

INCOME TAX APPELLATE TRIBUNAL  
DEHRADUN CIRCUIT BENCH: DEHRADUN  
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.2956/Del/2013 and 5583 & 5584/Del/2013  
(Assessment Year: 2006-07, 2007-08, and 2010-11)

MI Overseas Ltd, 302, 3 <sup>rd</sup> Floor, Prime Corporate Park, 230/231, Sahar Road, Behind ITC Grand Maratha Hotel, near International Airport (East), Mumbai PAN: AADCM8895K	Vs.	ADIT, International Taxation, Dehradun
(Appellant)		(Respondent)

ITA No.3045/Del/2013  
(Assessment Year: 2006-07)

ADIT, International Taxation, 13A, Subhash Road, Aayakar Bhawan, Dehradun	Vs.	MI Overseas Ltd, C/o. SRBC & Associates, 4 <sup>th</sup> & 5 <sup>th</sup> Floor, Plot NO. 2B, Tower-2, Gautam Budh Nagar, Sector 126, Noida PAN: AADCM8895K
(Appellant)		(Respondent)

ITA No.5564 & 5565/Del/2013  
(Assessment Year: 2007-08 and 2010-11)

ADIT, International Taxation, Dehradun	Vs.	MI Overseas Ltd, 302, 3 <sup>rd</sup> Floor, Prime Corporate Park, 230/231, Sahar Road, Behind ITC Grand Maratha Hotel, near International Airport (East), Mumbai PAN: AADCM8895K
(Appellant)		(Respondent)

ITA No.462, 3072/Del/2012  
(Assessment Year: 2008-09 and 2009-10)

MI Overseas Ltd, C/o. Nangia & Company, CA Suite 4A, Plaza M6, Jasola, New Delhi PAN: AADCM8895K	Vs.	ADIT, International Taxation, Dehradun
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Deepesh Jain, Adv
Revenue by:	Shri Thakur Singh Mapwal, JCIT DR
Date of Hearing	03/03/2021
Date of pronouncement	08/06/2021

## ORDER

Per Prashant Maharishi, Accountant Member

1. These are the cross appeals filed by both the parties for several assessment years involving similar grounds of appeal and issues arising out of similar facts and circumstances, therefore, both the parties have similar arguments on the issues, therefore, these appeals are heard together and disposed of by this common order. In view of this, we first take up the appeal of the assessment year 2006 – 07, which is guided by both the parties as the lead appeal; thereafter the decision of this year would be applied to other years.
2. ITA number 2956/Del/2013 is filed by the assessee i.e. MI overseas Ltd against the order passed by The Commissioner of Income Tax (Appeals) – 2, Dehradun (the learned CIT – A) dated 7/03/2013 for assessment year 2006 – 07. This order was passed by the learned CIT – A in appeal preferred by the assessee against the assessment order dated 27/2/2012 passed u/s 263/143 (3)/144C (3) of the Income Tax Act (the Act) by The Additional Director Of Income Tax (International Taxation) Dehradun (the learned AO) for the impugned assessment year 2006 – 07.
3. The assessee has raised the following grounds of appeal in ITA No. 2956/Del/2013 for the Assessment Year 2006-07:-
  - “1. *The learned CIT(A) has erred in holding that revenues received by the Appellant amounting to Rs 966,943,294 for offshore supply of imported material are taxable under section 44BB of the Act as opposed to the Appellant’s claim of not chargeable to tax in India.*
  2. *The leaned CIT(A) has erred in rejecting the Profit Attribution Report (‘PAR’) submitted by the Appellant based on the parameters of functions performed, risks assumed and assets employed by Indian office of the Appellant and comprehensive analysis carried out to arrive at profit to be attributable to the Indian office of the Appellant.*
    - 2.1 *The learned CIT(A) has erred in not providing any plausible reasons for rejecting the PAR submitted by the Appellant, without appreciating that the Appellant had good and sufficient reasons for non-submission earlier before the learned Assessing Officer.*
    - 2.2 *The learned CIT(A) has erred in not appreciating that admission of PAR was required to adjudicate the issue of taxability of offshore supply of imported material on fair and just basis.*

## *Ground 2 - Taxability of reimbursements*

- 3. The learned CIT(A) has erred in holding that receipts amounting to Rs 4,020,380 received by the Appellant from Niko Resources Limited on account of reimbursement of expenditure ie container rental charges and demurrage charges are taxable under section 44BB of the Act as opposed to Appellant's claim for non-taxability of the same.*

## *Ground 3 - Non-grant of credit for taxes deducted at source*

- 4. The AO while giving effect to the order of CIT (A) has erred in law and in fact, in granting appropriate credit of taxes deducted at source amounting to Rs 2,959,451."*

4. The revenue has raised the following grounds of appeal in ITA No. 3045/Del/2013 for the Assessment Year 2006-07:-

- "1. Whether on the facts and circumstances of the case, the CIT (A) has erred in holding that the mud engineering services provided by the assessee, was not in the nature of Fee for Technical Services as defined in section 9(l) (vii) of the Act.*
- 2. Whether on the facts and circumstances of the case, the CIT (A) has erred in holding that receipts of assessee as subcontractor engaged in rental of equipment, consumables and imported material, was not in the nature of Royalty under section 9(i) (vi) of the Act and eligible for 44BB.*
- 3. Whether on the facts and circumstances of the case, the CIT(A) has erred in holding" that the assessee was eligible for sec. 44Bb even though the nature of services rendered by the assessee was equipment hire rejecting the distinction between first leg and second leg and PSC vs. Non PSC vendors made by AO, purely on the grounds that it had no judicial precedent.*
- 4. Whether on the facts and circumstances of the case the CIT (A) has erred in ignoring the distinct scheme of taxation of FTS/royalty and holding that the income of the assessee was taxable under the presumptive provisions of sec. 44BB, disregarding the insertion of proviso in section 44BB/44DA/115A and the rationale behind the introduction of said clarificatory proviso's in the Finance Bill 2010.*
- 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, 2011 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 vs. CIT, delivered on 17.11.2005.*
- 6. Whether on the facts and circumstances of the case the CIT (A) has erred in referring to the decision of the ITAT in the case of M/s CGG VERITAS in holding that the income of the assessee company was covered under the provisions of section 44BB ignoring that the said decision of the ITAT has not been accepted by the department against which a miscellaneous petition has been filed.*
- 7. Whether the CIT (A), has erred in ignoring decisions of jurisdictional High Court in the case of CIT vs. ONGC as an agent of M/s Foramer France and M/s Rolls Royce Pvt. Ltd. (2007-TII-03-High Court Uttarakhand-Intl.).*

8. *Whether on the facts and circumstances of the case the CIT (A) has erred in holding that interest under section 234-B was not chargeable in this case by relying upon the decision of Hon'ble Uttarakhand High court in the case of Maersk (334 ITR 79) whereas the department has contested the issue and has filed SLP before the APEX Court against in the case of Jacobs Civil Incorporated/ Mitsubishi involving similar issue.*
5. Facts gathered from the orders of the lower authorities' shows that assessee M I oversees Ltd is a company organized and existing under the laws of Cayman Island. It is engaged in the business of providing services and facilities in connection with exploration and extraction of minerals.
6. It filed its return of income for assessment year 2006 – 07 with the Deputy Commissioner of income tax, Circle – 1, Dehradun declaring a total income of ₹ 61,834,432/-. In the return of income filed by the assessee, it is claimed that the reimbursement of expenditure amounting to ₹ 4,020,380/- was not taxable as per the income tax act 1961 as the same was devoid of any element of profit. Assessee further claimed that it has received a sum of ₹ 966,943,294/- because of supplies, which were not taxable in India as the revenue was generated from business operations carried on outside India. During the year the assessee received revenues on account of the contract entered with the several parties engaged in execution of these contracts in providing of services which include Mud engineering and equipment rental, consumables and imported materials and providing other services. The assessee has offered gross revenue of ₹ 618,354,322/- and has computed income by applying deemed profit at the rate of 10% u/s 44 BB of the income tax act in respect of all the above contracts.
7. Subsequently the assessment u/s 143 (3) of the act was computed by The Deputy Director of Income Tax International Taxation Dehradun on total income of ₹ 8,15,76,336/- on 24/12/2008. Rectification order was passed u/s 154 of the act on 30/3/2009. Thereafter order u/s 263 of the income tax was passed by The Director of Income Tax (International Taxation) – 2, New Delhi on 28/3/2011 wherein the order passed by the learned Assessing Officer was cancelled with the direction to make a fresh assessment in this case. Consequently, the fresh assessment was undertaken. Both these appeals for assessment year 2006 – 07 are pertaining to the order passed by the learned assessing officer pursuant to the order passed u/s 263 Of the Director of Income Tax (International Taxation) Dehradun.
8. As already stated that assessee has offered gross revenue of ₹ 618,354,322/- computing the income by applying the deemed profit rate of 10% u/s 44 BB of the income tax act in respect of all the above contracts executed by it. Further the

learned assessing officer in the original assessment has brought to tax receipt from sale of imported material at the rate of 2% amounting to Rs. 193,38,866/- being 2% of the sum of ₹ 966,943,294/-. The assessee also claimed deduction on account of reimbursement of ₹ 4,020,380/- from gross receipt which was added to the income of the assessee by the AO in the original assessment following the decision of the honourable High Court in case of CIT versus Halliburton offshore services (300 ITR 265).

