

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI "D" BENCH,
NEW DELHI

BEFORE SHRI R.K. PANDA ACCOUNTANT MEMBER AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No. 4284/DEL/2013
[Assessment Year: 2008-09]

Technip UK Limited C/o BMR & Associates LLP 22 nd Floor, Building No. 5 Tower 'A', DLF Cyber City, DLF Phase III, Gurgaon Haryana PAN : AACCT 8268 N (Appellant)	Vs.	The D.I.T. International - II New Delhi (Respondent)
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Assessee by: Shri Ajay Vohra, Adv
Shri Anshul Sachar, Adv
Shri Anuj Agarwal

Revenue by: Shri Anuj Arora, Sr- DR

Date of hearing : 24.01.2017

Date of pronouncement : 24.04.2017

ORDER

PER R.K. PANDA, ACCOUNTANT MEMBER:-

This appeal filed by the assessee is directed against the order dated 28.03.2013 passed u/s 263 of the Income-tax Act, 1961 by the DIT, [International Taxation], New Delhi relating to A.Y. 2008-09.

2. Facts of the case, in brief, are that the assessee is a company incorporated under the laws of United Kingdom. The assessee has been given sub-contract by Aker Installation FP AS (Aker') a portion of the Contract for installation of Subsea Facilities necessary for the first phase of D6 block development. Aker, a company incorporated in Norway, has entered into a contract ("Contract") with Reliance Industries Limited ("RIL"), a company incorporated in India for the commercial development of the MA D6 oil field in the block No KG DWN 98/3 off-shore Kakinada (hereinafter referred to as "MA-D6 block"). Under the contract Aker is in charge of the installation of manifolds, umbilical, flexible risers and flow lines and control systems in the D6 block] A portion of this contract had been subcontracted by Aker to the assessee.

3. The assessee filed its return of income on 31.03.2009 declaring taxable income of Rs. 39,63,29,420/-. During the course of assessment proceedings, the A.O observed that the assessee is performing in country services and out country services as per contract with Aker. The submission of the assessee that its in country services are taxable u/s 44BB of the Income-tax Act, 1961 and out country services are exempt since these are not fees for technical services under Article 13 of India-UK as these services do not make available any technical knowledge, experience, skill, know how etc. to Aker was accepted by the A.O. The A.O accordingly determined the profits and gains of business u/s 44BB of the Act at Rs. 39,63,29,420/- being

10% of gross Revenue and determined the total tax, surcharge, education cess, etc. at Rs. 16,73,69,914/-.

4. The DIT examined the assessment record and observed that the same appears to be erroneous in so far as it is prejudicial to the interest of the revenue for the following reasons:

- i) 44 BB does not cover '*second-leg*' contracts and this beneficial section is for assessees who are engaged in prospecting for or extraction or production of mineral oils and not for those engaged in providing technical services to contractors of those undertaking projects in oil exploration.
- ii) Assessee was thus *not taxable* under the presumptive provisions of sec 44BB in respect of income in the nature of FTS for a project not undertaken by the assessee, which is squarely covered under section 44DA and corroborated by clarificatory proviso to sec. 44BB and sec 44DA.
- iii) Further having wrongly allowed S 44BB on what are patently technical services, the AO went on to tax only the inside-India portion of receipts without bringing to tax an amount of Rs. 166,24,94,023/- which had been shown as outside-India *revenue* and has not been offered for taxation.
- iv) The AO in the assessment order has accepted the assessee's stand without going into the contract which clearly establishes that the contract is composite and Uttarakhand High Court in several cases has held that 44BB is applicable on both offshore and onshore receipts and should be taxed accordingly.

- v) Besides, the assessee has an admitted PE in India. The AO in the assessment order has not discussed the taxability of the above amount and has not brought to tax the above revenue. The order passed by the AO is thus both erroneous and prejudicial to the interests of revenue.
- vi) During the year an amount of 396,32,94,200/- has been shown as in-country receipts taxable u/s 44BB of the Income-tax Act, 1961. The AO in the assessment order has accepted the assessee's stand without going into the contract which clearly establishes that the nature of services are technical in nature and should have been taxed u/s 4, 5, 9(1) and 9(1)(vii) of the Income Tax Act 1961 accordingly.
- vii) The nature of the contract is composite and the services are technical and are undertaken by the assessee as a sub-contractor for Aker Installation FP AS who in turn is a contractor of RIL. The technical services are thus not rendered for, a project undertaken by the recipient". The order passed by the AO is thus both erroneous and prejudicial to the interest of revenue.
- viii) Since due to such erroneous order there has been loss of revenue the order of the Assessing Officer is clearly prejudicial to the interest of revenue. Though the words "*prejudicial to the interest of revenue*" have not been defined in the Act but it has been judiciously held they must mean that the orders of the assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State have not been realized or cannot realized.

5. He accordingly issued a notice u/s 263(1) of the Act to the assessee to explain as to why the order passed by the A.O should not be held as erroneous and prejudicial to the interest of the Revenue.

6. It was submitted by the assessee that the order passed by the A.O is not erroneous and prejudicial to the interest of revenue since the A.O has passed the order after conducting proper enquiries and due application of mind. It was argued that the A.O during the assessment proceedings had specifically asked the assessee to explain as to how the provisions of section 44BB of the Act are applicable in the case and as to why the receipts should not be taxed as fee for technical services. After examining the various details/information furnished by the assessee, the A.O has allowed the claim of the assessee and therefore, revision u/s 263 of the Act is not permissible. It was submitted that where two views are possible and the A.O has adopted one of the possible views to which the ld. DIT does not agree, the issue cannot be a ground for invoking jurisdiction u/s 263 of the Act.

7. However, the ld. DIT was not satisfied with the explanation given by the assessee. According to him, as per the settled legal position, revision of an order is not possible where two views are possible and the A.O has adopted one of the two possible views. However, in the instant case, the A.O has not adopted one of the possible views but has made wrong application of law. According to him, the A.O in the instant case has not

made proper enquiries to determine the nature of services rendered by the assessee. The assessee in the instant case has rendered services to Aker Installation FP AS [Aker] in relation to the commercial development of the MA D6 oil field in the Block No. KG DWN 98/3 offshore Kakinada, under the contract. According to him, the provisions of section 44BB does not cover the second-leg contracts and this beneficial section is for assessees who are engaged in prospecting for or extraction or production of mineral oils and not for those engaged in providing technical services to contractors of those undertaking projects in oil exploration. Therefore, the assessee being a second-leg contractor is only providing technical services to Aker and any sum in the nature of fees for technical services, for a project not undertaken by the recipient is outside the scope of section 44BB.

8. The Id. DIT, thereafter, analyzed the contract between Aker and the assessee dated 13.11.2007 and came to the conclusion that the characterization of receipts from Aker is unequivocally for technical services and technical personnel. He, thereafter, analyzed the provisions of section 9(1)(vii) and came to the conclusion that payment covered u/s 9(1)(vii) are ineligible for section 44BB of the Act.

9. Rejecting the various explanations given by the assessee and relying on various decisions, he held that the A.O was in error in assessing the income by way of FTS received by the assessee by applying the provisions of

section 44BB(1) of the Act. He further observed that since the nature of the contract is a composite one, provisions of section 44BB of the Act is applicable to both off-shore and on-shore receipts and should be taxed accordingly. However, the A.O went on to tax only the inside India portion of receipts without bringing to tax an amount of Rs. 1,66,24,94,023/- which had been shown as outside India revenue and had not been offered for taxation. Without proper enquiry, the A.O has accepted the claim of the assessee and as such, on this ground alone, the order of the A.O is erroneous.

10. Rejecting the various explanations given by the assessee and distinguishing the various decisions cited before him, the Id. DIT held that the order passed by the A.O is erroneous and prejudicial to the interest of the Revenue since the A.O has not adopted one of the possible views but has made wrong application of law. Further, the A.O has not made proper enquiries to determine the nature of services rendered by the assessee. The view taken by the A.O is an erroneous view and also prejudicial to the interest of the Revenue. In view of the above, the DIT cancelled the order passed by the A.O with the direction to make fresh assessment after conducting proper enquiries and after giving the assessee adequate opportunity of being heard.

11. Aggrieved with such order of the DIT, the assessee is in appeal before us with the following grounds :-

1. *That the order dated March 28, 2013 passed by the Director of Income Tax, International Taxation - II, New Delhi ("DIT") under section 263(1) of the Income-tax Act, 1961 ("Act") is without jurisdiction, void an initio and deserves to be quashed.*
2. **MAINTAINABILITY / VALIDITY OF REVISIONARY PROCEEDINGS**
 - 2.1 *That on facts and circumstances of the case and in law the DIT has erred in initiating the proceedings under section 263 of the Act without appreciating that the Assessing Officer ("AO") had passed the assessment order after detailed examination of facts in the Appellant's case and position of law.*
 - 2.2 *That on facts and circumstances of the case and in law, the DIT has erred in invoking provisions of section 263 of the Act without appreciating that the view adopted by the A.O in the course of assessment, regarding taxability of receipts from the contract with Aker Installation FP AS ("Aker") was a possible view and, therefore, the order was not erroneous and prejudicial to the interest of the revenue.*
 - 2.3 *That on facts and circumstances of the case and in law, the DIT has erred in invoking provisions of section 263 of the Act alleging that the AO had wrongly applied the law and therefore the order was erroneous and prejudicial to the interest of revenue.*
 - 2.4 *That on facts and circumstances of the case and in law, the DIT has erred in invoking the provisions of section 263 of the Act on the basis of the note sent by the AO and cancelling the order dated December*

27, 2010 of the AO and directing him to make a fresh assessment.

3. **APPLICABILITY OF SECTION 44BB OF THE ACT**

3.1 *That on facts and circumstances of the case and in law, the DIT has erred in holding that provisions of section 44BB of the Act were not applicable to services rendered by the Appellant to Aker.*

3.2 *That on facts and circumstances of the case and in law, the DIT has erred in holding that section 44BB of the Act does not cover services rendered by “second leg” contractors in connection with prospecting for or extraction or production of mineral oils.*

3.3 *That on facts and circumstances of the case and in law, the DIT has erred in holding that consideration for services rendered by the Appellant to Aker was in the nature of fee for technical services (“FTS”) within the meaning of section 9(1)(vii) and was, therefore, not entitled to the beneficial provisions of section 44BB of the Act.*

4. **TAXABILITY OF BOTH IN-COUNTRY AND OUT-COUNTRY RECEIPTS**

4.1 *That on facts and circumstances of the case and in law, the DIT has erred in holding that both in-country as well as out-country receipts from the contract with Aker shall be taxable in India.*

4.2 *That on facts and circumstances of the case and in law, the DIT has erred in holding that the AO has not discussed the taxability of the out-country receipts and has not brought to tax the said receipts.*

4.3 *That on facts and circumstances of the case and in law, the DIT has erred in concluding that the contract with Aker was a composite works contract and receipts therefrom could not be dissected/ segregated into in-country and out-country receipts.”*

12. The Id. Counsel for the assessee referring to the notice issued by the Id. CIT u/s 263 of the Act, the details of which have already been reproduced in the preceding paras, submitted that the DIT initiated revisionary proceedings u/s 263 of the Act on the ground that the A.O did not go through the contract between the assessee and Aker. He submitted that the A.O during the course of assessment proceedings had specifically analyzed the contract before concluding that the case of the assessee falls within the ambit of specific provisions of section 44BBB of the Act. Thus, the basic premise for initiation of revisionary proceedings is incorrect.

13. Referring to the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd reported in 243 ITR 83 [SC], he submitted that the Id. CIT can revise an order of assessment u/s 263 of the Act only if it is erroneous and prejudicial to the interest of the Revenue. The twin conditions, namely (a) order is erroneous and (b) prejudicial to the interest of the Revenue must be cumulatively satisfied before the Id. CIT can seek to exercise revisionary jurisdiction u/s 263 of the Act. For the above proposition, he also relied on the following decisions:

- a) CIT Vs. Max India Limited reported in 268 ITR 128 [P&H]
- b) CIT V. Arvind Jewellers: 259 ITR 502 (Guj.)
[SLP of the Revenue dismissed in 266 ITR (St.) 101.]
- c) Vimgi Investment (P) Limited: 290 ITR 505 (Del)
- d) CIT vs. Vikash Polymers: 194 Taxman 57 (Del)
- e) CIT v. Hindustan Coca Cola Beverages (P) Ltd.: 331 ITR 192:(Del.)
- f) CIT v. International Travel House Ltd.: 194 Taxman 324 (Del.)
- g) CIT v. Kelvinator of India: 323 ITR 231 (Del.)
- h) CIT vs. Gabriel India Limited: 203 ITR 108 (Bom)
- i) Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)
- j) CIT V. D.P. Karai: 266 ITR 113 (Guj.)
- k) N.N Aggarwal v. CIT: 189 ITR 769 (All.)
- l) Bhartia Industries Ltd. v. CIT: 353 ITR 486 (Cal.)
- m) Paul Mathew & Sons V. CIT: 263 ITR 101 (Ker.)
- n) CIT V. Mepco Industries Limited: 294 ITR 121 (Mad.)
- o) Delhi Airport Metro Express Pvt. Ltd vs. Pr. CIT:
ITA No. 2813/Del/2016 dated 12.01.2017

14. The ld. Counsel for the assessee referring to various pages of the paper book submitted that the assessee had at the time of filing of return of income as well as during the course of original assessment proceedings had submitted all relevant facts and material before the A.O with respect to its claim of taxing in country receipt under the contract in terms of section 44BB of the Act. He submitted that after considering the various details/documents/submissions, such as, computation of income specifically stating that the assessee is a non resident engaged in undertaking installation of subsea facilities services and the contractual receipts had

been offered to tax u/s 44BB of the Act and justification regarding applicability of section 44BB of the Act in respect of contractual receipts had passed original assessment order u/s 143(3) of the Act accepting the income returned by the assessee relating to in country receipts u/s 44BB of the Act. The A.O had also accepted that receipts for out country services are not taxable in India in view of Article 13 of the India- UK DTAA. Since the assessee had filed relevant details/documents during the course of assessment proceedings itself, which clearly would be that all necessary facts/information were available before the A.O. Based on the appreciation of these details/documents, the A.O had passed original assessment order and therefore, it cannot be stated that there is no enquiry by the A.O.

15. He submitted that since the A.O in the instant case had conducted necessary enquiries before completing assessment, therefore, by no stretch of imagination it can be stated that no enquiry had been conducted by the A.O during the course of original assessment proceedings. Referring to various decisions, the ld. counsel for the assessee submitted that where an issue has been examined by the A.O, the ld. CIT cannot set aside the assessment merely because according to the ld. CIT enquiry should have been conducted in a particular manner and/or further enquiries ought to have been conducted by the A.O. He submitted that no jurisdiction u/s 263 of the Act can be assumed merely on the basis of inadequate enquiries and the ld. CIT cannot substitute his opinion in place of that of the A.O as to the

manner and form in which enquiries should have been conducted during the course of assessment proceedings.

16. Referring to various decisions including that of the Jurisdictional High Court of Delhi in the case of DIT Vs. Jyoti Foundation reported at 357 ITR 388 [Del], he submitted that before setting aside an assessment as erroneous and prejudicial to the interest of the Revenue, the ld. CIT must record prima facie finding on merits, pointing out the error in the assessment and how the same has caused prejudice to the interest of the Revenue. Referring to the order of the ld. CIT, he submitted that there is no firm/definitive finding by the ld. DIT on the issue as to how the order passed by the A.O is erroneous and prejudicial to the interest of the Revenue. On the issue of taxability of contractual revenues u/s 44BB of the Act, the DIT in the impugned order has set aside the impugned assessment order, inter alia, on the ground that proper enquiries were not conducted and with a direction to the A.O to conduct proper enquiries and thereafter to pass fresh assessment order. The DIT has not pointed out the error, much less prejudice caused to the interest of Revenue, before setting aside the assessment. He submitted that the only attempt of the DIT has been to somehow hold the order passed by the A.O to be erroneous on the pretext of certain enquiries, which according to the ld. DIT, had either not been conducted or had been conducted in a manner/form not acceptable to the DIT, which is again, contrary to law. He accordingly submitted that the

order is clearly in violation of principles laid down by the courts, particularly the Hon'ble jurisdictional High Court of Delhi.

17. So far as the merit of the case is concerned, the ld. counsel for the assessee drew the attention of the Bench to the provisions of section 44BB of the Act, and submitted that the following conditions are required to be cumulatively satisfied for claiming taxability under this deeming section:

- a) The recipient of income should be non-resident;
- b) The non-resident should be engaged in the business of provisions of services or facilities or should supply plant and machinery on hire;
- c) The services rendered or the plant and machinery provided on hire should be used in connection with prospecting extraction and production of mineral oil; and
- d) The income from services rendered should not be taxable under the provisions of section 42, or section 44AD or section 115A or section 293 of the Act.

18. He submitted that the provision of section 44BB of the Act is a special, specific and exclusive provision providing for deemed/presumptive basis of taxation in case of non residents providing, inter alia services of facility in connection with prospecting for or exploration or production of mineral oils

in India. The words 'in connection with' are of the widest amplitude and would include services or facilities provided by a non resident to a person who is engaged in exploration or production of mineral oil. It is not necessary that the person providing such services or facility must be engaged in such activities.

19. Referring to the following decisions, he submitted that the scope of section 44BB of the Act is wide and includes consideration for any services of whatever nature rendered by a non resident entity in connection with the prospecting for, or extraction or production of mineral oil in India:

- Geofizyka Torun Sp zoo [2010] 320 ITR 268 [AAR]
- ACIT Vs. Paradigm Geophysical Private Limited [2008] 117 TTJ 812
- Lloyd Helicopters International Pty Ltd [2001] 249 ITR 162
- Seabird Exploration FZLLC [2010] 320 ITR 286
- Wavefield Inseis Asa [2009] 320 ITR290
- McDermott International Inc. Vs. DCIT [1994] 49 ITD 590 [Del]

20. The ld. counsel for the assessee referring to the exclusions as per the proviso to section 44BB submitted that the proviso specifically excludes cases where provisions of section 42 or 44D or 115A or 293 A of the Act are applicable for the purpose of computing income in accordance with those sections.

21. He submitted that provisions of section 42 of the Act applies to companies engaged in the business of prospecting for, or extraction or production of mineral oil, in relation to which it has entered into an agreement with the Central Government, i.e., exploration and production companies. Similarly, section 293A grants power to the Government to make exemption to certain companies in respect of taxability of their income. Section 44D of the Act applies to contracts entered into by non-residents before April 1, 2003. Further, section 115A of the Act inter-alia provides that fees for technical services received by a non-resident pursuant to an agreement made by such non-resident with the Government or an Indian concern is taxable @ 10 percent. He submitted that the aforesaid sections are not applicable in the instant case due to the following reasons:

- a) Section 42 and section 115A of the Act are not applicable since the assessee has entered into a contract with Aker, which is a non-resident company for the purposes of the Act.
- b) Section 44D of the Act is not applicable since the assessee has entered into the contract on 13.11.2007, i.e., after 31.03.2003

22. He submitted that the assessee's scope of work in relation to the activities to be performed in India under the Contract involves rendition of services in relation to installation of manifolds, umbilicals, flexible risers and flowlines and control systems in the D6 block and the associated engineering necessary for the installation of facilities in the

first oil phase of the MA D6 oil field development. Accordingly, the services rendered by the assessee in India in connection with exploration, extraction and production of mineral oil are taxable in terms of section 44BB of the Act.

23. The ld. counsel for the assessee also referred to the provisions of section 44DA read with section 9(1)(vii) of the Act. Referring to Instruction No. 1862 dated 28.02.1998 issued by the CBDT he submitted that as per the said Instruction, the mining project or like project would include rendering of services like imparting of training for carrying out drilling operation in connection with extraction of mineral oil. Referring to the decision of the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Limited Vs. CIT reported in 376 ITR 306, the ld. counsel for the assessee submitted that the Hon'ble Supreme Court in the said decision has held that payments for providing various services in connection with imparting training and carrying out drilling operations for exploration of and extraction of oil and natural gas would be chargeable to tax under the provisions of section 44BB and not section 44D of the Act.

24. He submitted that the amendment brought out by the Finance Act, 2010, in Section 44BB and 44DA of the Act amounts to substantial change in the scheme of taxation of income arising to non residents engaged in the business of prospecting/extraction of mineral oils. Such a substantial

amendment can take effect prospectively and cannot have retrospective operation. He referred to the decision of the Hon'ble Uttarakhand High Court in the case of B.J. Services Vs. DDIT reported in 339 ITR 169 wherein it has been held that the above amendment made by the Finance Act, 2010 would apply prospectively from A.Y 2011-12 and onwards. He submitted that the above decision of the Single Judge has been confirmed by the Division Bench of the Hon'ble Uttarakhand High Court vide order dated 28.05.2013.

25. Referring to the decision of the Hon'ble Delhi High Court in the case of DIT Vs. OHM Ltd reported in 352 ITR 406, he submitted that the Hon'ble High Court in the said decision has held that income received from services rendered in connection with providing services in relation to extraction and production of mineral oil should be taxable u/s 44BB and not u/s 44DA of the Act and the amendment to the aforesaid sections by the Finance Act, 2010 could not have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation, so as to take away the separate identity of section 44BB of the Act. He submitted that the Hon'ble High Court of Delhi in the case of PGS Exploration [Norway] AS Vs. ADIT 68 Taxmann.com 143 [Delhi] followed its earlier order in the case of DIT Vs. OHM Ltd [supra].

26. Referring to the decision of the Delhi Bench of the Tribunal in the case of CGG Veritas Services, SA Vs. Addl. DIT reported in [2012] 50 SOT 335, he submitted that the Tribunal in the said decision has held that for the A.Ys 2004-05 to 2010-11, income in the nature of fees for technical services earned by those non resident entities engaged in oil and gas sector who have PE in India and where such income is effectively connected with the PE, would be taxable only u/s 44BB of the Act. He also relied on the following decisions.

- Schlumberger Asia Services Ltd. Vs. Addl DIT : ITA No. 6063/DEL/2010
- Western Geco International Ltd. Vs. Addl DIT : ITA No. 5977/DEL/2010

27. The ld. counsel for the assessee submitted that in the absence of retrospective operation of amended proviso to section 44BB of the Act, payments received in relation to in country services i.e. the activities carried out in India has to be taxed under the said section and not under section 44DA of the Act. Without prejudice to the aforesaid argument that services in the case of the assessee do not qualify as fee for technical services within the meaning of the Act, he submitted that the provisions of section 44DA also do not apply to the assessee's case because section 44DA only covers payments in the nature of 'royalties' or 'fees for technical services' by a Government or an Indian concern to a non resident company. However, in the instant case, payment has been received by the assessee

from another non-resident company, i.e. Aker and, therefore, section 44DA is rendered inapplicable.

