IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 6642/MUM/2018
Assessment Year: 2015-16

Maritime Vanguard Pte Ltd. C/O SRBC & Associates, LLP, 14th floor, The Ruby, 29 SenapatiBapat Marg, Dadar, (West), Mumbai-400028. **PAN No. AAJCM3609F**	Vs.	Assistant Commissioner of Income Tax (International Taxation) Circle-3(2)(1), 16th Floor, Room No. 1607, Air India Building Nariman Point, Mumbai-400021.
Appellant		**Respondent**

Assessee by	:	Mr. M.P. Lohia, AR
Revenue by	:	Ms. Abha Kala Chanda, CIT-DR & Ms. Kavita Kaushik, DR
Last Date of Hearing	:	27/09/2019
Date of Pronouncement	:	20/12/2019

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2015-16. The appeal is directed against the order passed by the Assistant Commissioner of Income Tax (International Taxation)-3(2)(1), Mumbai (hereinafter, the AO) u/s 143(3) r.w.s. 144C(5) & 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

On the facts and in the circumstances of the case and in law, the AO, based on directions of DRP has:

1. erred in assessing total income at Rs.40,62,51,200 as against returned income of Rs. Nil;
2. erred in holding that the receipts earned by the Appellant on account of provision of services through various vessels to the charterers (BGEPIL, LTHE, Sapura and Astro) were for providing the 'use' or 'right to use' the industrial, commercial or scientific equipment, thereby treating the same as "Royalty" u/s 9(1)(vi) of the Act;
3. erred in holding that the benefit of exclusion provided under explanation 2 to section 9(1)(vi) of the Act would be available only if the receipts earned by MVPL is offered to tax under section 44BB of the Act.
4. erred in treating the receipts earned by Appellant from provision of services through various vessels as royalty u/s 9(1)(vi) of the Act, whereas the same is in the nature of business receipts;
5. without prejudice to the above, the Appellant submits that if the above receipts are considered as chargeable to tax, the same should be chargeable to tax in the nature of business receipts, chargeable u/s 44BB of the Act i.e. 10% of the gross receipts deemed as profit chargeable to tax.
6. erred in holding that receipts earned by the Appellant on provision of services through various vessels to the charterers shall be covered within the definition of the term "Royalty" under Article 12(3) of the India-Singapore DTAA.
7. should have appreciated that the above receipts are on account of provision of services, which is governed by Article 12(4) of the DTAA i.e. Fees for Technical Services (‘FTS') and in absence of 'make available' of technical knowledge, experience, skill, know-how or processes, the same is not chargeable to tax;
8. without prejudice to the above, even if the impugned receipts are treated as Royally/ FTS as per the Article 12 of the DTAA, the said receipts, as per Article 12(5) of the DTAA, would be governed by Article 7 of the DTAA, and due to non-

satisfaction of the threshold for Permanent Establishment ('PE') as per clause 5 of Article 5, the impugned receipts would not be chargeable to tax.

9. erred in levying interest under section 234B of the Act amounting to Rs.1,00,01,922.
10. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

3. Briefly stated, the assessee is a Singapore based company. It is a tax resident in Singapore. The control and management of its affairs is situated entirely in Singapore and hence it is a non-resident in India. The assessee filed its first Indian return of income in AY 2015-16 i.e. the AY under consideration is the assessee's first year pursuant to commencement of its Indian operations.

During the course of assessment proceedings, the Assessing Officer (AO) asked the assessee to explain as to why receipts earned from provision of services through various vessels were not offered to tax. In response to it, the assessee filed a written submission before the AO stating that during the impugned assessment year, it has earned revenues from the following contracts for provision of vessels on time charter basis :

Charterers	Vessel Name	Charter period	
		From	To
BG Exploration & Production India Ltd. ('BGEPIL')	PW Natuna & POSH Mulia	25-Dec-14	31-Mar-15
Larsen & Turbro Hydrocarbon	POSH Bangka & Maritime Putra	15-Dec-14	31-Mar-15
Astro Offshore Pte Ltd. ('Astro')	Maritime Putri	15-Dec-14	31-Mar-15
Sapura Kencana TL Offshore Sdn Bhd ('Sapura')	POSH Bangka & Maritime Putra	01-Feb-15	21-Feb-15

It was explained before the AO that the above vessels were provided by the assessee on time charter basis and present in India from 15.12.2014 to 31.03.2015 during the financial year (FY) 2014-15 and accordingly, the total

period of operation in India pursuant to the abovementioned contract was 106 days.

It was stated before the AO that the assessee did not offer to tax the receipts earned from provision of services through various vessels, as the services are rendered in India for only 165 days in the concerned financial year and the threshold to trigger a PE in India as per the India-Singapore DTAA is 183 days in a fiscal year.

Further, it was explained to the AO that while the receipts earned by the assessee from provision of services through various vessels are covered u/s 44BB of the Act, however, since the assessee was not having a PE in India as per clause 5 of Article 5 of DTAA, the revenues are not taxable in India as per Article 7 of the India-Singapore DTAA.

However, the AO characterized the charter receipts earned by the assessee during the year as royalty by denying the specific exclusion granted for activities covered u/s 44BB of the Act from the definition of royalty in Explanation 2 to section 9(1)(vi) of the Act on the ground that no amounts were offered to tax u/s 44BB of the Act. Further, the AO held that the provision of vessels by the assessee to the charterers during the year is purely in the nature of leasing/hiring of vessel on rental and hence, taxable as royalty. Accordingly, the AO concluded that the receipts in lieu of the lease of the vessels to the respective charterers is actually pure hire of the vessel. Relying on the judgment of the Hon'ble Madras High Court in the case of *Poompuhar Shipping Corporation Ltd*. (38 taxmann.com 150), the AO held that receipts are in the nature of equipment royalty.

4. Before us, the Ld. counsel for the assessee submits that the vessels were provided by the assessee on time charter basis and the same were present in India from 15.12.2014 to 31.03.2015 during the FY 2014-15 and accordingly, the total period of operation in India pursuant to the abovementioned contract is 106 solar days; the vessels were chartered to the respective charterers along with the crew for carrying out certain activities "in connection with" exploration or extraction of mineral oils in India. It is stated that the assessee has provided services using the vessels to the charterers to enable them to undertake subsea installation, testing and pre-commissioning of the subsea facilities, commissioning support, towing or assist in towing of drilling rig and anchor handling, transportation of cargo, personnel and supplies ; and standby coverage and emergency assistance, towing of jack-up drilling rig with deck equipment and crew onboard i.e. provision of services or facilities in connection with exploration, exploitation or extraction of mineral.

Elaborating further, the Ld. counsel submits that (i) the services rendered by the assessee do not qualify as 'royalty' under clause (iva) of Explanation 2 of section 9(1)(vi) of the Act- as the same being covered u/s 44BB are expressly excluded from the definition of royalty, (ii) the services rendered by the assessee do not qualify as Fees for Technical Services ('FTS') due to the specific exclusion provided u/s 9(1)(vii) of the Act of 'mining and like projects', (iii) the services provided by the assessee are inextricably connected with the prospecting, extraction or production of mineral oils and hence as per the ratio laid down by the Supreme Court in the case of *Oil & Natural Gas Corporation Limited* ('*ONGC')* (2015) 376 ITR 306 (SC), the time charter services rendered by the assessee to the Charterers in connection with

prospecting, extraction or production of mineral oil would be covered u/s 44BB of the Act, (iv) since the services rendered by the assessee do not qualify as 'royalty'/ 'FTS' under the Act, the same cannot be brought to tax as 'royalty'/ 'FTS' under DTAA, (v) since the assessee has provided services for only 106 solar days in the fiscal year, the assessee does not constitute a PE in India as per Article 5(5) of the DTAA; in absence of a PE in India, revenues earned by the assessee on provision of services is not taxable in India as per the DTAA.

Thus it is stated that the assessee has rightly filed a 'Nil' return of income adopting a 'No PE, No Tax' position as per the DTAA being more beneficial as compared to the taxability u/s 44BB of the Act.

The Ld. counsel further submits that the AO incorrectly observed that the assessee is not rendering services which are in the nature of prospecting, extraction or production of mineral oil. Relying on the judgment of the Supreme Court in *ONGC* (supra), the Ld. counsel explains that profits should be computed in accordance with the provisions of section 44BB of the Act which is a specific provision for computing income of non-resident from provision of services or facilities in connection with or supplying plant & machinery on hire used in prospecting and extraction or production of mineral oil in India. It is stated by him that in the said ruling, the Supreme Court held that the services rendered by various non-resident companies with which ONGC had entered into separate agreements for availing of diverse services (such as provision of personnel with expertise and experience in operation and management of an oil rig, engineering and technical support, processing of seismic data, consultancy services, training service, analysis of

data, geological and feasibility study, inspection and repair service etc.) were inextricably linked with prospecting, extraction or production of mineral oil and hence were mining and related/ancillary services, so as to get excluded from the definition of FTS as provided under the Act.

Further, reliance is placed on the order of the Tribunal in case of *Swiwar Offshore Pte Ltd. v. ADIT* (89 taxmann.com 346) (Mumbai-ITAT), wherein it is held that where an assessee, a non-resident gave vessels on hire to India companies, in view of the fact that said vessels were used by hirers for transporting men and machines to locations where it was doing exploration/production of mineral oil, said service being 'in connection with' prospecting for and exploration activity, income arising out of such activities had to be assessed u/s 44BB. The Tribunal explaining that the word 'services' followed by an expansive phrase 'in connection with' are relatable to prospecting for and exploration of mineral oil; that means all services associated with prospecting for and exploration activities are brought within the scope of section 44BB. Further, another category of assessees governed by section 44BB are those supplying plant & machinery on hire. Thus it is stated that both these two categories of assessees covered by section 44BB engage themselves in core activities relating to prospecting and exploration of oil and gas. So it is argued that the assessee is eligible to be governed by the provisions of section 44BB of the Act as against section 9(1)(vi) as assessed by the AO.

4.1 Stating that the time charter receipt cannot be taxable as 'royalty' under the Act, the Ld. counsel submits that during the impugned assessment year the assessee has earned revenues from providing services and chartering out

vessels along with crew to the charterers on a time charter basis and typically, this arrangement is in the nature of a wet lease/time charter arrangement i.e. it involves a service element and not a pure rental contract. Referring to the clauses of the agreement, it is explained by him that the said agreement between the assessee and the charterers was not in the nature of simpliciter hire/lease of vessels as held by the AO, rather, it was a time charter contract whereby the assessee agreed to provide services through various vessels. Further, it is argued by him that in case of time charter of ship, though the charterer may have the right to give direction to the master, officer or other crew, but the charterer does not have full control, possession or operating responsibility of the vessel and hence, in substance is availing a service only and the charterer does not have any involvement in the functioning of the vessel and hence in a time charter arrangement, the revenues will not be taxable as royalty.

Clarifying further, it is stated by him that since the assessee has full control over the vessel and the crew, the revenue earned by it will not be taxable as 'royalty' under the Act; accordingly the revenue earned by the assessee are not for hire or use of or right to use of any industrial, commercial or scientific equipment but for provision of services. In this regard, reliance is placed by him on the order of the ITAT, Chennai in the case of *Sical Logistics Ltd.* (TS-701-ITAT-2016), wherein it is held that since the master/crew of the vessel is under the control of the owner of the vessel, the payments received in lieu of the same should not be taxable as royalty. Similarly, reliance is placed by him on the decision in *Dell International Services India Private*

Limited 305 ITR 37 (AAR), *Technip Singapore Limited v. DIT* (385 ITR 408), *Van Oord Dredging and Marine Contractors BV v. ADIT* (7589 Mumbai 2012).

Thus it is stated by him that the revenues of the assessee can only be taxed u/s 44BB of the Act. However, the revenue were not to be chargeable in India in view of beneficial provision of DTAA. Elaborating further, it is stated by him that the assessee has provided services/facilities in connection with exploration, exploitation or extraction of mineral oil for 106 solar days during the impugned assessment year and accordingly it does not create a PE in India as its operations in India are for less than 183 days and therefore, in absence of having a PE in India, the revenues of assessee are not taxable in India under the beneficial provisions of the DTAA. In this regard reliance is placed by him on the decision in *Enron Oil & Gas Expat Services Inc. v. CIT* (29 taxmann.com 419), *Aditya Birla Nuvo Ltd. v. Assistant Director of Income Tax* (44 SOT 601), *Gupta Overseas v. DCIT* (30 ITR (T) 738.

5. On the other hand, the Ld. Departmental Representatives (DRs) submit that the assessee is not rendering services which are in the nature of prospecting, extraction or production of mineral oil and hence the services provided to the charterers, who in turn use the same in providing services related to oil and gas, cannot be equated with the assessee providing the services covered u/s 44BB, more so when the assessee itself does not offer any tax u/s 44BB. Thus it is stated by them that the decision in *ONGC* (supra) cannot be applied to the assessee to say that the services are in the nature of prospecting, extraction or production of mineral oil and thereby excluded from the meaning of 'royalty' under clause (via) of Explanation 2 of section 9(1)(vi). Submitting further that the revenues earned by the assessee are

towards hiring of vessels on a fixed rate per day basis and not a service contract, it is explained by them that even though it is a time charter agreement, the crew is entirely at the command and directions of charterer and not assessee. Relying on the judgment of the Hon'ble Madras High Court in *Poompuhar Shipping Corporation Ltd*. (supra), wherein it is held that 'Ship' is an equipment and therefore, receipts from hire of a ship are covered u/s 9(1)(vi) and taxable as 'equipment royalty', the Ld. DRs state that the revenues earned by the assessee on account of hire charges is taxable as royalty.

Thus the Ld. DRs conclude that the order passed by the AO be affirmed.

6. We have heard the rival submissions and perused the relevant materials on record. The 1st ground of appeal is general in nature. The reasons for our decisions in respect of the 2nd to 8th ground of appeal, being interrelated, are given below.

Section 44BB is a special provision for computing profits and gains in connection with the business of exploration of mineral oil. Parliament engrafted the aforesaid provision in the Income Tax Act as a measure of simplification providing for determination of income of such taxpayers at 10% of the aggregate of certain amount. By virtue of section 44BB and because of *non-obstante* clause, section 28 of the Act will have no application.

Thus section 44BB contains special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils. Under the said section, in the case of an assessee being non-resident engaged in the business of providing services or facilities in connection with or

supplying plant and machines on hire for use or to be used in the prospecting of or extraction or production of mineral oils, a sum equal to 10% of the aggregate of the amounts specified shall be deemed to be the profits and gains of such business chargeable to tax under the head 'profits and gains of business or profession'. Deemed profits to the tune of 10% are taxed under the said section and it overrides the other charging sections in this regard.

The amount mentioned in section 44BB(2) clearly shows that the amount paid to the assessee on account of provision of services and facilities in connection with the extraction or production of mineral oils, whether paid in or outside India, are to be included.

The word 'services' followed by expansive phrase 'in connection with' are relatable to prospecting for and exploration of mineral oil. That means, all services associated with prospecting for and exploration activities are brought within the scope and reach of section 44BB. Another category of assessees governed by section 44BB are those supplying plant and machinery on hire.

6.1 As mentioned earlier, in the instant case the assessee is a tax resident in Singapore and consequently, a non-resident in India. It has entered into time charters contracts with BGEPIL, LTHE, Astro and Sapura during the year under consideration. To appreciate the issue, we mention below the scope of work between the assessee i.e Maritime Vanguard Pte Ltd (in short'MVPL') and BG Exploration & Production India Ltd (in short 'BGEPIL') as filed by the Ld. counsel :

"**Scope of work**

ONGC, Reliance Industries Ltd and BGEPIL are joint operators of Panna-Mukta offshore oil and gas production field situated in the Arabia sea on the west coast of India. The oil and gas is produced at these fields and treated, compressed and then exported through subsea pipeline. The contract has been entered into for offshore installation at the aforesaid oil fields for which MVPL is required to provide for accommodation, barge, AHT etc to BGEPIL. The scope of work for the said activities have been summarized as under :

Clause 7: Employment

- The entire operation, navigation and management of the vessel shall be in the exclusive control and command of MVPL; the vessel will be operated and the services hereunder will be rendered as requested by charterers, subject always to the exclusive right of MVPL.

Clause 11: Duties of master, officers and crew

The master, officers and crew will perform the following services:

- Will connect and disconnect the water, fuel, liquid mud hoses etc and other hoses in port as well as offshore installations;
- Will operate appropriate machinery on board the vessel (i.e. loading unloading cargoes, anchor handling etc)
- Will hook on and unhook cargo when discharging/loading in port and offshore installation;
- Will be in sufficient number to allow the vessel to operate for twenty-four hours per day;
- Will obtain and maintain all available pilotage exemptions for port locations etc.

Clause 18 - Bunkers at delivery and redelivery

- MVPL is responsible for provision of lubricant oils, grease and other consumables throughout the charter period.

Clause 26 - Insurance

- MVPL shall be under an obligation to effect and maintain insurance policies. MVPL was also responsible for any damage of the vessel and crew therein and accordingly would bear all the costs in relation to the same.

Clause 10: Scope of work for AHT

- Apart from Anchor Handling activities the AHT would be required for intra-field transfer of personnel and material at required location (i.e. Mumbai);
- AHT to have positioning equipment and personnel to monitor anchor positions while anchor handling activities;
- Implementation of systems for anchor handling, personnel transfer, offshore installations etc.

Clause 11: Scope of work for barge

- The barges will be provided as support for carrying out work at the areas where AHT will be stationed for providing services.

Clause 12.4: Garbage Handling facility

- There will be a specified garbage area on the deck and will be provided by MVPL based on the specifications mentioned in the contract;

Clause 12.5: Compliant helideck

- A helideck would be available on the barge/workboat and would be compliant as per the specifications provided in the contract;

Clause 12.6: Laundry facilities

- MVPL would be required to provide laundry facilities for the crew working on the vessel;

Clause 12.7: Toilet facilities

- MVPL would be required to provide toilet facilities for the crew working on the vessel which has high class hygiene and cleanliness and one which is regularly maintained. Alongwith the facilities, MVPL to provide adequate competent personnel for maintaining the toilet facility;

Clause 12.8: Accommodation and conference room and client office facilities

- MVPL to provide adequate and requisite cabins as preferred for the senior personnel. In addition to the same, MVPL to provide for conference rooms with adequate seating capacity and all other necessary electronic arrangements (viz telephone, LCD TV, cables etc);

Clause 12.9: Entertainment, recreation facilities

- MVPL to provide mess rooms, smoking rooms, recreation rooms with the requisite furniture and appliances as mentioned in the contract;

Clause 12.13: Medical facilities

- MVPL to provide medical facilities i.e. certified doctor, advanced medical responder bag with medicines, oxygen cylinder etc, first aid bag and kits etc;

Further, the following clauses of the agreements between MVPL and L&T, Sapura & Astro demonstrate that the agreement was on account of provision of services and not simpliciter hire of equipment/vessel:

- **Clause 14 -** Insurance - MVPL shall be under an obligation to effect and maintain insurance policies. MVPL was also responsible for any damage of the vessel and crew therein and accordingly would bear all the costs in relation to the same.
- **Clause 6 -** Master and Crew - the entire operation, navigation and management of the vessel shall be in the exclusive control and command of MVPL; the vessel. The vessel will be operated and the services hereunder will be rendered as requested by charterers, subject always to the exclusive right of MVPL; and
- **Clause 7 -** Owners to provide - Remuneration of the master, officer and other crew is to be borne by MVPL."

6.2 At this juncture, we refer to the judgment of the Hon'ble Supreme Court in *ONGC* (supra). In that case, the assessee-company 'ONGC' and a non-resident/foreign company had entered into an agreement by which the non-resident company had agreed to make available supervisory staff and personnel having experience and expertise for operations and management of drilling rigs. The assessee-company paid amounts to non-resident assessees/foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil. The Assessing Officer held that the assessment should be made u/s 44D. However, the Appellate Commissioner and the Tribunal treated said payments u/s 44BB. The High Court, taking a view that the contract did not mention that the personnel of the non-resident company was also carrying out the work of drilling of wells, held that as the company had received fees for rendering service, therefore, the payments made to the foreign companies were liable to be taxed under the provisions of section 44D. On appeal, the Hon'ble Supreme Court held as under :

"13. The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil

Fields (Development and Regulation) Act, 1948. While construing the somewhat pari materia 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 in 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 far 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 hold 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 APT 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.
44.	1523	Supply, installation and familiarization of software for processing seismic data.

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 assessees or foreign 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."

6.3 As mentioned here-in-before, their Lordships of the Hon'ble Supreme Court have held 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."

Under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. Once there is a pronouncement of the highest Court of the land, the same is binding on all courts, tribunals and all authorities in view of this Article. If the Hon'ble Supreme Court has construed the meaning of a section, then any decision to the contrary given by any other authority must be held to be erroneous.

In the instant case, we find that neither the AO nor the DRP has examined the applicability of section 44BB by looking into whether the pith and substance of each of the contract/agreement entered by the assessee is inextricably connected with prospecting, extraction or production of mineral oil. This is evident from the order of the DRP dated 29.08.2018 passed u/s 144C(5) and the assessment order dated 19.09.2018 passed by the AO u/s 143(3) r.w.s. 144C(5) and 144C(13) of the Act. Therefore, we set aside the order of the AO and restore the matter to him to make an order afresh after examining each of the contract/agreement and by following the ratio laid down by the Hon'ble Supreme Court in *ONGC* (supra) mentioned at para 6.2 hereinbefore. We direct the assessee to file the relevant documents/evidence before the AO. We make it abundantly clear that in the *de novo* proceedings, the AO would examine the contentions of the assessee that (i) since the receipts earned from provision of services through various vessels are covered u/s 44BB of the Act, the same should be excluded from the definition

of royalty under the Act under clause (iva) of explanation 2 of section 9(1)(vi), (ii) as per section 90(2) of the Act, the assessee would be governed u/s 44BB of the Act or under the provisions of DTAA, which is more beneficial to the assessee, (iii) since the assessee does not have a PE in India as per clause 5 of Article 5 of DTAA(presence in India during AY 2015-16 for 106 days ie less than 183 days), the revenues are not taxable in India.

In view of the binding nature of the above decision of the Hon'ble Supreme Court, we are not adverting to the other case-laws cited by both sides. The assessee would feel free to cite the other case-laws before the AO.

Thus the 2nd to 8th ground of appeal are allowed for statistical purposes.

7. The levy of interest u/s 234B is consequential in nature. The initiation of penalty u/s 271(1)(c) is premature.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 20th December, 2019

Sd/-	Sd/-
(MAHAVIR SINGH)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai
Dated: 20/12/2019
Rahul Sharma, Sr. P.S.

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy. / Asst. Registrar)
ITAT, Mumbai