9. During the course of assessment proceedings the nature of the activities performed by the assessee i.e. Mud engineering services involving supply of imported material, local material and other services were examined and found that these are activities of highly technical nature and assessee has executed contract for various companies including PSC and NON PSC companies. Accordingly, the nature of services performed was considered by the assessing officer as fees for technical services/royalties where the services are such or equipment rental pertains to non-PSC companies. After consideration of the reply of the assessee, regarding off shore supply of materials, learned assessing officer noted that from the nature of contract it is clear that the supplies are made in India for the contract executed in India and title in goods passed to the customers in India. There is no FOB sale, which could have been proved. The supplies are intricately connected with the contracts/services performed in India in respect of the above contracts and accordingly the supply of imported material liable to be taxed in India and the claim of the assessee, therefore, that outside India receipts (of imported material) are not taxable was rejected. With respect to the nature of services (Mud services) he held that these are technical in nature and covered by the provisions of Section 9 (1) (vii) of the act as technical services therefore he rejected the claim of the assessee that these gross receipts are covered u/s 44 BB of the income tax act. He relied on the decision of the authority of advance ruling number P – 6/AAR/1995. He further held that the provisions of Section 44 BB are not applicable to a non-resident who supplies plant and machinery on hire to a person who does not itself undertake the activities of providing services and facilities in connection with prospecting or for extracting or production of mineral oil exploration. According to him, the above is receipt of the services, which would constitute income by way of royalty under the income tax act. With respect to the reimbursement of ₹ 4,020,380/- he included the same in the gross receipt for working out profit u/s 44 BB of the income tax act. Therefore, he proposed draft assessment order where income of the assessee

computed at ₹ 458,032,014/–, income of ₹ 125,698,442/– being taxed at the normal rate and income of ₹ 332,333,572/– is to be taxed at the rate of 10%. Thus, he considered the sum of ₹ 332,333,572 as income characterized as fees for technical services or royalty. Against draft assessment order no objections were filed before the learned dispute resolution panel and therefore the assessment order was passed on 27/2/2012. Thus, the learned assessing officer held as Under:-

- i. Revenue received from production sharing contract [ PSC] partners of ₹ 33,661,486 and from non-PSC partners are sum of ₹ 3,901,913/on account of mud engineering services received on as fees for technical services as per the income tax act as opposed to the claim of the assessee that these receipts are taxable u/s 44 BB of the income tax act.
  - ii. Revenue received from non-PSC partners of ₹ 62,094,388/– on account of Mud engineering contract as fees for technical services u/s 9 of the income tax act as opposed to the claim of the assessee that these receipts are taxable u/s 44 BB of the act
  - iii. Revenue received from non-PSC partners of Rs. 141,15,645 on account of supply of local material under mud engineering contracts, being in the nature of fees for technical services against the assessee offered it to be income covered u/s 44 BB of the act.
  - iv. Revenue received from PSC partners of ₹ 748,383,154/– on account of supply of imported material to be included in the revenue chargeable to tax u/s 44 BB of the income tax act as proposed to the claim of the assessee that these are not chargeable to tax in India.
  - v. Revenue received from non-PSC partners amounting to ₹ 218,560,140 on account of supply of imported material to be in the nature of fees for technical services as opposed to the claim of the assessee that these are not chargeable to tax in India.
  - vi. Considering the receipt of reimbursement of expenditure of ₹ 4,020,380/– in the nature of the fees for technical services taxable as opposed to the claim of the assessee that reimbursement of expenditure does not contain any amount of income and therefore is not covered u/s 44 BB of The Income Tax Act.
10. Aggrieved by this order of the learned assessing officer, assessee preferred an appeal before the learned CIT – A. He passed an order on 07/03/ 2013 wherein with respect to the taxability of revenue from offshore supply of imported material

amounting to ₹ 966,943,294 pertaining to PSC partners of ₹ 748,383,154 and non-PSC partners of ₹ 218,560,140/- held as taxable u/s 44 BB of the income tax act. He held that all 16 contracts are composite contracts involving rendering of certain services in connection with extraction of mineral oils and supply of goods. There is no single contract involving only supply of goods. It is noteworthy that the two activities are intricately linked with each other and any distinction between the two would amount to creating an artificial cleavage between supply of goods and rendering of services. He further referred that the act attempts at artificially splitting up supply of goods and rendering of services cannot be supported. He further held that it is a settled principle of law through several pronouncement of the honourable jurisdictional High Court that once an assessee chooses to come within the purview of Section 44 BB of the income tax act and all its receipts received or receivable (in India or outside India) are to be included for the purpose of computation of income u/s 44 BB of the act. Thus, since the appellant has chosen to opt for computation u/s 44 BB of the act its entire receipt from all 16 composite contracts shall be taxed u/s 44 BB of the act. He thus held that it would also render infructuous any attempt at splitting revenue through so-called attribution reports. Therefore, he held entire quantum of receipts is taxable as per the provisions of Section 44 BB of the income tax act. Thus, the appeal of the assessee was partly allowed. Therefore the assessee is aggrieved with the order of the learned CIT – A is an appeal before us on the issue that the

- a. taxability of revenue from offshore supply of imported material is not chargeable to tax in India,
  - b. Reimbursement of expenditure of ₹ 4,020,380/- received by the assessee is a reimbursement of expenditure and therefore it is not taxable u/s 44 BB of the income tax act.
  - c. For not granting the appropriate tax credit amounting to ₹ 2,959,451/-.
11. Coming to the appeal of the assessee the ground number 1 of appeal is with respect to the taxability of revenue from offshore supply of imported material amounting to ₹ 96,69,43,294/-. The learned Sr Advocate referred to the contracts placed in the paper book and submitted that the contracts entered with various parties are not in the nature of composite contracts and clearly distinguishable of goods/materials and rendering of services. Therefore he submitted that income on account of supply of imported material does not accrue or arise in India as the title in the goods passes outside India therefore income of the supply of material is not taxable in India. He

referred to the decision of the honourable Supreme Court in case of Ishikawajima Harima heavy industries Ltd 288 ITR 408 (SC), CIT versus Hyundai heavy industries 291 ITR 482 (SC) DIT versus Ericsson AB 343 ITR 470 (Delhi), DIT versus Nokia networks OY 358 ITR 259 (Delhi), DIT versus LG Cable Ltd ITA 703 of 2009 dated 24/12/2010 (Delhi), DIT versus Xelo Pty Ltd 203 taxman 475 (Bombay), LS cable Ltd 331 ITR 35 (AR), Deepak Cable India Ltd 337 ITR 127, ION Geophysical Corporation versus DCIT 72 taxmann.com 298 and National petroleum construction Co versus ACIT 20 ITR (T) 545 (Delhi). He further submitted that the provisions of Section 44 BB of the income tax are applicable only to the services/facilities and providing plant and machinery on hire and does not apply on sale of goods and materials. Without prejudice to the above argument he submitted that supplies are not taxable in India, it is submitted that even if it is to be held that the title in the goods passes to the buyer in India, the same is taxable under the normal provisions of the act and not as per the provisions of Section 44 BB of the income tax act being profits to be attributed to permanent establishment in India based on profit attribution report. He submitted that the aforesaid view is supported by the decision of the coordinate bench of the tribunal in the case of Baker Hughes Asia-Pacific Ltd versus ACIT 151 ITD 79 (Delhi ) which is affirmed by the Uttaranchal High Court in ITA number 64 of 2014.

12. The learned departmental representative vehemently supported the orders of the lower authorities. He submitted that this appeal is arising out of the order passed by the learned Director Of International Taxation u/s 263 of the income tax act pursuant to which the assessment orders are framed. He submitted that the assessee challenged the order passed by the learned Director Of Income Tax passed u/s 263 of the income tax act dated 28<sup>th</sup> of March 2011 for the same assessment year before the coordinate bench which is reported in 22 taxmann.com 227 (Delhi) and the appeal of the assessee was dismissed. He submitted that though the appeal was dismissed holding that there is an order which is erroneous and prejudicial to the interest of the revenue, however, observations at para number 5 of that order clearly clinches the issue against the assessee wherein it has been held that both the services as well as the material required to provide such services are composite an integral part of the contract. The assessee specialized in providing Mud services along with specialized chemicals required for that purpose. Thus, both these aspects are composite and cannot be segregated in part. This was a case of composite contract, which cannot be considered in part for the purpose of taxation.

Therefore, he submitted that these observations by the coordinate bench while deciding this issue now binds us. He further submitted that these findings have not been challenged by the assessee and therefore they have become final. He further referred to the decision of the Authority For Advance Ruling in 24 taxmann.com 73 in case of the assessee dated 1 August 2012 wherein it has been held that amount received by the assessee for providing Mud engineering services to an Indian company in connection with the extraction of mineral oils has to be taxed as fees for technical services. He referred to paragraph number [3] where the assessee itself has stated before the authority for advance ruling that the income of the assessee would be chargeable to tax u/s 44 BB of the income tax act with respect to a contract, which has been, mentioned in para no 2(1) of the order. Therefore, he submitted that the assessee itself has stated before the authority for advance ruling that it is connected contract and the receipt for material cannot be segregated from the services. With respect to the argument of the learned authorised representative that goods cannot be included for the purpose of Section 44 BB of the income tax act, it was submitted that the honourable Supreme Court in case of ONGC Ltd versus CIT 376 ITR 306 has held that the Pith & substance of each of the contract and agreement is required to be seen and if it is inextricably connected with the prospecting and extraction and production of mineral oil same should be considered for the provisions of Section 44 BB of the income tax act. It was further stated that the dominant purpose for each of the agreement is required to be seen though it may be certain ancillary works contemplated there under. It was referred to the serial number 43 and 44 of the various contracts listed by the honourable Supreme Court in that decision wherein supply, supervision and installation of software was also considered for the purpose of taxability u/s 44 BB of the income tax act. Therefore, it was submitted that there is no point in exclusion of supply of material by the contractor to the principal, which are used in the performance of that particular contract to be excluded from the provisions of Section 44 BB of the act. He further referred to the order of the learned assessing officer where in it has been held that there is no evidence of FOB sale in any of the contracts or invoices. Therefore, he submitted that when there is no evidences that there is an offshore supply of material, the decision cited by the learned authorised representative do not apply. In nutshell he submitted that the provision of Section 44 BB of the act does not make any distinction between supply of goods and other services, it is only one contract.

13. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused the copies of the contract submitted by assessee along with the various case laws supported in contentions of the parties. To examine the claim of the rival parties it is necessary to look into the contract awarded to the assessee. For this, we have examined the agreement number 2003/B/G/D/610 for the provision of drilling fluid material equipment and services in respect of Tapti recompletion and Panna Infill drilling program between B G Exploration and production India Ltd and assessee. The contract work awarded to the assessee was part of the consortium between ONGC Ltd, Reliance Industries Ltd, and BG exploration and production India Ltd in terms of that production-sharing contract dated 22 November 1995 for some of the work given to the BG exploration and production India Ltd. It has appointed assessee as a contractor. Scope of work is mentioned in 'Exhibit C'. Work is defined as provision of Mud material, chemical, completion fluid, mud engineers and equipment and personnel for removal of drilled solids. This contract is bifurcated into three different parts (1) fluid engineering services, (2) fluid management services, (3) mud materials and chemical supply. At point number 1.3 the condition for material and chemical supply shows that is the duty of the contractor to provide all equipment, labour and material and services specified therein and it is solely responsibility of the contractor for the operation of the contractors equipment including but not limited to the rigging up, testing, running and rigging down thereof. It is further the responsibility of the contractor to ensure that the requirement for chemicals and additives are kept in adequate stock to meet 4 well programs. The contractor was also required to maintain sufficient inventory of mud material and chemicals at its warehouse in Bhavnagar at its cost to smoothly run the drilling work over operations at all times. It is further mentioned that contractor shall deliver the material and chemicals to BSB and it shall be the responsibility of the contractor to dispose waste and the packing materials in an environment friendly manner. Further, the compensation is also linked with ability of the contractor to provide all equipment, labour and materials and services specified in the schedule. As per para number 2.4, assessee is also required to provide certain personnel for performance of the contract. Thus, the nature of work is removal of drilled solids. Assessee contractor was to arrange, the man, material, technology, equipments to do this act. Whole material is also required to be consumed for this work only. There are no other purposes of material for the B G Exploration P Ltd other than this work. Thus, infact contract is for Removal of drilled

solids from rigs for exploration. Process of removal of Drilled solid is a well-known procedure in exploration business which increases efficiency, saves environment, and increase labor safety. It requires expertise, equipments, material, and labour for performance of the work. Therefore, it is apparent that the whole contract is indivisible, not capable of standing alone on its own legs as far as the material supply portion is concerned. It is further apparent that had the company been awarded the other aspects of the work, it would not have been awarded the portion of supply of the material. Therefore, apparently the contract is a works contract, which involved, supply of material, labour and technology and supported by the available equipments to perform that work. Further, no evidence has been shown that the material is to be delivered by the assessee to the principal outside India and the risk and reward in the goods passes outside India. Contrary to that, it is the assessee, which is maintaining stock and issuing the material for the performance of the contract at the work site. The responsibility cast upon the assessee with respect to this material also shows that the property in the goods passes on to the buyer only to the extent of what is consumed in the performance of the contract. In fact, the property in the goods never passes to the contractor but it is consumed by the assessee for performing a work contract of removal of solid drills.

14. Honourable Supreme Court in case of oil and natural gas Corporation Ltd v Commissioner of income tax [2015] 59 taxmann.com 1 (SC)/[2015] 233 Taxman 495 (SC)/[2015] 376 ITR 306 (SC) has held 'pith & substance' of the contract is required to be seen which in this case shows that it is a composite contract for providing mud material, chemical, completion fluid, mud engineers and equipments and personnel for 'removal of drilled solids'. Therefore, pith and substance of the contract is removal of drilled solids from rigs.
15. Further the decision of the honourable Supreme Court in Sedco Forex international incorporation versus DIT[2017] 87 taxmann.com 29 (SC)/[2017] 251 Taxman 459 (SC)/[2017] 399 ITR 1 (SC)/[2017] 299 CTR 1 (SC) while deciding the issue of mobilization fees has held that when the contracts are indivisible, it is not appropriate to treat the various receipts of the contract differently. Therefore, material used for performance of contract cannot be treated differently than other consideration received. In fact, it is a composite consideration where the material is paid based on what is consumed, labour is paid based on manhours, and number of labours, equipments are also paid based on uses. Every such consideration has

profit in built in that for the assessee and the composite contract is for removal of solid drilled from rigs. Therefore, each receipt cannot be treated separately.

16. The next argument of assessee is that supply of material by the assessee cannot be included while computing the profits and gains in connection with the business of exploration etc of mineral oils u/s 44 BB of the income tax act as it covers only the service or facility. We have carefully given our thought to this argument and find that the provisions of Section 44BB of the income tax act qualifies the assessee who is engaged in the business of providing services or facilities in connection with supplying plant and machinery on hire used to be used in the prospecting for extraction of production of mineral oils. It charges a sum equal to 10% of the aggregate of the amount specified in subsection 2 as income on presumptive basis. . Subsection (2) (a) talks about the amounts paid or payable to the assessee or to any other person on his behalf on account of the provision of services. As we have already held that assessee is providing a service of removal of drilled solids from rig, all sums, which are paid in connection with that, shall be aggregated for the purpose of taxation u/s 44 BB of the act. Therefore it is not correct to say that when a material is required in performance of the service and if that is used and billed separately to the principal it is required to be excluded for the purpose of computation of the aggregate sum of services for purpose of chargeability u/s 44 BB of the act. We also get support from the decision of the honourable Supreme Court in case of Oil And Natural Gas Corporation Ltd (supra) wherein even the supply and installation of software which is a 'goods' is also considered for the purpose of computing the aggregate amount of sum to be covered for the purpose of Section 44 BB of the act. In view of the decision of the honourable Supreme Court in ONGC, (supra) the decision cited by the assessee of coordinate bench in Baker Hughes Asia-Pacific Ltd versus ACIT 151 ITD 79 (Del) does not apply at all. Even in that decision, also it has been stated that this is not an offshore supply as title to the goods have passed in India and not outside India. Further decision of the honourable High Court in ITA number 64 of 2014 does not deal with supply of goods. The honourable Supreme Court has categorically held that even supply installation of goods (in that case software) also fall within the purview of provisions of Section 44 BB of the income tax act. Therefore, contention of the assessee that the goods are not included for aggregation of sums u/s 44 BB of the income tax act does not appeal to us, hence, rejected.

