

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
(Through Video Conferencing)

BEFORE

SHRI AMIT SHUKLA, JUDICIAL MEMBER

AND

SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 5577/Del/2018

Asstt. Year : 2015-16

INTECSEA Asia Pacific Sdn Bhd KPMG Salarpuria Knowledge City, Orwell Unit 3, 6 th Floor Sy. No. 83/2, Plot 2, Raidurg, Hyderabad 500081 (Appellant)	Vs.	ACIT, International Taxation, Circle-1, Dehradun (Respondent)
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Assessee by:	Shri Ajit Jain, CA Shri Siddhesh Chaughle, CA
Department by :	Shri Thakur Singh Mapwal, Sr. DR

ORDER

PER AMIT SHUKLA, JM

The aforesaid appeal has been filed by the assessee against impugned order dated 22.6.2018 passed by Ld. CIT(A) -2

Noida for the quantum of assessment passed u/s 143(3) / 144C(3)(b) for the assessment year 2015-16. In the grounds of appeal assessee has raised following grounds:-

“1. On the facts and in the circumstance of the case and in law, the Assistant Commissioner of Income Tax, International Taxation, Circle-1, Dehradun (‘Ld. AO’) and the Learned Commissioner of Income Tax (Appeals) - II, Noida [‘Ld. CIT(A)] erred in concluding that the services provided by the Appellant to Oil & Natural Gas Corporation Limited (‘ONGC’) are not in the nature of ‘mining or like project’ and thereby erred in treating the consideration received by the Appellant as fees for technical services under section 9(1)(vii) of the Income-tax Act, 1961 (‘the Act’).

2. On the facts and in the circumstance of the case and in law, the Ld. AO and the Ld. CIT(A) erred in concluding that the receipts in connection with services provided by the Appellant to Leighton India Private Limited (‘Leighton India’) as listed at SI. No. 23 and 24 of the scope of work in the contract are in the nature of fees for technical services.

3. On the facts and in the circumstance of the case and in law, the Ld. AO and the Ld. CIT(A) erred in not appreciating that the receipts referred in Ground No. 1 and 2 above should be taxed as per the provisions of section 44BB of the Act and not under section 44DA of the Act.”

2. The facts in brief are that Intecsea Asia Pacific Sdn Bhd (‘Intecsea AP’ the Appellant’) is a company incorporated under the laws of Malaysia and is engaged in the business of providing

engineering services to companies engaged in the business of prospecting/ extraction/ mining of mineral oils, natural gas etc. During the AY 2015-16, the Appellant had provided engineering consultancy services to its two Indian clients i.e. Oil and Natural Gas Corporation Limited ('ONGC') and Leighton India Contractors Private Limited ('Leighton India'). The amounts received by the Appellant from its contracts with ONGC and Leighton India during the AY 2015-16 are Rs. 11,17,56,538 and Rs. 2,51,21,958 respectively. The Appellant filed its return of income for the Financial Year ('FY') 2014-15 i.e. AY 2015-16 electronically on 31 October 2015. The scrutiny assessment proceedings were initiated vide notice dated 15 July 2016 issued under section 143(2) of the Income-tax Act, 1961 ('Act') by the Assistant Commissioner of Income Tax, International taxation, Circle 1, (hereinafter referred to as 'Learned Assessing Officer' or 'Ld. AO'). In the return of income, the Assessee had offered its income to tax under the provisions of section 44BB, which deems 10% of its gross receipts as taxable income.

3. Ld. AO in the draft assessment order dated 6.12.2018 wherein the appellant in respect of ONGC contract the scope of work is in respect of Project Management Consultancy services to ONGC for completion of balance work of G1 and GS 15 development project. The gist of scope of work is as under:-

1. PMC services for the total scope including progress reporting, preparation of project completion schedule:

2. Preparation of specifications for procurement of required items such as isolation valve for Wye-piece for 10-inch pipeline;
3. Review and approval of detailed design documents/drawings preformed by others including installation engineering and vendor related documents;
4. Provide offshore construction supervision during installation & commissioning of the shallow and deep water facilities work;
5. Perform flow assurance for the shallow water pipeline in view of part completion of shallow water facilities first and deep water facilities at a later stage as compared to earlier single completion of total project. Suggest selection of chemical and its dosages;
6. Review of additional engineering required to comply with requirement for Flare Tower, DPCU/Glycol dehydration unit and its associated power requirement, IW/PW systems etc.