28. The ld. counsel for the assessee submitted that the provisions of section 44BB are applicable to second level contractors. He submitted that section 44BB of the Act, inter-alia, 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.

29. Referring to the following decisions, he submitted that provisions of section 44BB of the Act are applicable to the assessee, being a second level contractor/ sub-contractor:

- a) Oil & Natural Gas Corporation Ltd. vs. CIT: 376 ITR 306 (SC)
- b) Louis Dreyfus Armateures SAS vs. ADIT: 54 taxmann.com 366 (Delhi)
- c) Pride Offshore International LLC vs ADIT: 59 taxmann.com 23 (Delhi)
- d) ADIT V International Technical Services LLC:71 taxmann.com 351 (Del)
- e) Iranian Offshore Engineering & Construction Company vs.
ADIT: 76 taxmann.com 95 (Delhi)
- f) Micoperi S.P.A. Milano vs DCIT [2002] 82 ITD 369 (Mumbai)
- g) McDermott International Inc vs DCIT [1994] 49 ITD 590 (Delhi)
- h) Bourbon Offshore Asia Pte Ltd [2011] 337 ITR 122 (AAR)
- i) Spectrum Geo Ltd [2012] 346 ITR 422 (AAR)
- j) Wavefield Inseis ASA (AAR No 844 of 2009)
- k) Lloyd Helicopters Pty Ltd [2001] 249 ITR 162 (AAR)

30. The ld. counsel for the assessee while arguing that the receipts for out-country services are not taxable in India, submitted that during the impugned assessment year, the assessee had undertaken certain activities from outside India in the nature of project engineering, assistance in System Integration Testing (SIT), pre-commissioning, etc. in relation to commercial development of MA D6 block under the Contract No.1001-ZZ-8022-01 entered into with Aker. He submitted that income received in respect of such activities performed outside India was not offered to tax in India because of the following reasons:

(a) Taxability under the India-UK DTAA

In terms of section 90(2) of the Act, provisions of the Act are overridden by the provisions of the DTAA, to the extent more

beneficial to the non-resident assessee. In the present case, the assessee is a resident of UK and entitled to claim benefit under the Indo-UK DTAA.

(b) Article 7 of the Indo-UK DTAA

The assessee's income taxable in India shall only be so much of profits under the contract as is attributable to the PE in India. Referring to Article 7(1) and 7(2) of the India-UK DTAA, he submitted that profits attributable to PE in India shall be only profits arising from activities carried out by the PE in India. For the above proposition, he relied on the following judicial precedents:

a) *Carborandum Co vs CIT* [1977] 108 ITR 335 (SC)-

b) *CIT vs. Hyundai Heavy Industries*: 291 ITR 482 (SC)

31. He submitted that the ratio decidendi laid down by the Supreme Court squarely applies to the instant case since the out-country scope of the work under the Contract had been performed by the appellant from outside of India and without the intervention of the said permanent establishment in India.

32. The ld. counsel for the assessee drew the attention of the Bench to Paragraph (9) of Article 7 of the India-UK DTAA which provides as under:

“9. Where profits include items of income which are dealt with separately in other Articles of this convention, then the provisions of those Articles shall not be affected by the provisions of this Article.”

33. The ld. counsel for the assessee submitted that the taxability of the receipts by way of technical services rendered by the assessee had therefore, to be considered under Article 13 of the India-UK DTAA which reads as under:

“6 The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply.”

34. He submitted that the taxability of amounts received for services rendered had, in the absence of applicability of Article 13 is to be considered in terms of Article 7 of the India-UK DTAA. For the above proposition, he drew the attention of the Bench to the decision of the Delhi Bench of the Tribunal in the case of Paradigm Geophysical (supra) which reads as under:

“16. It was also contended by the revenue that if article 12(3)(g) of the DTAA was not applicable then one had to go back to the domestic law, namely, the Act and tax the receipt as fees for technical services within the meaning of section 9(l)(vii)(b) read with Explanation 2 thereunder. What article 7(7) seems to convey is that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the treaty, then those provisions would apply to those items. Per contra, if it is found that those provisions are not applicable to those items of income, then the logical result would be that those items of income would remain in article 7 and would not go out of the same. Such items of income which do not fall under any other provision of the double tax treaty, would continue to be viewed as business profits covered by article 7. Fees for technical services is essentially business profit, since the rendering of such services is the business of the non-resident. In order to take out an item of income from the business profits, it is necessary under article 7(7) that there should be some other provision in the treaty dealing specifically with the item of income sought to be taken out from the business profits. If there is no other provision in the treaty or if the provision made in the treaty is not found applicable or to cover the item of income sought to be taken out from the business profits, for whatever reason, then it follows that the particular item of income should continue to remain under article 7.

17. Therefore, the amount received by the assessee-company from RIL under the contract did not represent consideration for any technical services rendered by RIL, or consisted of the development and transfer of any technical plan or design within the meaning of article 12(3)(g) of the DTAA. The consideration would continue to be viewed as business profits under article 7 of the treaty and since the assessee

had no PE in India, the business profits could not be taxed in India. Therefore, the order of the Commissioner (Appeals) deserved to be upheld. ”

35. The ld. counsel for the assessee submitted that since the in country and out country receipts are to be considered as business profits, taxation thereof has to be governed by Article 7 of the paragraph of DTAA. He submitted that considering that out-country scope of the Contract was performed before setting up of the permanent establishment in India and / or without the intervention of the said permanent establishment, income from such out-country works was not attributable to such PE and could not, therefore, be taxed under Article 7(1) of the India-UK DTAA. Taxability of in country receipts which are admittedly attributable to the PE are determined in terms provisions of Article 7 of India-UK DTAA, as per the local laws, viz, section 44BB of the Act. He submitted that the view taken by the assessing officer in (i) not bringing to tax out-country receipts and (ii) taxing in country receipts in terms of section 44BB of the Act being in accordance with the provisions of the Act and decided judicial precedents cannot be said to be erroneous much less prejudicial to the interest of Revenue in view of the following decisions:

- CIT vs. Sunbeam Auto Ltd: 332 ITR 167 (Del)
- CIT v. International Travel House: 344 ITR 554 (Del)
- CIT vs. Vikas Polymers: 341 ITR 537 (Del)
- Gulmohar Finances Limited: 170 Taxman 483 (Del.)

- Fab India Overseas vs. CIT: 244 CTR 380 (Del.)
- CIT vs. Vodafone Essar: 212 Taxman 184 (Del.)
- CIT v. Ratlam Coal Ash Co: 171 ITR 141 (MP)
- CIT vs. Ganpat Ram Bishonoi: 152 Taxman 242 (Raj.)
- CIT vs. Mehrotra Brothers : 270 ITR 157 (MP)
- CIT vs. Associated Food Profits (P) Ltd. : 280 ITR 377
- CIT vs. Development Credit Bank Ltd: 323 ITR 206 (B

36. The ld. counsel for the assessee submitted that the issue regarding taxability of in-country and out-country receipts in any case is debatable. Therefore, in view of the decisions of different Benches of the Tribunal and Hon'ble High Courts including the decision of the Hon'ble Delhi Court in the case of CIT vs. DLF Ltd. reported in 350 1TR 555 (DEL), the CIT/DIT has no jurisdiction u/s 263 where the issue is debatable. He accordingly submitted that both on merits as well as on legal grounds, the order passed u/s 263 by the DIT being illegal has to be quashed.

37. The ld. DR, on the other hand, heavily relied on the order of the DIT. He submitted that the DIT has passed a 30 page speaking order and has assumed jurisdiction u/s 263 of the Act on several grounds/aspects. He submitted that even if one of the grounds/aspects taken by the CIT/DIT satisfies the requisite conditions, the appeal of the assessee fails. Referring to page 2 of the order passed u/s 263 of the Act, the ld. DR submitted that the A.O has not brought to tax outside India Revenue of about 166.26 crores which has been addressed by the DIT at pages 18 to 21 of his order passed

u/s 263 of the Act. Referring to page 19 of the order passed u/s 263 of the Act, the ld. DR submitted that the DIT has noted that this is without prejudice to the finding that entire receipts/income should have been assessed as FTS received by the assessee by applying provisions of section 44BB (1) of the Act. Referring to the provisions of section 44BB of the Act, he submitted that as per the said provision, even so called outside India Revenue needs to be brought to tax. For the above proposition, he relied on the decision of the Hon'ble Uttarakhand High Court in the case of R & B Falcon Drilling Co. reported in 181 Taxman 62 [Utt.HC]. He also relied on the decision of the Hon'ble Uttarakhand High Court in the case of Sedco Forex reported in 299 ITR 238 [Utt.HC].

38. He accordingly submitted that in view of the above judgments, the wording of section 44BB of the Act are clear regarding taxability of outside India revenue due to the following:

- a. Section 5 and section 9 both are aimed at the income for the taxability under section 4 of the Act, while section 44BB does not take into account the income for calculating the aggregate amount to calculate 10 per cent, profits and gains.
- b. Profits and gains is a type of income to be taxed under a legal fiction, i.e., at 10 per cent, of the amount specified in sub-section (2) of section 44BB.

c. Section 44BB is a special provision relating to the non resident assessee who is providing services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in or outside India. The section is a complete code in itself.

d. The amount referred in sub-section (2) of section 44BB are four types of amounts and all the four types of amounts are mutually inclusive and has to be taken into account either all of them or any of them and its clauses themselves provide that whether the payment is made inside India or outside India.

39. So far as the argument of the ld. counsel for the assessee that the explanation/letter dated 27.12.2010 filed by the assessee explaining as to why the income from services rendered outside India in respect of contract executed during the period under consideration should not be taxed and that the A.O has taken a possible view that corresponding services do not make available any technical knowledge, experience, skill, knowhow, etc. is concerned, he submitted that the A.O has accepted the explanation submitted by the assessee on the issue of outside India Revenue mechanically without due application of mind and without making any further enquiries or bringing any further material on record. The letter addressed by the assessee do not address the various provisions of section 44BB of the Act. Therefore, the DIT was fully justified in holding that the order of the A.O is erroneous. Referring to the decision of the Hon'ble

Madhya Pradesh High Court in the case of Arjun Singh & Ors [2000] 246 ITR 363 [MP], he submitted that the orders cannot be passed mechanically in order to discharge statutory obligation. He submitted that since the A.O has not conducted proper enquiry and has merely accepted the submissions made by the assessee, therefore, the order has become erroneous as well as prejudicial to the interest of the Revenue and therefore, the DIT has correctly assumed jurisdiction u/s 263 of the Act.

40. The ld. DR submitted that the above is only one aspect of the several aspects taken up by the Ld. DIT to illustrate that all the principles laid by the Hon'ble SC in Malabar Industrial have been followed and met by the Ld. DIT for assuming jurisdiction u/s 263. He submitted that this should suffice in defeating the challenge to the order u/s 263.

41. He submitted that the ld DIT at page 14 - 15 of her order has relied on the decision of the Hon'ble Uttarakhand High Court in the case of ONGC Foramer France reported in 299 ITR 438 wherein the relevant activities were held as FTS as against being covered u/s 44BB as well as the clarificatory amendment brought in S.44BB. Similar to this case law, the Ld. DIT has also carried out analysis of the contract at page 6-7 of the 263 order. He submitted that the ld DIT has relied on the judgement of Utrrakhand HC in the case of Rolls Royce P. Ltd. wherein the relevant activities were held as FTS as against being covered u/s 44BB). As

regards the nature of amendment (retrospective or otherwise), the Ld DIT had relied on the relevant extracts of the Finance Bill 2010 and the Hon'ble SC judgement in the case of Sedco Forex International Drill Inc reported in [2005] 149 TAXMAN 352 (SC). As regards that reliance of the ld. counsel for the assessee on the decision of the Hon'ble Supreme Court in case of ONGC 306 to argue that 'second-leg' contractors are covered u/s 44BB is concerned, he submitted that the judgement came only on 1 July 2015 much after the date of initiation of proceedings u/s 263. Further, perusal of the judgement shows that this aspect of 'second-leg' contractors was neither specifically raised nor considered and decided by the Hon'ble SC. Therefore, any indirect inference cannot be drawn.

42. The ld. DR submitted that it is abundantly evident that the AO had not applied his mind adequately not only into the issue of 'outside-India' revenue but also into the aspects on FTS issues. He accordingly submitted that the order of the ld DIT being in accordance with law should be upheld and the grounds raised by the assessee should be dismissed.

43. The ld. counsel for the assessee in his rejoinder submitted that the A.O had not brought to tax outside India revenues. The CIT DR has argued that the A.O erred in not bringing to tax out country receipts under section 44BB of the Act, having regard to the language of the said section. In support thereof, reliance was placed upon Sedco Forex International Inc vs.

DIT: 299 ITR 23S (Utt. HC) and R & B Falcon Drilling Co. vs. DIT: 181 Taxman 62 (Utt. HC). He submitted that the said decisions were rendered in the context of provisions of the Act and did not deal with a Treaty situation. The said decisions have been distinguished in the later decision rendered by the Uttarakhand High Court in the case of CIT vs. Enron Expat Services Inc: 195 TAXMAN 342/ 327 ITR 626. In that case, ONGC, Reliance Industries Ltd. (RIL) and EOGIL had entered into a Production Sharing Contract (PSC) for exploration of oil with respect to contract area identified as Panna and Mukta fields. The PSC was laid before both Houses of the Parliament and was approved in terms of section 42 of the Act. The assessee, an American company which was an affiliate of EOGIL, earned revenues under its contract with EOGIL for providing expatriate technicians for the Indian operations of EOGIL. In terms of the PSC, the assessee rendered services on cost-to-cost basis and received only reimbursement of actual expenses through debit notes. The assessee filed nil return of income since it did not earn any element of profit from provisions of such services and, in any case, its income was not taxable in India in view of Article 7(3) of the Indo US DTAA. The assessing officer alleged that the said payments were taxable in terms of section 44BB of the Act. The Tribunal decided in favour of the assessee.

44. On an appeal filed by the department before the High Court, the Court held that if a non-resident is assessed under the provisions of the DTAA, then, provisions of section 44BB of the Act cannot be invoked by the assessing officer. He drew the attention of the Bench to the following observations of the Hon'ble High Court:

“20. Sub-section (2) of section 90 of the Act clearly states that where there is a Double Taxation Avoidance Agreement, the provisions of the Act can be applied only to the extent to which such provisions are more beneficial to the assessee as compared to the Double Taxation Avoidance Agreement and in the exercise of the powers conferred by the above section 90 of the Act, the Central Government entered into an agreement for avoidance of double taxation of income with the United States of America. We find force in the argument of learned counsel for the assesseees that section 44BB of the Act invoked by the Assessing Officer, had no application, once the assesseees were to be assessed under the provisions of the Double Taxation Avoidance Agreement.

23. The submission of the learned counsel for the revenue that the matter is covered against the assesseees by the decisions in CIT v. Halliburton Offshore Services Inc.'s case (supra) and Sedco Forex International Inc. 's case (supra) is totally incorrect because of the fact, as held above, the present controversy did not arise for

determination by this court in these appeals.

45. He submitted that the decision in **CIT vs ONGC: 299 ITR 438 (Utt. HC)** relied upon by the CIT DR has been reversed by the Supreme Court in **Oil and Natural Gas Corporation Limited vs. CIT: 376 ITR 306.**

46. So far as the decision in the case of **CIT vs. Rolls Royce India Pvt Ltd: 170 TAXMAN 563 (Utt. HC)** referred to by the CIT DR is concerned, the ld. counsel for the assessee submitted that in the case of the assessee, a non-resident company, in terms of the contract with the ONGC, rendered services of inspection of the existing control system of three units of RR Avon Gas Generator Driven Process Gas Compressor at SHP platform and provided services of engineer for Y2K roll over nine at offshore installation. The Court held that the said payments were taxable as 'fees for technical services' in terms of section 44D, read with section 115A of the Act. He submitted that the aforesaid decision has no application to the facts of the present case since section 115A of the Act, inter-alia, provides that fees for technical services received by a non-resident pursuant to an agreement made by such non-resident with the Government or an Indian concern is taxable @10 percent. Section 115 A of the Act is not applicable in the instant case since the assessee has entered into a contract with Aker, which is a non-resident company for the purposes of the Act.

47. He submitted that the ld. DIT during the course of the proceedings under section 263 of the Act erred in holding that the invoices do not state whether the payment is for in-country or out-country receipts. He submitted that on the contrary the invoices clearly state the said fact and such invoices were duly submitted by the assessee before the assessing officer vide submission dated December 16, 2010 and duly formed part of record before CIT.

48. The ld. counsel for the assessee accordingly submitted that the impugned order passed by the DIT under section 263 of the Act is without judicious appreciation of the facts of the case and position in law, therefore, should be quashed.

49. We have considered the rival arguments made by both the sides, perused the orders of the A.O and the ld. DIT and the paper book filed on behalf of the assessee. We have also considered the various decisions cited by both the sides. We find the assessee, in the instant case, is a company incorporated under the laws of the United Kingdom and engaged in the business of installation of subsea facilities necessary for the first phase of D6 Block Development. It filed its return of income for the impugned A.Y on 31.03.2009 declaring taxable income of Rs. 39,63,29,420/- under the provisions of section 44BB of the Act on presumptive basis @ 10% of gross revenue. Since according to the assessee the activities performed were in connection with prospecting for or exploration or production of mineral oils

in India, the above income was in respect of in country receipts. The A.O, after considering the various submissions made by the assessee from time to time, passed order u/s 143(3) of the Act. We find the DIT, New Delhi, initiated proceedings u/s 263 of the Act on the ground that the A.O has accepted the assessee's stand without going into the contract which, according to him, clearly established that services rendered by the assessee were technical in nature and accordingly both in country and out country receipts were in nature of fees for technical services [FTS] liable to be taxed as such as against bringing to tax only the in country receipts u/s 44BB of the Act.

50. We find rejecting the various explanations given by the assessee, the DIT invoked jurisdiction u/s 263 of the Act and held that section 44BB of the Act does not cover second leg of contract and said beneficial section is not applicable to sub contractors engaged in providing technical services to contractors of those undertaking projects in oil exploration. According to him, income received by the assessee was squarely covered u/s 44DA and hence not taxable u/s 44BB of the Act. Since the A.O has accepted the assessee's stand without going into the contract, which according to him was a composite contract and has taxed only the in country services receipts without bringing to tax the out country services receipts and since the A.O did not discuss the taxability of total receipts with regard to admitted PE of

the assessee, in India, therefore, he held that the order of the A.O has become erroneous and prejudicial to the interest of the Revenue.

51. It is the submissions of the ld. counsel for the assessee that since the A.O in the instant case after considering the various submissions made by the assessee has passed the order accepting the returned income by the assessee, therefore, the DIT has no jurisdiction to revise the order. According to him, jurisdiction u/s 263 of the Act could be exercised by the DIT if, and only if, the order passed by the A.O is found to be erroneous as well as prejudicial to the interest of the Revenue.

52. It is also the submission of the ld. counsel for the assessee that adequate enquiries were conducted by the A.O during the course of original assessment proceedings. The DIT has no power to assume jurisdiction u/s 263 of the Act and he cannot substitute his own opinion in place of that of the A.O. It is also the submission of the ld. counsel for the assessee that as per the provision of section 44BB of the Act, the following conditions are required to be cumulatively satisfied for claiming taxability under the deeming provisions:

- a) The recipient of income should be non-resident;
- b) The non-resident should be engaged in the business of provisions of services or facilities or should supply plant and machinery on hire;

c) The services rendered or the plant and machinery provided on hire should be used in connection with prospecting extraction and production of mineral oil; and

d) The income from services rendered should not be taxable under the provisions of section 42, or section 44AD or section 115A or section 293 of the Act.

53. According to him, proviso to section 44BB of the Act substantially excludes those cases where provisions of section 42 or 44DD or 115A or 293A of the Act are applicable for the purpose of computation of income in accordance with those sections. It is also his submission that the amendment brought out by the Finance Act, 2010 in section 44BB and 44DA of the Act amounts to substantial change in the scheme of taxation of income arising to non residents engaged in the business of prospecting and extraction of mineral oil. Such a substantial amendment can be taken prospectively and cannot have retrospective operation. It is also his submissions that the provisions of section 44BB are applicable to second level contractors and receipts for out country services are not taxable in India in view of Article 13 of the India- UK DTAA. Since the A.O while framing the assessment has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O, he cannot substitute his own opinion to assume jurisdiction u/s 263 of the Act. According to him, since the issue is

debatable in view of the various decisions cited by him, therefore, the jurisdiction u/s 263 of the Act cannot be assumed by the DIT in the instant case.

54. We find merit in the above argument of the ld. counsel for the assessee. We find during the course of assessment proceedings the A.O has specifically raised the following queries:

- a) Why the receipts of the assessee should not be treated as FTS u/s 9(1)(vii) of the Act?
- b) Why income from services rendered outside India in respect of contract executed during the relevant year should not be taxed in India?

55. We find the assessee in response to the above furnished complete details of the contract and detailed submission on the queries raised by the A.O. We find the A.O after duly examining /verifying the details/explanation filed by the assessee passed the assessment order u/s 143(3) of the Act accepting the returned income. Under these circumstances, we have to see as to whether the ld. DIT can revise the order of assessment u/s 263 of the Act on the ground that the order is erroneous and prejudicial to the interest of the Revenue.

56. It is the settled legal proposition of law that for assuming jurisdiction u/s 263 of the Act, the twin conditions, namely (a) the order must be erroneous (b) the order must be prejudicial to the interest of the Revenue must be fulfilled. 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 Armateures 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. Parmannand v.Mohan Koikal [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 plain 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 Id. 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 suo motu 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 s. 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.

65. In the result, the appeal filed by the assessee is allowed

Order pronounced in the open court on 24.04.2017.

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

Dated: 24.04.2017

V. Lakshmi

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Copy forwarded to:

- 1) Appellant
- 2) Respondent
- 3) CIT
- 4) CIT (Appeals)
- 5) DR: ITAT

ASSISTANT REGISTRAR

	Date
Draft dictated on	12.04.2017
Draft placed before author	12.04.2017
Draft proposed & placed before the second member	12.04.2017
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on	
File sent to the Bench Clerk	.04.2017
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	