17. In view of our above finding, there is no question of any profit attribution on supply of goods, which is an integral part of the contract for removal of solid drills, which is includible in aggregate sum for considering income u/s 44BB of the act. Thus, alternative submission of the assessee does not arise at all for consideration.
18. In the result ground number 1 about the taxability of revenue from offshore supply of imported material covering point number 1 and 2 are dismissed.
19. Ground number 2 of the appeal is with respect to the taxability of the reimbursement expenditure of ₹ 4,020, 380/-. The learned authorised representative submitted that Uttaranchal High Court in case of CIT versus Halliburton offshore services incorporation 300 ITR 200 and held that reimbursement of freight and transportation expenses was to be added to the gross receipt while computing income u/s 44 BB of the income tax act in the said decision was challenged before the honourable Supreme Court wherein it has been affirmed by the honourable Supreme Court in the decision of Sedco Forex international incorporation versus CIT 399 ITR 1(SC) read with 256 taxmann 65 wherein the review petition has been dismissed against the said decision of the honourable Supreme Court. Therefore, he submitted that the said issue is decided against the assessee.
20. In view of the above submission, the ground number 2 of the appeal with respect to the taxability of reimbursement expenditure of ₹ 4,020,318/- is includible in gross receipt while computing the profit u/s 44 BB of the income tax act. In the result, ground 2 of the appeal is dismissed.
21. The ground number 3 is with respect to short credit of tax deduction at source of ₹ 2,959,451/- . Though we do not find any such ground of appeal before the learned CIT – A and do not find any such reference in the draft assessment order or in the final assessment order. Nevertheless, we direct the assessing officer to examine the claim of the tax credit of the assessee with respect to the sum of ₹ 2,959,451/- and grant credit for the same after verification, if found in accordance with law. In the result, ground 3 of the appeal of the assessee is allowed.
22. In the result, appeal filed by the assessee in ITA number 2956/Del/2013 for assessment year 2006-07 is partly allowed.
23. Now coming to the grounds raised by the learned assessing officer , in Ground Nos 1 – 7 are with respect to the taxability of the sum u/s 44BB of the income tax act or u/s 9 (1) of the act as royalty and fees for technical services. The learned assessing officer has further drawn distinction between the PSC and non-PSC partners for the purpose of chargeability of income u/s 44 BB of the income tax act.

In the return of income the assessee has offered to tax income from onshore and offshore services and equipment rental to tax in terms of provisions of Section 44 BB of the income tax act as assessee is engaged in the business of providing services and facilities in connection with an supplying plant and machinery on rent for the purpose of extraction and production of mineral oil. The assessee did not distinguish the stream of its income received from PSC and non-PSC partners. The learned assessing officer held that receipts from PSC contracts are considered to be eligible for claim of benefit u/s 44 BB of the act whereas the non-PSC partners receipt is required to be taxed as fees for technical services or royalty incomes of provisions of Section 9 (1) of the act. The learned CIT Appeal decided the issue in favour of the assessee holding that the distinction between non-PSC and PSC entities has no sanction in the law. Therefore, revenue is in appeal before us.

24. The learned departmental representative vehemently supported the order of the learned assessing officer. He also made a written submission on this point.
25. The learned authorised representative submitted that this issue is now squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of ONGC versus CIT 3 76 ITR 306 wherein it has been held that the vendor non-resident provide services and facilities in connection with a supplying plant and machinery used or to be used in prospecting, extracting or production of mineral oils, the same is chargeable to tax u/s 44BB of the act. Therefore, the provisions of Section 44 BB shall apply, In that case, also the distinction drawn by the learned assessing officer between the receipt from PSC and non-PSC partners has been dismissed.
26. We've carefully considered the rival contention and find that the issue is squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of ONGC versus CIT (supra) wherein even the second leg contract was also considered to be eligible for the preferential treatment u/s 44 BB of the income tax act. Thus if the pith and substance of the contract is for exploration purposes etc, whether the contract is from PSC or NON PSC parties do not matter and both the receipt can be taxed u/s 44BB of the act. In view of this, these grounds of the appeal of AO are dismissed.
27. Ground number 8 of the appeal is against the chargeability of interest u/s 234B of the income tax act. The learned assessing officer is aggrieved that the learned CIT – A has held that the interest u/s 234B was not chargeable in this case by relying on the decision of the honourable jurisdictional High Court in case of 334 ITR 79. His

grievance is that the revenue has filed a special leave petition before the honourable Supreme Court where similar issue is involved and therefore the order of the learned CIT appeal is erroneous.

28. The learned authorised representative submitted that the issue is squarely covered in favour of the assessee by the decision of the full bench of the jurisdictional High Court in 334 ITR 79. He also relied on several other judicial precedents.
29. We have carefully considered the rival contention and perused the orders of the lower authorities. In fact, in case of a receipt by a non-resident, provisions of Section 195 of the income tax are applicable and the tax is deductible at source from payments made to a non-resident. Assessee is a non-resident and therefore the total income of the non-resident assessee is subject to tax deduction at source. The provisions of Section 234B are applicable if the assessee has failed to pay advance tax u/s 208 of the income tax act. According to Section 208 and Section 209 (1) (d) of the act, the advance tax payable is to be computed by estimating the tax liability of the assessee after deduction there from of 'tax deductible at source'. As the tax deductible at source is required to be deducted from the estimated tax liability of the assessee for the purpose of the computation of advance tax, in case of a non-resident where the total income is subject to withholding tax u/s 195 of the income tax act, therefore on such income on which tax is deductible whether deducted or not, cannot be considered for the purpose of levy of advance tax and consequent interest u/s 234B of the act is not chargeable. Honourable Jurisdictional high court in Director of Income-Tax And Another Vs Maersk co. Ltd. Uttarakhand high court— full bench in [2011] 334 ITR 79 (Uttarakhand) has considered this issue and held that Section 209 of the Act, which spells out liability for advance tax, would require the amount to be ascertained, after the tax that would be deductible at source from the tax on the current income under section 209(1)(d). Section 234B would levy interest on the assessed tax, which would allow deduction for any tax deducted/collected and not what is merely deductible. Where there is failure on the part of the deductor to make such deduction as the amount payable as advance tax is only the net amount after deduction of tax, which ought to have been deducted. Thus, Id AO cannot charge interest on shortfall as claimed by the assessee. This claim was allowed by the Tribunal and upheld by the Full Bench of the High Court in Director of Income-tax v. Maersk Co. Ltd. [2011] [334 ITR 79](#) (Uttarakhand) [FB] in the light of the conflicting decisions on this issue so that the matter came before the Full Bench. After review of the provision, it was pointed out that interest is payable

by the deductor for any shortfall or delay in the deposit of tax under section 201(1A). It was further pointed out that the law provides for direct payment at the stage of self-assessment tax, where the tax paid falls short of the tax payable. Interest under section 220(2) would also arise on the same amount for the same period so as to require levy of interest under section 234B. In coming to the conclusion, the Full Bench of the High Court approved its earlier decision of CIT v. Tide Water Marine International Inc. [2009] [309 ITR 85](#) (Uttarakhand), while drawing support from CIT v. Sedco Forex International Drilling Co. Ltd. [2003] [264 ITR 320](#) (Uttaranchal), CIT v. Halliburton Offshore Services Inc. [2004] [271 ITR 395](#) (Uttaranchal), CIT v. Madras Fertilizers Ltd. [1984] [149 ITR 703](#) (Mad) and CIT v. Ranoli Investment P. Ltd. [1999] [235 ITR 433](#) (Guj). Thus for assessment year 2006 – 07, the assessee cannot be subjected to interest u/s 234B of the income tax act. This is also for the reason that proviso inserted u/s 209 (1) of the act by The Finance Act 2012 is with effect from 1/4/2012 and does not apply to assessment year 2006 – 07. Therefore, respectfully following the decision of the honourable jurisdictional High Court, we hold that assessee is not liable to pay interest u/s 234B of the act for this year. In view of this ground number 8 of the appeal of the AO is dismissed.

30. In the result, appeal filed by the learned assessing officer in ITA number 3045/del/2013 for assessment year 2006 – 07 is dismissed.

#### **Assessment year 2007 – 08**

31. For assessment year 2007 – 08 assessee has filed the appeal in ITA number 5583/Del/2013 against the order passed by the Commissioner of income tax (appeals) –II, New Delhi (the learned CIT – A) dated 30 July 2013 wherein appeal filed by the assessee against the order passed by The Assistant Director Of Income Tax, International Taxation, Dehradun (the learned AO) u/s 143 (3) read with Section 144C (3) of The Income Tax Act dated 14 May 2013 was partly allowed. The learned assessing officer has also filed an appeal in ITA number 5564/Del/2013 against the same order.
32. The learned AO has raised the following grounds of appeal in ITA No. 5564/Del/2013 for the Assessment Year 2007-08:-

“1. *Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in holding that no distinction can be made between receipts from PSC and Non-PSC Partners, ignoring the facts that the receipts from the non-PSC partners on account of equipment rental, provision of services & supply of material are in respect of contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, liable to tax*

*u/s 9(1)(vi)/9(1)(vii) read with Section 44DA and not Section 44BB of the IT Act, 1961 ('Act').*

- 1(a) *The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-production sharing participants (non-PSC partners) on account of provision of mud engineering services along with supply of local material ('services') are not in the nature of Fee for Technical Services ('FTS') u/s 9(l)(vii) read with Section 44DA of the Act and are eligible for treatment under presumptive provisions of Section 44BB of the Act.*
  - 1(B) *The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-PSC Partners' for supplying plant & machinery on hire ('equipment rental') are not in the nature of Royalty u/s 9(l)(vi) of the Act, 1961 read with the section 44DA of the Act and are eligible for treatment under presumptive provisions of Section 44BB of the Act.*
  - 1(c) *The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-PSC Partners on account of supply of imported material are in the nature of FTS u/s 9(l)(vii) read with Section 44DA of the Act and are eligible for treatment u/s 44BB of the Act, not appreciating the findings of the AO that the supply of the material is intrinsically linked with the performance of mud engineering services under composite contracts with the recipients of services.*
  2. *Whether on the facts and circumstances of the case, the Ld CIT(if) has erred in ignoring the distinct scheme of taxation of FTS/Royalty and disregarding the insertion of provisos in section(s) 44BB/44DA/115A and the rationale behind the introduction of said clarificatory proviso's in the Finance Bill 2010 while holding that the income of the assessee company was covered under the presumptive provision of the Section 44BB.*
  3. *Whether on the facts and circumstances of the case, the Ld.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/sCIT.*
  4. *Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in the ignoring the decision of jurisdiction High court in the cases of ONG as agent of Foramer France and M/s Rolls Royce Pvt. Ltd. [2007-TII-03-HC-UKHAND-INTL]."*
33. The assessee has raised the following grounds of appeal in ITA No. 5583/Del/2013 for the Assessment Year 2007-08:-

*"Based on the facts and circumstances of the case and in law, MI Overseas Limited (hereinafter referred to as 'MIOL' or 'the Appellant') respectfully craves leave to prefer an appeal against the order dated 30 July 2013 passed by the Commissioner of Income-tax (Appeals) - II, Dehradun under section 250(6) of the Income-tax Act, 1961 ('Act'), on the following grounds:*

*Initiation of reassessment proceedings*

1. *The learned CIT(A) has erred in law and in fact, by dismissing the claim of the Appellant that the reassessment proceedings were initiated under section 147 of the Act without having any fresh material on record and using section 147*

*as a substitute to section 143(2) of the Act and without having any valid 'reason to believe' that income of the Appellant has escaped assessment.*

*Taxability of revenues from offshore supply of imported material*

2. *The learned CIT(A) has erred in holding that revenues received by the Appellant from offshore supply of imported material amounting to Rs. 1,193,673,644, are taxable under section 44BB of the Act, as opposed to the Appellant's claim of non-taxability of the same .*
3. *The learned CIT(A) has erred in not accepting a without prejudice claim of the Appellant that 2% of revenues from supply of imported material should be taxed in India.*
4. *The learned CIT(A) has erred in not following the assessment order for AY 2006-07, where revenues from offshore supply of imported material have been taxed at 2% by the assessing officer on his own motion.*
5. *The learned CIT(A) has erred in rejecting the Profit Attribution Report ('PAR') submitted by the Appellant based on parameters of functions performed, risks assumed and assets employed by Indian office of the Appellant and comprehensive analysis carried out to arrive at profit to be attributable to the Indian office of the Appellant.*
  - a. *The learned. CIT(A) has erred in arbitrarily rejecting the analysis of the Appellant on the basis of preconceived notions, conjectures and surmises without any cogent basis or evidence.*
  - b. *The learned CIT(A) has erred in not appreciating that acceptance of PAR was essential to adjudicate the issue of taxability of offshore supply of imported material on fair and just basis.*
  - c. *The learned CIT(A) has erred in not considering the PAR merely on the basis that contracts are composite contracts involving supply of material and rendering of services without appreciating that a separate consideration has been identified for offshore supply.*
  - d. *The learned CIT(A) erred in not rejecting the action of the learned AO to reject the PAR submitted by the Appellant based on the following allegations:*
    - *Comparable companies identified in the PAR are of different business dynamics and economies , none of the comparable companies are engaged in services of the nature performed by the Appellant, the comparables are all in respect of Indian companies engaged in trading in India only.*
    - *The margins of the comparables show large variation and the Appellant has chosen to consider values of comparables which are most acceptable to it.*

*Taxability of reimbursements*

6. *The learned CIT(A) has erred in facts and in law by taxing receipts on account of reimbursement of expenditure amounting to Rs 70,096 under section 44BB of the Act as opposed to Appellant's claim for non-taxability of such reimbursements.*

*Levy of interest*

7. *The learned CIT(A) has erred in law and in fact, by upholding levy of interest under section 234A of the Act, amounting to Rs. 440,061.*
8. *the learned CIT (A) has erred in law and in fact, by upholding levy of interest under section 234 D of the Act, amounting to Rs. 2,168,838.”*
34. Coming to the appeal of the learned assessing officer the parties stated before us that ground number 1 – 4 of the appeal are identical to ground number 1 – 7 of the appeal of the learned assessing officer for assessment year 2006 – 07. There is no change in the facts and circumstances of the case, their arguments are also same, and therefore for the reasons stated therein, we dismiss these grounds of appeal.
35. In view of this appeal of the learned assessing officer for assessment year 2007 – 08 in ITA number 5564/Del/2013 is dismissed.
36. Coming to the appeal of the assessee, ground number 1 is with respect to the initiation of reassessment proceedings, no arguments were advanced before us, therefore this ground of appeal is dismissed.
37. Ground number 2 – 5 is with respect to the taxability of revenue from offshore supply of imported material. The parties submitted that facts are identical to ground number 2 of the appeal of the assessee for assessment year 2006 – 07 and their arguments are also similar. We have already decided this ground in appeal for assessment year 2006 – 07 dismissing the grounds of the appeal of the assessee. For the similar reasons we dismiss these grounds of appeal.
38. Ground number 6 is with respect to the taxability of reimbursement expenditure amounting to ₹ 70,096/- u/s 44 BB of the act. The parties submitted that this is identical to the ground of the appeal of the assessee for assessment year 2006 – 07 which was dismissed by us following the decision of the honourable Supreme Court in case of the sedco Forex international incorporation versus CIT 399 ITR 1, therefore, for similar reasons this ground of appeal is dismissed.
39. Ground number 7 – 8 are with respect to the chargeability of interest u/s 234A amounting to Rs. 40,061/- and u/s 234D of the act of ₹ 2,168,838. The parties submitted that levy and computation of interest under these sections are consequential hence; these grounds of appeal are dismissed.
40. In the result, appeal of the assessee for assessment year 2007 – 08 in ITA number 5583/Del/2013 is dismissed.

#### **Assessment year 2008 – 09**

41. ITA number 462/Del/2012 is filed by the assessee against the order passed by the learned Assistant Director Of Income Tax, International Taxation, Dehradun (the

learned AO) passed on 25 November 2011 u/s 143 (3) read with Section 144C (13) of The Income Tax Act, 1961 for assessment year 2008 – 09. In this case the assessee filed its return of income declaring an income of ₹ 190,902,690/-. The learned assessing officer passed the draft assessment order determining total income of the assessee at ₹ 997,782,274/- against which the assessee filed an objection before the learned Dispute Resolution Panel. After the direction of the learned dispute resolution panel the total income of the assessee was assessed at ₹ 1,339,980,650/- by the order dated 25 November 2011. Assessee is aggrieved with that order.

42. The assessee has raised the following grounds of appeal in ITA No. 462/Del/2012 for the Assessment Year 2008-09:-

“1. *The order passed by The Asst. Director of Income Tax, International Taxation , Dehradun (AO) under section 143(3) read with section 144C and 154 of the Income Tax Act, 1961 (herein after referred to as "the Act") as well as the directions issued by Dispute Resolution panel(DRP) are contrary to facts and law and are therefore bad in law. The same deserve to be set aside and the income as returned by the Appellant deserves to be accepted.*

2. *The AO have erred in facts and in law dismissing the claim of the appellant that the income as returned by the Appellant is earned from business of rendering services in connection with prospecting for, extraction or production of, mineral oils to customers should be computed in accordance with the provisions of Section 44BB of the Act. The action of AO in bifurcating the income for differential treatment is not only contrary to law but also is in gross violation of basic principles of natural justice.*

*Addition qua services in connection with exploration/ prospecting/ extraction of mineral oil to PSC and non -PSC partners*

3. *Without prejudice to above, the impugned order passed is without the authority of law , contrary to law , illegal and untenable inter alia for the following reasons:*

a. *The AO has grossly erred in assessing that only a part of the income earned by the appellant would qualify for assessment under section 44 BB and the balance would have to be taxed as either Fee for Technical Services and / or royalty, such a view is contrary to the express provisions of the act. The same amounts to rewriting the provisions of the act by imposing new conditions which is impermissible. The Ld. AO erred on facts and in law in not following the directions of the DRP and contrary to directions of the DRP held the "revenue of Rs 17,635,349 received by the assessee from 'other services'.*

*Addition qua sale of imported material*

4. *Without prejudice to the above, AO has erred on facts and in law in not accepting the reasonable basis on which the appellant had offered income relating to offshore sale of imported material to tax and in holding that the*

*income from the sale of imported materials should be taxed as per Section 44BB of the Act.*

*Addition qua offshore sale revenue from Oil India Limited concluded outside India*

5. *The AO has erred on facts and in law in holding that the income from the offshore sale of imported materials is taxable in India. Further the AO erred on facts and in law in holding that the income from the offshore sale be taxed as per Section 44BB of the Act. AO has erred on facts and in law holding that the revenue received by appellant from offshore sale of Rs 29,578,349 was taxable in India.*

*Addition qua service tax*

6. *AO has erred on facts and in law in adding a sum of Rs. 3,757,476/- to the gross receipts without appreciating that the said amount represented reimbursement of service tax which is not chargeable to tax under section 44 BB.*

*Levy of interest*

7. *AO has erred on facts and in law in levying interest under section 234B of the Act disregarding the fact that Appellant is a non-resident assessee and its entire revenues/receipts are subject to tax withholding in India under Section 195 of the Act.”*

43. Ground number 1 – 3 of the appeal is with respect to the services in connection with exploration/prospecting/extraction of mineral oil to PSC and non-PSC partners. The parties submitted that these grounds are identical to ground number 1 – 7 raised by the learned assessing officer in his appeal for assessment year 2006 – 07. The parties confirmed that the facts and circumstances are identical and their arguments also remain the same.
44. We have carefully considered the rival contention and find that identical ground has been decided as per ground number 1 – 7 in the appeal of the learned assessing officer for AY 2006-07 and we, dismissing the appeal of the revenue, held that assessee is entitled to beneficial treatment u/s 44 BB of the income tax act with respect to PSC and non-PSC contracts. Therefore, these grounds of appeal of the assessee are allowed.
45. Ground number 4 – 5 of the appeal of the assessee is with respect to the taxability of revenue from offshore supply of imported material and its taxability under the provisions of Section 44 BB of the income tax act. The parties submitted before us that these are identical to ground number 1 – 2 of the appeal of the assessee for assessment year 2006 – 07, their arguments are also similar.
46. We have already decided this issue in the appeal of the assessee for assessment year 2006 – 07 wherein we have held that taxability of revenue from offshore supply of imported material is also chargeable to tax u/s 44 BB of the income tax act and

dismissed those grounds. For the same reasons we dismiss ground number 4 – 5 of the appeal of the assessee.

47. Ground number 6 of the appeal of the assessee is with respect to the taxability of service tax amounting to ₹ 3,757,476/- as gross receipt being reimbursement of service tax, according to the assessee it is not chargeable to tax u/s 44BB of the income tax act. Both the parties agreed that this issue is squarely covered in favour of the assessee by the decision of the honourable jurisdictional High Court in DIT V Schlumberger Asia services Ltd 414 ITR 1 wherein it has been held that that the amount reimbursed by the Corporation, towards the service tax paid by the assessee payable to the Government, was not an amount paid to the assessee towards the services provided by the later in connection with the prospecting, extraction or production of mineral oils, and was not required to be included in the amounts specified in clauses (a) and (b) of section 44BB(2) of the Act. Therefore respectfully following the decision of the honourable High Court, ground number 6 of the appeal is allowed.
48. Ground number 7 of the appeal of the assessee is with respect to the levy of interest u/s 234B of the income tax act, which is identical to ground number 9 of the appeal of the learned assessing officer for assessment year 2006 – 07. We have dismissed this ground of appeal of the learned assessing officer for assessment year 2006 – 07, therefore for the same reason we allow this ground of appeal of the assessee holding that interest u/s 234B of the act is not chargeable in case of a non-resident assessee wherein said entire income are subject to tax withholding in India u/s 195 of the income tax act. Thus, ground number 7 of the appeal is allowed.
49. In the result ITA number 462/Del/2012 filed by the assessee is partly allowed.

#### **Assessment Year 2009-10**

50. ITA number 3072/Del/2012 is filed by assessee against the order passed by the Assistant Director Of Income Tax (International Taxation) Dehradun u/s 143 (3) read with Section 144C (13) of The Income Tax Act 1961 dated 13/4/2012 wherein the total income of the assessee is assessed at ₹ 1,194,359,160/- against the returned income of ₹ 248,086,095/- pursuant to the direction of the learned Dispute Resolution Panel –II, New Delhi dated 28<sup>th</sup> of March 2012.
51. The assessee has raised the following grounds of appeal in ITA No. 3072/Del/2012 for the Assessment Year 2009-10:-

*“Based upon the facts of the case, the appellant respectfully craves to prefer an appeal before your lordship against the Assessment Order issued by the Asst. Director of Income Tax, International Taxation, Dehradun (hereinafter referred to as*

*“Ld AO”) under section 143(3) read with section 144C of the Income Tax Act, 1961 (herein after referred to as “the Act”)*

*The Ld AO has erred in stating that the stand taken in the assessment order dated 13 April 2012 under section 143(3)7144(0 of the Act, is in consonance with the directions of the Dispute Resolution Panel (‘DRP’) given for AY 2008-09, as the taxability of revenues of non-PSC partners on account of local material and imported material as fees for technical services is not in accordance with the order under section 143(3V144(C)/154 of the Act read with Rule 13 of DRP rules 2009 dated 23 January 2012 for AY 2008-09.*

*Addition qua services in connection with exploration/prospecting /extraction of mineral oil to non-PSC partners*

- 1. The Ld AO has erred on facts and in law in assessing receipts of Rs. 174,219,718/- from non-PSC partners on account of provision of mud-engineering services as fees for technical services under section 9(l)(vii) and equipment rental as royalty under section 9(l)(vi) as opposed to the claim u the assessee that the income against this revenue is to be computed as per the provisions of section 44BB of the Act.*

*Addition qua revenue received from PSC partners*

- 2. The Ld AO has erred on facts and in law in holding that the receipts of Rs. 2,763,327 on account of “other services” received on mud-engineering contracts from PSC partners should be taxed as fees for technical services as opposed to the claim of the assessee that the income against this revenue is to be computed as per the provisions of section 44BB of the Act.*

*Further, it is claimed that the Ld AO has also erred in not following the directions of the DRP for AY 2008-09 in the case of the assessee wherein under similar circumstances the DRP has held that the income from receipts on account of other services from PSC partners are to be computed as per the provisions of section 44BB of the Act.*

*Addition qua sales of imported material to PSC partners*

- 3. The Ld AO has erred on facts and in law in holding that the income from receipts of Rs 200,714,280 on account of offshore sale of imported material from PSC partners should be computed as per the provisions of section 44BB of the Act as opposed to the reasonable basis on which the assessee had offered the income to tax in India.*

*Addition qua sales of imported material to non-PSC partners*

- 4. The Ld AO has erred on facts and in law in holding that the receipts of Rs 469,422,082 on account of offshore sale of imported material from non-PSC partners should be taxed as fees for technical services under section 9(l)(vii) of the Act as opposed to the reasonable basis on which the assessee had offered the income to tax in India.*
- 5. Without prejudice to the above, it is claimed that the Ld AO has also erred in not following the directions of the DRP for the AY 2008-09 in the case of the assessee wherein under similar circumstances the DRP had held that the income from receipts on account of offshore sale of imported material to non-PSC partners is to be computed as per the provisions of section 44BB of the Act.*

*Addition qua sales of local material to non-PSC partners*

6. *The Ld AO has erred on facts and in law in holding that the receipts of Rs 173,259,827 on account of sale of local material from non-PSC partners should be taxed as fees for technical services under section 9(l)(vii) of the Act as opposed to the claim of the assessee that the income from these receipts is to be computed as per the provisions section 44BB of the Act.*

*Further, it is claimed that the Ld AO has also erred in not following the directions of the Dispute Resolution Panel for the AY 2008-09 in the case of the assessee wherein under similar circumstances the DRP had held that the income on account of sale of local material to non-PSC partners is to be computed as per the provisions of section 44BB of the Act.*

*Addition qua service tax receipts from PSC partners*

7. *The Ld AO has erred on facts and in law in adding a sum of Rs. 24,455,503/- to the gross receipts without appreciating that the said amount represented reimbursement of service tax which is not chargeable to tax.*

*Addition qua service tax receipts from non-PSC partners*

8. *The Ld AO has erred on facts and in law in adding a sum of Rs. 8,014,145/- to the gross receipts chargeable to tax as fees for technical services under section 9(l)(vii) without appreciating that the said amount represented reimbursement of service tax which is not chargeable to tax.*

*Lew of interest*

9. *The Ld AO has erred on facts and in law in levying interest under section 234B and section 234C of the Act disregarding the fact that Appellant is a non-resident assessee and its entire revenues/receipts are subject to tax withholding in India under Section 195 of the Act and the appellant has no liability on the assessee to pay advance tax under section 209(1 )(d) of the Income-tax Act, 1961.*
10. *The Ld AO has erred on facts and in law in holding that the assessee has concealed the particulars of its income or furnished inaccurate particulars and initiating penalty proceedings under section 271 (l)(c) of the Act*
11. *The Ld AO has erred on facts and in law in holding that the assessee is required to comply with the provisions of section 44AB of the Act by furnishing the audited accounts by the specified date and initiating penalty proceeding under section 271B of the Act.”*

52. Ground number 1, 2 and 6 are with respect to the taxability u/s 44 BB of the income tax act with respect to the amount received from PSC and non-PSC partners for the purpose of provisions of Section 44 BB of the income tax act vis-a-vis the chargeability to income tax u/s 9 (1) of the act as fees for technical services and royalty. Both the parties agreed that this is identical to ground number 1 – 7 of the appeal of the learned assessing officer for assessment year 2006 – 07 and there is no change in the facts and circumstances of the case.
53. We have carefully considered the rival contentions and find that the grounds stated above are squarely covered in favour of the assessee for assessment year 2006 –

07 on identical facts and circumstances we have dismissed grounds of appeal of the learned assessing officer holding that the receipt from PSC and non-PSC partners are chargeable to income tax u/s 44 BB of the income tax act in similar manner, if the pith and substance of the contract is covered by that section. Accordingly the grounds of appeal are allowed for similar reasons. Thus, ground numbers 1, 2, 6 of the appeal of the assessee are allowed.

54. Ground number 3 – 5 of the appeal of the assessee are with respect to taxability of revenue from offshore supply of imported material. The parties submitted that this is identical to ground number 1 – 2 of the appeal of the assessee for assessment year 2006 – 07. They also submitted that there is no change in the facts and circumstances of the case and their arguments are also same.
55. We have carefully considered the rival contention and find that these grounds of appeal are identical to the grounds number 1 – 2 of appeal of the assessee for assessment year 2006 – 07. While deciding the appeal of the assessee for assessment year 2006 – 07 we have dismissed those grounds and for similar reasons we also dismiss ground number 3 – 5 of the appeal of the assessee holding that revenue from offshore supply of imported material is also chargeable to tax u/s 44 BB of the income tax act as it is merely a component of a composite contract and cannot be taxed differently.
56. Ground number 7 – 8 of the appeal of the assessee is with respect to the taxability of reimbursement in the nature of service tax paid which is covered in favour of the assessee is aggrieved by the parties by the decision of the honourable jurisdictional High Court in 414 ITR 1 and also decided by us in appeal of the assessee for assessment year 2008 – 09 wherein ground number 6 of the appeal of the assessee was allowed holding that service tax reimbursement cannot be included for the purpose of computation of income of the assessee u/s 44 BB of the income tax act. Therefore, these grounds of appeal (7 – 8) of the appeal of the assessee are allowed.
57. Ground number 9 of the appeal of the assessee is with respect to the levy of interest u/s 234B and 234C of the act wherein it has been claimed that the appellant is a non-resident assessee and its entire revenue/receipts are subject to tax with the holding in India u/s 195 of the income tax act and the appellant has no liability on the assessee to pay any advance tax u/s 209 (1) (d) of the act. This issue also arose in case of the appeal of the revenue for assessment year 2006 – 07 wherein we have dismissed the appeal of the learned assessing officer on this ground. Therefore, for

the similar reasons we allow ground number 9 of the appeal of the assessee holding that assessee is not responsible for payment of advance tax on the sum on which tax withholding is required under the provisions of Section 195 of the income tax act and therefore not required to pay interest u/s 234B & 234C of the act.

58. Ground number 10 and 11 are with respect to the initiation of the penalty proceedings u/s 271 (1) (c) and Section 271B of the act. As the learned assessing officer has merely initiated the penalty proceedings, these grounds of appeal are premature and therefore dismissed.
59. In the result, appeal filed by the assessee in ITA number 3072/del/2012 for assessment year 2009 – 10 is partly allowed.

### **Assessment year 2010-11**

60. Assessee, as well as the learned Assessing Officer has preferred cross appeals for assessment year 2010 – 11 against the order of the learned CIT – A –II, Dehradun dated 31 July 2013 wherein the appeal filed by the assessee against the order of assessment passed by The Assistant Director Of Income Tax, International Taxation, Dehradun u/s 143 (3) read with Section 144C (3) of The Income Tax Act dated 14 May 2013 was partly allowed. Both the parties are aggrieved with that order and therefore are in appeal.
61. The learned AO has raised the following grounds of appeal in ITA No. 5565/Del/2012 for the Assessment Year 2010-11:-

*"1. Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in holding that no distinction can be made between receipts from PSC and Non-PSC Partners, ignoring the facts that the receipts from the non-PSC partners on account of equipment rental, provision of services & supply of material are in respect of contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, liable to tax u/s 9(1)(vi)/9(1)(vii) read with Section 44DA and not Section 44BB of the IT Act, 1961 ('Act').*

*1(a) The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-production sharing participants (non-PSC partners) on account of provision of mud engineering services along with supply of local material ('services') are not in the nature of Fee for Technical Services ('FTS') u/s 9(l)(vii) read with Section 44DA of the Act and are eligible for treatment under presumptive provisions of Section 44BB of the Act.*

*1(B) The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-PSC Partners' for supplying plant & machinery on hire ('equipment rental') are not in the nature of Royalty u/s 9(l)(vi) of the Act, 1961 read with the section 44DA of the Act and are eligible for treatment under presumptive provisions of Section 44BB of the Act.*

- 1(c) *The Ld. CIT(A) has erred in holding that the receipts of the assessee from non-PSC Partners on account of supply of imported material are in the nature of FTS u/s 9(l)(vii) read with Section 44DA of the Act and are eligible for treatment u/s 44BB of the Act, not appreciating the findings of the AO that the supply of the material is intrinsically linked with the performance of mud engineering services under composite contracts with the recipients of services.*
  2. *Whether on the facts and circumstances of the case, the Ld CIT(if) has erred in ignoring the distinct scheme of taxation of FTS/Royalty and disregarding the insertion of provisos in section(s) 44BB/44DA/115A and the rationale behind the introduction of said clarificatory proviso's in the Finance Bill 2010 while holding that the income of the assessee company was covered under the presumptive provision of the Section 44BB.*
  3. *Whether on the facts and circumstances of the case, the Ld.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/sCIT.*
  4. *Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in the ignoring the decision of jurisdiction High court in the cases of ONG as agent of Foramer France and M/s Rolls Royce Pvt. Ltd. [2007-TII-03-HC-UKHAND-INTL].”*
62. The assessee has raised the following grounds of appeal in ITA No. 5584/Del/2013 for the Assessment Year 2010-11:-

*“Based on the facts and circumstances of the case and in law, MI Overseas Limited (hereinafter referred to as ‘MIOL’ or ‘the Appellant’) respectfully craves leave to prefer an appeal against the order dated 31 July 2013 passed by the Commissioner of Income-tax (Appeals) - II, Dehradun under section 250(6) of the Income-tax Act, 1961 (‘Act’), on the following grounds:*

*Taxability of revenues from offshore supply of imported material*

1. *The learned CIT(A) has erred in holding that revenues received by the Appellant from offshore supply of imported material amounting to Rs 1,898,390,096 are taxable under section 44BB of the Act, as opposed to the Appellant's claim that 2% of revenues should be taxed in India.*
2. *The learned CIT(A) has erred in not following the assessment order for AY 2006-07, where 2% of the revenues from offshore supply of imported material have been taxed by the Assessing Officer (‘AO’) on his own motion.*
3. *The learned CIT(A) has erred in rejecting the Appellant's claim, wherein the Appellant had offered 2% of the revenues from offshore supply of imported materials from PSC and Non-PSC partners to tax following the assessment order for AY 2006-07, in order to avoid litigation and to buy peace of mind.*
4. *The learned CIT(A) has erred in rejecting the Profit Attribution Report (‘PAR’) submitted by the Appellant based on parameters of functions performed, risks assumed and assets employed by Indian office of the Appellant and comprehensive analysis carried out to arrive at profit to be attributable to the Indian office of the Appellant.*

- a. *The learned CIT(A) has erred in arbitrarily rejecting the analysis of the Appellant on the basis of preconceived notions, conjectures and surmises without any cogent basis or evidence.*
- b. *The learned CIT(A) has erred in not appreciating that acceptance of PAR was essential to adjudicate the issue of taxability of offshore supply of imported material on fair and just basis.*
- c. *The learned CIT(A) has erred in not considering the PAR merely on the basis that contracts are composite contracts involving supply of material and rendering of services without appreciating that a separate consideration has been identified for offshore supply.*
- d. *The learned CIT(A) erred in not rejecting the action of the learned AO to reject the*

*PAR submitted by the Appellant based on the following allegations:*

- *Comparable companies identified in the PAR are of different business dynamics and economies, none of the comparable companies are engaged in services of the nature performed by the Appellant, the comparables are all in respect of Indian companies engaged in trading in India only.*
- *The margins of the comparables show large variation and the Appellant has chosen to consider values of comparables which are most acceptable to it.*

*Taxability of reimbursement of service tax*

5. *The learned CIT(A) has erred in facts and in law by taxing receipts on account of reimbursement of service tax amounting to Rs 19,717,314 received from PSC and Non-PSC partners under section 44BB of the Act as opposed to Appellant's claim for non-taxability of such reimbursements.*

*Full credit of Taxes Deducted at Source ('TPS')*

6. *The learned AO has erred in granting the credit of TDS only to the extent of Rs 63,675,226 as against credit of TDS amounting to Rs 76,566,153 claimed by the Appellant in its return of income for the subject AY, thereby granting a short credit of TDS to the extent of Rs 12,890,927.*

*Levy of interest*

7. *The learned CIT(A) has erred in law and in fact, by upholding levy of interest under section 234A of the Act, amounting to Rs.4,125,414."*

63. We first come to the appeal of the assessee. Per ground number 1 – 4, the assessee has challenged the taxability of revenue from offshore supply of imported material. Both the parties confirm that this is identical to ground number 1 – 2 of the appeal of the assessee for assessment year 2006 – 07 and their arguments are similar.
64. We have carefully considered the rival contention and find that this issue has already been decided by us while deciding the appeal of the assessee as per ground number 1 – 2 for assessment year 2006 – 07 wherein we have dismissed the appeal of the assessee. Therefore, for the similar reasons we dismiss ground number 1 – 4 of the appeal of the assessee for this year also.

65. Ground number 5 is with respect to the taxability of the reimbursement of service tax of Rs 1 97,17,314/- which is identical to ground number 6 of the appeal of the assessee for assessment year 2008 – 09 and ground number 7 – 8 of the appeal of the assessee for assessment year 2009 – 10 wherein we have allowed these ground of the appeal relying on the decision of the honourable jurisdictional High Court in 414 ITR 1 holding that service tax is a statutory liability which is collected by the assessee from its customers and deposited to the exchequer of the government. Since such service tax is received by the assessee merely as a custodian and the same does not have any income element, such service tax component cannot be included in the gross receipt offered to tax u/s 44 BB of the income tax act. Accordingly, ground number 5 of the appeal of the assessee is allowed.
66. Ground number 6 is with respect to the granting of credit of tax deduction at source to the assessee inadequately. As per this ground it is contested that assessee has claimed tax deduction at source credit of ₹ 76,566,153/- in its return of income whereas the learned assessing officer has granted credit of ₹ 63,675,226/- only and thereby there is a short credit of tax deduction at source to the extent of Rs 128,90,927.
67. After hearing the parties, we direct the learned assessing officer to examine the claim of the assessee of the short credit of tax deduction at source and after proper verification, eligible credit may be granted to the assessee. The assessee is also directed to submit the relevant documents and eligible tax credit claims before the assessing officer for his verification. Accordingly, ground number 6 of the appeal of the assessee is allowed.
68. Ground number 7 of the appeal of the assessee is with respect to the chargeability of interest u/s 234A of the income tax act of ₹ 4,125,414/-. Charging of the interest u/s 234A of the income tax act is consequential in nature and therefore this ground of the appeal of the assessee is dismissed.
69. In the result ITA number 5584/Del/2013 filed by the assessee for assessment year 2000 – 11 is partly allowed.
70. Coming to the appeal filed by the learned assessing officer wherein as per ground number 1 – 4 of the appeal the issue has been raised with respect of taxability of the sum received by the assessee whether chargeable to tax u/s 44 BB of the income tax act or u/s 9(1)(vi) /(vii) with respect to receipt from PSC and non-PSC partners. The parties submitted that this issue is identical to ground number 1 – 7 of the

appeal of the learned assessing officer for assessment year 2006 – 07 and there is no change in the facts and circumstances of the case.

71. We have carefully considered the rival contention and find that identical ground number 1 – 7 of the appeal of the learned assessing officer for assessment year 2006 – 07 is dismissed holding that assessee is eligible for the benefit u/s 44 BB of the income tax act of the sum received from PSC as well as non-PSC partners, for the similar reasons , we dismiss ground number 1 – 4 of the appeal of the AO.
72. In the result, appeal filed by the learned assessing officer in ITA number 5565/Del/2013 for assessment year 2000 – 11 is dismissed.
73. In the result all the appeals of the assessee as well as the AO are disposed of.
74. Considering the second wave of pandemic and consequential safety measures adopted of lockdown and restricted attendance across the country resulted in to extraordinary circumstances due to which the order could not be passed within 90 days of the date of hearing which took place at Dehradun on 3/6/2021, Period of 90 days expired on 2/6/2021 and this order is thus beyond that time by 6 days due to these extra ordinary circumstances.

Order pronounced in the open court on 08/06/2021.

-Sd/-  
(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 08/06/2021  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi