

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

**BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA Nos.245/Del/2017, 3640/Del/2017, 4839/Del/2018 & 4840/Del/2018
Assessment Years : 2011-12, 2012-13, 2013-14 & 2014-15**

M/s BG International Limited, C/o Deloitte Haskins and Sells LLP., Indiabulls Finance Centre, Tower 3, 28th Floor, Elphinstone Mill Compound, Senapati Bapat Marg, Elphinstone (W), Mumbai – 400 013. PAN : AACCB6571E. (Appellant)	Vs. Joint Commissioner of Income Tax, (International Taxation), Dehradun. (Respondent)
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Appellant by	:	Shri Ajay Vohra, Senior Advocate, Shri Anshul Sachar, Advocate and Shri Karan Jain, CA.
Respondent by	:	Shri G.K. Dhall, CIT-DR.

Date of hearing	:	28.01.2019
Date of pronouncement	:	30.01.2019

ORDER

PER BENCH :-

These appeals by the assessee for the assessment years 2011-12 to 2014-15 are directed against the directions of learned Dispute Resolution Panel-2, New Delhi dated 13th December, 2016.

ITA No.245/Del/2017 (AY 2011-12) :-

2. Ground No.1 of the assessee's appeal reads as under :-

“That the Assessing Officer (‘AO’) erred on facts and in law in completing the assessment under section 143(3) read with section 144C of the Income-tax Act (‘the Act’) at an income of Rs.225,53,35,997 as against NIL income declared by the appellant in its return of income.”

3. At the time of hearing before us, the learned counsel for the assessee fairly stated that this ground is of a general nature and needs no specific adjudication.

4. Ground No.2 of the assessee’s appeal, which reads as under, has not been pressed by the learned counsel and is accordingly dismissed:-

“That the order passed by the AO is bad in law and is liable to be quashed having regard to the statutory time limit prescribed under the section 153 of the Act read with Explanation 1 to section 153(4) of the Act.”

5. Ground Nos.3 to 6 of the assessee’s appeal read as under :-

“3. That the AO/Dispute Resolution Panel (‘DRP’) erred on facts and in law in failing to appreciate that reimbursement of expenses by BG Exploration and Production India Limited (‘BGEPIIL’) to the appellant for services rendered could, under no circumstances, result in accrual of income chargeable to tax under the Act.

4. That the AO/DRP erred on facts and in law in alleging that the appellant had failed to establish that services were actually incurred by the appellant to BGEPIIL while bringing to tax payments received for such services.

5. That the AO/DRP erred on facts and in law in alleging that the appellant had failed to substantiate its claim regarding allocation of expenses incurred for services rendered to BGEPIIL despite substantial evidence on record, such as debit notes, skill supply agreements, cost allocation policy, with reports of independent consultants certifying the soundness of the allocation policy.

6. *That the AO/DRP erred on facts and in law in alleging that the appellant was maintaining books of accounts in India which were not produced for reasons best known to the assessee."*

6. At the time of hearing before us, learned counsel stated that the assessee is rendering services to BG Exploration and Production India Limited (BGEPIIL) and BGEPIIL is reimbursing expenses to the assessee. Therefore, there is no income which could be chargeable to tax in India. He has furnished a long written submission of 63 pages in support of his contentions. However, he was fair enough to state that this issue is considered by the ITAT in assessee's own case in the earlier years, wherein the ITAT did not accept the assessee's contention but directed that the income of the assessee be determined under Section 44BB. This view is being consistently taken by the ITAT in preceding many years. He specifically pointed out to the order dated 18th March, 2015 for assessment year 2007-08 vide ITA No.171/Del/2012, which is followed in assessment years 2008-09 to 2010-11 in ITA Nos.470/Del/2013, 815/Del/2014 & 107/Del/2015.

7. Learned CIT-DR, on the other hand, relied upon the order of the Assessing Officer and he also furnished written submissions, which read as under :-

"PRELIMINARY

1. *The assessment order and the DRP directions /order of the CIT(A) are emphatically relied upon.*
2. *This submission is restricted only to specific aspects. On balance aspects, above orders and oral submissions are relied upon.*

A. Earlier Year's Findings-

<i><u>Issue</u></i>	<i><u>2003-04 to 2005-06</u></i>	<i><u>2006-07</u></i>	<i><u>2007-08</u></i>	<i><u>2008-09 to 2010- 11</u></i>
<i>Taxabilit</i>	<i>Assessee-</i>	<i>CIT(A)/ITAT-</i>	<i>Assessee- Not</i>	<i>Assessee-</i>

<p>y under Act or DTAA</p>	<p>Not Taxable u/s 44BB [GOA-(b)&(c), p. 207 of PB] AO- Taxable u/s 44BB ITAT- Held as taxable u/s 44BB.</p>	<p>- 44BB not applicable. - No income taxable in India except interest income as per Art-7 of DTAA.</p>	<p>offered u/s 44BB [p.169] AO/DRP- Business income [in the presence of PE] ITAT- Taxable u/s 44BB</p>	<p>Not offered u/s 44BB of the Act. AO/DRP- Business income [in the presence of PE] after allowing expenses. ITAT- Taxable u/s 44BB</p>
<p>Whether Reimbursements & Profit Element therein</p>	<p>Remanded to verify the claim of the assessee that the receipts are only reimbursements without any profit element in line with PSC (p.212-213)</p>	<p>CIT(A)- - "The appellant has furnished the debit notes along with invoices." [p.193] - "Regarding 1% over-head charged by the parent company on the expenses incurred on Indian project, the revenue on this account may have an element of profit but the same can't be brought to tax because the income, if any does not accrue or arise in India. [p.193-194] ITAT- - "In the present year, Ld. CIT(A) has considered the factual aspects..."[p.203] - "We are of the opinion that other members of PSC would not allow the affiliated</p>	<p>DRP- - AO & DRP has brought on record that there is no evidence of expenses being incurred by BGI for which the alleged reimbursement was taken. [p.181] ITAT- - The main dispute is whether assessee has been able to provide primary evidence in respect of various types of services allegedly rendered to BGEIPL for which it claimed to have received reimbursements from BGEIPL. [p.183, para-9.6] - We are not inclined to accept this plea of Ld. Counsel because in A.Y. 2006-07, Ld. CIT(A) had allowed the</p>	<p>ITAT- - "... we hold that the amount received by the assessee from BGEIPL is taxable and cannot be accepted to be reimbursement of expenses by BGEIPL to the assessee." [p.159, para-5.1] - "... the assessee's alternate contention that the above receipts should be taxed as per provisions of</p>

		<p><i>concern of any member to inflate its expenses for the services and enable it to earn profit in the garb of providing such services.” (p204)</i></p>	<p><i>claim of the assessee because he held that services had been provided on cost-to-cost basis. Tribunal’s findings were based on the Id. CIT(A)’s observation that the assessee had produced invoices and no material was brought by the AO to doubt the debit notes and invoices. However, in the present year the assessee has not produced any evidence before the AO or Id. DRP to justify that it had incurred any expenses.[p.184]</i></p> <p><i>- AO had carried out a survey u/s 133A of the Act at the premises of BGEIPL on 12-11-10 (i.e. A.Y.2011-12) and during the survey operations, no documents were produced to substantiate rendering of services by your employees and regularization of such services by BGEIPL. [p.185, para-9.12]</i></p> <p><i>- The debit notes did not show as to on what account and where the expenses were incurred by the</i></p>	<p>section 44BB is accepted. [p.159, para-5.1]</p>
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			<p><i>assessee on behalf of BGEIPL. [p.185. par-9.13]</i> - <i>Ld. Counsel has pointed out that it is not possible to give one to one nexus for each debit note vis-à-vis services rendered.[p.185, para-9.14]</i></p>	
<p><i>Final Finding</i></p>	<p><i>During the course of remand proceedings, the assessee failed to substantiate its claim regarding the payments being in the nature of reimbursement in A.Y. 2004-05. [p181, para-7.1]</i></p>	<p><i>Both the CIT(A) & Tribunal recorded a finding that in the absence of any evidence to the contrary, the expenses have been incurred in line with PSC and services are related to PSC only. No part of services/expenses can be attributed to BGPIIL for its non-PSC sphere of activities.</i></p>	<p>- <i>Now the core issue that remains for consideration is whether the whole amount claimed to be reimbursement should be accepted or not. On this count, admittedly the asses-see has not been able to establish one-to-one nexus between the services rendered and alleged reimbursement. [p.186, para-9.23]</i> - <i>The assessee failed to substantiate its claim regarding allocation of expenses incurred by it for the services rendered to BGEIPL. It has not been able to substantiate its claim as to what common expenses have been incurred; how those were allocated to assessee' and why those</i></p>	

			<p><i>needed to be allowed as deduction from Indian operations. It is a settled law that unless the assessee is able to substantiate its claim the deduction cannot be allowed....</i></p> <p><i>Consequently, the assessee was not entitled to the deduction claimed. [p.186-187, para-9.24]</i></p> <p><i>- We are of the considered opinion that no fruitful purpose would be served by restoring the matter to the file of AO for examining the assessee's claim again as that would be a futile exercise particularly because assessee has clearly stated that it is not possible to have one to one nexus of the expenses with services rendered. [p.187, para-9.25]</i></p> <p><i>- Under such circum-stances, in our opinion, the only possible recourse is to invoke section 44BB because BGI provide services to BGEIPL, which was engaged in</i></p>	
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			prospecting the mineral oils. [p.187, para-9.26]	
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✓ **2007-08 - Other Important Observations of Hon'ble ITAT-**

- *The ground on existence of PE not pressed and hence dismissed by ITAT (p177)*
 - *Considered the decisions of HC (p181, 6.17)*
 - *The TPO was primarily concerned with the ALP of the receipts of the assessee.....the issue before TPO was not to verify the expenses incurred by the assessee. (p185, 9.11)*
 - *The TPO did not propose any adjustment because the TPO was prohibited by section 92C(3) to reduce the transaction price of receipts which would have resulted in reduction of income. Therefore, the finding of the TPO in the case of the assessee has no bearing to the issue before us which is with regard to claim of the assessee that the receipts are reimbursement of expenses. (p185,9.12)*
 - *Result of Survey (p185,9.12)*
 - *Now the core issue that remains for consideration is whether the whole amount claimed to be reimbursement should be accepted or not. (p186,9.23)*
 - *Assessee failed to substantiate its claim regarding allocation of expenses incurred by it for the services rendered to BGEIPL....consequently, the assessee was not entitled to the deduction claimed. (p186-187,9.24)*
- ✓ **2008-09 to 2010-11 – Followed 2007-08**

B. Claim of the Assessee-

It is the option of the assessee to be governed either by the provisions of the domestic legislation i.e. Income Tax Act or the DTAA. Historically, the assessee has never opted to be governed by the provisions of the Act or more specifically, the provisions of sec. 44BB. A.Y. 2003-04 to 2005-06- GOA-(b) & (c)[p.207 of PB]; A.Y. 2006-07 Not to be taxed u/s 44BB as per CIT(A) & ITAT A.Y. 2007-08 to 2010-11 Alternate plea for taxation u/s 44BB on 'without prejudice' basis.

During the current year too no income was computed or offered to tax u/s 44BB of the Act. The AO therefore proceeded to assess the income as business income [in the presence of PE] after allowing expenses. It was during the proceedings before DRP that the plea for taxation u/s 44BB on 'without prejudice' basis was made. [grounds-1(vii) & 4, p.10 of DRP] As regards the applicability of section 44BB of the Act, it would have application only in a situation where the foreign company is liable to be assessed under the provisions of the Act. Where the foreign company opts to be assessed in terms of the provisions of the relevant Double Taxation Avoidance Agreement, the provisions of

section do not come into play. In the light of the above, since the assessee has never opted to be covered under the provisions of section 44BB of the Act, the AO is justified in computing the profits of the PE under Art-7 of the DTAA.

C. Allowability of Costs/Expenses incurred-

Assessee can't charge any profit for the services provided by it to BGEIPL in pursuance of clauses of PSC. Clause-3.1.4(b)(i) – Shall not include any element of profit. (p.3394) The question is whether all the reimbursements are covered under this clause?

- 1. Assessee claimed to have incurred expenses to the tune of Rs. 270,60,26,911/- on behalf of BGEIPL a nonresident company incorporated in the Cayman Islands.*
- 2. Out of this, AO removed (allowed) that part of expenses which were covered under Clause-3.1.4(b)(i) and shared by JV and approved by JV Board [Operating Board of PCS] amounting to Rs. 24,62,32,708/- (AO, p.9 table). What about the balance expenses? Can there be any expenses other than those covered under Clause-3.1.4(b)(i) of PSC? The AO and DRP as well as Hon'ble ITAT in the case of BGEIPL answered this question in affirmative as reproduced hereunder-*
 - a. Certain portion of the service provided by the assessee to BGPIL is related to PSC with BGPIL. It simply means there is no prohibition on the assessee on not charging markup on services solely provided to BGPIL (not related to PSC) for which the expenses are solely born by BGPIL. Direct receipt of part of reimbursements from parties with which it has no agreements (DRP, p.8)*
 - b. There can be other expenses as well which are not affected by the terms of PSC contract. [Refer submissions for ground 8 before DRP p40-42]*
 - c. Findings of ITAT in case of BGEIPL for 2010-11 in 2017-TII-154-ITAT-DEL-TP*

28. The Ld. authorized representative made detailed submission on this count as under:-

- i. Assessee incurs expenditure to undertake activities required by the PSC, having regard to its standard of operation, including the quality of execution of work, access to latest industry information and global updates, safety of its employees and the environment, etc. The said expenses are required to be incurred based on commercial expediency determined by the appellant. The same are not necessarily accepted by the JV partners as the incurrence and need is not dependent on the point of view of the other contractors in the JV (who likewise may incur expenditure based on their commercial*

expediency having regard to their overall business and circumstances, which may vary from that of the appellant in different aspects). However, the cost would have to be incurred by ASSESSEE based on commercial expediency, notwithstanding that some cost may not be shared by the JV partners. As an Operator in the PMT JV, ASSESSEE incurs expenses as it deems are appropriate and necessary for conducting the operations. Out of the said expenditure, only the expenditure which is approved by the Joint Operator Board would be debited to the JV account and shared by the JV partners. The balance expenditure would have to be borne by ASSESSEE. He submitted that typically, costs are not shared with the JV in the following cases:

1. The expense is incurred in order to safeguard assessee's interest in any oil block in which it operates (such as analysis on risks, analysis of insurance, information management related services, HR international support, accounting support, insurance support, taxation support, marketing of oil and gas support, and cost control and finance service function); or
2. It is in relation to support functions (such as HR, legal, accounts and finance, etc.) which are inevitable for carrying on its business and incurred based on the commercial expediency determined by ASSESSEE (but not accepted by the Operator Board based on commercial expediency determined by them);
3. It is incurred to enable ASSESSEE to perform operations under the PSC, sustain its activities and maintain its standard of operations, based on the commercial expediency determined by ASSESSEE (but not accepted by the Operator Board based on commercial expediency determined by them).

*It is pertinent to point out that in case of points '2' and '3' above, **there could be occasions where ASSESSEE deems it necessary and expedient to incur certain expenditure for its business, whereas, the other JV partners have a different point of view in the matter. In such case, some cost may not be shared by the JV.***

He further submitted that principal reason for the Joint Operator Board not approving expenditure is its impact on cost recovery (as Cost Petroleum) and consequent profit (as Profit Petroleum). As it is not in the government interest (impact on Profit Petroleum) to consider the high cost of the full engagement, ONGC, looking into the government's benefit, attempts to push back costs outside the JV. According to him however, it does not alter the nature of cost in the hands of ASSESSEE; the costs are expenses incurred wholly and exclusively for the purpose of its business of prospecting for, exploration and production of crude oil and natural gas. [p.383-385]

*“31.....The Assessee has stated that it has incurred such expenditure having regard to its standard of operation and the quality of execution work, safety of its employees in the environment. These expenses are required to be incurred by the Assessee **based on the commercial expediency**. The Assessee has stated that in relation to the support functions, which are innovatively inevitable for carrying on its business and incurred based on the commercial expediency are expenses belonging to the Assessee which cannot be accepted by the operating board. Further, **there may be certain expenditure which are required to be incurred to enable the Assessee to perform its operation under the production sharing contract sustaining its activities and maintaining its standard of operations**. It is irrelevant whether the joint operator board has approved such expenditure or not because there may be several other reasons for joint-venture partners to not to share the expenditure.”(p.392)*

3. *Allowability of such Non-PSC expenditure. On the basis of supporting third party evidences furnished during the course of assessment proceedings, expenditure to the tune of Rs. 20,44,58,406/- was allowed by AO. **No deduction was allowed by the AO in respect of the remaining expenses to the tune of Rs. 225,53,35,797/- since these are neither approved by the JV Board nor are supported by any other evidences.** (AO, p.9 table)*

D. Taxability of receipts from BG Exploration & Production India Ltd. (BGEIPL)-

- “ amount received by the assessee from BGEIPL is taxable and cannot be accepted to be reimbursement of expenses by BGEIPL to the assessee. [para-5.1 & 6, ITAT, A.Y.2008-09 to 2010-11]
- “.... the nature of receipts for the year under consideration are similar to those in earlier years.....” [p. 122, assessee’s submission before AO]
- The A claims that these expenses are incurred on a cost to cost basis without any profit element therein. The TP study in the case of BGEIPL that has been relied upon only proves that the transactions are done at arm’s length. However ALP can’t be a substitute for cost-to-cost price. ALP is an indicator for the proximity to the independent party transaction. However, it can’t be said that the independent party transaction is without any profit element in it.
- Similarity/Difference with BGEIPL Tribunal Order for 2009-10 & 2010-11-
TPO doubted whether the services have been actually provided and whether services so provided has any value w.r.t. the business of BGEIPL. (p.224) [Finding of Tribunal in p.261 -262.] ***In the instant case, the AO doesn’t doubt the provision of services to BGEIPL because that will be antithetic to taxing such services. What the AO doubts is the cost of such services and the assessee incurring such expenses amounting to Rs. 225,53,35,797/-. Since these are neither approved by the JV Board nor are supported by any other evidences.***”

8. We have carefully considered the submissions of both the sides and perused the material placed before us. We find that this issue is settled by the ITAT in assessee’s own case in earlier years. We find that in assessment year 2007-08, the ITAT, after considering the submissions of both the sides, held as under :-

“9.17. The assessee has relied on the global allocation policy which only provides that those costs which are deemed to benefit the asset are included in the general and administrative over head cost.

9.18. Ld. CIT(DR) has pointed out that revenue does not doubt that a MNC like British gas Group does not have a cost allocation policy, but the assessee has failed to justify how this policy had been used to allocate the expenses to Indian assets. Ld. CIT(DR) has pointed out that for taxation services an amount of Rs. 31,56,243/- was allocated. Ld.

CIT(DR) has rightly observed that assessee has to establish that where and to whom these amounts were paid and how the same are connected to Indian business. BGEPIIL was operating the PSC and was maintaining the accounts in India, therefore, it could reasonably be inferred that it must have separately made payments to its tax advisor. Why this amount has been further charged by BGEPIIL, the assessee was required to demonstrate this aspect.

9.19. Further, the Id. CIT(DR) has questioned as to why the Indian Permanent establishment was allocated marketing expenses which were not incurred in India. He has rightly pointed out that Executive VP support is no doubt the head office expenses and attract the application of section 44C but the deduction could not be allowed in full.

9.20. Ld. CIT(DR) has also pointed out that the report of PWC has to be considered having regard to the terms of reference for appointing it. He pointed out that at page 125 of the report, it has been observed that, "the purpose of the Agreed upon procedure is to ensure that BG International Limited's overhead cost allocation and time writing policy, has been adhered throughout the year. The agreed upon procedure will examine application of the policy on a sample basis, to ensure that" . He pointed out that these terms of references nowhere require the PWC to examine as to how the cost had been allocated to various assets (business in different locations/ countries) and do not refer to certification of benefits tests. He pointed out that PWC has come out with a time writing rates which were primarily hourly rates which needed to be applied for various types of activities.

9.21. As regards the reliance placed on M/s Lancaster Mac Lean, UK report, Id. CIT(DR) has pointed out that this independent consultant was appointed to represent the interest of joint venture partners. They also gave hourly rates for a charge.

9.22. He pointed out that these reports nowhere show what the total general and administrative overhead cost was, what were the keys of allocation of these expenses and how the same had been allocated to various assets/ countries. What expenses had been allocated to India, on what basis and what were the benefits.

9.23. Once it is accepted that global cost allocation policy exist in a case of group of size like B.G. Group, then it cannot be denied that the debit notes raised are towards services rendered. Now the core issue that remains for consideration is whether the whole amount claimed to be reimbursement should be accepted or not. On this count, admittedly the assessee has not been able to establish one to one nexus between the services rendered and alleged reimbursement. There are also no comparable cases which obviously could not be there.

9.24. Thus, in sum and substance the position as it emerges is that inspite of there being a global cost allocation policy, the existence of which is not doubted by revenue, the assessee failed to substantiate its claim regarding allocation of expenses incurred by it for the services rendered to BGEPIIL. It has not been able to substantiate its claim as to what common expenses had been incurred; how those were allocated to assessee; and why those needed to be allowed as deduction from Indian operations. It is settled law that unless the assessee is able to substantiate its claim the deduction cannot be allowed. In this regard we may refer to the decision of Hon'ble Supreme court in the case of CIT Vs. Calcutta Agency Ltd. (1951) 19 ITR 191, wherein it has been held that the burden of proving the necessary facts in order to entitle the assessee to claim exemption u/s 10(2)(xv) was on the assessee but the necessary facts had not been established by the assessee at any stage of the proceedings and the High Court was in error in applying the principles of Mitchell's case on the assumption of facts which were not proved. Consequently the assessee was not entitled to the deduction claimed. In view of above discussion, keeping in view the entire conspectus of the cases, we are of the opinion that it would be fair to tax the assessee's receipts u/s 44BB, as has been done in past also. In this regard we find ourselves in agreement with the Id. counsel for the assessee that in AY 2003- 04, the department while preferring appeal before Hon'ble High Court has itself taken a ground that the assessee's receipts are taxable u/s 44BB and the ITAT erred in deciding that the receipt are not taxable u/s 44BB.

9.25. We are conscious of the fact that earlier we have observed that merely because in AY 2004-05 assessee agreed for its receipts being taxed u/s 44BB, cannot

operate as estoppels against it for pleading that the entire receipts were in the nature of reimbursement. However, considering the fact that assessee is not able to substantiate its claim, as has been extensively demonstrated by Id. Cit(DR) in his submissions and the assessee has only given a general write up for the benefits derived by BGEPIIL, we are of the considered opinion that no fruitful purpose would be served by restoring the matter to the file of AO for examining the assessee's claim again as that would be a futile exercise particularly because assessee has clearly stated that it is not possible to have one to one nexus of the expenses with the services rendered.

9.26. Under such circumstances, in our opinion, the only possible course is to invoke section 44BB because B.G.I. provide services to BGEPIIL, which was engaged in prospecting the mineral oils. We direct accordingly.”

9. The above order was followed by the ITAT in assessee’s own case for assessment years 2008-09 to 2010-11, wherein ITAT held as under:-

“5.1 Since the facts are identical, respectfully following the above decision of the ITAT in assessee’s own case, we hold that the amount received by the assessee from BGEPIIL is taxable and cannot be accepted to be reimbursement of expenses by BGEPIIL to the assessee. However, the assessee’s alternate contention that the above receipt should be taxed as per provisions of section 44BB is accepted. Accordingly, ground no.8 of assessee’s appeal for AY 2008-09 is rejected while ground no.7 of assessee’s appeal is allowed.”

10. In view of the above, we, respectfully following the above decision of ITAT, hold that the amount received by the assessee from BGEPIIL cannot be accepted to be reimbursement of expenses by BGEPIIL to the assessee and the same is taxable in India. Accordingly, ground Nos.3 to 6 of assessee’s appeal are rejected.

11. Ground Nos.7 & 8 of the assessee's appeal read as under:-

"7. That the AO/DRP erred on facts and in law in holding that payments received by the appellant from BGEPIIL were taxable in terms of section 44DA of the Act as opposed to section 44BB of the Act.

8. That the AO/DRP erred on facts and in law in arbitrarily allowing deduction for expenses only to the extent approved by the Operating Board under the Production Sharing Contract (PSC)."

12. By way of these grounds, the assessee has made an alternate claim that if at all the income is taxable, it should be taxed in terms of Section 44BB and not Section 44DA. Learned counsel was fair enough to point out that in Section 44DA, the second proviso has been inserted with effect 01.04.2011, which reads as under :-

"Provided further that the provisions of section 44BB shall not apply in respect of the income referred to in this section."

13. He submitted that, however, Section 44DA itself is not applicable in the case of the assessee because the assessee has not received any amount from Government or an Indian concern which is a precondition for applicability of Section 44DA. The entire amount received by the assessee is from BGEPIIL which is not an Indian concern.

14. Learned DR, on the other hand, relied upon the orders of authorities below.

15. We have carefully considered the arguments of both the sides and perused the material placed before us. As we have already stated that the ITAT in the earlier years, the relevant portion of which has

already been quoted above, has held that the income of the assessee is to be taxed under Section 44BB. Therefore, now, the limited question is whether Section 44DA is applicable because, as per second proviso to Section 44DA, it will supersede Section 44BB. Section 44DA(1) reads as under :-

“44DA. (1) The income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of profession situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession, as the case may be, shall be computed under the head “Profits and gains of business or profession” in accordance with the provisions of this Act :

Provided that no deduction shall be allowed,-

(i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or

(ii) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices :

[Provided further that the provisions of section 44BB shall not apply in respect of the income referred to in this section.]”

16. From the above, it is evident that Section 44DA would be applicable where the income by way of royalty or fees for technical

services is received from the Government or an Indian concern in pursuance to an agreement made by a non-resident or a foreign company with Government or Indian concern after 31st day of March, 2003. In the case under consideration before us, admittedly, the payment is neither received from the Government nor from an Indian concern. Therefore, Section 44DA would not be applicable and, the decisions of ITAT in assessee's own case in earlier years holding that the income of the assessee is to be determined as per Section 44BB, would hold good. We, therefore, respectfully following the decisions of ITAT in earlier years, direct the Assessing Officer to determine the income of the assessee by applying Section 44BB of the Act. Ground Nos.7 & 8 of the assessee's appeal are, therefore, allowed.

17. Ground No.9 of the assessee's appeal reads as under :-

"That the AO/DRP erred on facts and in law in levying interest under section 234B of the Act."

18. We have heard both the parties and find this issue to be covered in favour of the assessee by the order dated 17th April, 2015 of ITAT in assessee's own case in ITA No.470/Del/2013 and others. We find that the ITAT held as under :-

"11. We have carefully considered the arguments of both the sides and perused the material placed before us. The Id. CIT-DR (Intl. Tax) has distinguished the decision of Hon'ble Jurisdictional High Court on the ground that in the case before the Hon'ble Uttarakhand High Court, the assessee's income was chargeable to tax under the head "salaries" on which tax was to be deducted by the employer. In the case of the assessee, it is the business income and not the salary income and; moreover, the employees of the assessee-company were looking after the accounts of the payers i.e. BGEPII. She further submitted that even while raising the bill, the assessee used to

mention the amount of the TDS and thus, the rate of TDS was determined by the assessee and not by the payers i.e. BGEFIL. In support of her contention, she has relied upon the decisions of Hon'ble Delhi High Court in the case of DIT vs. Jacobs Civil Incorporated /Mitsubishi Corporation, 235 CTR 123 (Delhi) and in the case of DIT vs. Alcatel Lucent USA, Inc., 264 CTR 240 (Delhi). After considering the arguments of both the sides and perusing the decisions of Hon'ble Uttarakhand High Court and Delhi High Court, we are unable to agree with the contention of Id. CIT DR (Intl. Tax). The Hon'ble Jurisdictional High Court in the case of DIT vs. Maersk Co. Ltd., 334 ITR 79, held as under:-

"Looking into the scheme of Chapter XVII of the Income tax Act, 1961 it is clear that the provisions relating to payment of tax and those relating to payment of interest operate in two different areas.

From a combined reading of sections 190, 191, 192, 198, 200, 201, 203 and 204 of the Act, it is clear that as soon as tax is deducted at source by the person responsible to make the payment, the liability of the assessee to pay the tax gets discharged. If the tax is not deducted, it is payable by the assessee directly as provided under section 191 of the Act. Further, the liability to pay interest under section 201(1A) is on the person who fails to deduct the tax at source; it is absolute and is upon the person responsible for deducting tax at source till the date it was actually paid. The liability to pay interest under section 234B is on the person who fails to pay advance tax under section 208 of the Act and/or under section 210 of the Act.

Where the assessee's income is chargeable under the head "Salaries", the person responsible for paying the income chargeable under the head "Salaries" shall at the time of paying, deduct income tax at source and failure on his part of the employer to deduct tax at source, the assessee only becomes liable to pay the tax directly under section 191 of the Act and does not become liable to pay interest under section 234B of the Act."

From the above it is clear that the principle laid down by the Hon'ble Jurisdictional High Court is that when tax is deductible at source, the liability of the assessee to pay the tax gets discharged. While forming this opinion, their Lordships of Hon'ble Jurisdictional High Court have referred

various sections under which tax is required to be deducted like 190, 191, 192, 198, 200, 201, 203 and 204. Therefore, the contention of the Id. CIT DR that the above decision would be applicable only where the tax is to be deducted from salary cannot be accepted. The Id. CIT DR also mentioned that it is the assessee who decided the rate on which tax is to be deducted at source. We are unable to agree with this contention of the Id. CIT DR because tax is to be deducted at source as per the rate prescribed under the Income tax Act. If any assessee wants the deduction of tax at lower rate than the rate prescribed under the Income tax Act, such assessee has to apply to the Income Tax Officer and it is the Income Tax Officer who can issue the certificate for deduction of tax at lower rate. It is not the case of the Revenue that the tax deducted at source by BGEPIIL was not as per the prescribed rate under the Income tax Act. Moreover, the Hon'ble Jurisdictional High court has also taken note of the situation that if the tax is not properly deducted by payer, then he would be liable to pay interest u/s 201(1A) if he fails to deduct the tax at source. Therefore, in our opinion, the decision of Hon'ble Jurisdictional High Court in the case of Maersk Co. Ltd. (supra) would be squarely applicable to the case of the assessee. Though the decision of Delhi High Court in the case of Alcatel Lucent USA, Inc. (supra), relied upon by the Id. CIT DR, supports the case of the Revenue under certain circumstances; however, when there is a decision of Hon'ble Jurisdictional High Court, the ITAT is bound by the decision of Hon'ble Jurisdictional High Court in preference to any other High Courts. We, therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court, hold that the assessee was not liable to pay interest u/s 234B of the Act. Accordingly, the same is deleted."

19. Respectfully following the same, we hold that the assessee was not liable to pay interest under Section 234B of the Act. Ground No.9 is accordingly allowed.

ITA No.3640/Del/2017 (AY 2012-13) :-

20. At the time of hearing before us, both the parties agreed that since the grounds as well as facts are same, therefore, their arguments

remain the same as in assessment year 2011-12. With this submission, we proceed to decide various grounds raised by the assessee for assessment year 2012-13.

21. By way of ground No.1, the assessee has claimed that the order for assessment year 2012-13 is bad in law and is liable to be quashed. This ground was not there for assessment year 2011-12 and no arguments have been raised by the assessee in support of this ground while arguing the appeal for assessment year 2012-13. He only relied upon his submission for assessment year 2011-12. We, therefore, consider this ground as not pressed and accordingly, the same is rejected.

22. By way of ground No.2, the assessee has claimed that the receipt of amount from BGEPIIL is reimbursement of income and the same is not chargeable to tax as income. We have already considered this issue while deciding ground Nos.3 to 6 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we hold that the receipt from BGEPIIL cannot be accepted to be reimbursement of income but the same is business receipt chargeable to tax in India. Accordingly, ground No.2 of the assessee's appeal is rejected.

23. By way of ground Nos.3 & 4, the assessee has claimed that the income, if any, should be taxed under Section 44BB of the Income-tax Act and not under Section 44DA. We have already considered this issue while deciding ground No.7 & 8 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we agree with the assessee's contention that the income of the assessee is chargeable to tax u/s 44BB and not u/s 44DA. Accordingly, ground Nos.3 & 4 of the assessee's appeal are allowed.

24. Ground No.5 is against levy of interest u/s 234B. This ground is identical to ground No.9 of the assessee's appeal for assessment year 2011-12. For the detailed discussion therein, we hold that the interest u/s 234B is not chargeable. Accordingly, ground No.5 is allowed.

25. Ground Nos.6 & 7 of the assessee's appeal are against initiation of penalty proceedings u/s 271B and 271(1)(c) respectively. The same are premature. Accordingly, they are rejected as such.

26. By way of ground No.8, the assessee has claimed that the impugned order passed by the AO/DRP is in violation of principles of natural justice. However, at the time of hearing before us, the learned counsel has not advanced any argument in support of this ground and has not proved how the impugned order is in violation of principles of natural justice. Accordingly, we reject ground No.8 of the assessee's appeal.

27. Ground No.9 is of general nature and needs no specific adjudication.

ITA No.4839/Del/2018 (AY 2013-14) :-

28. At the time of hearing before us, both the parties agreed that since the grounds as well as facts are same, therefore, their arguments remain the same as in assessment year 2011-12. With this submission, we proceed to decide various grounds raised by the assessee for assessment year 2013-14.

29. By way of ground No.1, the assessee has claimed that the order for assessment year 2012-13 is bad in law and is liable to be quashed.

This ground was not there for assessment year 2011-12 and no arguments have been raised by the assessee in support of this ground while arguing the appeal for assessment year 2012-13. He only relied upon his submission for assessment year 2011-12. We, therefore, consider this ground as not pressed and accordingly, the same is rejected.

30. By way of ground No.2, the assessee has claimed that the receipt of amount from BGEPIIL is reimbursement of income and the same is not chargeable to tax as income. We have already considered this issue while deciding ground Nos.3 to 6 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we hold that the receipt from BGEPIIL cannot be accepted to be reimbursement of income but the same is business receipt chargeable to tax in India. Accordingly, ground No.2 of the assessee's appeal is rejected.

31. By way of ground Nos.3 & 4, the assessee has claimed that the income, if any, should be taxed under Section 44BB of the Income-tax Act and not under Section 44DA. We have already considered this issue while deciding ground No.7 & 8 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we agree with the assessee's contention that the income of the assessee is chargeable to tax u/s 44BB and not u/s 44DA. Accordingly, ground Nos.3 & 4 of the assessee's appeal are allowed.

32. Ground Nos.5 & 6 of the assessee's appeal are against initiation of penalty proceedings u/s 271B and 271(1)(c) respectively. The same are premature. Accordingly, they are rejected as such.

33. By way of ground No.7, the assessee has claimed that the impugned order passed by the AO/DRP is in violation of principles of natural justice. However, at the time of hearing before us, the learned counsel has not advanced any argument in support of this ground and has not proved how the impugned order is in violation of principles of natural justice. Accordingly, we reject ground No.7 of the assessee's appeal.

34. Ground No.8 is of general nature and needs no specific adjudication.

ITA No.4840/Del/2018 (AY 2014-15) :-

35. At the time of hearing before us, both the parties agreed that since the grounds as well as facts are same, therefore, their arguments remain the same as in assessment year 2011-12. With this submission, we proceed to decide various grounds raised by the assessee for assessment year 2014-15.

36. By way of ground No.1, the assessee has claimed that the receipt of amount from BGEPIIL is reimbursement of income and the same is not chargeable to tax as income. We have already considered this issue while deciding ground Nos.3 to 6 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we hold that the receipt from BGEPIIL cannot be accepted to be reimbursement of income but the same is business receipt chargeable to tax in India. Accordingly, ground No.1 of the assessee's appeal is rejected.

37. By way of ground Nos.2 & 3, the assessee has claimed that the income, if any, should be taxed under Section 44BB of the Income-tax

Act and not under Section 44DA. We have already considered this issue while deciding ground No.7 & 8 of assessee's appeal for assessment year 2011-12 and, for the detailed discussion therein, we agree with the assessee's contention that the income of the assessee is chargeable to tax u/s 44BB and not u/s 44DA. Accordingly, ground Nos.2 & 3 of the assessee's appeal are allowed.

38. Ground Nos.4 & 5 of the assessee's appeal are against initiation of penalty proceedings u/s 271B and 271(1)(c) respectively. The same are premature. Accordingly, they are rejected as such.

39. By way of ground No.6, the assessee has claimed that the impugned order passed by the AO/DRP is in violation of principles of natural justice. However, at the time of hearing before us, the learned counsel has not advanced any argument in support of this ground and has not proved how the impugned order is in violation of principles of natural justice. Accordingly, we reject ground No.6 of the assessee's appeal.

40. Ground No.7 is of general nature and needs no specific adjudication.

41. In the result, all the appeals of the assessee are partly allowed.
Decision pronounced in the open Court on 30.01.2019.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(G.D. AGRAWAL)
VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : **M/s BG International Limited,
C/o Deloitte Haskins and Sells LLP.,
Indiabulls Finance Centre, Tower 3, 28th Floor,
Elphinstone Mill Compound, Senapati Bapat Marg,
Elphinstone (W), Mumbai – 400 013.**
2. Respondent : **Joint Commissioner of Income Tax,
(International Taxation), Dehradun.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar