

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIALMEMBER**

ITA No.724/Del/2015
Assessment Year: 2011-12

DCIT, Circle-3(1)(2), International Taxation, New Delhi	Vs.	M/s. Technip France SAS, C/o-BMR & Associates LLP, 22 nd Floor, Building No. 5, Tower -A, DLF Cyber City, DLF Phase-III, Gurgaon
PAN :AADCT4064B		
(Appellant)		(Respondent)

Appellant by	Sh. Ajay Vohra, Sr. Advocate & Sh. Tavish Verma, Advocate
Respondent by	Smt. Sapna Bhatia, CIT-DR & Sh. Sanjay Kumar, Sr. DR

Date of hearing	27.04.2022
Date of pronouncement	26.07.2022

ORDER

PERSAKTIJIT DEY, JM:

Captioned appeal has been filed by the Revenue challenging the directions of learned Dispute Resolution Panel (DRP)-II, New Delhi, issued under section 144C(5) of Income-tax Act, 1961 (for short 'the Act') pertaining to assessment year 2011-12.

2. Though, the Revenue has raised multiple grounds, however, the solitary issue arising for consideration is, whether the Assessing Officer was justified in treating the amount received by assessee from M/s. Reliance India Ltd. (RIL) as Fees for Technical Services (FTS), hence, taxable under section 44DA of the Act.

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of France and a tax resident of the said country. As stated by the Assessing Officer, assessee is primarily engaged in engineering, procurement and construction business for oil production- off-shore and on-shore, refining petrochemicals, fertilizers, chemical fertilizers, non-conventional energy and submarine pipelines etc. The assessee had entered into contracts with two Indian entities viz. Oil and Natural Gas Corporation (ONGC) and RIL. During the year under consideration, the assessee has earned income from both the contracts. However, insofar as receipt from ONGC contract is concerned, there is no dispute between the assessee and the Revenue. The dispute is only with regard to the receipts from contract entered with RIL.

4. As could be seen from the facts on record, as per the scope of work under the contract with RIL, the assessee was entrusted

with the work in connection with remedial action on well A5 in the Krishna Godawari (KG block), which involved retrieval of the installed X Mas Tree (XMT), and installation of XMT. The process further involved retrieval of the Jumper, disconnection of umbilicals, re-installation of Jumper and stabbing of umbilicals, once the new XMT is installed.

5. Before the Assessing Officer, assessee pleaded that the amount received by the assessee towards services rendered under the contract with RIL is in connection with prospecting for extraction and production of mineral oil. Hence, it has to be subjected to tax as per the provisions of section 44BB of the Act. In fact, in the return of income filed for the impugned assessment year, the assessee computed its income under section 44BB of the Act on presumptive basis at 10% of the gross receipts. The Assessing Officer, however, was not convinced with the submission of the assessee. After calling for necessary details, including the contract with RIL, invoices, etc. and examining them, the Assessing Officer was of the view that the work/services performed/rendered by the assessee is by way of second line contractor. Therefore, services rendered by the

assessee cannot be considered to be in the nature of receipt from any construction, assembly, mining or like project as mentioned in Explanation 2 to section 9(1)(vii), to exclude from the definition of FTS as provided therein. Thus, he observed, the amount received by the assessee qualifies as FTS under section 9(1)(vii) of the Act. Proceeding further, he observed, the amount received by the assessee from RIL contract can also qualify as FTS under Article 13 of India – France Double Taxation Avoidance Agreement (DTAA), since, while rendering the services to RIL, the assessee has made available the technology, knowhow, skill etc. to the service recipient. Thus, he concluded that the amount received by the assessee from RIL contract is in the nature of FTS. Having held so, he proceeded to compute the income of the assessee under section 44DA of the Act.

6. Against the draft assessment order so passed, the assessee raised objections before learned DRP. Appreciating the submissions made by the assessee, learned DRP held that the amount received by the assessee does not fall in the category of FTS under section 9(1)(vii) of the Act, as it comes within the exception provided under explanation 2 to section 9(1)(vii) of the

Act. Further, learned DRP held that the amount received cannot be regarded as FTS, even, under Article 13 of the India – France DTAA as the ‘make available’ condition is not satisfied. Having held so, learned DRP concluded that since the services rendered by the assessee are in connection with prospecting for mineral oil, such income of the assessee has to be taxed by applying the presumptive rate as per section 44BB of the Act.

7. Sh. Sanjay Kumar, learned Departmental Representative, strongly relying upon the observations of the Assessing Officer, submitted that the assessee itself is not engaged in the business of prospecting for or extraction or production of mineral oils. He submitted, the activity of prospecting for, or extraction or production of mineral oil was actually performed by RIL. He submitted, RIL engaged the assessee as a second line contractor for providing certain services in relation to repair/replacement of certain parts of plants/machineries used in prospecting for or extraction of mineral oils. Therefore, the provisions of section 44BB of the Act would not be applicable to the assessee. In this context, he drew our attention to the scope of work as envisaged in the contract between the assessee and RIL.

8. Drawing our attention to the decision of the Hon'ble Supreme Court in case of ONGC Ltd. Vs. CIT, 376 ITR 306, learned Departmental Representative submitted that what is to be examined is, whether the dominant purpose of the contract is prospecting for or extraction or production of mineral oils. He submitted, as per the contract with RIL, the assessee is not required to perform any activity in connection with prospecting for or extraction or production of mineral oil as it was being done by RIL. He submitted, unless the services rendered by the assessee are directly associated and inextricably connected with prospecting, extraction or production of mineral oils, the income earned cannot be taxed under section 44BB of the Act. He submitted, the services rendered by assessee to RIL are in relation to replacement of certain parts/accessories related to the superstructure assisting flow and transport of oil, rather than repair of the well itself. Therefore, he submitted, even the repair/replacement activities noted by the Hon'ble Supreme Court in case of ONGC (supra) would not cover the activities performed by the assessee.

9. On the contrary, he submitted, the services rendered by the assessee are purely of technical nature, hence, has to be treated as FTS under section 9(1)(vii) of the Act. He submitted, the exceptions provided under Explanation 2 to section 9(1)(vii) would not be applicable to the assessee as the amount received by the assessee is not for any construction, assembly, mining or like projects undertaken by the assessee. He submitted, once it is held that the amount received is FTS, the assessee being a non-resident, the receipts have to be taxed in terms with section 44DA of the Act. He submitted, since, the provision contained under section 44DA is applicable from assessment year 2011-12, the Assessing Officer has correctly computed assessee's income under the said provision. He submitted, section 44BB would not be applicable to the assessee as any income falling under sections 44DA and 115A of the Act are expressly excluded from the scope of section 44BB(1) of the Act. He submitted, Explanation to section 115A(1) of the Act explicitly provides that FTS would have the same meaning as in Explanation 2 to section 9(1)(vii) of the Act. Thus, he submitted, the amount received by the assessee, being in the nature of FTS, has to be taxed in terms with section 44DA read with section 115A of the Act. Without prejudice, he

submitted, Article 13(4) of the India-France Tax Treaty, which defines the term FTS is more or less similar to the definition provided under section 9(1)(vii) of the Act. He submitted, FTS as defined in the Treaty does not impose any 'make available' condition. Thus, he submitted, even under the treaty provision, the services rendered by the assessee would qualify as FTS. In support of his submission, he relied upon the following decisions:

1. *Paradigm Geophysical Pty. Ltd. Vs. CIT, WP(C) No. 1370 of 2019, dated 13.03.2020*
2. *University of Calgary Vs. ADIT, (2017) (ITA No. 4877/Del/2013 & 1327/Del/2016)*

10. Sh. Ajay Vohra, learned Senior Counsel appearing for the assessee submitted, the services rendered by the assessee cannot be regarded as FTS, either under section 9(1)(vii) of the Act or under Article 13 of Indian – France Treaty. Drawing our attention to the agreement between the assessee and RIL, learned counsel submitted, while RIL has been entrusted with the work of drilling and exploration of oil at KG Basin, a part of the work was subcontracted to the assessee by RIL. He submitted, due to some issues relating to a particular oil well in a block, RIL intended to carry on remedial action. He submitted, the services rendered by the assessee were in connection with prospecting for, extraction

and production of mineral oil. Therefore, the assessee computed its income under section 44BB of the Act. He submitted, expression 'in connection with' is of wide amplitude and includes consideration for any services of whatever nature rendered by a non-resident entity in connection with prospecting for, or extraction or production of mineral oil in India. In this context, he drew our attention to the decision of coordinate bench in case of DCIT Vs. Technip UK Ltd, ITA No. 1116/Del/2014 and a number of other decisions holding that even in case of second line contractors provisions of section 44BB would apply.

11. As regards the contention of Revenue that the amount received by the assessee is taxable under section 44DA and section 115A, learned counsel for the assessee submitted, these sections are not applicable, since, the activity performed by the assessee are services in connection with prospecting for, extraction of or production of mineral oils. Further, he submitted, section 44DA refers to FTS as defined under Explanation 2 to section 9(1)(vii) of the Act. Drawing our attention to the said provision, he submitted, it specifically excludes the consideration received for construction, assembly, mining or like projects from

the purview of FTS. He submitted, whether extraction of mineral oil and activities in connection therewith would be covered within the term mining or like projects was clarified in instruction no. 1862 dated 22.10.1990 issued by Central Board of Direct Taxes (CBDT), wherein, it was stated that mining or like projects would include rendering of services like imparting of training for carrying out drilling operation in connection with extraction of mineral oil. Therefore, such services would be outside the purview of FTS under section 9(1)(vii) of the Act. In support of such contention, he relied upon the decision of Hon'ble Supreme Court in case of Oil and Natural Gas Corporation Vs. CIT, 376 ITR 306 (SC). Additionally, he also relied upon the decision of Hon'ble Delhi High Court in case of DIT Vs. OHM Ltd., 352 ITR 406, wherein, the Hon'ble High Court held that income received from services rendered in connection with extraction and production of mineral oils will be taxable under section 44BB as opposed to section 44DA of the Act. He submitted, amendment to the aforesaid section by Finance Act, 2010 would not have the effect of altering or effacing fundamental nature of both the provision and their respective spheres of operation or to take away the separate identity of section 44BB of the Act. Thus, relying upon

the ratio laid down in these decisions, learned counsel submitted, mining/oil exploration projects are not restricted to carrying out mining simpliciter. The said projects comprise of amalgam of activities where each of such activities are indispensable to the completion of the project. Therefore, considered in that context, the activities performed by the assessee are services in connection with prospecting for, extraction or production of mineral oils, hence would be covered under section 44BB.

12. He submitted, section 44DA of the Act provides that income by way of royalty or FTS earned by a non-resident assessee in pursuance to an agreement with the Government or an Indian concern shall be computed under the head 'profit and gains from business or profession', in case, the non-resident assessee carries out its business in India through a Permanent Establishment (PE) situated therein and the right, property or contract in respect of which the royalty or FTS paid is effectively connected with such PE. He submitted, since, the assessee had no PE in India under the India – France DTAA, section 44DA would not be applicable. Elaborating further, he submitted, as per Article 5(3) of India – France DTAA, for constituting an installation PE, a period of six

months is required. However, in assessee's case, the installation and related services did not exceed the period of five months. He submitted, the allegation of the Assessing Officer that the assessee had carried out the installation work for more than six months is totally misconceived, as, the date on which the invoice is raised is not decisive for determining the duration of the PE in India. For such proposition, he relied upon a decision of the Coordinate Bench in case of M/s. J. Ray McDermott Eastern Hemisphere Ltd. Vs. JCIT , 39 SOT 240.

13. Proceeding further, he submitted, services rendered by the assessee cannot be treated as FTS under Article 13(4) of the Tax Treaty. He submitted, the protocol to the India – France Treaty provides that if under any convention, agreement or protocol signed after 01.09.1989 between India and a third State, which is a member of OECD, India limits its taxation rate on dividend, interest, royalty, FTS, to a rate lower or a scope more restricted than the rate or scope provided for in the Indian – France Tax Treaty, then, the restrictive covenant of that other Treaty would apply. He submitted, Article 12(4) of India – Portuguese Tax Treaty has a more restrictive definition of FTS as it speaks of

'make available' condition. Thus, he submitted, going by the protocol to India – France Tax Treaty, the restrictive provision of India – Portuguese Tax Treaty, insofar as it relates to definition of FTS, would apply, hence, the “make available” condition has to be satisfied. He submitted, the services rendered by the assessee under the contract do not make available any technical knowledge, experience, skill, knowhow etc. to RIL. Therefore, even under the Treaty provision, the amount received by the assessee cannot be regarded as FTS. For such proposition, he relied upon the following decisions:

1. *DIT Vs. OHM Ltd.*, 352 ITR 406
2. *DCIT Vs. Technip UK, Ltd.* (ITA No. 1116/Del/2014)
3. *Technip UK Ltd. Vs. DIT* (ITA No. 4284/Del/2013)
4. *Geofizyka Torun Sp zoo* [2010] 320 ITR 268 (AAR)
5. *ACIT Vs. Paradigm Geophysical Pvt. Ltd.* [2008] 117 TTJ 812 (Delhi)
6. *Lloyd Helicopters International Pty Ltd.* [2001] 249 ITR 162
7. *Seabird Exploration FZ LLC* [2010] 320 ITR 286
8. *Wavefield Inseis Asa* [2009] 320 ITR 290
9. *McDermott International Inc. Vs. DCIT* [1994] 49 ITD 590 (Delhi)
10. *Oil and Natural Gas Corporation Ltd. VS. CIT*, 376 ITR 306 (SC)
11. *Louis Dreyfus Armateurs SAS Vs. ADIT*, 54 *taxmann.com* 366 (Delhi)
12. *Pride Offshore International LLC Vs. ADIT*, 59 *taxmann.com* 23 (Delhi)
13. *ADIT Vs. International Technical Services LLC*, 71 *taxmann.com* 351 (Delhi)

14. *Iranian Offshore Engineering & Construction Company Vs. ADIT, 76 taxmann.com 95 (Delhi)*
15. *Micoperi S.P.A. Milano Vs. DCIT [2002] 82 ITD 369 (Mumbai)*
16. *Bourbon Offshore Asia Pte Ltd. [2011] 337 ITR 122 (AAR)*
17. *Spectrum Geo Ltd. [2012] 346 ITR 422 (AAR)*
18. *ADIT Vs. International Technical Services LLC, 159 ITD 958 (Delhi)*
19. *ADIT vs. M.B. Petroleum Services LLC.: 63 SOT 63 (Del.)*
20. *ADIT vs. TDI Brooks Intl. Inc: 64 taxmann.com 390 (Del.)*
21. *Viking Maritime Inc. vs. DCIT: 69 taxmann.com 303 (Del.)*
22. *Fugro Geoteam vs. ADIT: 37 ITR(T) 46 (Del.)*
23. *ADIT vs. International Technical Services LLC: 71 Taxmann.com 361 (Del.)*
24. *ADIT vs. Western Geco International Limited: 71 Taxmann.com 166 (Del.)*
25. *Siem Offshore Crewing AS vs. ADIT: 68 taxmann.com 135 (Del Trib.)*
26. *JSC SMNG Center, Russia, In re: 74 taxmann.com 248 (AAR)*
27. *Spectrum Geo Ltd., In re: 346 ITR 422 (AAR)*
28. *Corpro Systems Limited: 68 Taxmann.com 330 (AAR)*

14. In rejoinder, learned Departmental Representative submitted, Article 13(4) of Indian – France Tax Treaty, admittedly, does not have any “make available” clause. He submitted, the assessee’s contention that more restrictive definition of FTS under India – Portuguese Tax Treaty would be applicable, in view of the protocol to India France Tax Treaty, cannot be accepted as in terms with section 90 sub-section (1) of the Act, the Government is required to make the provision more restrictive by importing

the FTS provision of other Treaties. He submitted, since there is no such notification issued by the Government, the definition of FTS in India – Portuguese Tax Treaty cannot be imported to India – France Tax Treaty. For such proposition, he relied upon the decision of Hon'ble Supreme Court in case of Union of India vs. Azadi Bachao Andolan, 263 ITR 706.

15. We have patiently and carefully considered rival submissions made, both, orally as well as in writing, in the light of the decisions relied upon. We have also perused the materials on record, including the paper books submitted by the assessee. The core issue arising for considering is, whether the amount received by the assessee from the services rendered to RIL in connection with a particular oil well in KG Basin is to be treated as FTS or not. It is the case of the Revenue that the amount received by the assessee falls within the purview of FTS as defined under section 9(1)(vii) of the Act as well as under Article 13(4) of the India - France Tax Treaty. Hence, would be taxable under section 44DA of the Act. Whereas, the consistent stand of the assessee is to the effect that the amount received is for providing services in connection with prospecting for or extraction or

production of mineral oils, hence, has to be treated as business profit, thus, taxable under section 44BB of the Act.

16. At the outset, we propose to deal with the contention of the Revenue that the amount received by the assessee falls within the definition of FTS under section 9(1)(vii) of the Act. Section 9(1)(vii) of the Act provides for taxation of FTS. Explanation 2 to section 9(1)(vii) defines FTS as under:

“Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";

17. A reading of Explanation 2 to section 9(1)(vii) would make it clear that it carves out an exception by excluding consideration received for any construction, assembly, mining or like projects and, off course, any income which is chargeable under the head “salary” from the term ‘FTS’. The meaning of expression “mining or like projects” as used in Explanation 2 to section 9(1)(vii) of the Act has been clarified by the CBDT in instruction no. 1862, dated 22.10.1990 as under:

“INSTRUCTION NO. 1862, DATED 22-10-1990

1. The expression "fees for technical services" has been defined in Explanation 2 to section 9(1)(vii) of the Income-tax Act, 1961 as under :

"Explanation 2 : For the purpose of this clause, 'fees for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining, or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries.' "

2. 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 project' occurring in Explanation 2 to section 9(l)(vii) 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.

3. In view of the above opinion, the consideration for such services will not be treated as fees for technical services for the purpose of Explanation 2 to section 9(1) (vii) of the Income-tax Act, 1961. Payments for such services to a foreign company, therefore, will be income chargeable to tax under the provisions of section 44BB of the Income-tax Act, 1961 and not under the special provision for the taxation of fees for technical services contained in section 115A, read with section 44D of the Income-tax Act, 1961."

18. In case of Oil and Natural Gas Corporation Vs. CIT (supra), the Hon'ble Supreme Court, while examining somewhat identical issue relating to applicability of section 44BB vis a vis section 44D of the Act, observed that the expression "mines or minerals" has not been defined under the Act. Thereafter, referring to the definition of the expression "mines and minerals" under some other Acts like, Mines Act, 1952; Oil Fields (Development and Regulation) Act, 1948; Mines and Minerals (Development and Regulation) Act, 1957 as well as Entries 53 and 54 of List 1 and

Entry 22 of List 2 of the 7th Schedule to the Constitution of India, the Hon'ble Supreme Court held that drilling operation for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. For ascertaining whether a particular activity carried out is in the nature of mining activity or a mining operation, the Hon'ble Supreme Court propounded that it is the proximity of work contemplated under an agreement executed with a non-resident assessee with mining activity or mining operation, that would be crucial for determining, whether the payment made under such an agreement to the non-resident is to be assessed under section 44BB or section 44D of the Act. Thus, Hon'ble Apex Court observed that test of pith and substance of the agreement would be the factor to decide, whether the amount received would be in the nature of profit earned for rendering services or facilities in connection with prospecting for mineral oils etc. While so observing, the Hon'ble Supreme Court also referred to CBDT Instruction No. 1862, dated 22.10.1990. Thus, what follows from the observations of Hon'ble Supreme Court in case of Oil and Natural Gas Corporation (supra) is, the expression 'mining or like projects' would also

encompass activities in relation to prospecting and exploration of minerals oils.

19. At this stage, we need to examine the contract entered between the assessee and RIL on 6th March, 2010, a copy of which is placed at page 132 of the paper-book. The scope of work to be undertaken by the assessee as per Exhibit -1 to the contract is as under:

“Company intends to carry out remedial action on well A5 due to some we related issues. The remedial works involves retrieving the installed XMT and installation of new XMT as well A5; which further entails retrieval of the jumper between the A5 XMT & PLET of AF M3 pipeline, disconnection of the umbilical from A5 XMT and again installation of the jumper and re-stabbing of umbilical once the new XMT is installed.”

20. Thus, the scope of work clearly envisages that the assessee has to render certain services in connection with the mining activity carried on in well A5 in KG Basin. Thus, once the activity carried on by the assessee falls within the expression “mining or like projects”, it goes out of the purview of FTS as defined under Explanation 2 to section 9(1)(vii) of the Act. That being the factual and legal position, the amount received by the assessee cannot be treated as FTS under section 9(1)(vii) of the Act. That being the case, the provision of the Act being more beneficial in such a scenario, as per section 90(2) of the Act, will be applicable.

Therefore, there is no need for us to examine the applicability of the term 'FTS' under India – France Tax Treaty. Thus, once the amount received by the assessee does not fall within the definition of FTS under section 9(1)(vii) of the Act, by default, section 44DD would not apply to such payment.

21. That leaves us with the issue, whether the amount received by the assessee is business profit under section 44BB of the Act. A reading of section 44BB makes it clear, it is a special provision for computing profits and gains 'in connection with the business of exploration of minerals oils'. Sub-section (1) of section 44BB reads as under:

“Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.

44BB. (1) *Notwithstanding anything to the contrary contained in [sections 28](#) to [41](#) and [sections 43](#) and [43A](#), in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :*

22. On a careful reading of the aforesaid provision makes it clear that profits earned by a non-resident engaged in the business of providing services or facilities **in connection with** or supplying plant and machinery on hire used, or to be used in the

prospecting for or extraction or production of mineral oils would be taxable at the rate of 10% of the aggregate amount as specified in sub-section (2). Off course, the proviso to sub-section (1) of section 44BB carves out an exception by providing that the provision would not apply in a case where provision of section 42 or section 44D or section 44DA or section 115A or section 293A would apply for computing profits and gains of the business. In the facts of the present case, admittedly, entire case of the Revenue is, assessee's income is to be computed under section 44DA. However, we have already held that the amount received not being in the nature of royalty or FTS, section 44DA would not apply.

23. Reverting back to the issue of applicability of section 44BB of the Act, it would be of some importance to note that as per sub-section (1) of section 44BB, the profits from providing services or facilities in connection with prospecting for or extraction or production of mineral oil would fall within the ambit of section 44BB. Thus, it is required to determine, whether the services provided by the assessee under the contract with RIL are in connection with prospecting for or extraction or production of mineral oils. The expression **“in connection with”** being of

widest amplitude cannot be given a restrictive meaning. The expression would also encompass services or facilities provided to a person who is engaged in exploration or production of mineral oils. Going by the plain meaning of the words as used in the aforesaid provision, it cannot be said that for claiming benefit under section 44BB, a non-resident entity providing services in connection with exploration or production of mineral oils must itself be engaged in such activities.

24. In case of Geofizyka Torun Sp zoo, 320 ITR 268, the Authority for Advance Ruling (AAR), while interpreting the expression “in connection with” as used in section 44BB(1), has observed that in view of use of expression ‘in connection with’ an expansive meaning has to be given to include a variety of services relating to exploration, extraction and production of mineral oils. In case of DIT Vs. OHM Ltd. (supra), the Hon’ble jurisdiction High Court, while approving the aforesaid decision of AAR has observed as under:

“11. We do not think that there is any error in the view taken by AAR. Basically the rule that the specific provision excludes the general provision has been applied. Section 44BB is a special provision for computing the profits and gains of a non-resident in connection with the business of providing services or facilities in connection with or supplying plant and machinery on hire, used or to be used, in the prospecting for, or extraction or production of mineral oils including petroleum and natural gas. Section 44DA is also a

provision which applies to non-residents only. It is, however, broader and more several in nature and provides for assessment of the income of the non-resident by way of royalty or fees for technical services, where such nonresident carries on business in India through a permanent establishment situated therein or performs services from a fixed place of profession situated in India and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with the permanent establishment or fixed place of profession. **Such income would be computed and assessed under the head "business" in accordance with the provisions of the Ad, subject to the condition that no deduction would be allowed in respect of any expenditure or allowance which is not wholly or exclusively incurred for the business of such permanent establishment or fixed place of profession or in respect of amounts, if any, paid by the permanent establishment to its head office or to any of its other offices.** Under section 44BB one does not find any reference to a permanent establishment in India. The type of services contemplated by the provision is more specific than what is contemplated by Section 44DA. **Section 44BB refers specifically to "services or facilities in connection with, or supplying plant and machinery on hire, used or to be used in the prospecting for, or extraction or production of mineral oils".** Revenues earned by the nonresident from rendering such specific services are covered by Section 44BB **It is a well settled rule of interpretation that if a special provision is made respecting a certain matter, that matter is excluded from the general provision under the rule which is expressed by the maxim "Generalliaspecialibus non derogant".** It is again a well-settled rule of construction that when, in an enactment two provisions exist, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This was stated to be the "rule of harmonious construction" by the Supreme Court in VenkataramanaDevaru v. State of Mysore AIR 1958 SC 255. If as contended by the Revenue, Section 44DA covers all types of services rendered by the non-resident, that would reduce section 44BB to a useless lumber or dead letter and such a result would be opposed to the very essence of the rule of harmonious construction In South India Corporation (P.) Ltd v. Secretary. Board of Revenue Trivandrum, AIR 1964 SC 207 it was held that a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific.

12. The second proviso to sub-section (I) of Section 44DA inserted by the Finance Act, 2010 w.e.f. 01.04.2011 makes the position clear. Simultaneously a reference to Section 44DA was inserted in the proviso to sub-section (I) of section 44BB. It should be remembered that section 44DA also requires that the non-resident or the foreign

company should carry on business in India through a permanent establishment situated therein and the right, property or contract in respect of which the royalty or fees for technical services is paid should be effectively connected with the permanent establishment. Such a requirement has not been spelt out in Section 44BB; moreover, a flat rate of 10% of the revenues received by the non-resident for the specific services rendered by it are deemed to be profits from the business chargeable to tax in India under Section 44BB, whereas under Section 44DA, deduction of expenditure or allowance wholly and exclusively incurred by the non-resident for the business of the permanent establishment in India and for expenditure towards reimbursement of actual expense by the permanent establishment to its head office or to any of its other offices is allowed from the revenues received by the nonresident. Because of the different modes or methods prescribed in the two sections for computing the profits, it apparently became necessary to clarify the position by making necessary amendments. That perhaps is the reason for inserting the second proviso to sub-section (1) of Section 44DA and a reference to section 44DA in the proviso below subsection (1) of Section 44BB. A careful perusal of both the provisos shows that they refer only to computation of the profits under the sections. If both the sections have to be read harmoniously and in such a manner that neither of them becomes a useless lumber then the only way in which the provisos can be given effect to is to understand them as referring only to the computation of profits, and to understand the amendments as having been inserted only to clarify the position. So understood, the proviso to subsection (1) of Section 44BB can only mean that the flat rate of 10% of the revenues cannot be deemed to be the profits of the non-resident where the services are of the type which do not fall under that section, but are more general in nature so as to fall under Section 44DA. Similarly, the second proviso to sub-section (1) of Section 44 DA can only be interpreted to mean that where the services are general in nature and fall under the subsection read with Explanation 2 to Section 9(1)(vii) of the Act, then an assessee rendering such services as provided in Section 44BB cannot claim the benefit of being assessed on the basis that 10% of the revenues will be deemed to be the profits as provided in Section 44BB. In other words, the amendment made by the Finance Act, 2010 w.e.f 01.04.2011 in both the sections, cannot have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation or to take away the separate identity of Section 44BB. We do not, therefore, see how these amendments can assist the Revenue's contention in the present case, put forward by the learned Senior Standing Counsel. We, therefore, agree with the AAR that in the present case the profits shall be computed in accordance with the provisions of section 44BB of the Act and not section 44DA.

(Emphasis supplied)

25. In fact, in case of Oil and Natural Gas Corporation Vs. CIT (supra), the Hon'ble Apex Court, while adjudicating the dispute concerning the applicability of section 44BB(1) to payments received for various works executing under a contract, including planning and supervision of repair of wells, has observed as under:

“.....Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under [Section 44BB](#) or [Section 44D](#) of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions “mining projects” or “like projects” occurring in Explanation 2 to [Section 9\(1\)](#) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of [Section 44BB](#) and not [Section 44D](#) of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct.....”

26. From the details of works covered under the contract enumerated in the aforesaid observations of the Hon'ble Supreme Court, it can be well appreciated that wide spectrum of services in the nature of analysis of data of wells to prepare a job design, review of sub-surface well data, providing repair plan of wells and supervise repairs, repair of gas turbine, gas control system and inspection of gas turbine and generator, repair and inspection of turbines, repair, inspection and overhauling of turbines, expert advice on the device to clean insides of a pipeline, feasibility study of rig to assess its remaining useful life and to carry out structural alteration, etc., were found to be in connection with prospecting for or exploration or extraction of mineral oils. The Hon'ble Supreme Court, while taking note of the nature of work to be executed under the contract, has observed that the pith and substance of the contract is inextricably connected with prospecting for or extraction or production of mineral oil. Thus, the amount received falls under section 44BB(1) of the Act. The aforesaid observations of Hon'ble Supreme Court would squarely apply to the facts of the present appeal, as, the work performed by the assessee under the contract is definitely in connection

with prospecting for or extraction or production of mineral oils as it is inextricably linked to the exploration/extraction of oil from A5 well.

26. As regards the contention of the Revenue that section 44BB would not be applicable to a second line contractor, we find, the aforesaid issue has been decided against the Revenue by a Coordinate Bench at Delhi in case of DCIT Vs. Technip UK Ltd. in ITA No. 1116/Del/2014, dated 17.12.2018, wherein the Bench has held as under:

“17. The second contention of the Revenue is that section 44BB of the Act is not applicable to second level contractors.

18. A plain reading of section 44BB of the Act envisages a non-resident service provider not merely engaged in the business of providing services or facilities in connection with prospecting, extraction or production of mineral oils but providing such services / facilities to a person / entity engaged in such activities. The said section does not distinguish between the main contractor or a sub-contractor. If the intention of the Legislature was to restrict the benefit of section 44BB of the Act to the main contractor only, then, the words after 'the assessee engaged in the business of 'providing services or facilities in connection therewith' or 'supplying plant and machinery on hire' ought to have been omitted. Hence, where the provision does not create any discrimination between the person who actually does the activity of prospecting for or extraction or production, and the person who renders services in connection therewith, the section cannot be narrowly construed.”

19. It would not be out of place to refer to the decision of the co-ordinate bench in assessee's own case in ITA No. 4284/DEL/2013. Though the said decision of the co-ordinate bench was in respect of the order framed u/s 263 of the Act, but the findings are very much relevant to the case in hand. The relevant extract of the said decision of the co-ordinate bench reads as under:

"In the instant case, ground for which the DIT assumed jurisdiction u/s 263 of the Act are that provisions of section 44BB of the Act does not cover second leg contract and the said section is not application to sub-contracts engaged in providing technical services to contractors for those undertaking projects in oil exploration, that income received by the assessee was clearly covered u/s 44DA of the Act and hence not taxable u/s 44BB of the Act and that the A.O has not taxed out country receipts and that contract was a composite one and the A.O in the order did not discuss the taxability of the total receipts with regard to the admitted PE of the assessee in India.

57. From the various decisions filed by the assessee in the paper book, we find it has been held in various decisions that section 44BB of the Act are applicable to second level contractor/sub-contractor. We find the Delhi Bench of the Tribunal in the case of Louis Dreyfus Armateurs SAS [supra] has held as under:

"60. A reading of the aforesaid judicial precedence clarify that sec. 44BB does not distinguish between the main contractor or a sub-contractor as has been interpreted by the AO and the DRP. The conclusions of the A.O and the DRP are erroneous on account of the reason that the provision clearly envisages the non- resident assessee to be engaged in the business of supplying plant and machinery on hire. The only condition imposed, to say, is that such plant and machinery has to be used or should be used for the purposes of prospecting or extraction or production of mineral oils. The language in section 44BB in our view is clear so also the Legislative intention. It is a trite law that has already held by the Hon'ble Supreme Court in B. Parmannandv.MohanKoikal [2011] 4 SCC 266 that "the language employed in a statute is the determinative factor of the Legislative intend. It is well settled principle of law that the Court cannot read anything into a statutory vision which is plan and unambiguous". If the legislatures intention as contended by the Revenue was to restrict the benefit of sec. 44BB only to the main contractor or ONGC, then the words after 'the assessee engaged in the business of supplying plant and machinery on hire' or 'providing services or facilities' ought to e been omitted. Hence, where the provision does not create any discrimination between the person who actually does the activity of prospecting for or extraction or production, and the person who supplies the plants and machinery, the narrow interpretation of the provision is thus not permitted. The basic condition to satisfied in the said provision is that the plant or

machinery supplied or lented on hire by the assessee, non-resident should be used in the prospecting for or extraction or production of minerals oils or where equipment has been supplied, such equipment should have been used for the purposes of prospecting for or extraction or fiction of mineral oils. Having regard to the above we are of the considered opinion that the fetter assumed by authorities below while interpreting the provisions of Section 44BB of the Act are manifestly it and there is nothing in the said provision so as to disentitle a sub- contractor from invoking the said provision. Accordingly we do not find any fault in the claim of the assessee that revenues received under the charter agreements with CGG for providing two seismic survey vessels are in consideration with prospecting extractions or production of mineral oils and therefore taxable u/s 44BB of the Act."

58. The various other decisions relied on by the ld. counsel for the assessee also support the proposition that the provision of section 44BB of the Act are held to be applicable to the tax payer being a second leg contractor/sub-contractor. Further, it has been held in various decisions including the decision of the Hon'ble Delhi High Court in the case of DIT Vs. OHM Ltd. reported in 352 ITR 406 that the services rendered in relation to extraction and production of mineral oil are taxable u/s 44BB of the Act.

59. So far as the receipts of out-country services as taxable in India is concerned, we find in terms of section 90(2) of the Act, provisions of the Act are over ridden by the provisions of DTAA to the extent more beneficial to the non-resident assessee. Article 7(1) and 7(2) of the Indo-UK DTAA provides that profits attributable to PE in India shall be only profits arising from activities carried out by the PE in India. Therefore, we find merit in the submission of the ld. counsel for the assessee that assessee's income taxable in India shall only be so much of profits under contract as is attributable to the PE in India. The Hon'ble Supreme Court in the case of Carborandum Co vs CIT [supra] has held that if, however, all the operations are not carried out in India, the profits and gains of the business deemed to accrue or arise in the taxable territories shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in India.

60. Similar view has been taken by the Hon'ble Supreme Court in the case of CIT Vs. Hyundai Heavy Industries Co. Ltd reported in 291 ITR 482 [SC]. So far as the allegation of the ld.

DIT that the A.O has not gone through the contract is concerned, we find the assessee has filed details including the copy of the contract before the A.O who, after analyzing the same has accepted the returned income.

61. We find the A.O in the instant case, after going through the various details filed by the assessee has taken a possible view. It has been held in various decisions that where the A.O has taken a possible view, the assessment order cannot be held as erroneous and prejudicial to the interest of revenue. We find the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. (supra), law on this aspect was discussed in the following manner:

".....From a reading of sub-s. (1) of section, it is clear that the power of suomotu revision can be exercised by the CIT only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the ITO is 'erroneous insofar as it is prejudicial to the interests of the Revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in

sub-s. (1). The consideration of the CIT as to whether an order is erroneous insofar as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the CIT acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The CIT cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induces repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. [see Parashuram Pottery Works Co. Ltd. vs. ITO 1977 CTR (SC) 32 : (1977) 106 ITR 1 (SC) at p. 10].

.....

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the CIT simply because, according to him, the order should have been written more elaborately This section does not visualise a case of substitution of the judgment of the CIT for that of the ITO, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The CIT, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the CIT he would have estimated the income at a figure higher than the one determined by the ITO. That would not vest the CIT with power to reexamine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

We may now examine the facts of the present case in the light of the powers of the CIT set out above. The ITO in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the ITO on being satisfied with the explanation of the assessee. Such decision of the ITO cannot be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard....."

13. When we examine the matter in the light of the aforesaid principle, we find that the AO had called for explanation on this very item, from the assessee and the assessee had furnished his explanation vide letter dt. 26th Sept., 2002. This fact is even taken note of by the CIT himself in para 3 of his order dt. 3rd Nov., 2004. This order also reproduces the reply of the respondent in para 3 of the order in the following manner: "

The tools and dyes have a very short life and can produce upto maximum 1 lakh permissible shorts and have to be replaced thereafter to retain the accuracy. Most of the parts manufactured are for the automobile industries which have to work on complete accuracy at high speed for a longer period. Since it is an ongoing procedure, a company had produced 10,75,000 sets whose selling rates is inclusive of the reimbursement of the dyes cost. The purchase orders indicating the costing include the reimbursement of dyes cost are being produced before your Honour. Since the sale rate includes the reimbursement of dye cost and to have the matching effect, the cost of the dyes has been claimed as a revenue expenditure."

14. This clearly shows that the AO had undertaken the exercise of examining as to whether the expenditure incurred by the assessee in the replacement of dyes and tools is to be treated as revenue expenditure or not. It appears that since the AO was satisfied with the aforesaid explanation, he accepted the same. The CIT in his impugned order even accepts this in the following words : "AO accepted the explanation without raising any further questions, and as stated earlier, completed the assessment at the returned income."

15. Thus, even the CIT conceded the position that the AO made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the CIT was that the AO

should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.

*16. Having put the records straight on this aspect, let us proceed further. Is it a case where the CIT has concluded that the opinion of the AO was clearly erroneous and not warranted on the facts before him and, viz., the expenditure incurred was not the revenue expenditure but should have been treated as capital expenditure obviously not? Even the CIT in his order, passed under sec. 263 of the Act, is not clear as to whether the expenditure can be treated as capital expenditure or it is revenue in nature. No doubt, in certain cases, it may not be possible to come to a definite finding and therefore, it is not necessary that in all cases the CIT is bound to express final view, as held by this Court in *Gee Vee Enterprises (supra)*. But, the least that was expected was to record a finding that order sought to be revised was erroneous and prejudicial to the interest of the Revenue. [See *Seshasayee Paper (supra)*]. No basis for this is disclosed. In sum and substance, accounting practice of the assessee is questioned. However, that basis of the order vanishes in thin air when we find that this very accounting practice, followed for number of years, had the approval of the IT authorities. Interestingly, even for future assessment years, the same very accounting practice is accepted.*

62. We find the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar reported in 335 ITR 83 has held that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held as under:

"We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to : (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the

interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assesseees and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee."

64. Since in the instant case the A.O after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O, he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held in several decisions that when the A.O has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could have been investigated/ probed in a particular manner, he cannot assume jurisdiction u/s 263 of the Act. In view of the above discussion, we hold that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance with law. We, therefore, quash the same and grounds raised by the assessee are allowed."

20. Considering the facts of the case in hand in the light of the judicial decisions discussed elsewhere, we decline to interfere with the directions of the DRP.”

27. Thus, on overall consideration of facts and materials on record, the relevant statutory provisions and keeping in view the ratio laid down in various judicial precedents cited before us, we have no hesitation in holding that the amount received by the assessee has to be charged to tax under section 44BB of the Act. Therefore, we do not find any valid reason to interfere with the decision of learned DRP. Grounds raised are dismissed.

28. In the result, appeal is dismissed.

Order pronounced in the open court on 26th July, 2022

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIALMEMBER

Dated: 26th July, 2022.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi