

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : "E" NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No: 1522/Del/2012
AY : - 2012-13

Oil and Natural Gas Corporation Limited vs. ITO,
DGM-Head, Corporate Tax, International Taxation,
Oil and Natural Gas Corporation Ltd., Aayakar Bhawan, 13-A
Room No. 244, Old Secretariat Building, Subhash Road,
Tel Bhawan, Dehradun 248003 Dehradun 248001
PAN AAACO1598A

(Appellant)

(Respondent)

ITA No: 1600/Del/2012
AY : - 2012-13

ITO vs. Oil and Natural Gas Corporation Limited
International Taxation as representative assessee of Degolyer &
13-A, Subhash Road, McNaughten, ONGC Ltd., Corporate Tax
Aayakar Bhawan, Division, Room No. 244, Tel Bhawan,
Dehradun. Dehradun

(Appellant)

(Respondent)

Assessee by : Shri Gaurav Jain, Advocate,
Bhavata Kumar, Advocate
Department by : Shri Anuj Arora, CIT DR

ORDER

PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

These cross appeals are directed against the order of the CIT(A)-II, Dehradun dated 16.1.2012 for the asstt. year 2012-13.

2. Facts in brief :- Oil and Natural Gas Corporation Limited (ON GC) had, against Contract No. EXPLIMMI903/2011-12/ZA4CS11005/5010063252 dated 19-04-2011,

made a payment of USD 4,25,000/- to DeGolyer and MacNaughton, USA (non-resident) towards third party certification of Ultimate Reserves and Reserves of 62 fields of ONGC. The non-resident is a tax resident of United States of America (USA) and does not have a Permanent Establishment (PE) in India in terms of Double Taxation Avoidance Agreement (DT AA) between India and USA. Certification work involves review of wire line logs, conventional cores and PVT analysis results, pressure-production history, geological correlations/sections and other related reservoir engineering, geological and production engineering data. The report has to certify Proved, Proved + Probable, and Proved + Probable and Possible ultimate reserves of oil, condensate, associated gas and free gas as on 01- 04-2011. The certification services were rendered by the non-resident from outside India. The representatives of the non-resident had, however, visited India only for two days just for collection of data required for certification services rendered by the non-resident. ONGC applied for an order under section 195(2) of the Income Tax Act, 1961 (Act) vide application dated 16.5.2011 to the Income Tax Officer (International Taxation), Dehra Dun (ITO). The ITO, vide order dated 30.5.2011 and Corrigendum thereto dated 4.7.2011, directed ONGC to deduct tax @ 10% plus surcharge and education cess on the gross contractual payments including the payments arising on account of all types of expenditures to be made to the non-resident, considering the payments to be made under the contract as "fees for technical services". The Indian tax liability of the non-resident has been borne by ONGC as per the contract with the non-resident. Accordingly, tax amounting to Rs. 22,51,135/- on the payment of USD 4,25,000/- released to the non-resident on 20.6.2011, was deposited by ONGC in Government account on 7.7.2011.

3. Thereafter ONGC filed an appeal before the Ld. CIT(A). The first appellate authority granted part relief. The Ld. CIT(A)-II held that NRC (non resident company) is providing an independent certification of oil reserves in 62 fields managed by M/s. ONGC and that this activity would not amount to passing on of any technical knowledge or experience or skill to ONGC, for the activity to qualify as FTS. He held that section 44BB of the Act applies squarely on the facts of this case. He held that the entire payment by ONGC to NRC should be subjected to tax @ 10% of the gross payment as amended u/s 44BB(1) of the Act. Aggrieved both assessee as well as the revenue are in appeal before us.

4. The grounds taken by the assessee are as follows :-

1. *"The Ld. Commissioner of Income Tax (Appeals)-II, Dehra Dun, has erred in law and in the facts and circumstances of the case in rejecting the contention of the appellant regarding non-taxability of the receipts of DeGolyer and MacNaughton, USA.*
2. *The Ld. Commissioner of Income Tax (Appeals)-II, Dehra Dun, has erred in law and in the facts and circumstances of the case in not directing that the tax deposited by the appellant on the sums payable to DeGolyer an MacNaughton, USA, be refunded to it."*

5. After hearing rival contentions we hold as follows :-

6. The function of NRC is to provide third party certification of oil reserves at 62 field owned or managed by M/s. ONGC. If the payment has to be treated as FTS as has been held by AO, it would have to be excluded from the purview of mining as mentioned in Explanation 2 to Sec. 9 (1) (vii) of the Act. The pertinent issue for consideration is whether at all, the work performed by the NRC, has a proximate nexus with the extraction of mineral oils.

7. The Ld. CIT(A) held as follows : "It is seen that the NRC is providing an independent certification of oil reserves in 62 fields managed by M/s. ONGC. This activity would not amount to passing on any technical knowledge or experience or skill to ONGC for the activity to qualify as FTS. What emerges most clearly on a reading of the contract is that the services provided by the NRC to ONGC are to be used exclusively for the purposes of prospecting for or exploration of mineral oils. Thus section 44BB of the Act applies squarely on the facts of this case. This also simultaneously puts this case out of purview of section 9(1)(vii) of the Act since the activities pertain to "mining". Since it is held that that services are as defined u/s 44BB of the Act, the judgment in the case of R & B Falcon Drilling Co. reported in 181 Taxman 62 (UK) has to be followed as in para 6 of this judgment it has been laid down that "the sum paid or payable, whether in or outside India to the assessee or to any person on his behalf on account of provisions of services and facilities in connection with.....". This case follows the ruling given in the case of Sedco Forex Intl. Inc. Reported in 299 ITR 238 (UK). Furthermore, in a case before the AAR [Western Geco Intl. Ltd. reported in 201 Taxman 101 (AAR-Delhi) it has been held, following the two case law of the Hon'ble Uttarakhand High Court, that once an assessee opts to come u/s 44BB(1) of the Act, the provision itself deems its profits and gains as 10% of aggregate of amounts specified in sub-section 2 of section 44BB of the Act, i.e. amount payable or paid whether in or out of India. In view of these rulings, the entire payments by ONGC to the NRC may be subjected to tax @ 10% of the gross payments as mandated u/s 44BB of the Act."

This decision that the Ld. CIT(A) is challenged by the revenue. Before going into the merits of the revenue in appeal, we take up the assessee's appeal.

8. It is not in dispute that the services in question were rendered outside India. The payment in question cannot be construed as fees for technical services under India-USA DTAA, as no technical knowledge, skill, know how etc. was made available to the assessee. The issue in question is no more res integra in view of the following judgments :-

1. DIT vs. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504
2. CIT vs. De Beers India Minerals (P) Ltd. 346 ITR 467

9. Thus the amount paid by ONGC to the NRC can be brought to tax only under article 7 of the Indo-USA DTAA as business profit, provided the NRC has a Permanent Establishment (PE) in India and the profit in question is attributable to such PE. Admittedly NRC does not have PE in India. Under these circumstances the receipt of the non resident cannot be brought to tax in India under the Indo-USA DTAA. Hence this ground of the assessee has to be allowed.

10. In the result ground No. 1 is allowed.

11. Ground No. 2 is consequential. The amount deposited by the assessee on the sums payable to DeGolyer and MacNaughton, USA should be refunded.

12. Ground No. 3 is general in nature.

13. In the result the appeal of the assessee is allowed.

14. Coming to the revenue's appeal, in view of our decision in the assessee's appeal, the revenue's appeal becomes infructuous. Hence the same is dismissed.

15. In the result the appeal of the assessee is allowed and the appeal of the revenue is dismissed.

Order pronounced in the open court on 16/5/2016.

sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

sd/-
(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 16/5/2016

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Copy of the Order forwarded to:

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

By order
Dy. Registrar