to a situation like this, where 'make available' clause is there has been considered by the Hon'ble jurisdictional High Court in the case of DIT vs. Guy Carpenter and company limited 346 ITR 504 (Delhi) in the light of Article 13 (4) (c) of the DTAA between India and United Kingdom which is in parimateria with the Article 12(5)(b) of the DTAA between India and Netherlands, and the Hon'ble jurisdictional High Court held that,-

> *"A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design."*

16. 'Make available' clause in article 12(5)(b) of the DTAA between India and Netherlands was considered by the Hon'ble Karnataka High Court in the case of C.I.T. Vs. De Beers India Minerals Private Limited 346 ITR 467 (Karnataka) and Hon'ble court held that Article 12(5) of the DTAA defines "fees for technical services" to mean payments in consideration for the rendering of any technical or consultancy services "which make availabletechnical knowledge, experience, etc or consist of the development and transfer of a technical plan or technical design. To be said to "make available", the service should be aimed at and result in transmitting technical knowledge etc so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into terminology "making available", the technical

knowledge, skills etc. must remain with the person receiving the service even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider has gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessees, which the assessee can apply independently and without assistance and undertake such survey independently. Consequently, the consideration is not assessable as "fees for technical services".

17. When we appreciate the facts involved in the case in hand, it is clear that the services rendered by the vendors to the ONGC in this matter are one-time job performed by the vendors and their job ends with the submission of the investigation report. There is no recurrence of the services and there is no guarantee that the accidents would happen in the same way so that the investigation report submitted by the vendor would be a guidance for the ONGC for conducting such investigation on its own. It is plainly clear that the ONGC had the benefit of the services but did not gain any technical knowledge, experience or skill in respect of the conducting, reporting and analysing any investigation into an accident, which would enable the ONGC to undertake such an endeavour independently in future without the aid and assistance of the vendor. With this view of the matter we conclude that the impugned payment does not satisfy the tests of, firstly, for the services which are ancillary and subsidiary to the application for enjoyment of any right, property

or information under Article 12(5)(a) of the DTAA, and secondly, the 'make available' clause within the meaning of Article 12(5)(b) of the DTAA between India and Netherlands. We accordingly hold that the payment in question does not fall within the scope and ambit of Article 12 of the DTAA between India and Netherlands. It follows that inasmuch as there is no permanent establishment for the services rendered in India, the receipts are not taxable under Article 7 also.

18. For the reasons recorded in the preceding paragraphs, we find it difficult to sustain the addition made in this case and the same is accordingly directed to be deleted. ITA No. 5863/Del/2010 stands allowed.

ITA 5864/Del/2010:

19. In this case the ONGC had awarded a tax protected work order to a non-resident Australian company, namely, JP Kenny Pty. Ltd for hiring of export services for feasibility of jack-up/FPSO for BHN well platform. The services are,-

- Review responses from contractors and develop final shortlist based on.
- Technical suitability for purpose.
- Projected project value
- Schedule risk
- Prepare subsea scope to interface with Vessel and Mumbai High facilities
- Facilities definition
- Procurement lead time.
- Preliminary design/construction schedule.
- Standards and Specification for critical items
- Review Installation methodology for Vessel and subseafacilities and select determine criteria for selection.
- Carryout process functionality review to establish basic process specification. Extend this over the life of the facility.
- Carry out high level controls system review.
- Carry out preliminary mooring and riser studies for vessel and determine optimum configuration. Metocean and Geotechnical data will reviewed bearing in mind that a permanently moored facility will be preferred as long as the risk is acceptable to ONGC.

- Prepare Value analysis of Project using data derived from the above and the related items on ONGC's recovery plan. Credits will be allowed in this analysis for any part of that plan which may be discounted by the Project (This will be developed jointly between ONGC and the consultant.
- Prepare Feasibility Report.
- The Report will summarize the work carried out in this phase and present Project definition, cost and schedule based on the remaining short listed vessels. It will include a comparative risk analysis covering the short list and recommend actions to be taken in Phase 2. It may include an Assessment/recommendation to enter into contract negotiations with one or more supplier. Carry out Subsea Layout and Facility location study this will take into account the options available to flow from existing and new platform and subsea well facilities and the proposed export destinations for oil and lift gas. It will seek to optimize cost and operational advantages without raising the risk.
- Prepare first draft of functional requirements the functional specification is the basis on which a contract will be placed. Responses from the bidders will be used to identify the best fit for ONGC and incorporate the principal attributes of the vessel into the Specification. The draft will identify all of the principal interfaces and will include hold points to indicate which areas of the specification should be further developed in Phase 2. Prepare work plan for phase 2.

20. During the financial year 2006-07 the non-resident has earned revenue to the extent of Rs.1,24,92,433/-on account of the above work and M/s ONGC offered the revenues earned by the NRC as exempt as it believes that the income accrued by the non-resident is taxable only in Australia as per Article 7 dealing with business profit of agreement between India and Australia for avoidance of double taxation and the prevention of fiscal evasion with respect to tax in India.

21. Ld. Assessing Officer, however, held that the scope of work involved in the contract reveals that the NRC's is receiving payment on account of providing of technical and consultancy services which is liable to be brought to tax as a 'Fee for Technical Services' (FTS) and accordingly he proposed to bring

the same to tax as 'Fee for Technical Services' (FTS) under the provisions of the DTAA.

22. Assessee filed objections before the Ld. DRP-II, New Delhi and contended that the expression 'Fee for Technical Services' (FTS) is not found as such in the India-Australia DTAA and thereby the receipts from ONGC by the foreign vendor are not covered by Article 12 of DTAA and are not taxable in India. Assessee further contended that the case of the non-resident is covered under Article 7 of DTAA between India and Australia under the head "business income" and since the assessee does not have a permanent establishment in India, its receipts are not taxable in India even as business income. An alternative plea was also taken by the assessee to the effect that at best the receipts can be taxed as per the provisions of section 44 BB of the Act.

23. Ld. DRP, however, considered the case of the assessee in the light of provisions of section 9(1)(vi) of the Act and 9(1)(vii) of the Act and Article 12 of Indo Australia DTAA, and rejected the contentions of the assessee.

24. In the light of the facts and the contentions raised, we looked into the provisions of the DTAA between India and Australia. Article 12 of this DTAA deals with royalties. Article 12 (3) reads as follows:-

> "3. The term "royalties" in this article means payments of credits, whether periodical or not, and, however, described or computed, to the extent to which they are made as consideration for:
>
> (a) The use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark, or other like property or right;
> (b) The use of, or the right to use, any industrial or commercial or scientific equipment;
> (c) The supply of scientific, technical, industrial or commercial knowledge or information;

(d) The rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such property or right as is mentioned in sub-paragraph (a), any such equipment as is mentioned in sub-paragraph (b) or any such knowledge or information as is mentioned in sub-paragraph (c);

(e) The use of, or the right to use:
  (i) Motion picture films;
  (ii) Films or video tapes for us in connection with television; or
  (iii) Tapes for use in connection with radio broadcasting;

(f) Total or partial forbearance in respect of the use or supply of any property or right referred to in sub-paragraphs (a) to (e); or

(g) The rendering of any services including those of technical or other personnel) which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design; but that term does not include payments or credits relating to services mentioned in sub paragraphs (d) and (c) that are made;

(h) For services that are ancillary and subsidiary and inextricably and essentially linked to a sale of property.

(i) For services that are ancillary and subsidiary to the rental of ships, aircraft containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(j) For teaching in or by an educational institution;

(k) For services for the personal use of the individual or individuals making the payments or credits; or

(l) To an employee of the person making the payments or credits or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14.

25. The counsel submits that the case of the assessee does not fall in any of the clauses mentioned above and at best clause (g) falls for consideration in the given facts. He submits that according to clause (g), in order to be called royalty, the payment must have been made as consideration for the rendering of any service, including those of technical or other personnel, which 'make available' technical knowledge, experience, skill, knowhow or processes are consist of the development and transfer of a technical plan or a design, but at that time does not include payments or credits relating to services mentioned in subparagraphs (d) and (c) that are made. However in this case the services

rendered by the vendor and the numerator in the order of the Ld. assessing officer do not indicate that any technical knowledge, experience, skill, knowhow or processes are consist of the development and transfer of a technical plan or a design that was made available to the assessee so that the assessee can independently undertake such an exercise independently and without the assistance of the vendor.

26. We are convinced with this argument advanced on behalf of the assessee in view of our finding in the preceding paragraphs while dealing with the 'make available' clause in ITA No. 5863/Del/2010 in the case of Shell International Exploration and Production BV. For the reasons which are applicable equally to this case also, we hold that for non-satisfaction of the 'make available' clause within the meaning of article 12(3)(g) of the DTAA between India and Australia the impugned payment does not fall within the scope and ambit of royalty/FTS under Article 12 thereof and cannot be brought to tax in India.

27. For these reasons, we find it difficult to sustain the addition made in this case and the same is accordingly directed to be deleted. ITA No. 5864/Del/2010 stands allowed.

ITA 4982/Del/2011:

28. Insofar as this matter is concerned, it could be culled out from the record that M/s ONGC Ltd had entered into a contract dated 28/2/2005 with Boots & Coots International well control Inc. USA, for blowout control services which are intended to bring under control a situation where there is an uncontrolled flow of crude oil/natural gas from oil or gas well after pressure control systems have failed; that such blowouts are a serious threat to any oil

drilling operation, both in terms of endangering human lives and equipment engaged in the process; that towards this end, the foreign vendor was engaged in training personnel in the field as well as in the classroom in the technique of handling such situations; that they were engaged for inspection and testing of blowout control equipment, as also to provide services for allotment of procedures and practices for blowout control operations; and that this description of the nature of work undertaken for ONGC was initiated to understand the nature of services rendered by the foreign vendor and to assess the degree of proximity of such services with extraction or production of mineral oils.

29. In the capacity of a representative assessee of the foreign vendor, ONGC filed the return of income on 29/11/2006 showing an income of Rs.21,62,740/- offering the receipts taxable as per the provisions of section 44 BB of the Act.

30. Ld. Assessing officer, however, denied the claim of the assessee for assessing its income under section 44BB of the Act stating that the case does not fall within the exception as mentioned in Explanation 2 to section 9(1)(vii) of the Act; that the scope of work as understood from the contract entered into between the assessee and ONGC indicates that the services rendered were of “technical nature” and as the provisions of section 115 A of the Act are applicable; and that the scope of work does not mention any of the services included in section 44BB of the Act. Ld. assessing officer, thereby, concluded that the work is managerial and technical in nature, falling within the purview of section 44D or Section 115 A and accordingly brought the total receipts of Rs.2,07,59,268/-to tax under section 115 A read with Section 28 of the Act.

31. In the appeal preferred by the assessee, learned Commissioner of Income Tax (Appeals)-II, Dehradun considered the question whether the

services rendered by the assessee have some relationship with extraction of mineral oils or not and whether section 44 BB is applicable to the case or the matter goes beyond Section 115 read with section 9 (1) of the Act. Ld. CIT(A) after dealing with the issue at length reached a conclusion that the case of the assessee deserves to be considered as falling within the purview of Section44BB of the Act and on that ground he recorded a finding that the action of the Ld. Assessing Officer cannot be supported.

32. The revenue is, therefore, in appeal before us contending that the nature of services provided by the assessee as consultant were in the nature of 'Fee for Technical Services' (FTS) as defined under section 9(1)(vii) of the Act and income of the assessee was taxable under the provisions of section 44DA read with section 115 A inasmuch as the nature of services rendered by the assessee were technical in nature. It is further contended on behalf of the revenue that the income of the assessee was not taxable under the presumptive provisions of 44BB and the taxability under section 44 BB shall not be applicable in respect of income referred to in section 44DA in view of the clarificatory provisions of 2 section 44 BB and 44 DA of the Act. Lastly, it is contended that the proviso to Section 44 DA brought about by Finance Act 2011 was only clarificatory in nature and its application has to be read into the main provisions w.e.f. the time the main provision came into effect in view of the decision of the Hon'ble Apex court in the case of Sedco forex international drilling vs. C.I.T(A) Appeal No.351/355 of 2015.

33. At the outset, Ld. AR submitted that on similar facts in assessee's own case for the Assessment Year 2011-12 in ITA No. 1328/Del/2016 by order dated 25/4/2018, a coordinate bench of this tribunal dealt with this issue at length and while following the decisions for the earlier years in assessee's own

case for Assessment Years 2010-11 and 2009-10 in ITA No. 4469/Del/2013 and ITANo.4269/Del/2012respectively by orders dated 3/12/2015 and 16/11/2016 respectively which were rendered while following the binding precedent rendered by the Hon'ble Apex Court in the case of ONGC verses C.I.T. 376 ITR 306, reached a conclusion that the receipts in question are taxable under section 44BB of the Act and cannot be taxed as FTS under Section 9(1)(vii) of the Act.

34. There is no denial of the fact that in assessee's own case, while respectfully following the decision of the Hon'ble Apex Court in the case of ONGC (supra), the coordinate benches of this tribunal had taken a consistent view that the impugned receipts have to be taxed only under section 44 BB of the Act and not otherwise. Facts being similar, rule of consistency demands that a coordinate bench cannot take a different view from the one that was taken for the earlier years in assessee's own case. We accordingly while respectfully following the consistent viewreferred to above hold that the grounds of appeal of revenue are devoid of merits and are liable to be dismissed. We accordingly dismiss ITA No. 4982/Del/2011.

ITA No. 441/Del/2012:

35. Coming to the case of the National Mining Research Centre, Russia, it could be seen from the record that this assessee was engaged by the ONGC by agreement dated 10/6/2006 for services in connection with Underground Coal Gasification (UCG) which is a process to convert the underground coal/lignite into combustible gases by classifying the coal in-situ; that reactants, a mix of air/oxygen rich air/water/steam are injected through injector to react with coal to form gases, liquids and ash; that produced gases are mixture of combustible (carbon-mono-oxide, hydrogen and methane) and non-combustibles (carbon

dioxide, nitrogen and sulphur compounds and unreacted water vapour); that coal is gasifiedunderground by drilling boreholes from surface into the coal steam, creating linkage through coal steam between the injection and production wells and injecting air (or oxygen, water or steam) into the underground reaction zone; and that the coal is ignited to start the process of reaction to generate gases, both combustible and non-combustible and is carried to the surface where it is cleaned and upgraded for use. VastanMine Block was found suitable for carrying further work and the contract was aimed at further work in VastanMine Block and object was "investigation and the detailed evaluation of the mining, geological and hydro-geological conditions of coal steam deposition in the VastanBlock of Surat district and selection of location for experimental modules of the UCG pilot plant.

36. During the Financial Year 2007-08, the assessee earned revenues to the tune of Rs.76,54,800/-and the ONGC filed the return of income in its capacity as the representative assessee of M/s National Mining Research Centre, Russia, and pleaded that the services rendered by the vendors are covered under the provisions of section 44 BB of the Act.

37. Ld. Assessing Officer, however, vide order dated 25/2/2011 under section 143(3) of the Act brought the total receipts of Rs.76,54,800/- of the non-resident to tax as fees for technical services as per provisions of section 28 read with Section 115 A of the Act, by rejecting the contentions of the ONGC.

38. In appeal, Ld. CIT(A) held that the activities concerning the providing of technical services, skill and know-how to ONGC for production of combustible gases through an industrial process which takes place inside the mine for a production facility situated underground, and not on the surface and thus what comes out of the earth is not a natural product but an article or thing which is

under one manufacturing activity in the bowels of the earth itself. On this premise, Ld. CIT(A) held that the work profile as envisioned in the contract takes the entire matter out of purview of section 44 BB of the Act and also out of the purview of the exceptions mentioned in Explanation 2 to Section 9(1)(vii) of the Act and consequently while rejecting the contentions raised on behalf of the assessee, Ld. CIT(A) confirmed the assessment order on this aspect.

39. It is the argument on behalf of the assessee that the UCG is a process to convert underground coal into combustible gases by gasoline in the coal mine itself while getting certain reactants such as mixture of air/oxygen rich air/water/steam into coal to form gases, both combustible and non-combustible, liquid and ash; that the resultant gases mixture is thereafter filtered to obtain purely combustible gases; that all this exercise was an experimental project which was being undertaken by the assessee to identify new and Eco friendly ways of production of combustible gases; that the non-resident, having technical expertise in the field of geological study, had been engaged to conduct survey and investigation of various coal deposits with a view to identify suitable sites for carrying out the above procedure. He therefore submits that the services rendered by the vendors are in the nature of mining and like project and therefore, such services will not fall within the ambit and scope of 'Fee for Technical Services' (FTS), as contemplated in Explanation 2 of Section 9(1)(vii) of the Act and in view of the judgement of the Hon'ble Apex Court in the case of ONGC (supra), such services shall be construed to have rendered in relation to prospecting, extraction and production of mineral oil falling within the meaning of mining, and have to be excluded from the purview of 'Fee for Technical Services' under proviso to

Explanation 2 to section 9(1)(vii) of the Act and are covered within the scope of presumptive taxation under Section 44 BB of the Act.

40. We have gone through the decision of the Hon'ble Apex Court in the case of ONGC (supra). Relevant observations given in the said judgement for the sake of ready reference are as follow:-

> *The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act 1948. While construing the somewhat parimateria 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 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 2(jj) 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. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section*

44BB and not Section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil."

41. The above observations of the Hon'ble Apex Court in the case in hand and while respectfully following the same we hold that the receipts of National Mining Research Centre, Russia from ONGC are taxable only under section 44BB of the Act. With this observation, we allow the grounds of appeal and consequently ITA 441/Del/2012 of the assessee stands allowed.

In the result, whereas assessee's appeals in ITA Nos. 5863/Del/2010, 5864/Del/2010 and 441/Del/2012 are allowed, appeal of the revenue in ITA No.4982/Del/2011 is dismissed.

Order pronounced in the Open Court on 11th January, 2019.

Sd/- sd/-

(G.D. AGARWAL) **(K. NARASIMHA CHARY)**
VICE PRESIDENT **JUDICIAL MEMBER**

Dated: 19TH January, 2019
VJ

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Draft dictated on	04.01.2019
Draft placed before author	08.01.2019
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on	
Date of uploading order on the website	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	