

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SH. R.K PANDA, ACCOUNTANT MEMBER**

ITA No.6169/Del/2014
Assessment Year: 2010-11

DDIT International Taxation Aayakar Bhawan, 13A- Subhash Road, Dehradun – 248001 (APPELLANT)	Vs	ONGC as Representative Assessee of M/s. Cameron Singapore Pte. Ltd. Co., Tel Bhawan, Dehradun (RESPONDENT)
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Appellant by	Sh. Rinku Singh, Sr. DR
Respondent by	Sh. Gaurav Jain, Advocate Ms. Manisha Sharma, Advocate

Date of hearing:	03/01/2019
Date of Pronouncement:	/01/2019

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the revenue is directed against the order dated 28.08.2014 of the CIT(A)-II, Dehradun relating to A. Y. 2010-11.
2. Facts of the case, in brief, are that the assessee filed its return of income on 13.09.2010 declaring total income of Rs.40,72,220/-in its capacity as representatives assessee of M/s. Cameron Singapore Pte. Ltd. The Assessing Officer, during the course of assessment proceedings, observed that during the relevant previous year, ONGC had made payments of Rs.3,90,72,159/- to M/s. Cameron Singapore Pte. Ltd. against tax protected contract no. CW/BDA/MM/CAMERON/SERVICE/Workshop, ONGC, Baroda. The scope of work of aforesaid contract included identification of machines, commissioning tools and materials required for

establishment set up for repair of Blow Out Preventers (BOPs) at central work shop, ONGC, Baroda. The scope of the aforesaid work includes identification of machines, equipments, tools and machines required for installation, testing and commissioning of all machines/equipment required for repair of BOPs, identification and development of vendors base for performing BOP repairs etc. and the assessee has not offered any revenues to tax in India in the return filed.

3. The Assessing Officer, therefore, issued a show cause notice asking the assessee to explain as to why the revenues received by it should not be treated as fees for technical services looking at the nature of activity performed under the contract. The assessee filed its written submission explaining that as per the definition of Fees for Technical Services u/s 9 (i) (vii) and Explanation thereto while consideration for rendering of any managerial, technical or consultancy services is taxable as "Fees for Technical Services", consideration for any construction, assembly, mining or like project, is not taxable as 'fees for technical services'. The CBDT Instruction no. 1862 dated 22.10.1990 of CBDT was brought to the notice of the Assessing Officer and it was argued that services like training and carrying out drilling operation shall be excluded from FTS.

4. However, the Assessing Officer held that the contention of the assessee is not acceptable. Assessee NRC is not carrying out drilling/mining activities and the same is done by ONGC only. Thus instruction no. 1862 is not applicable nor assessee gets relief by the definition of Explanation to sec. 9(1)(vii) of I.T. Act. For the above proposition the Assessing Officer relied on the decision of ITAT Delhi in the case of CGG Veritas Services SA reported in 50 SOT 335. The assessee's submission regarding non applicability of this ITAT order was also rejected.

5. The Assessing Officer rejecting the explanation given by the assessee and distinguishing the decisions cited before him passed draft assessment order determining the taxable income at Rs.1,69,08,500/-. The assessee did not file any objection before the DRP. The Assessing Officer, therefore, in the final order passed u/s 143 (3)/ 144C(3) dated 15.04.2013 determined the total income of Rs.1,69,08.500/-.

6. In appeal the Ld. CIT(A) following his order for preceding assessment order i.e. A. Y. 2009-10 directed the Assessing Officer to compute taxable income on the basis of section 44BB of the IT Act.

7. Aggrieved with such order of the CIT(A), the revenue is in appeal before the Tribunal by raising following grounds of appeal :-

1 Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in holding that the scope of work executed by the assessee under Contracts with ONGC for establishment of set-up for repair of Blow Out Preventors (BOPs) at Baroda ('services') was not in the nature of Fee for Technical Services ('FTS') squarely covered u/s 9(l)(vii) of the IT Act, 1961 ('the Act')

1.1 The Ld CIT(A) failed to appreciate that the scope of the work under the contract included, inter alia, not only establishing/ managing/ supervising a supply chain for BOPs, and identification & development of vendor base for performing BOPs, but also imparting training to ONGC Personnel for assembly, testing, installation/commissioning, repairs of BOPs and therefore the payments qualified as Fee for Technical Services under the Act read with the DTAA

Whether on the facts and in the circumstances of the case, the Ld CIT (A) has erred in holding that the income of the assessee was taxable under the presumptive provisions of sec 44BB and ignoring the fact that taxability u/s 44BB shall not apply in respect of income referred to in section 44DA in view of the clarifactory proviso to sec. 44BB and sec 44DA of the Act.

3. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in his interpretation of the legislative intent behind the scheme of taxation envisaged in sections 9(l)(vii) & 9(l)(vi) read with sections 44DA and 44BB of the Act, ignoring the decision in the case of

CIT M/s ONGC As Agent of M/s Foramer France [(2008) 299 ITR 438 Uttarakhand]

4. *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in relying upon the decision of the ITAT in the case of M/s CGG VERITAS Services, SA in ITA No.4653/Del/2010 (on the issue that once a PE is established to be in place then the income has to be treated as business profits and assessable u/s 44BB)*

5. *Whether on the facts and circumstances of the case the CIT (A) has erred in not appreciating the fact that proviso to section 44DA brought about by the Finance Act 2010 was only clarificatory in nature and its application has to be read into the main provisions with effect from the time the main provision came into effect in view of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drilling v/s CIT*

6. *Whether on the facts and circumstances on the facts, the LdCIT(A) has erred in reversing the action of the AO who, having held that the assessee's revenues on account of services under the Contracts are liable to be taxed u/s 44DA , rightly estimated the income of the assessee by applying 25% rate of profit on gross receipts in the absence of books of accounts and details of expenses incurred in providing the services.*

7) *Whether on the facts and in the circumstances of the case and in law , the Ld CIT(Appeals) has erred in holding that the assessee is not liable to pay interest u/s 234B of the Act and in observing that the issue is covered in favour of the assessee by decision in the case of M/s Maersk [334 ITR 79, Uttarakhand]*

7.1 *The Ld CIT(Appeals) has erred in not appreciating the fact that the case of M/s Maersk was distinguishable on facts wherein the employer failed to deduct tax at source despite the specific mandatory provisions of the Act stipulating the employer being liable to deduct tax on the salary paid to the employee, thereby holding that an employee is not liable to pay advance tax on salary. The ITAT has erred in relying upon this decision as the case does not lay down a general proposition of law that interest u/s 234B is not chargeable in all cases, particularly in cases where the Non-Resident assessee/payee/deductee has played a role in inducing non-deduction or short-deduction on the part of the payer/deductor.*

7.2 *The Ld CIT(Appeals) has erred in failing to take note of the observations of the Hon'ble High Court in the case of M/s Mitsubishi [330 ITR 578, Del]that the role of the assessee/payee/deductee in short-*

deduction or non-deduction of tax needs to be ascertained before claim regarding non-liability to interest u/s 234B of the Act is accepted, a proposition affirmed subsequently in the case of M/s Alcatel Lucent (judgement of Delhi High Court dated 7.11.2013 in ITA No. 327 &Ors of 2012)

8. The Ld. Counsel for the assessee, at the outset, submitted that identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. The Tribunal vide ITA No.176/Del/2013 order dated 24.05.2016 has decided the issue in favour of the assessee and dismissed the appeal filed by the Revenue. Since the facts of the instant case are identical to the facts of the case decided by the Tribunal, therefore, the order of the CIT(A) has to be upheld and the grounds raised by the revenue should be dismissed.

9. The Ld. DR on the other hand fairly conceded that the issue has been decided in favour of the revenue by the decision of the Tribunal.

10. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Assessing Officer in the instant case has brought to tax the gross receipt of the NRC as FTS as per section 44 DA of the Act. We find identical issue had come up before the Tribunal and the Tribunal in the preceding assessment year vide ITA No.176/Del/2013 order dated 24.05.2016 has dismissed the appeal filed by the revenue by observing as under :-

“5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. Grounds No.1 to 8 raised by the revenue in this case lead to the sole question to be determined by the Tribunal is, “as to whether revenue of Rs.2,04,83,587/- earned by the assessee/ foreign company from supply chain for 10 Blow Out Prevents, train ONGC

shop labour, cleaning of equipment, ONGC shop labour on paint, assembly and testing of equipment was taxable under presumptive provisions u/s 44BB of the Act or is to be taxed under Proviso to section 44BB and section 44DA as income in the nature of FTS (fee for technical services)?”

7. Ld. DR for the revenue challenging the impugned order relied upon the order passed by the AO. However, on the other hand, the ld. AR for the assessee by relying upon the law laid down by Hon'ble Supreme Court in judgment cited as Oil & Natural Gas Corporation Ltd. vs. CIT - (2015) 376 ITR 306 (SC) contended the issue in controversy is squarely covered.

8. Undisputedly, the non-resident assessee/foreign company was engaged by Oil & Natural Gas Corporation Ltd. vide contract dated 20.12.2007 to deploy expert to help establish the supply chain for 10 Blow Out Preventers (BOPs), (ii) train ONGC shop labour for dis-assembly and cleaning of equipment, train machinist at vendors for rough out and finish machine, train ONGC welders and impart training to ONGC shop labour on paint, assembly and testing of equipment. BOPs are essential equipment for safe production of mineral oil as they help control formation pressure to prevent any blow-outs.

9. Assessee company categorically claimed that the work carried out by the non-resident is in connection with the exploration, extraction and production of mineral oils and gas and as such, is to be taxable under the presumptive provisions contained u/s 44BB of the Act and not as fees for technical services. However, AO considered the payment to carry out the aforesaid work by a non-resident company as fee for technical services and invoked the provisions of section 9(1)(vii) of the Act and charged the same to tax under amended Proviso to section 44BB and u/s 44D of the Act.

10. Hon'ble Apex Court in the judgment in Oil & Natural Gas Corporation Ltd. (supra) decided the identical issue in assessee's own case in favour of the assessee and operative part thereof is reproduced as under for ready reference :-

"13. The income Tax Act does not define the expression "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 pari material 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. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct. The said details are set out below.

S.No.	Civil Appeal No.	Work covered under the contract
1.	4321	Drilling of exploration wells and carrying out seismic surveys for exploratory drilling.
2.	740	Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.
3.	731	Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.
4.	1722	Furnishing supervisory staff with expertise in operation and management of Drilling unit.
5.	729	Capping including subduing of well, fire fighting.
6.	738	Capping including subduing of well, fire fighting.
7.	1528	Analysis of data to prepare job design, procedure for execution and details regarding monitoring.
8.	1532	Study for selection of enhanced Oil Recovery processes and conceptual design of Pilot Tests.
9.	1520	Engineering and technical support to ONGC implementation of Cyclic Steam Stimulation in Heavy Oil Wells.

10.	2794	Assessment and processing of seismic data along with engineering and technical support in implementation of Cyclic Steam Stimulation.
11.	1524	Conducting reservoir stimulation studies in association with personnel of ONGC.
12.	1535	Laboratory testing under simulated reservoir conditions.
13.	1514	Consultancy for optimal exploitation of hydrocarbon resources.
14.	2797	Consultancy for all aspects of Coal Bed Methane
15.	6174	Analysis of data of wells to prepare a job design.
16.	1517	Geological study of the area and analysis of seismic information reports to design 2 dimensional seismic surveys.
17.	7226	Opinion on hydrocarbon resources and foreseeable potential.
18.	7227	Opinion on hydrocarbon resources and foreseeable potential.
19.	7230	Opinion on hydrocarbon resources and foreseeable potential.
20.	6016	Opinion on hydrocarbon resources and foreseeable potential.
21.	6008	Evaluation of ultimate resource potential and presentations outside India in connection with promotional activities for Joint Venture Exploration program.
22.	1531	Review of sub-surface well data, provide repair plan of wells and supervise repairs.

23.	733	Repair of gas turbine, gas control system and inspection of gas turbine and generator
24.	741	Repair and inspection of turbines.
25.	737	Repair, inspection and overhauling of turbines.
26.	736	Inspection, engine performance evaluation, instrument calibration and inspection of gas turbines.
27.	1522	Replacement of choke and kill consoles on drilling rigs.
28.	1521	Inspection of gas generators.
29.	1515	Inspection of rigs.
30.	2012	Inspection of generator.
31.	1240	Inspection of existing control system and deputing engineer to attend to any problem arising in the machines.
32.	1529	Inspection of drilling rig and verification of reliability of control systems in the drilling rig.
33.	2008	Expert advice on the device to clean insides of a pipeline.
34.	2795	Feasibility study of rig to assess its remaining useful life and to carry out structural alterations.
35.	925	Engineering analysis of rig.
36.	1519	Imparting training on cased hole production log evaluation and

		analysis.
37.	1533	Training on well control.
38.	1518	Training on implementation of Six Sigma concepts.
39.	1516	Training on implementation of Six Sigma concepts.
40.	6023	Training on Drilling project management.
41.	2796	Training in Safety Rating System and assistance in development and audit of Safety Management System.
42.	1239	To develop technical specification for 3D Seismic API modules of work and to prepare bid packages.
43.	1527	Supply supervision and installation of software which is used for analysis of flow rate of mineral oil to determine reservoir conditions.

The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assesseees or foreign companies under the said contracts is assessable under the provisions of section 44BB and not companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act. On the basis of the said conclusion reached by us, we allow the appeals under consideration by setting aside the orders of the High Court passed in each of the cases before it and restoring the view taken by the learned Appellate Commissioner as affirmed by the learned Tribunal.”

11.AO proceeded to treat the revenue receipt under consideration as FTS by applying the amendment to section 44BB and 44DA retrospectively whereas it came into force w.e.f. 1.4.2011, applicable to AY 2011-12. However, Hon’ble

Supreme Court in the judgment in Oil & Natural Gas Corporation Ltd. (supra) set the controversy at rest by holding that the services rendered by the non-resident company to the Oil & Natural Gas Corporation Ltd. as referred in para 8 of this order vide contract dated 20.12.2007, viz., to deploy expert to help establish the supply chain for 10 Blow Out Preventers (BOPs), (ii) train ONGC shop labour for dis-assembly and cleaning of equipment, train machinist at vendors for rough out and finish machine, train ONGC welders and impart training to ONG C shop labour on paint, assembly and testing of equipment. BOPs are essential equipment for safe production of mineral oil as they help control formation pressure to prevent any blow-outs, squarely fall in the category of the work held to be inextricably connected with prospecting extraction or production of mineral oil and not FTS as treated by the AO.

12. So, the assessee's case is squarely covered by the judgment cited as Oil & Natural Gas Corporation Ltd. (supra) rendered by the Hon'ble Supreme Court and as such, we are of the considered view that the services rendered by the non-resident company fall within the purview of presumptive provisions of section 44BB of the Act. So, there is no ground to interfere into the findings returned by the Id. CIT (A), hence grounds no.1 to 8 are determined against the revenue."

11. Since the Ld. CIT(A) while allowing the appeal filed by the assessee has followed his order for the preceding assessment year and since the order of the CIT(A) for the preceding assessment year has been upheld by the Tribunal and the appeal filed by the revenue has been dismissed, therefore, in absence of any contrary material brought to our notice, the order of the CIT(A) is upheld and the grounds raised by the revenue are dismissed.

12. In the result, the appeal filed by the revenue is dismissed.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Neha

Date:-11.02.2019

Copy forwarded to:

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

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	03.01.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	11.02.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	