4. In respect of Leighton Weispun Contractors Pvt. Ltd. contract the scope of work is as under-

1. Providing inputs for pre-engineering survey
2. Review survey data and provide design updates
3. Appraisal of data & design brief preparation
4. Pipeline protection/stability design
5. Pipeline free span analysis
6. Offshore pipeline crossing design

7. Pipeline cathodic protection design
8. Pipe lay feasibility study
9. Pipeline segment head insulation design
10. Pipeline purchase specification, material requisitions/RFQ for PS items.

5. As per the scope of work of contract the assessee is engaged in the work of progress reporting, preparation for project completion schedule, preparation of specifications, review and approval of detailed design, supervision, review of additional engineering, design and engineering of submarine pipeline, pre-engineering survey, review survey data and provide design, appraisal of data and stability design, etc. For pipeline design, pro control optimization flows modeling, etc., software are used and work is done using computer simulators like PIPESIM/OLGA. Based upon this information, models are created which are further given as input to the execution partner/developer/depaihnent. In present contract the assessee has been hired to provide pipeline related data services and creating data models using non embedded “off the shelf software”, unlike a SCADA (Supervisory control and data acquisition) system.

6. Ld. AO in his draft assessment order has considered the services proved by the appellant as fees for technical services (FTS) u/s 9(1)(vii) and also concluded that assessee has permanent established in India. Accordingly on adhoc basis, he treated 25% of gross receipt as total income u/s 44BB r.w. rule

10 of the Income Tax Rules. Since the appellant did not file any objection with the DRP, AO proceeded to pass the final assessment order u/s 143(3) w.e.f. 144C (1) vide order dated 23rd January, 2018 wherein additions made in the assessment order were confirmed. Accordingly the assessee's income was computed at Rs. 3,42,19,620/-.

7. In the first appeal Ld. CIT (A) partly allowed the appeal and the relevant observation and the finding of the Ld. CIT(A) reads as under :-

5.8 The chief question, therefore that arises, is whether the services qualify as fee for technical services within the provisions of section 9(l)(vii) of the Act or the services were such which are covered within the provisions of section 44 BB of the Act. This would depend upon facts of each case. In order to ascertain the aforesaid, it would be pertinent to have a look at the contractual agreements and scope of work as provided in the contract.

5.9 On examination of the agreement, the scope of work for the Project Management Consultancy services to ONGC for the completion of the balance works of G-1 85 GS-15 development project is as under:

- 1. PMC services to ONGC for the total scope including process reporting. Preparation of project completion schedule;*
- 2. Firming up execution methodology and advice any procurement of long lead items not ordered by*

CEL/required for completion by ONGC including materials required to complete the tie-ins;

3. Preparation of Specifications for procurement of required items such as isolation valve for the Wye-piece for 10-inch pipeline;

4. Review and approval of all detailed design documents/drawings performed by others including installation engineering and vendor related documents;

5. Interface with various contractors where necessary;

6. Perform Flow assurance for the shallow water pipeline in view of part completion of shallow water facilities first and deep water facilities at a later stage as compared to earlier single completion of total project. Suggest selection of chemicals & its dosages;

7. Provide a budget estimate for the offshore installation contractor for the remaining offshore work and the total project completion cost including drilling and well completion;

8. Preparing the bid document defining the scope and responsibilities for appointing an installation contractor for the deep water works;

9. Review of the bid document prepared by Technip KTI for appointing an installation contractor for the deep water works;

10. Evaluation of offers received from the installation contractors for shallow and deep water works;

11. *Provide offshore construction supervision during installation & commissioning of the shallow and deep water facilities works;*

12. *Attend meetings related to project issues including interface issues.*

13. *Balance engineering, if any, related to pipelines.*

14. *Review of additional engineering required to comply with requirement of r Flare Tower, DPDU/Glycol dehydration unit & its associated power requirement, IW/PW system etc. done by Technip KT1.*

15. *Project close out.*

5.10 *The appellant itself submits that it had provided ‘Project Management Consultancy Services’ in the case of ONGC. On bare perusal of the nature of ‘PMC’ services, it is evident that none of the services are related to mining or like projects. To be excluded from the purview of section 9(l)(vii) of the Act, the Managerial, Technical or Consultancy services should be construction, assembly, mining or like projects.*

5.11 *PMC service for the “total scope including process reporting and preparation of project completion schedule” can’t be considered as ‘mining project’. Preparation of project completion schedule, which appellant itself admits that it is ‘PMC Services’, may be used subsequently by the client (who is engaged in the production and exploration of mineral oils) for the purpose of exploration of mineral oil but under no circumstances, it can be stretched to consider that the*

appellant's services were in the nature of mining or like project.

5.12 Similarly, "advice given in regard to procurement of materials (SI.No.2 & 3 of the scope of work) can't be considered as services related to mining project. "Review and approval of design documents/drawings" performed by others including installation, engineering and vendor related documents are again consultancy services not at all associated with mining or like project.

5.13 On further examination of the scope of contract, it is found that the appellant has also provided the services of 'Budget estimate' and the 'Estimate of total project completion cost' (SI.no.7 of scope of work). Such services are also not related to mining or like projects.

5.14 Preparation of bid document, review of bid document, evaluation of offers received from installation contractor (Sl.no.8, 9 &10) are similarly not connected with any mining or like project.

5.15 Supervision activity, attending meeting, review of additional engineering requirement are certainly the services provided by the appellant for the purpose other than mining.

5.16 Such findings from the scope of work clearly indicates that none of the services provided by the appellant to ONGC are similar to any of the contract/sub-contract examined by the ONGC in the decision ONGC vs CIT (supra).

5.17 In view of the above discussion, it is held that the receipts on account of PMC services provided by the appellant to ONGC are very much the fees for technical sendees and not excluded from the purview of section 9(l)(vii) of the Act as per Explanation 2 of the said section as these services are not provided for any construction, assembly, mining or like projects. Hence, I find no infirmity in the order of the AO in treating these receipts from ONGC under section 44DA of the Act.

5.18 Further, on examination of the scope of work in the agreement between the appellant and M/s Leighton India, it is found that the scope of work in the case of Leighton India is as under:

“ The Consultant scope of work shall include the entire Design & Engineering of submarine pipeline (rigid, coiled and flexible) responsibility for both the Season (I & II) related but not limited to the following -

1. Providing inputs for pre-engineering survey
2. Review Survey Data and Design Brief Preparation
3. Appraisal of Data & Design Brief Preparation
4. Pipeline Steady State Hydraulic Analysis
5. Pipeline Wall Thickness Selection/Confirmation
6. Pipeline On-Bottom Stability, Thermal Expansion and In-Place Stress Analysis
7. Pipeline Protection/Stability Design
8. Pipeline Free Span Analysis

9. *Offshore Pipeline Crossing Design*
10. *Pipeline Cathodic Protection Design*
11. *Pipelay feasibility study*
12. *Pipeline Segment heat insulation Design*
13. *Subsea SSIV system*
14. *Riser Design Report*
15. *Riser Clamp Design*
16. *Pipeline and Riser MTO*
17. *Pipeline Purchase Specifications, Material Requisitions/RFQ for PS items*
18. *Pipeline and Riser Engineering Drawings*
19. *Design of Flange Tie-in spool between Riser and Submarine Pipeline*
20. *Preparation of all Detailed Design AFC drawings (similar to PRP 2) and documents related to the above scope*
21. *Review of vendor documentation like Drawings, Data sheets, Engineering Calculations and miscellaneous reports*
22. *Engineering Management to achieve above scope.*
23. *Attending meetings with Employer/Contractor (base price includes on 3 meetings in India per Season/Phase for one person).*
24. *Providing office space to Employer/Contractor (base price only includes one office space)*

5.19 On perusal of the scope of work it is found that the services given by the appellant to M/s Leighton India were in regard to ‘Design and Engineering of submarine pipeline. Sl.no. 1 to 22 of the Technical Scope of work” appears to be similar to various scope of work examined by the Hon hie Supreme Court in its order ONGC vs CIT (737 of 2001). It is evident from the scope of work that all the services in regard to ‘Design and Engineering of submarine pipeline are integral to exploration of mineral oil. It is clear enough form the description of work at serial no. 17,8,9,10,11,16 and 33 of the table inserted in the ONGC Ltd case (supra) that the purpose of the services given by the appellant is squarely covered with the scope of work involved in the contracts examined by the Honble Supreme court in the above said order. The services provided by the Appellant were very much in connection with exploration of mineral oil.

5.20 However, the services of “Attending meetings with Employer/Contractor and “Providing office space to Employer/Contractor” (SI No. 23 & 24 of the scope of work) are not related to mining or like projects. These services are in the nature of Managerial services and therefore the receipts on account of these two services provided to M/s Leighton India are required to be included in the receipts to be taxed u/s 44 DA of the Act.

5.21In view of the above discussion, it is held that the receipts on account of services provided to M/s Leighton India (as per SI No. 1 to 22 of scope of work) are in respect of the Design and Engineering of submarine pipeline and, therefore,

taxable under section 44 BB of the Act. Remaining receipts, on account of services provided as per SI No. 23 & 24 of the scope of work, are to be taxed u/s 44 DA of the Act.

5.22 In view of the above discussion, it is held that the entire receipts of the Appellant in the case of ONGC are taxable under section 44DA the Act. Receipts from M/s Leighton India is taxable under section 44BB and section 44DA of the Act, as per the discussions between Para 5.21 above. The Grounds of Appeal No. 1, 2 & 3, are therefore, partly allowed.”

8. We have heard both the parties and also perused the relevant finding of the impugned order as well as material preferred to before us. During the relevant assessment year the appellant assessee has received consideration from ONGC and Leighton India for providing engineering consultancy services. During the course of assessment proceeding the AO had asked the Appellant to show cause why the receipts from ONGC (and Leighton) should not be treated as FTS. The Appellant explained that the consideration received by it from ONGC and Leighton India were in relation to the exploration and production of oil and natural gas and did not fall within the definition of FTS under section 9(1)(vii) of the Act. Since the consideration received by the Appellant was covered by the exclusion provided in the definition of FTS for “mining or like projects”, the same should not be treated as FTS under section 9(1)(vii) of the Act. The Appellant relied on the decision of the **Hon'ble Supreme Court in case of ONGC v CIT [(2015) 59 taxmann.com 1 (SC)]**, wherein the Hon'ble Supreme Court has held that where the pith and

substance of an agreement is providing services for prospecting, extraction or production of mineral oils, payments made to non-resident companies are assessable under the provisions of section 44BB of the Act and not under section 44D of the Act. Relevant extracts of the judgment is reproduced as under:

“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.”

9. Ld. Counsel Shri Ajit Jain before us submitted that the the scope of services covered under the ONGC ruling were similar to those rendered by the Appellant. The Appellant also relied upon the Instruction issued by Central Board of Direct Taxes No 1862 dated 22 October 1990, wherein the question whether prospecting for, or extraction or production of, mineral oil can be termed as 'mining operations, was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like projects' occurring in Explanation 2 to Section 9(1) (ii) of the Income Tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas.

10. Further, relying on the provisions of section 44BB of the Act, he submitted that the services or facilities provided to ONGC and Leighton India were in connection with prospecting for, or extraction or production of mineral oils. Accordingly, the amount payable by ONGC and Leighton India to the Company should be covered by the provisions of section 44BB of the Act. Also, the Hon'ble Supreme Court in the case of ONGC (supra), held that any payments made by ONGC towards services in connection with extraction and mining of mineral oil and received by the non-resident assessee or foreign companies under the said contracts should be assessed under section 44BB of the Act.

11. In addition to the above ONGC ruling and the Instruction issued by CBDT, Ld. Counsel also relied upon the following decisions in support of its claim that services in relation to

“mining or like activity” are excluded from the definition of FTS vide Explanation 2 under section 9(1)(vii) of the Act and therefore taxable under section 44BB of the Act:

- Corpro Systems Limited, UK, In re [(2016) 389 ITR 0029];
- Addl. DIT (International Taxation) vs Halliburton Offshore Services Inc. [(2016) 47 CCH 0425] (Delhi ITAT);
- ITO (International Taxation) vs. ONGC [(2016) ITA No. 1596, 1597, 1598 & 1599/Del/2012] (Delhi ITAT);
- National Oil Well Maintenance Company vs DCIT [(2018) (89 taxmann.com 24)];
- Production Testing Services Inc. Vs DCIT [(2018) (89 taxmann.com 416)];
- PGS Exploration (Norway) AS vs Addl. DIT [(2016) (68 taxmann.com 143)];
- DIT vs. Jindal Drilling & Industries Ltd. [(2009) (182 Taxman 59)];
- Siem Offshore Inc, In re. [(2011) 12 taxmann.com 374]

12. Apart from above, he also relied upon the following decisions in support of its clam that consideration received for services rendered in connection with prospecting, extraction or production of mineral oils shall be taxable under section 44BB of the Act

- Technip UK Ltd vs DIT (International Tax) [(2017) 81 taxmann.com 311];

- JSC SMNG- Centre, Russia In Re [(2016) 74 taxmann.com 248 (AAR)];
- ADIT vs International Technical Services LLC [(2016) 71 taxmann.com 351 (ITAT Delhi)];
- B.J. Services Company Middle East Ltd. vs. ADIT [(2017) 77 taxmann.com 218 (ITAT Delhi)];
- Viking Maritime Inc. vs DCIT [(2016) 69 taxman.com 303 (ITAT Delhi)]
- Geofizyka Torun Sp. Zo.o, In re [(2010) (186 Taxman 13)];
- Marine Geology Services LLP, UK In Re [(2016) 73 taxmann.com 107] (AAR);
- Pride Offshore International LLC vs ADIT [(2015) 59 taxmann.com 23] (ITAT Delhi)

13. Thereafter Ld. Counsel drew our attention to the relevant facts and the findings of the Ld. CIT(A) and the agreements entered with ONGC and Leighton India submitted that the issue stands squarely covered by the decision of the Hon'ble Supreme Court in the case of ONGC and the receipts ought to have been taxed u/s 144BB of the Act.

14. Ld. DR on the other hand submitted that in view of the amendment vide Finance Act 2010 and the decision of Hon'ble Delhi High Court in the case of Paradigm Geophysical Pty Limited cannot be treated as same.

15. From the perusal of the services and the nature of scope of work, we find that duties carried out by the appellant on contract with ONGC in fact has mining activity which was excluded from the definition of FTS u/s 9(1)(vii) as they are essential to the development and exploration of the oil and gas fields of ONGC. These services ostensibly is to be regarded as exclusion to FTS under section 9(1)(vii) and such activities need not itself be of mining or like nature so long as they are related to 'mining or like project' as has been clarified in the Circular No. 1862 dated 22.10.1990, that 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.

16. Thus in parting of training is a part of mining activity only carried out by his appellant in his contract to the aforesaid parties. In so far as the reliance placed by the Ld. DR on the decision of Paradigm Geophysical Pty Limited, was on different facts as the assessee therein was involved in providing software services definition of which is covered under section 9(1)(vi) of the Act whereas Appellant's case is that of FTS under section 9(1)(vii) read with section 44DA of the Act. AR further explained that section 44DA of the Act can be applied only if the income in the first-place falls within the definition of FTS under section 9(1)(vii). In the Appellant's case, since the services are covered by the exclusion in section 9(1)(vii), they do not qualify as FTS for invoking section 44DA of the Act.

17. Accordingly we hold that not only receipt of accounts of services which has been accepted by the Ld. CIT (A) was also other scope of work relating to attending meetings but also the other activities are inextricably linked with the contract of design and engineering of submarine pipeline. Therefore the entire receipts for the ONGC as well as Leighton India are taxable u/s 44BB. Accordingly the appeal of the assessee is allowed.

Order pronounced in the open court on 8th October, 2021.

sd/-

(B.R.R. KUMAR)

ACCOUNTANT MEMBER

sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Dated: 08/10/2021

Veena

Copy forwarded to

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

ASSISTANT REGISTRAR

ITAT, New Delhi