IN THE INCOME TAX APPELLATE TRIBUNAL 'I' BENCH, MUMBAI
BEFORE SHRI M.BALAGANESH, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./ I.T.A. No. 1422/Mum/2018
(**निर्धारण वर्ष /** Assessment Year: 2014-15)

Production Testing Services Inc. USA, C/o. Madhav Joshi & Associates, 801/B, Heritage Plaza, 8th Floor, B Wing, Teli Galli Cross Road, Andheri (East), Mumbai – 400 069.	**बनाम/ Vs.**	Dy. CIT (IT)-3(3)(2) Room No. 1603, 16th Floor, Air India Building, Nariman Point, Mumbai – 400 021
स्थायीलेखासं ./जीआइआरसं ./**PAN/GIR No.**		**AAFCP5834R**
(अपीलार्थी**/Appellant)**	**:**	**(**प्रत्यर्थी / **Respondent**

अपीलार्थी की ओर से/**Appellant by**	**:**	Sh. R.V. Shah & Ms. Mallika Devendra, A.Rs.
प्रत्यर्थी की ओर से**/ Respondent by**	**:**	Sh. V. Srikar, D.R

सुनवाई की तारीख**/ Date of Hearing**	**:**	13/03/2019
घोषणा की तारीख **/ Date of Pronouncement**	**:**	15/03/2019

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER

The present appeal filed by the assessee is directed against the order passed by the Assessing Officer (for short 'A.O') under Sec. 143(3) r.w.s 144C(13), dated. 16.05.2017, wherein the latter had given effect to the directions given by the Dispute Resolution

Panel-2, Mumbai (for short 'DRP'), vide its order dated 31.03.2017, which in itself was passed pursuant to the objections filed by the assessee to the additions/variations made by the A.O in his draft assessment order passed under Sec. 143(3) r.w.s 144C(1) of the Income Tax, 1961 (for short 'I.T Act'), dated 30.12.2016. The assessee assailing the order of the A.O has raised before us the following grounds of appeal:

"1. The Ld. Assessing Officer has erred in holding that income received by Appellant constitutes fees for technical services and covered under section 115A of the Income Tax Act, 1961 instead of applying the provisions of section 44BB of the Income Tax Act, 1961 which is a special provision for computing profits and gains in connection with the business of exploration, etc of mineral oils.

2. Without Prejudice to the above, Appellant submits that Assessing Officer has erred in holding that B.J. Services has given a sub contract to the Appellant who has agreed to perform the services indirectly for ONGC and wrongly stated that the payments are made by ONCG to Appellant. These observations are factually incorrect and further contrary to the various judicial decisions which were cited by the Appellant. Therefore the said order is had in law and deserves to be quashed.

3. Without Prejudice to the above Appellant submits that Learned Assessing Officer has failed to appreciate that section 44BB of the Income Tax Act overrides all other provisions of the Income Tax Act, being a special provision specifically for the purpose of Assessee engaged in the business of prospecting for, or extraction or production of mineral oils.

4. Without Prejudice to the above, Appellant submits that Appellant is a non resident company and provides services to another non resident company. Hence, provisions of sec.115A are not applicable to the facts instead section 44BB is applicable in the Appellant's case. Appellant therefore prays that order deserves to be set aside.

5. Without Prejudice to the above, Appellant submits that the DRP had called for agreement between B.J. Services and ONGC to verify that the Appellant is not performing services indirectly for ONGC. As the Appellant do not have any control over the third party documents and so the said agreement could not be produced.

6. Without Prejudice to the above, Appellant submits that it had produced before the DRP the confirmation issued by B J Services clearly stating that the Appellant did not have any direct contract with ONGC and that the invoice were raised on B.J. services and payments were made accordingly by B J Services. Thus the order is non-est factum and deserves to be deleted.

7. Without Prejudice to the above, Appellant submits that agreement of B.J. Services with the appellant was produced before the DRP as well as the Assessing Officer for the work performed by the Appellant along with the term and conditions of the agreement with the B.J. Services, in spite of verifying the agreement in entirety, the Assessing Officer held that the appellant had rendered the services to ONGC. Therefore, the order passed is not based on correct appreciation of law and facts.

8. Without Prejudice to the above, Assessing Officer has overlooked that section 115A is applicable only when income for technical fees is received from Government or an Indian concern. In the Appellant company's case, income is not received from an Indian Concern nor from the Government Appellant assessee therefore prays that provisions of section 115A are not applicable.

9. Without Prejudice to the above, Assessing Officer has not considered the decision of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. v. CIT (2015) 59 Taxman.com 1 (SC) though the same was cited and discussed at length. The Assessing Officer has not even distinguished the said case law and neither have commented on the said case law. The Appellant therefore, prays that the provisions of sec.44BB are applicable and eligible to claim deduction under sec.44BB of the Income Tax Act, 1961.

10. Appellant company submits that the Assessing Officer has not construed the law and judicial pronouncements on the subject. Hence, the Appellant company prays that assessment be made u/s 44BB of the Income Tax Act, 1961.

11. Appellant craves leave to add alter, amend, modify or omit any of the aforesaid grounds as the occasion may arise or demand."

2. Briefly stated, the facts of the case are that the assessee viz. Production Testing Services Inc., Texas, USA is a Foreign company incorporated in USA and is engaged in providing Fracturing Flow Back Services to oil companies. The assessee had e-filed its return of income for A.Y. 2014-15 on 19.09.2014, declaring total income at Rs. Nil.

3. The issue involved in the present case lies in a narrow compass. One B.J Services Company (Middle East) Ltd., a company incorporated in Scotland and having a project office in Mumbai was awarded a contract for Fracturing Flow Back Services by Oil and Natural Gas Commission (for short 'ONGC'). B.J Services Company (Middle East) Ltd. in turn sub-contracted the work to the assessee, vide agreement

dated. 15.07.2007. As per the terms of the agreement, the assessee received an amount of Rs. 3,02,40,747/- from B.J Services Company (Middle East) Ltd. The assessee as per the provisions of Sec. 44BB offered an amount of Rs. 30,24,075/-(10% of the total receipts of Rs. 3,02,40,747/-) for tax during the year under consideration. That out of the tax deducted at source of Rs. 32,54,634/- on the aforesaid amount the assessee had after adjusting its tax liability claimed refund of the balance amount. However, the A.O during the course of the assessment proceedings holding a conviction that as B.J Services Company (Middle East) Ltd. was carrying out Fracturing Flow Back Services and various operations at the Oil rigs pursuant to its contract with ONGC, therefore, the assessee who was sub-contracted the said work by B.J Services Company (Middle East) was indirectly performing the services for ONGC. The A.O further held a conviction that Fracturing Flow Back Services were technical services that were provided by the assessee for prospecting extraction or production of mineral oil. The A.O observed that the certificates issued under Sec. 197 clearly provided for deduction of tax at source @10%/15% on the gross amount payable by B.J Services Company (Middle East) Ltd. to the assessee in respect of fees for professional/technical services.

4. In the backdrop of the aforesaid facts, the A.O called upon the assessee to show cause as to why the amount of Rs. 3,02,40,747/- received from B.J Services Company (Middle East) Ltd may not be treated as fees for technical services and brought to tax as per the provisions of Sec. 115A of the I.T Act. The assessee submitted before the A.O that the provisions of Sec. 44BB were clearly applicable in its case. However, the A.O after deliberating on the explanation of the assessee did not find favour with the same. The A.O primarily driven by the facts viz. (i). that as B.J Services Company (Middle East) Ltd was carrying out Fracturing Flow Back Services and various

operations at the Oil rigs pursuant to a contract with ONGC, therefore, the assessee who was sub-contracted the said work was indirectly performing the services for ONGC; and (ii). that the certificates issued under Sec. 197(1) clearly provided for deduction of tax at source @10%/15% under Sec. 194J on the gross amount payable by B.J Services Company (Middle East) Ltd to the assessee in respect of fees for professional/technical services, therefore, vide his draft assessment order passed under Sec. 143(3) r.w.s 144C(1) proposed to subject the amount of Rs. 3,02,40,747/- to tax under Sec. 115A as amount received by the assessee by way of 'Fess for technical services'.

5. Aggrieved with the adjustments/variations proposed by the A.O in the draft assessment order, the assessee filed its objections with DRP-2, Mumbai. The assessee assailed the draft assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(1) on the ground that the amount of Rs.3,02,40,747/- received from B.J Services Company (Middle East) Ltd that was offered by the assessee for tax under Sec. 44BB of the I.T Act was proposed by the A.O to be assessed u/s 115A. The DRP taking cognizance of the fact that a similar issue was adjudicated upon by the DRP in the immediately preceding year, viz. A.Y 2013-14, against the assessee, therefore, by taking support of the said observations recorded in the said preceding year was thus not persuaded to accept the contentions of the assessee and followed the view taken in its case for the aforesaid preceding year. On the basis of his aforesaid observations the DRP upheld the findings of the A.O and concluded that as per *Explanation 2* to Sec. 9(1)(vii) as the technical services rendered by a non-resident had been used and utilized in India, therefore, the same were assessable as fees for technical services under Sec. 115A of the I.T Act.

6. The A.O giving effect to the directions of the DRP framed the assessment vide his order passed under Sec. 143(3) r.w.s 144C(13), dated 16.05.2017. The A.O followed the directions of the DRP and brought the amount of Rs. 3,02,40,747/- received by the assessee from B.J Services Company (Middle East) Ltd for rendering of Fracturing Flow Back Services to tax as per the provisions of Sec. 115A of the I.T Act.

7. Aggrieved, the assessee has assailed before us the order passed by the A.O under Sec. 143(3) r.w.s 144C(13). We find that the present appeal filed by the assessee involves a delay of 232 days. The assessee has filed an application dated 12.02.2019, therein praying that the delay involved in filing of the appeal may be condoned. It is the claim of the assessee that the aforesaid delay had occurred due inadvertent omission on the part of its chartered accountant who had forgotten to file the appeal within the stipulated time period. The assessee explaining the reasons leading to the delay on the part of the chartered accountant had stated that as at the relevant point of time he was pre-occupied and engrossed with carrying out compliance of the new law of GST which had came into force on 01.07.2017, as well as filing of the returns of income of the non corporate assessees which were supposed to be filed latest by 31.07.2017, therefore, for the said reason the aforesaid delay in filing of the appeal had occasioned on his part. In order to fortify its bonafides, it is stated by the assessee that involving identical facts the appeal for the preceding year i.e. AY. 2011-12 filed by the assessee had been heard by the Tribunal on 14.08.2017. In sum and substance, it is stated by the assessee that the delay involved in filing of the present appeal had occurred because of bonafide reasons and not for any laches or lapses on the part of the assessee. The ld. Departmental Representative (for short 'D.R') objected to the application filed by the assessee seeking condonation

of delay in filing of the appeal. It was submitted by the ld. D.R that as the delay involved in filing of the present appeal was substantial, therefore, the same did not deserved to be condoned and was liable to be dismissed on the said count itself.

8. We have heard the authorized representatives for both the parties and had deliberated upon the explanation of the assessee as regards the delay in filing of the present appeal. The assessee as well as his chartered accountant in order to substantiate the facts stated in the application seeking condonation of delay, had filed their respective affidavits. On a perusal of the affidavits, it can safely be gathered that the delay in filing of the appeal had occurred on account of an inadvertent omission on the part of the chartered accountant to file the appeal within the stipulated time period. We have given a thoughtful consideration and are of the considered view that as admitted by the chartered accountant viz. Shri Madhav Joshi that the delay in filing of the present appeal was on account of an inadvertent omission on his part, which in itself was backed by the reason that he had remained under huge work pressure at the relevant point of time, therefore, no lapse or laches in respect of the delay involved in filing of the appeal can be attributed to the assessee. Apart there from, we find that the chartered accountant had also sufficiently explained the reasons leading to failure on his part in filing the appeal within the stipulated time period. We are of the considered view that as the delay in filing of the appeal before us does not smack of malafides or a dilatory strategy on the part of the assessee, therefore, the explanation advanced by him cannot be brushed aside. We thus being of the considered view that in the backdrop of the aforesaid facts the delay involved in filing of the present appeal merits to be condoned, therefore, condone the delay of 232 days involved in filing of the same.

9. We shall now advert to the merits of the case. The ld. Authorised representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the issue involved in the present case was squarely covered by the orders of the Tribunal in the assessee's own case for the preceding years i.e A.Y 2011-12, A.Y 2012-13 and A.Y 2013-14 (copies placed on record). It was submitted by the ld. A.R that the Tribunal in the aforementioned cases for the preceding years, had after deliberating at length on the amounts received by the assessee from B.J Services Company (Middle East) Ltd. for rendering of Fracturing Flow Back Services in connection with extraction or production of mineral oil, had concluded that the same was liable to be taxed as per the provisions of Sec. 44BB of the I.T Act. It was submitted by the ld. A.R that the Tribunal in its aforesaid order had held that the provisions of Sec. 115A and Sec. 44DA would not be applicable to the case of the assessee. The ld. Departmental Representative (for short 'D.R') fairly conceded to the factual position as was so averred by the counsel for the assessee and admitted that th issue was covered against the revenue .

10. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Our indulgence in the present case has been sought to adjudicate as to whether the amount received by the assessee from M/s B.J Services Company (Middle East) Ltd for rendering of Fracturing Flow Back Services at the oil rigs would fall within the purview of Fees for Technical Services and thus would be liable to be brought to tax as per Sec. 115A of the I.T Act, or is covered by the special and specific provisions envisaged in Sec. 44BB for computing the profit and gains of a non-resident engaged in the business of providing services or facilities in connection with or supplying plant and machinery on hire used, or to be used, in the

prospecting for or extraction or production of mineral oils. We are persuaded to be in agreement with the Ld. A.R that the issue involved in the present case is squarely covered by the orders of the Tribunal in the assessee's own case for the preceding years viz. A.Y 2011-12, A.Y 2012-13 and A.Y 2013-14. The Tribunal in the case of the assessee for A.Y 2012-13 viz. Production Testing Services Inc Vs. DCIT, 3(3)(2), Mumbai, ITA No. 2060/Mum/2016, dated 02.02.2018, had followed the view earlier taken in the assesses own case for A.Y 2011-12, wherein it was observed as under:-

> "*9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the assessee ,viz. Production Testing Services Inc., Texas, USA, which is a Foreign company incorporated in USA, is engaged in providing fracturing flow back services to oil companies. We find that B.J Services Company (Middle East) Ltd., a company incorporated in Scotland and having a project office in Mumbai was awarded a contract for Fracturing Flow Back Services by Oil and Natural Gas Commission (for short 'ONGC'). That B.J Services Company (Middle East) Ltd. in turn awarded the contract to the assessee, vide agreement dated. 15.07.2007. We find that the assessee pursuant to the sub-contract awarded by B.J Services Company (Middle East) Ltd. had rendered Fracturing Flow Back Services and various operations at the Oil rigs. We have deliberated on the terms of the contract between ONGC and B.J Services Company (Middle East) Ltd., and after perusing Page 23-24 – Para 35 of the said contract find that the contractor, viz. B.J Services Company (Middle East) Ltd. was solely responsible for the manner in which the work assigned to it was performed. We are persuaded to be in agreement with the ld. A.R that as the contents of the aforesaid contract clearly stated that if any Sub-contractor was engaged by the contractor for performing the contract, then he shall be under the complete control of the contractor and there shall be no contractual relationship between any such Sub-contractor and the company, viz. ONGC. We thus, are of the considered view that in the backdrop of the aforesaid clear terms of the contract, now when the assessee who was engaged as a Sub-contractor by B.J Services Company (Middle East) Ltd had nothing to do with the company, viz. ONGC, therefore, the A.O/DRP were wrong in concluding that the amount received by the assessee from B.J Services Company (Middle East) Ltd for rendering Fracturing Flow Back Services were indirectly received from ONGC. We thus set aside the aforesaid observations of the A.O/DRP and hold that the amount under consideration was received by the assessee from B.J Services Company (Middle East) Ltd.*
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> *10. We further find that pursuant to the judgment of the Hon'ble Supreme Court in the case of ONGC Vs. CIT (2015) 376 ITR 306 (SC), it stands settled as on date that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec. 9(1)(vii), and would rather be covered by Sec. 44BB of the 'Act'. We are of the considered view that after the aforesaid judgment of the Hon'ble Supreme*

Court, the issue that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec. 9(1)(vii) stands settled and is no more found to be res integra. We are of the considered view that Sec. 115A(b) clearly presupposes existence of 'fees for technical services', which further as per the Explanation (a) contemplated therein refers to Explanation 2 of Sec. 9(1)(vii). That now when pursuant to the judgment of the Hon'ble Supreme Court in the case of ONGC vs. CIT (2015) 376 ITR 306 (SC), the issue that prospecting for or extraction or production of mineral oil is not to be treated as technical services for the purpose of Explanation 2 of Sec. 9(1)(vii), therefore, it can safely be concluded that the payments received by the assessee from rendering of Fracturing Flow Back Services for extraction or production of mineral oil would not fall within the realm of 'fees for technical services'. We thus, are of the considered view that as the precondition for invoking of Sec. 115A is in itself found to be missing, therefore, the same would not be attracted to the case of the assessee. We have further given a thoughtful consideration to the contention of the assessee that as it had received the amounts for rendering the services of Fracturing Flow Back Services from B.J Services Company (Middle East) Ltd., which itself was a foreign company, viz. a company incorporated in Scotland ,therefore, the said sums not having been received by the assessee from Government or an Indian concern, therefore, for the said reason also excluded the applicability of the provisions of Sec. 115A and Sec. 44DA. We are of the considered view that as observed by us hereinabove, the assessee had received the amount from B.J Services Company (Middle East) Ltd. and not from ONGC, therefore, the aforesaid contention of the ld. A.R carries substantial force. We thus, also on the said count that the assessee had not received the amount for rendering of services of Fracturing Flow Back Services in extraction or production of mineral oil from the Government or an Indian concern, therefore, hold that the applicability of the provisions of Sec. 115A and Sec. 44DA to the facts of the case of the present assessee would stand excluded.

11. We thus, in the backdrop of our aforesaid observations set aside the order of the A.O assessing the amount of Rs. 2,65,46,753/- received by the assessee from B.J Services Company (Middle East) Ltd. for rendering of Fracturing Flow Back Services at the oil rigs to tax as per the provisions of Sec. 115A of the 'Act'. We are persuaded to be in agreement with the ld. A.R that now when Sec. 44BB contemplates special and specific provisions for computing profits and gains of a non-resident in connection with the business of providing services or facilities in connection with or supplying plant and machinery on hire used or to be used in the prospecting for or extraction or production of mineral oils, therefore, the Fracturing Flow Back Services rendered by the assessee in connection with extraction or production of mineral oil would squarely be covered by the provisions of Sec. 44BB. We thus, set aside the order of the A.O and direct him to assess the amount of amount of Rs. 2,65,46,753/- received by the assessee from B.J Services Company (Middle East) Ltd as per the provisions of Sec. 44BB."

We have perused the aforesaid observations of the Tribunal and find that the issue involved in the present case is squarely covered by the order passed by the Tribunal in the assesses own case for A.Y 2011-

12, A.Y 2012-13 and A.Y 2013-14. In the said preceding years, it was observed by the tribunal that the amount received by the assessee from M/s B.J Services Company (Middle East) Ltd. for rendering of Fracturing Flow Back Services was rightly offered by the assessee for tax as per the provisions of Sec. 44BB of the I.T Act. We thus finding ourselves to be in agreement with the view therein taken by the Tribunal, are thus of the considered view that the assessee during the year under consideration had rightly offered the amount of Rs. 3,02,40,747/- for tax under Sec. 44BB of the I.T Act. In the backdrop of our aforesaid observations the order passed by the A.O under Sec. 143(3) r.w.s. 144C(13) is set aside.

11. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 15.03.2019

Sd/-	Sd/-
(M.Balaganesh)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 15.03.2019
PS. Rohit

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**