

| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

I.T.A. No. 2566/Mum/2024

Assessment Year: 2019-20

&

I.T.A. No. 2567/Mum/2024

Assessment Year: 2020-21

MMA Offshore Asia Vessel Operations PTE Ltd. 9 Raffles Place #15-02, Republic Plaza 8, Cross Street Singapore - 048619 [PAN: AACJ8004E]	Vs	The Commissioner of Income Tax (International Taxation)-3, Mumbai
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Nitesh Joshi/Punit Lohiya, A/Rs
Revenue by :	Shri Vivek Perampurna, D/R

सुनवाई की तारीख/**Date of Hearing** : 05/11/2024

घोषणा की तारीख/**Date of Pronouncement** : 08/11/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

I.T.A. No. 2566/Mum/2024 & I.T.A. No. 2567/Mum/2024 are two separate appeals by the assessee preferred against two separate orders of the ld. CIT(IT)-3, Mumbai, (hereinafter 'ld. CIT') dated 29/03/2024 & 31/03/2024 framed u/s 263 pertaining to AY 2019-20 & 2020-21, respectively.

2. Since the underlying facts in the impugned quarrel are similar, therefore, both these appeals were heard together and are disposed off by this common order for the sake of convenience and brevity.

3. The common grievance in both these appeals relate to the assumption of jurisdiction u/s 263 of the Act by which the ld. CIT treated

the impugned assessment orders as not only erroneous but also prejudicial to the interest of the revenue.

4. Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules, 1963.

5. At the concession of the representatives, we have heard the appeals for AY 2019-20 and are considering the facts for AY 2019-20 as the facts for AY 2020-21 are *mutatis mutandis* the same.

6. The assessee filed its return of income on 26/09/2019 declaring total income of Rs. Nil. The return was selected for complete scrutiny through CASS with following reasons:-

- a) The assessee has claimed substantial refund out of TDS u/s 195.
- b) The assessee has claimed substantial amount of refund.
- c) The assessee has claimed large refund claimed out of overall TDS.

6.1. Statutory notices were issued and served upon the assessee and subsequently, after due verification of submissions made by the assessee and documents available, the income of the assessee was assessed at Nil and the exemption claimed as per DTAA amounting to Rs. 33,46,06,627/- was allowed.

7. Since the assessment order only refers to the submissions made by the assessee and documents considered thereon and there being no further discussion of what were the submissions of the assessee and what documents were considered, it would be pertinent to consider the same here.

8. The first notice dated 31/03/2021 was followed by notice u/s 142(1) of the Act dated 07/07/2021 with the following questionnaire:-

- “1. Copy of ROI and certified copies of the following documents along with all its schedules.
- (i) Computation of total income with notes to accounts attached thereto.
 - (ii) Annual report including Balance sheet, P&L & Audit report, if any.
 - (iii) Form No. 3CEB, if applicable.
 - (iv) Copy of 26AS and reconciliation.
2. Detailed and descriptive note on the nature of activity conducted during your operations in India along with a detailed note on the modus operandi.
3. Submit a detailed note on the nature of income and justify the exemption claimed if any in the return of income.
4. Details along with quantum of all income earned through your operations in India during the year under consideration, whether offered to tax or not.
5. Copy of approval /permission granted by the Reserve Bank of India / SEBI and other regulatory bodies to you to operate in India.
6. Copy of Tax Residency certificate.
7. Submit copy of all the contract agreements and other agreements signed with Indian parties with respect to your operations in India.
8. Reconciliation statement of the income returned with the income corresponding to credit of TDS claimed as per the return of income and in accordance with the AIR. You are also requested to submit copies of all TDS certificates for verification of the claim of credit and 26AS.
9. The complete details of inter-office adjustments showing the gross adjustments and the net adjustments.
10. Any other document on which you may wish to rely in support of Return of Income.
11. Recurring Issues: With reference to the additions/disallowances made in the earlier assessment orders and appeal status, please give details of similar claims liable for disallowances on similar grounds. In case the issues have been decided in your favor at any stage of appeal, relevant details may also be submitted. Please provide copies of the last three (03) assessment orders.”

9. The assessee replied as under:-

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Mumbai- 400028, India

24 July 2021

The Deputy Commissioner of Income Tax
International Tax Circle – 3(2)(2),
16th floor, Air India, Nariman Point,
Mumbai – 400021.

Dear Madam,

Re: **MMA Offshore Asia Vessel Operations Pte Ltd ('MMA')**
PAN: AACCJ8004E
Assessment Year ('AY'): 2019-20
Notice No: ITBA/AST/F/142(1)/2021-22/1034057441(1)

Sub: Reply to notice issued under section 142(1) of the Income tax Act, 1961 ('Act')

We refer to the notice dated 7 July 2021 issued by your goodself under section 142(1) of the Act requesting for details/ information in relation to Assessment Year 2019-20. Copy of notice is enclosed as **Annexure 1**.

In this connection, MMASV wishes to submit as under:

1. **Copy of ROI and certified copies of the following documents along with all its schedules.**
2. (i) **Computation of total income with notes to accounts attached thereto**

We have attached copy of computation of total income as **Annexure 2**.

(ii) **Annual report including Balance sheet, P&L & Audit report, if any**

Income earned by MMASV during the year under consideration is exempt from tax as per the India-Singapore Double Taxation Avoidance Agreement ('DTAA' or 'tax treaty'). Since, no income is liable to tax in India, MMASV is not liable to maintain books of accounts in India.

Further, MMASV does not have any office or presence in India. Therefore, no books of accounts are required to be maintained.

(iii) **Form No. 3CEB, if applicable**

Not Applicable

(iv) **Copy of 26AS and reconciliation**

Copy of Form 26AS is enclosed as **Annexure 3**.

3. **Detailed and descriptive note on the nature of activity conducted during your operations in India along with a detailed note on the modus operandi**

MMASV is engaged in the business of rendering vessels along with crew to charterers engaged in or connected to the business of prospecting, extraction and/ or production of mineral oil. During the year under consideration, MMASV has entered into following contracts for provision of vessel on time charter basis:



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Party Name	Vessel	Scope of Services
BG Exploration and Production India Limited ('BGEPII')	MMV Falcon	Providing various services as under: - Related to seismic, hydrographic, - Diving support, anchor handling - Transport of materials and personnel, - Towing, standby duties, catering services etc. related to contract of BGEPII for exploration work carried out at the West Coast of India in Panna/ Mukta and Mid and South Tapti oil fields.
J Ray McDermott SA ('McDermott')	Jaya Vigilant	ROV support of pipeline/ umbilical pre-commissioning and commissioning activities, subsea lifts up to 20 metres etc related to contract of McDermott with ONGC for exploration work in Indian waters.

The details of operation of vessels in India during the year under consideration are provided as under:

Company	Vessel	Period of operation of vessels in India in TY 2018-19	No. of days in India in TY 2018-19
BGEPII	MMV Falcon	1 November 2018 – 31 March 2019	151
McDermott	Jaya Vigilant	1 April 2018 – 16 April 2018	16
Total			167

Further, a copy of the Vessel Daily Report ('VDR') evidencing the presence of the vessels namely MMV Falcon and Jaya Vigilant in India, being less than 183 days has been enclosed as **Annexure 4A** and **Annexure 4B** respectively.

4. Submit a detailed note on the nature of income and justify the exemption claimed if any in the return of income

As stated in Point 2 above, MMASV has entered into time charter agreements with BGEPII and McDermott. The details of income earned by MMASV from the both the contracts are forming part of **Annexure 2**.

MMASV is a tax resident of Singapore for the period 1 April 2018 to 31 March 2019 (copy of Tax Residency Certificate covering year under consideration attached as **Annexure 5**), therefore, as per section 90(2) of the Act, it would be governed by the provisions of the India-Singapore tax treaty or the Act whichever is more beneficial. We have discussed below the taxability of revenues of MMASV under the Act as well as tax treaty:

Taxability under the Act

- ▶ Section 44BB of the Act is a special provision for taxation of non-residents engaged in the business of providing services in the oil and gas sector. As the scope of work pursuant to the contract is integral to the prospecting and extraction of oil and gas, the taxability of the revenues should be governed under section 44BB of the Act. The relevant extract of the section is reproduced below:

"44BB Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils as follows:

Building working work

(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 percent 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"

- ▶ Section 44BB(1) of the Act applies to 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 oil. As per section 44BB(1) of the Act, a sum equal to 10 percent of the gross revenues received by the non-resident shall be deemed to be the profits and gains from such business.
- ▶ Thus, section 44BB(1) of the Act applies to a non-resident engaged in the business of providing services or facilities in connection with the prospecting for, or extraction or production of mineral oil.
- ▶ As stated above, MMASV has entered into time charter contract for providing 'MWV Falcon' vessel and 'Jay Vigilant' vessel and services such as seismic, hydrographic, diving support, anchor handling, towing, ROV support for pipeline, commissioning, pre-commissioning services etc. along with bulk transfer, cargo & personnel transfer and food run, accommodation for charterer personnel, catering and communication facilities services for all crew who are involved in exploration work.
- ▶ In view of the above and given that services provided by MMASV to BGEPIIL and McDermott are in connection with the prospecting for, or extraction or production of mineral oil as envisaged under section 44BB of the Act, the said services falls under the ambit of section 44BB of the Act.
- ▶ The tax rate for MMASV being a foreign company is 40% (exclusive of surcharge @ 5% and health and education cess @ 4%). Accordingly, the effective tax rate applicable to MMASV in such a case is 4.368% on the gross receipts.
- ▶ Further, the Hon'ble Supreme Court in its judgment in the case of **ONGC vs CIT [(2015) 376 ITR 306]**, acting as an agent of M/s. Foramer France [Civil Appeal No 731 of 2007] dated 1 July 2015, held that that in view of specific exclusion of 'mining or like project' from the definition of fees for technical services ('FTS'), the services or manpower provided to render technical services which is directly and inextricably linked with prospecting, extraction or production of mineral oils, will not be considered as FTS within the meaning of Explanation to section 9(1)(vii) of the Act. Further, the Supreme Court has also summarised certain scope of work which would be very well covered within the ambit of section 44BB of the Act:
 - ▶ Drilling of exploration wells and carrying out seismic surveys for exploratory drilling;
 - ▶ Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel;
 - ▶ Drilling, furnishing supervisory staff with expertise in operation and management of drilling rig;
 - ▶ Repair and inspection of turbines;
 - ▶ Analysis of data to prepare job design, procedure for execution and details regarding monitoring.;
 - ▶ Engineering and technical support to ONGC in implementation of Cyclic Steam Stimulation in Heavy Oil wells



- ▶ Assessment and processing of seismic data along with engineering and technical support in implementation of Cyclic Steam Stimulation.
 - ▶ Laboratory testing under simulated reservoir conditions;
 - ▶ Consultancy for optimal exploitation of hydrocarbon resources, coal bed methane;
 - ▶ Geological study of the area and analysis of seismic information reports to design 2 dimensional seismic surveys;
 - ▶ Opinion on hydrocarbon resources and foreseeable potential;
 - ▶ Inspection of rigs, generators, gas generators;
 - ▶ Seismic related activities;
 - ▶ Capping including subduing of well, fire-fighting; etc
- ▶ Further, the Supreme Court has held that **where the agreement/ contract is in pith and substance connected with the prospecting, extraction or production of mineral oils, will be covered under the presumptive taxation regime of section 44BB.**
- ▶ Further, reliance is placed on the following case laws/ rulings wherein it has been held that the services rendered in connection with exploitation, extraction or production of mineral oils in India are covered under Section 44BB of the Act
- ▶ OHM Ltd (W.P. (C) No. 6830 of 2011) (Delhi High Court)
 - ▶ Seabird Exploration FZ LLC, UAE (AAR) 829 of 2009
 - ▶ M/s SBS Marine Ltd Vs. ADIT (ITA No. 107/DEL/2012) (Delhi Trib.)
 - ▶ Wavefield Inseis ASA (AAR no 823 of 2009)
 - ▶ Geofizyka Torun Sp zo o (AAR no 813 of 2009)
 - ▶ Bergen Oilfield Services AS, in Re (337 ITR 167)
 - ▶ WesternGeco International Limited (AAR No 938 of 2010)
 - ▶ SeaBird Exploration FZ LLC (AAR No 815 of 2009)
- ▶ Reliance is also placed on ruling of Advance Authority Ruling ('AAR') in the case of **Llyod Helicopters International Pty Ltd v CIT (115 taxman 334)** wherein the AAR has observed that revenues earned from providing helicopter services is in relation to business of mineral oil and would attract section 44BB of the Act.
- ▶ Where the services are in connection with or supply of plant or machinery on hire is used/ to be used in the prospecting for, or extraction or production of, mineral oils in India, the benefits under section 44BB of the Act can be availed. Based on various judicial precedents and the provisions of the Act, the activities performed by MMASV form an essential and integral part in prospecting for, extraction and production of mineral oil. Accordingly, the services provided by MMASV will be taxable under section 44BB of the Act.
- ▶ Accordingly, as per section 44BB of the Act, 10% of gross receipts would be deemed as taxable profits, thereby resulting in an effective tax rate of 4% (exclusive of surcharge and health and education cess).

Taxability under the India-Singapore tax treaty

Taxability of revenues as Fees for Technical Services ('FTS') under the tax treaty

- ▶ Article 12 of the treaty defines FTS as:

"Payments of any kind to any person in consideration for the rendering of any managerial, technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

- a) ...



- b) *make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein*
- c) *...*

- ▶ In the instant case, services provided by MMASV do not "make available" any technical knowledge, experience, skill, know-how etc. to the charterer as per Article 12 of tax treaty between India and Singapore, ie it does not enable BGEPIIL and J Ray Mcdermott S.A. to independently use the vessels and thereby apply any technology.

Further, mere rendering of services do not make available any technical knowledge, experience, skill, know-how etc. unless the following conditions are also fulfilled:

- The technical knowledge, skills, etc. remain with the person receiving the services even after the agreement comes to an end.
- The technical knowledge or skills of the provider are imparted to the recipient.
- The recipient is in a position to deploy similar skills or technology or techniques in future without the aid or assistance of the service provider.

The aforesaid view is supported/ taken by the following Courts/ Tribunals:

- ▶ Mumbai Tribunal in the case of Raymonds Ltd vs DCIT (86 ITD 791)
- ▶ Mumbai Tribunal in the case of Mahindra & Mahindra Ltd vs DCIT (30 SOT 374) (SB)
- ▶ Karnataka High Court in the case of CIT vs De Beers India Minerals Pvt Ltd (364 ITR 467)
- ▶ Kolkatta Tribunal CESC Ltd Vs. DCIT 87 ITD 653 (Kol)(TM)
- ▶ KPMG vs JCIT 142 ITD 323 (Mum)
- ▶ DCIT vs Xansa India Ltd (ITA No.2283/Del/2011 & Ors
- ▶ Linklaters LLP vs DCIT (ITA No. 1690/Mum/2015)

Therefore, your goodself would appreciate that the services provided by MMASV are not FTS under the India-Singapore tax treaty.

- ▶ As the revenues earned by MMASV do not qualify as FTS, taxability of such revenue (if any) will be governed as per Article 7 read with Article 5 of the tax treaty.

Taxability of time charter hire revenues as Business Profits

- ▶ Article 7 of tax treaty: Business Profits

"(1) The profits of an enterprise of one of the States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment."

- ▶ As per the above Article, the business profits earned by MMASV shall be liable to tax in India only if it carries on business in India through a Permanent Establishment ('PE') in India and the profits earned by it in India are attributable to the activities of the PE.

- ▶ Article 5 of tax treaty: PE

✓ The term PE is defined under Article 5 of the tax treaty as.

- "1.
- 5. ... an enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business from that permanent establishment if it provides services or

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facilities in that Contracting State for a period of more than 183 days in any fiscal year in connection with exploration, exploitation, or extraction of mineral oil in that Contracting State."

Basis above, it is understood that if period of services rendered in India exceeds 183 days, the same would constitute a permanent establishment in India as per Article 5(5) of the India-Singapore tax treaty.

- ▶ In the instant case, given that MMASV would provide services/ facilities in connection with exploration, exploitation, or extraction of mineral oil in India, Article 5(5) shall be applicable.
- ▶ As stated above, MMASV has rendered services to BGEPIIL and McDermott for a cumulative period of 167 days during AY 2019-20. Accordingly, MMASV does not have a PE in India as services rendered in India do not exceed more than 183 days in a fiscal year.
- ▶ Hence, in absence of a PE in India, revenues of MMASV are not taxable as per Article 7 read with Article 5(5) of the tax treaty.

Conclusion:

- ▶ In view of the above, income earned by MMASV from BGEPIIL and McDermott from provision of services is not be taxable in India.

5. Details along with quantum of all income earned through your operations in India during the year under consideration, whether offered to tax or not.

The income earned by MMASV from business operations in India are summarised as below:

Contract	Gross income earned during TY 2018-19 (USD)	Gross income earned during TY 2018-19 (INR)	Offered to tax or not
BGEPIIL	45,52,885	32,09,51,234	Exempt – Please refer Point 4 for detailed submissions
McDermott	1,94,356	1,36,55,393	Exempt – Please refer Point 4 for detailed submissions
Total	47,47,241	33,46,06,627	

6. Copy of approval /permission granted by the Reserve Bank of India/ SEBI and other regulatory bodies to you to operate in India.

MMASV does not have any office/ presence in India, hence, it does not require any approval/ permission from RBI/SEBI/Other Regulatory to operate in India.

7. Copy of Tax Residency certificate ('TRC')

Copy of TRC for year 2018 and 2019 are enclosed as **Annexure 5**.

8. Submit copy of all the contract agreements and other agreements signed with Indian parties with respect to your operations in India. (point 7 of the notice).

Copy of agreements with BGEPIIL and McDermott are enclosed as **Annexure 6A** and **Annexure 6B** respectively.



9. **Reconciliation statement of the income returned with the income corresponding to credit of TDS claimed as per the return of income and in accordance with the AIR. You are also requested to submit copies of all TDS certificates for verification of the claim of credit and 26AS. (point 8 of the notice)**

We have attached TDS certificate issued by BGEFIL as **Annexure 7**.

10. **The complete details of inter-office adjustments showing the gross adjustments and the net adjustments. (point 9 of the notice)**

We request you to provide exact details required by your goodself to enable MMASV to collate the same.

11. **Any other document on which you may wish to rely in support of Return of Income**

As discussed in Point 4, we have attached the a copy of the VDR evidencing the presence of the vessels namely MMV Falcon and Jaya Vigilant in India, being less than 183 days – refer **Annexure 4**.

12. **Recurring Issues: With reference to the additions/disallowances made in the earlier assessment orders and appeal status, please give details of similar claims liable for disallowances on similar grounds. In case the issues have been decided in your favour at any stage of appeal, relevant details may also be submitted. Please provide copies of the last three (03) assessment orders.**

This the first year of assessment, hence, details called for are not applicable.

We request you to above on records and oblige.

Should your goodself require any further information and clarifications, we shall be happy to provide the same.

Yours faithfully,

For **Ernst & Young LLP**

**Sanjay
Shukla**

Digitally signed by Sanjay Shukla
DN: cn=Sanjay Shukla,
email=Sanjay.Shukla@in.ey.com
Date: 2021.07.23 22:04:39
+05'30'

Authorized Signatory
Encl: as above

10. From the above it is crystal clear that specific queries were raised by the AO in respect of nature of income and justification for the claim of exemption. The AO also asked specifically for contract agreements and other agreements signed with the Indian parties with respect to operations in India.

10.1. From the above reply of the assessee exhibited hereinabove, it can be seen that the assessee had given complete details and descriptive note of the nature of activity conducted during the year in India along with a detailed note on the *modus operandi*. In its reply, the assessee has also given complete details and justification of the exemption claimed in its return of income. It was elaborately explained as to how the provisions of Section

44BB of the Act would apply and after its application how the income will be exempt, does not come within the purview of Articles 5, 7 or 12 of the India Singapore tax treaty.

10.2. Not satisfied with the submissions of the assessee, the AO issue second notice u/s 142(1) of the Act dated 15/09/2021 raising the following queries:-

“As per order us 127 of IT Act passed by CIT(IT)-3, Mumbai, the jurisdiction of the assessee has been transferred to this office for disposal of pending assessment proceeding.

1. Submit the corporate structure with details of parent company(s) its parent company(s) and ultimate group company(s) along with name, address, country of incorporation, % shareholding.

2. Submit the details of income tax paid on the receipts received during the year in Singapore.

3. In respect of MNV Falcon:

a) Details of vessel registration along with supporting documentary evidence.

b) Your relationship with the vessel, whether owned or chartered along with supporting documentary evidences. If owned, year in which acquired along with cost and mode of acquisition, if chartered, name of owner with country and copy of charter agreement and relationship with owner.

As per your submission, vessel "MNV Falcon" is time chartered by BG Exploration and Production India Pvt. Ltd. (BGEPIIL) for which agreement between assessee and BGEPIIL dated 24.09.2018 is submitted. In respect of this agreement, submit the followings:

a) Country from where the vessel was dispatched to India under this agreement along with date of dispatch of vessel with supporting document, date of entry of vessel in India along with supporting document.

b) Date when the vessel was relieved by the charterer under said agreement along with supporting document

c) The scope of work has been defined under said agreement under Para 2 titled "Scope" under "Technical Attachment B" wherein following items appear under scope of

1. Safety standby duties, operation standby duties

2. Bulk transfer, cargo, personnel transfer and food run,

3. Accommodation for charterer personnel with allied activities

4. Catering services for the crew

5. Communication facilities

You are required to submit the specific services provided under each above scope along with supporting documents. You are further required to substantiate as to how said activities are covered under section 44BB of IT Act. Please note that you have submitted in your submission that receipts from said agreement are covered under section 44BB of IT Act therefore you are bound to explain as to how activities performed by you are connected with prospecting for, exploration or production of mineral oils in India.

Therefore, you are expected to submit all the activities done by you and establish their direct and inextricable connection with activities covered in section 44BB of IT Act. In case you fail to do so, please treat this as show cause for denying the deemed income provision under section 44BB of IT Act.

d) As per said agreement, the period of charter of vessel is 195 days with 2 extension of 15 days each and mobilisation window period 23.10.2018 to 07.11.2018. Submit the date of mobilisation of vessel and total period under which vessel was chartered to charterer under said agreement.

5. In respect of Jaya Vigilant:

a) Details of vessel registration along with supporting documentary evidence.

b) Your relationship with the vessel, whether owned or chartered along with supporting documentary evidences. If owned, year in which acquired along with cost and mode of acquisition, if chartered, name of owner with country and copy of charter agreement and relationship with owner.

6. As per your submission vessel "Jaya Vigilant" is time chartered by J Ray McDermott SA (McDermott) for which agreement between assessee and McDermott dated 01.06.2017 is submitted. In respect of this agreement, submit the followings:

a) Country from where the vessel was dispatched to India under this agreement along with date of dispatch of vessel with supporting document, date of entry of vessel in India along with supporting document

b) Date when the vessel was relieved by the charterer under said agreement along with supporting document

c) The scope of work has been defined under said agreement under Para 37 titled "Scope of work (SOW)" wherein following items appear under scope of work to be performed by the charterer:

1. ROV support of pipeline/umbilical pre-commissioning and commissioning activities,

2. Subsea lifts up to 20MT,

3. DP operations for 24 hour operations

In Para 38 of said agreement, owner's responsibility for provision of vessel are mentioned. In view of this, you are required to submit the specific services provided under Para 38 of agreement along with supporting documents. You are further required to substantiate as to how said activities are covered under section 44BB of IT Act. Please note that you have Submitted in your submission that receipts from said agreement are covered under section 44BB of IT Act therefore you are bound to explain as to how activities performed by you are connected with prospecting for, exploration or production of mineral oils in India. Therefore, you are expected to submit all the activities done by you and establish their direct and inextricable connection with activities covered in section 44B of IT Act. In case you fail to do so, please treat this as show cause for denying the deemed income provision under

As per said agreement, the period of charter of vessel is 60 days. Submit the date of mobilisation of vessel and total period under which vessel was chartered to charterer under said agreement."

10.3. It can be seen from the above that the AO, referring to the previous reply of the assessee raised further queries which were replied by the

assessee vide response dated 22/09/2021. The most relevant part of the reply read as under:-

22 September 2021

The Deputy Commissioner of Income Tax
International Tax Circle – 3(3)(1),
16th floor, Air India, Nariman Point,
Mumbai – 400021.

Dear Sir,

Re: MMA Offshore Asia Vessel Operations Pte Ltd ('MMA')
PAN: AACJ8004E
Assessment Year ('AY'): 2019-20
Notice No: ITBA/AST/F/142(1)/2021-22/1035584713(1)

Sub: Response to notice issued under section 142(1) of the Income tax Act, 1961 ('Act')

We refer to the notice issued by your goodself upon MMA for AY 2019-20 under section 142(1) of the Act dated 15 September 2021 (enclosed as **Annexure 1**). In this regard, further to our submission dated 24 July 2021 (enclosed as **Annexure 2**), we wish to submit as under:

Background

- MMA is engaged in the business of providing offshore support services involving charter of vessels to charterers engaged in or connected to the business of prospecting, extraction and/or production of mineral oil. During the year under consideration, MMA has executed the following contracts for provision of vessel and crew (ie on a time charter basis):

Party Name	Vessel	Scope of Services
BG Exploration and Production India Limited ('BGEPIIL')	MWV Falcon	Providing operational support services to BGEPIIL as well as support movement of personnel and materials: - Safety standby duties, operation standby duties - Bulk transfer, cargo, personnel transfer, food runs - Accommodation of Charterer's personnel and allied activities - Catering and communication facilities The said contract assists in exploration work carried out at the West Coast of India in Panna/ Mukta and Mid and South Tapti oil fields.
J Ray McDermott SA ('McDermott')	Jaya Vigilant	- Remotely operated vessel support of pipeline/ umbilical pre-commissioning and commissioning activities - Subsea lifts up to 20 MT - Dynamic positioning operations for 24 hours operations The said contract assists in exploration work carried out by McDermott with ONGC in Indian waters.

Offshore Asia Vessel Operations Pte. Ltd.
No. 200916206C
Street, Manulife Tower
11/03, SINGAPORE 048424

Meera

Submission on how MMASV's activities are connected to section 44BB of the Act:

(A) *Vessel MWV Falcon under contract with BGEPIIL*

- You goodself would appreciate that the contract entered by MMA is with BGEPIIL, who has entered into a Production Sharing Contract along with ONGC and Reliance Industries Limited with the Government of India for the Panna, Mukta and Tapti oil fields.
- MMA has provided various operational support services to BGEPIIL to assist with exploration work carried out by BGEPIIL in the aforesaid fields.
- Further, the vessel MWV Falcon has been imported by BGEPIIL under an Essentiality Certificate (EC) issued by the Directorate General of Hydrocarbons (ie customs exemption for Oil & Gas related activities). A copy of the EC is enclosed as **Annexure 2.1**, for your reference and records.
- We wish to draw your goodself's kind attention to Customs notification 50/2017, wherein customs exemption is provided by the Director General of Shipping and/ or Director General of Hydrocarbons to the importer of the vessel, who is engaged in Oil & Gas exploration activities. As per the said notification (item no. 404 read with list 33 of the said notification), the exemption is available on the following items:
 - Petroleum operations undertaken under petroleum exploration licenses or mining leases, granted by the Government of India or any State Government to the Oil and Natural Gas Corporation or Oil India Limited on nomination basis,
 - **Petroleum operations undertaken under specified contracts**
 - Petroleum operations undertaken under specified contracts under the New Exploration Licensing Policy
 - Petroleum operations undertaken under specified contracts under the Marginal Field Policy (MFP)
- The relevant line item from list 33 is reproduced as under:

"All types of marine vessels to support petroleum operations including work boats, barges, crew boats, tugs, anchor handling vessels, lay barges and supply boats, marine ship equipment including water maker, DP system and Diving system"
- Given the above, where an EC is issued by the Director General of Shipping and/ or Director General of Hydrocarbons only to those engaged in the business of extraction and production of Oil & Gas, no custom duty shall be leviable for the importer basis the aforesaid notification.
- Accordingly, the assessee submits that income from vessel used under time charter contract with BGEPIIL being used in the oil fields for Production Sharing Contractor (ie BGEPIIL), would be classified as eligible receipts under section 44BB of the Act (ie the activities are in connection with prospecting for, exploration or production of mineral oil as envisaged under section 44BB of the Act). We have provided the technical analysis of the same under Point 4(c) below.

(B) *Vessel Jaya Vigilant under contract with McDermott*

- The vessel Jaya Vigilant was under a time charter contract with McDermott assisting in exploration work carried out by McDermott with ONGC in Indian waters.
- Similar to the contract with BGEPIIL, the vessel Jaya Vigilant was imported to India under an EC by McDermott in India.

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OFFSHORE**

- Further, the scope of work to be executed by MMA Offshore includes activities such as **pre-commissioning, commissioning work, subsea lifts and other support services**, which are in connection with prospecting for or extraction or production of mineral oils.
- Accordingly, the assessee submits that income from vessel used under time charter contract with McDermott being used in ONGC contracts in Indian waters, would be classified as eligible receipts under section 44BB of the Act (ie the activities are in connection with prospecting for, exploration
- or production of mineral oil as envisaged under section 44BB of the Act). We have provided the technical analysis of the same under Point 6(c) below.

Given the above background, we wish to submit as under:

1. **Submit the corporate structure with details of parent company(s), its parent company(s) and ultimate group company(s) along with name, address, country of incorporation, percentage shareholding.**

We have provided below the group structure for MMA, on tax return filing date, as **Annexure 3**.

Name of the ultimate holding company	Address of the ultimate holding company	Country of incorporation	Percentage of shares held
MMA Offshore Limited	Endeavour Shed, 1 Mews Road, Fremantle WA 6160, Australia	Australia	100%

Name of the holding company	Address of the holding company	Country of incorporation	Percentage of shares held
MMA Offshore Asia Pte. Ltd.	#08-01/03, Manulife Tower, 8 Cross Street, Singapore, 048424	Singapore	100%

Submit the details of income tax paid on the receipts received during the year in Singapore.

The receipts from BGEPIIL and McDermott are received by MMA in Singapore. However, as per local laws in Singapore, taxes were not required to be paid by MMA on such receipts.

As per Article 4 of the India-Singapore DTAA, the term "resident of a Contracting State" means any person who is a resident of a Contracting State in accordance with the taxation laws of that State. Further, "a person" is defined under Article 3 of the India-Singapore DTAA which *inter-alia* includes a company which is treated as a taxable unit under the local taxation laws.

In the instant case, we wish to submit that MMA is a taxable unit as per the local laws of Singapore and holds a valid Tax Residency Certificate (TRC) issued by the Singapore Revenue Authorities. A copy of TRC was submitted by MMA as a part of submission dated 24 July 2021.

Accordingly, MMA is eligible to claim the beneficial provisions under the India-Singapore DTAA.

Further, limitation of relief under Article 24 of the India-Singapore DTAA is applicable when the following conditions are satisfied:

OFFSHORE

- The said income should be subject to tax in the contracting state (say, Singapore), under its domestic tax law, **by reference to the amount thereof which is remitted** to the contracting state (say, Singapore) and not be with reference to the full amount thereof;
- Such income be exempt from tax or be taxed at a reduced rate in the other contracting state (say, India); and
- The said income should be from a source in the other contracting state (say, India)

If one or more of the above conditions is not satisfied in context of a particular income, then limitation of relief under Article 24 will not be applicable. In the instant case, it is pertinent to note that the income is being remitted to Singapore and is not subject to tax basis remittance of income under local taxation laws of Singapore. Accordingly, limitation of relief under Article 24 of the India-Singapore DTAA would not be applicable in the said case. Hence, MMA is eligible to claim benefits under the India-Singapore DTAA.

3. **In respect of MWV Falcon:**

- a. Details of vessel registration along with supporting documentary evidence.

The vessel MWV Falcon is a steel offshore supply ship registered in Singapore. A copy of the vessel registration certificate is enclosed as **Annexure 4**.

- b. Relationship with the vessel, whether owned or chartered along with supporting documentary evidences. If owned, year in which acquired along with cost and mode of acquisition, if chartered, name of owner with country and copy of charter agreement and relationship with owner.

The vessel is chartered from a related party, i.e. MMA Offshore Asia Pte. Ltd, a company incorporated under the laws of Singapore. A copy of charter agreement dated 27 August 2018 is enclosed as **Annexure 5**. The vessel is owned by Poet Shipbuilding & Engineering Pte Ltd, an unrelated party to MMA.

✓ 4. **As per submissions made by MMA, vessel "MWV Falcon" is time chartered by BG Exploration and Production India Pvt. Ltd. (BGEPIIL) for which agreement between assessee and BGEPIIL dated 24.09.2018 is submitted. In respect of this agreement, submit the following:**

- a. Country from where the vessel was dispatched to India under this agreement along with date of dispatch of vessel with supporting document, date of entry of vessel in India along with supporting document.

Vessel was dispatched to the Mumbai Port from Singapore on 20 October 2018. Please refer the vessel daily report enclosed as **Annexure 6**. Further, the vessel reached the Mumbai port on 1 November 2018. We have enclosed a copy of the vessel daily report as on 2 November 2018 which specifies the arrival date and time in Mumbai port as **Annexure 7**.

- ✓ Kindly note that a Vessel daily report is a document that is required to be maintained by the vessel on a daily basis. Amongst other information, it provides:

- Details that support client invoicing (i.e. the client is provided with the VDR's during the charter period)
- An operations report describing activities on board the vessel, including who boarded and disembarked the vessel; and
- A summary of port calls logging when the vessel arrives at and leaves a port.

**MMA
OFFSHORE**

- b. Date when the vessel was relieved by the charterer under said agreement along with supporting document.

The vessel was relieved by the charterer on 23 May 2019. Further, the vessel was enroute to Singapore from Mumbai port on 30 May 2019. A copy of the vessel daily report evidencing off-hire is enclosed as **Annexure 8** and **Annexure 9** respectively.

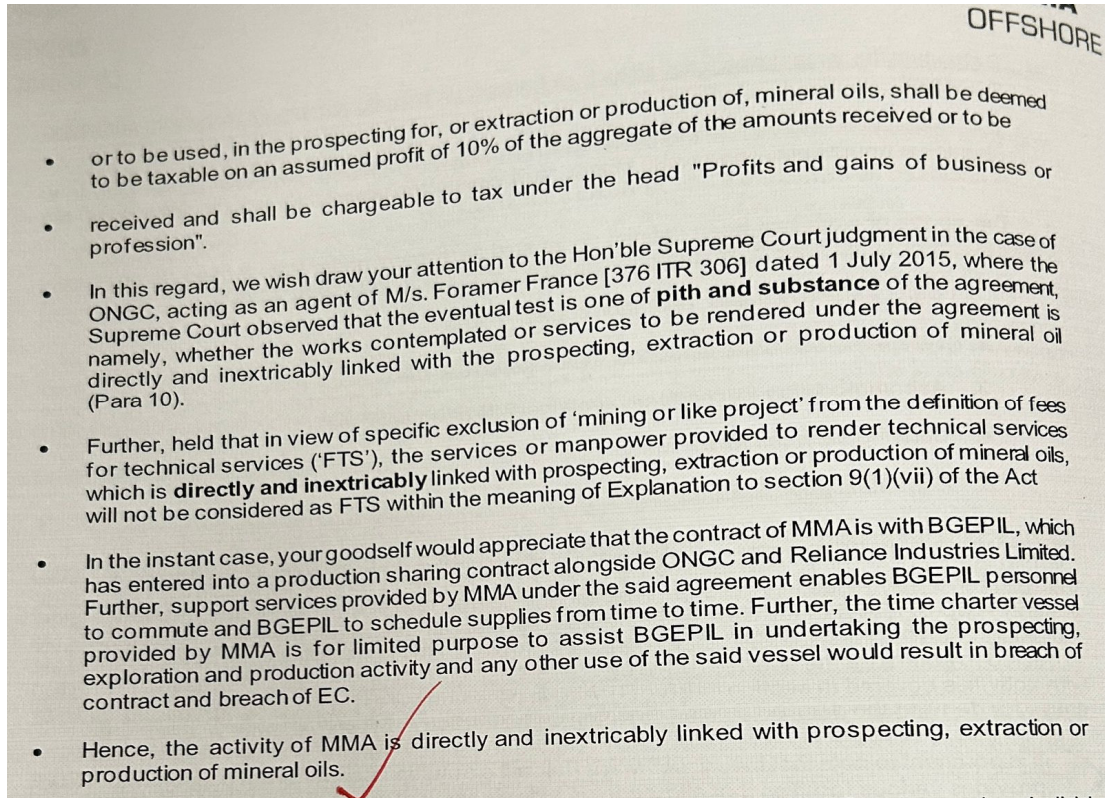
- c. The scope of work has been defined under said agreement under Para 2 titled "Scope" under "Technical Attachment B" wherein following items appear under scope of work:

1. Safety standby duties, operation standby duties
2. Bulk transfer, cargo, personnel transfer and food run,
3. Accommodation for charterer personnel with allied activities
4. Catering services for the crew
5. Communication facilities

Kindly submit the specific services provided under each above scope along with supporting documents. Further, substantiate as to how said activities are covered under section 44BB of IT Act. Please note that you have submitted in your submission that receipts from said agreement are covered under section 44BB of IT Act therefore you are bound to explain as to how activities performed by you are connected with prospecting for, exploration or production of mineral oils in India. Therefore, you are expected to submit all the activities done by you and establish their direct and inextricable connection with activities covered in section 44BB of IT Act. In case you fail to do so, please treat this as show cause for denying the deemed income provision under section 44BB of IT Act.

It is pertinent to note that the vessel "MWV Falcon" is a multipurpose offshore support vessel which provides various facilities that allow it to provide a variety of offshore services to exploration and production customers. For example, the vessel provides various tank capacities to carry fuel, water, ballast and drill water, deck space for carrying customers' equipment, deck crane and accommodation berths. The vessel was specifically designed, and is operated by MMASV, to provide marine offshore support services to exploration and production customers

- During the year under consideration, the vessel MWV Falcon was under a time charter contract with BGEPIIL to provide operational support services to BGEPIIL for exploration work carried out at the West Coast of India in Panna/ Mukta and Mid and South Tapti oil fields. BGEPIIL is a co-venturer under a Production Sharing Contract and requires support of MWV Falcon to undertake its operations in the oil fields.
- Further, as stated in Point (A) above, your goodself would appreciate that the vessel was imported to India under the EC for equipment to be used for prospecting or exploration or production of mineral oil. It is pertinent to note that the services provided by MWV Falcon is inextricably connected to BGEPIIL's activities, as it enables BGEPIIL personnel to commute and BGEPIIL to schedule supplies from time to time.
- Given the above, it is our humble submission that the said vessel is an integral part of provision of services in connection with prospecting for, exploration or production of mineral oils in India.
- As per section 44BB of the Act, revenue derived by a non-resident engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used,



11. From the reply of the assessee it can be seen that once again the assessee has explained in detail its claim of exemption.

12. To seek further clarification, the AO issued a third notice u/s 142(1) of the Act dated 17/09/2021, raising following queries:-

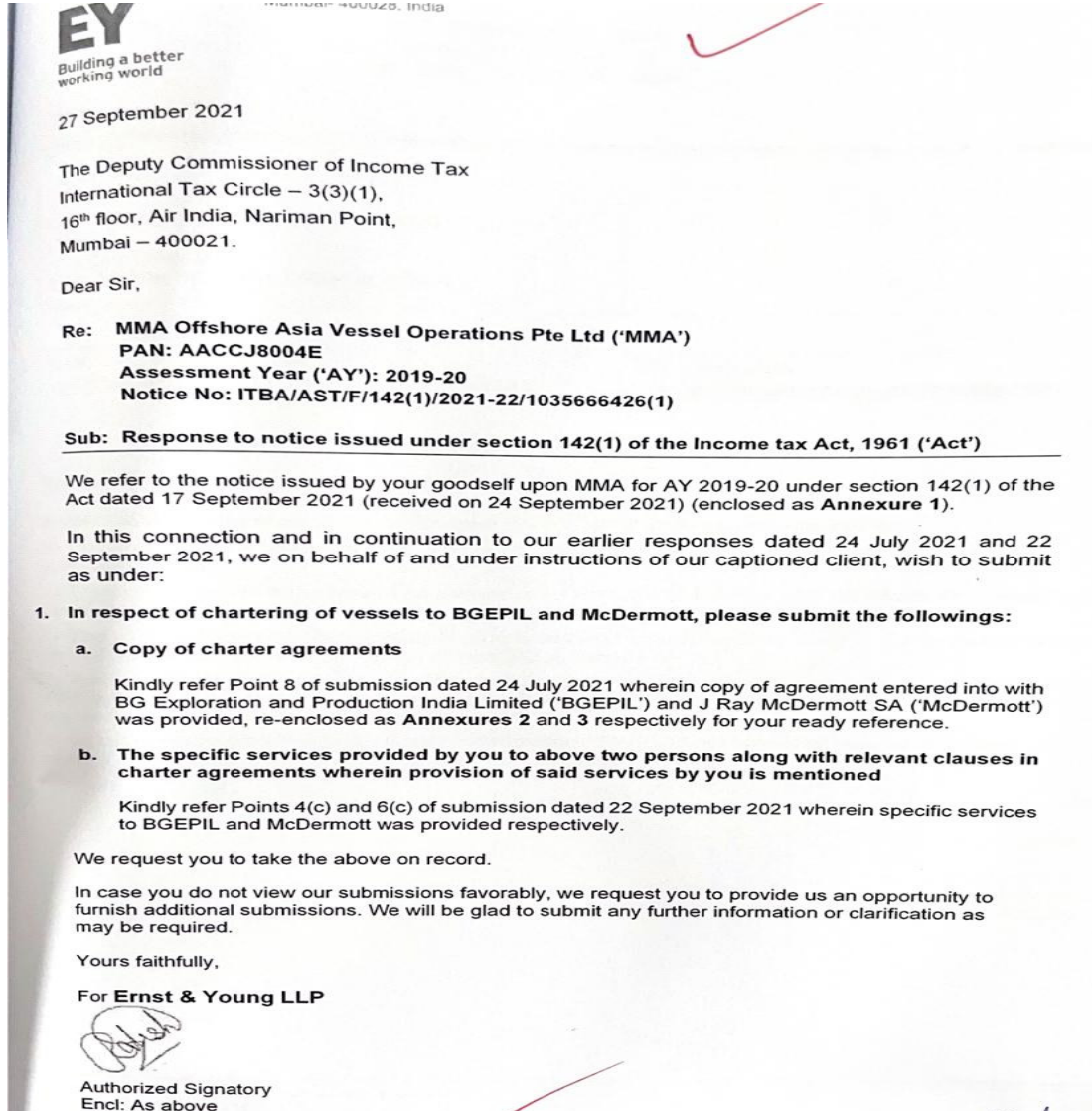
"In addition to queries raised vide notice u/s 142(1) dated 15.09.2021, you are required to furnish the following details:

1. In respect of chartering of vessels to BGEPIIL and McDermott, please submit the followings:

a) Copy of charter agreements,

b) The specific services provided by you to above two persons along with relevant clauses in charter agreements wherein provision of said services by you is mentioned."

12.1. To which, the assessee replied as under:-



12.2. In support of its claim of exemption, the assessee has also submitted the following certificates from the Directorate General of Hydrocarbons, Ministry of Petroleum & Natural Gas, Govt. of India:-

हाईड्रोकार्बन महानिदेशालय
पेट्रोलियम एवं प्राकृतिक गैस मंत्रालय
भारत सरकार
DIRECTORATE GENERAL OF HYDROCARBONS
Ministry of Petroleum & Natural Gas
Government of India

No. **ECIN201810290058- N**

Dated : 29-10-2018

The Deputy Commissioner of Customs,
MUMBAI SEAPORT

Sub: Essentiality Certificate for Import of Goods in terms of Custom Notification No. 50/2017-Customs dated 30th June-2017
(Clause (b) of Column (3) of S. No. 404 of Table, List 33 and Condition No. 48)

Ref: Production Sharing Contract entered into by the Govt. of India and the Operator mentioned below.

Operator's Name: BG Exploration & Production India Ltd
Importer's Name: BG EXPLORATION AND PRODUCTION INDIA LTD. ADDRESS: BG HOUSE, LAKE
BOULEVARD, HIRANANDANI BUSINESS PARK, POWAI, MUMBAI, MAHARASHTRA
400076
Total CIF Value: INR 1,70,88,89,574.22
Blocks: MID SOUTH TAPTI, PANNA-MUKTA
Invoice No.: CUMMA/2018/001 Dated: 08/10/2018 , CNIV/MMA/18/002 Dated: 08/10/2018

This is to certify that goods being imported, as per attached list, are required for petroleum operations for execution of project(s) under specified contract as per subject and reference matter mentioned above.

This has reference to said Custom Notification No. 50/2017-Customs dated 30th June-2017 (Clause (b) of Column (3) of S. No. 404 of Table, List 33 and Condition No. 48) issued by Ministry of Finance (Department of Revenue), New Delhi.

This certificate is valid for a period of six months from the date of issue.

Item/s: Eight (8)

No. of Sheet/s: Seven (7)

PASSED IN FULL
B/E No 8670195
30/10/18

PRAVEEN KUMAR
APPRAISER

SANDEEP SANCENA
By General Manager (D & H) (EC)
Deputy Commissioner of Customs
Directorate General of Hydrocarbons
Ministry of Petroleum & Natural Gas

हाईड्रोकार्बन महानिदेशालय
पेट्रोलियम एवं प्राकृतिक गैस मंत्रालय
भारत सरकार
DIRECTORATE GENERAL OF HYDROCARBONS
Ministry of Petroleum & Natural Gas
Government of India

No. **ECIN201712040035- N** Dated : 04-12-2017

The Deputy Commissioner of Customs,
Kakinada

Sub: Essentiality Certificate for Import of Goods in terms of Custom Notification No. 50/2017-Customs dated 30th June-2017.
(Clause (a) of Column (3) of S. No. 404 of Table, List 33 and Condition No. 48)

Ref: Petroleum Operation undertaken under Petroleum Exploration Licenses or Mining Leases granted by the Government of India or any state Govt. to the Oil & Natural Gas Corporation Ltd. or Oil India Ltd. on Nomination basis.

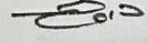
Operator's Name: Oil & Natural Gas Corp. Ltd.
Importer's Name: M/s J. Ray McDermott, S.A
413 A, B & C, 4TH Floor, Midas, Sahar Plaza, Kondivita, M.V. Road, Andheri East,
Maharashtra – 400 059, India
Total CIF Value: INR 14803,17,993.80
Blocks: NOMINATION BLOCK(S)-ONGC,
Invoice No.: JV/001 DATED 20.11.2017, JV/002 DATED 20.11.2017

This is to certify that goods being imported as per attached list, are required for petroleum operations for execution of project(s) under Petroleum Exploration Licenses or Mining Leases granted by the Government of India or any state Govt. to the Oil & Natural Gas Corporation Ltd. or Oil India Ltd. on nomination basis.

This has reference to said Custom Notification No. 50/2017-Customs dated 30th June-2017. (Clause (a) of Column (3) of S. No. 404 of Table, List 33 and Condition No. 48) issued by Ministry of Finance (Department of Revenue), New Delhi.

This certificate is valid for a period of six months from the date of issue.

Item/s: Nine (9) No. of Sheet/s: Forty Nine (49)


SANDEEP SAKSENA
Dy. General Manager (G) & HOD (EC)
Dy. Authorized Officer of the
Directorate General of Hydrocarbons
Ministry of Petroleum & Natural Gas
ONGC Bhawan, Tower-A, Plot No-2, Sector-73, Noida-201300
04 DEC 2017

13. From a thoughtful consideration of the aforesaid queries raised by the AO during the assessment proceedings and the detailed submissions made by the assessee, it is crystal clear that the AO raised specific queries and the assessee gave specific replies, therefore, we do not find any

justification in assumption of jurisdiction by the Id. CIT u/s 263 of the Act, wherein the Id. CIT setting aside the assessment order held that the assessment order is not only erroneous but also prejudicial to the interest of the revenue.

13.1. The entire case of the Id. CIT revolves around his allegation that the AO has not conducted proper enquiry into the details of the assessee's operations and has not applied his mind to the details provided by the assessee.

13.2. As explained elsewhere, the AO has made thorough enquiry and after considering the submissions and the documentary evidence took a view that the income of the assessee is not taxable. The view taken by the AO is against the plausible view on the facts of the case as explained elsewhere. Therefore, the allegation of the Id. CIT is not only baseless but also full of surmises and conjectures.

14. Assuming yet not accepting that the AO has not conducted proper enquiries, nothing prevented the Id. CIT to conduct enquiries as held by the Hon'ble High Court of Delhi in the case of *ITO vs. DG Housing Projects Ltd.* [2012] 343 ITR 329 (Delhi)(HC). The relevant findings read as under:-

"In cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the

error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT vs. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason

for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondents computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous".

The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."

15. It would not be out of place to refer to the judgment of the Hon'ble High Court of Delhi in the case of *CIT vs. Clix Finance India Pvt. Ltd.* ITA 1428/2018 order dated 01.03.2024. The relevant findings read as under:-

"19. A bare reading of sub-Section (1) of Section 263 of the Act makes it abundantly clear that the said provision lays down a two-pronged test to exercise the revisional authority i.e., firstly, the assessment order must be erroneous and secondly, it must be prejudicial to the interests of the Revenue. Further, Explanation 2 to Section 263 of the Act delineates certain conditions and circumstances when the order passed by the AO can be said to be erroneous and prejudicial to the Revenue.

20. *Clause (a) of Explanation 2 to Section 263 of the Act further stipulates that if an order is passed without making an enquiry or verification which should have been made, the same would bestow a revisional power upon the Commissioner. However, the said Clause or any other condition laid down in Explanation 2 does not warrant recording of the said enquiry or verification in its entirety in the assessment order.*

21. Admittedly, in the instant case, the questionnaire dated 02.11.2004, which has been annexed and brought on record in the present appeal, would manifest that the AO had asked for the allowability of the claims with respect to the issues in question. Consequently, the respondent-assessee duly furnished explanations thereof vide replies dated 09.12.2004, 20.12.2004 and 06.01.2005. Thus, it is not a case where no enquiry whatsoever has been conducted by the AO with respect to the claims under consideration. However, this whether the mandate of law for leads us to an ancillary question invoking the powers under Section 263 of the Act includes the cases where either an adequate enquiry has not been made and the same has not been recorded in the order of assessment or the said authority is circumscribed to only consider the cases where no enquiry has been conducted at all.

22. Reliance can be placed on the decision of this Court in the case of CIT v. Sunbeam Auto Ltd. [2009 SCC OnLine Del 4237], wherein, it was held that if the AO has not provided detailed reasons with respect to each and every item of deduction etc. in the assessment order, that by itself would not reflect a non-application of mind by the AO. It was further held that merely inadequacy of enquiry would not confer the power of revision under Section 263 of the Act on the Commissioner. The relevant paragraph of the said decision reads as under:-

“17. 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 Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer 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 Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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 Commissioner to pass orders under section 263 of the Act, merely because he has a 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. (1993) 203 ITR 108 (Bom), law on this aspect was discussed in the following manner

23. A similar view was taken by this Court in the case of CIT v. Anil Kumar Sharma [2010 SCC OnLine Del 838], wherein, it was held that once it is inferred from the record of assessment that AO has applied its mind, the proceedings under

Section 263 of the Act would fall in the category of Commissioner having a different opinion. Paragraph 8 of the said decision reads as under:-

“8. In view of the above discussion, it is apparent that the Tribunal arrived at a conclusive finding that, though the assessment order does not patently indicate that the issue in question had been considered by the Assessing Officer, the record showed that the Assessing Officer had applied his mind. Once such application of mind is discernible from the record, the proceedings under section 263 would fall into the area of the Commissioner having a different opinion. We are of the view that the findings of facts arrived at by the Tribunal do not warrant interference of this court. That being the position, the present case would not be one of “lack of inquiry” and, even if the inquiry was termed inadequate, following the decision in Sunbeam Auto Ltd. (2011) 332 ITR 167 (Delhi) (page 180) : “that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter.”

No substantial question of law arises for our consideration.”

24. *In Ashish Rajpal as well, this Court was of the view that the fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee.*

25. *Further, the decision of the Hon’ble Supreme Court in the case of Malabar Industrial Co. Ltd., enunciates the meaning and intent of the phrase “prejudicial to the interests of the Revenue”, in the following words:-*

“8. The phrase “prejudicial to the interests of the Revenue” is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. v. S.P. Jain [(1957) 31 ITR 872 (Cal)], the High Court of Karnataka in CIT v. T. Narayana Pai [(1975) 98 ITR 422 (Kant)], the High Court of Bombay in CIT v. Gabriel India Ltd. [(1993) 203 ITR 108(Bom)] and the High Court of Gujarat in CIT v. Minalben S. Parikh [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the Revenue.

9. *Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrisna Rice Co. v. CIT [(1987) 163 ITR 129 (Mad)] interpreting “prejudicial to the interests of the Revenue”. The High Court held:*

“In this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which

might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration."

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the

Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue.

10. *The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See Rampyari Devi Saraogi v. CIT [(1968) 67 ITR 84 (SC)] and in Tara Devi Aggarwal v. CIT [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323].)" [Emphasis supplied]*

26. *Recently, the Hon'ble Supreme Court in the case of CIT v. Paville Projects (P) Ltd. [2023 SCC On Line SC 371], while relying upon Malabar Industrial Co. Ltd., has discussed the sanctity of*

two-fold conditions for the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

*"27. Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of Malabar Industrial Co. Ltd. (supra). It is true that in the said decision and on interpretation of Section 263 of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income tax Act, the Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act. ***"*

16. Considering the facts of the case in totality, we are of the considered view that the AO has made specific enquiries to which the assessee has given specific replies. Therefore, it cannot be said that no enquiry was made by the AO and as held by the Hon'ble High Court of Delhi in the case of *Clix Finance India Pvt Ltd [supra]*, inadequacy of enquiry by the Assessing Officer with respect to certain claim would not in itself be a reason to invoke powers enshrined in section 263 of the Act.

17. We accordingly set aside the order of the Id. CIT u/s 263 of the Act and restore that of the AO dated 29/09/2021 framed u/s 143(3) of the Act. Accordingly, appeal of the assessee in I.T.A. No. 2566/Mum/2024 for AY 2019-20, stands allowed.

18. As mentioned elsewhere, the underlying facts in ITA No. 2567/Mum/2024 for AY 2020-21 are *mutatis mutandis* the same as considered hereinabove in ITA No. 2566/Mum/2024 for AY 2019-20, for our detailed discussions therein, appeal for AY 2020-21 is allowed. The order of the PCIT dated 31/03/2024 is set aside and that of the AO dated 23/09/2022 framed u/s 143(3) of the Act is restored.

19. In the result, appeals of the assessee are allowed.

Order pronounced in the Court on 8th November, 2024 at Mumbai.

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 08/11/2024

S.S.P.

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

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

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai