IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'I-2' NEW DELHI

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A. No. 4542/Del/2013
Assessment Year: 2008-09

Siem Offshore Crewing AS C/o Nangia & Co., 75/7, Rajpur Road, Dehradun - 248001 (Appellant)	vs	Assistant Director of Income Tax, International Taxation, Dehradun. (Respondent)

Appellant by: S/Shri Amit Arora, CA, Amit Bhalla, CA & Suraj Nangia, CA
Respondent by: Shri Anand Kumar Kadia, CIT DR

Date of hearing: 10.03.2016

Date of pronouncement: 11.03.2016

PER SUDHANSHU SRIVASTAVA, JM

This appeal has been preferred by the assessee against order dated 21.05.2013 passed by the learned CIT (A)-II, Dehradun for Assessment Year 2008-09.

2. The brief facts of the case, as borne out from the records, are that the assessee is a non-resident company incorporated in Norway and derives revenue from Time Charter Agreement by providing crew on vessel. It filed its return of income under the provisions of section 44BB of the Income Tax Act, 1961

on 30.09.2008 at an income of Rs. 80,02,970/-. A revised return of income was filed on 24.12.2009. During the year under consideration, the assessee had shown gross revenues of Rs. 8,00,29,650/- on account of crew provision services. The Assessing Officer noticed that the assessee had not offered all the revenues earned by it from the contract for providing of crew to income-tax on the ground that the revenues earned by it beyond 200 nautical miles from the Indian shorelines was not taxable in India and hence the revenue earned for the period during which the vessel was not in India was not taxable. The Assessing Officer was of the opinion that as the contract for providing of crew was a continuing contract, the income could not be segregated and claimed as non-taxable for the period the vessel was not in India. The Assessing Officer was also of the opinion that under the scheme of section 44BB, the receipts are to be taxed on the basis of gross receipts. Secondly, the Assessing Officer was of the view that the assessee was only providing management services and as such, the same was covered within the definition of fees for technical services as envisaged in section 9(1)(vii) of the Income Tax Act, 1961. He also referred the matter to the Transfer Pricing Officer for determination of Arms Length Price (ALP) in this respect and the TPO suggested an adjustment of Rs. 55,37,033/- on this issue. The assessee was required to furnish details/documents regarding its calculation of ALP. However, the assessee did not respond to the query and also did not raise any objections to the draft assessment order. Subsequently, the assessment was finalized at Rs.11,59,84,960/- after making an addition of Rs.

3,04,18,274/- towards amount excluded by the assessee from its gross receipts, addition of Rs. 55,37,033/- towards adjustment as suggested by the TPO and addition of Rs.1,62,381/- towards reimbursement of employees' tax cost.

3. Aggrieved, the assessee approached the first appellate authority who upheld the action of the Assessing Officer on all the counts and only gave relief in terms of levying of interest u/s 234B of the Income Tax Act, 1961.

4. Now, in second appeal, the assessee is before us and he has raised the following grounds of appeal:-

> *"1. On the facts and circumstances of the case, the Ld. CIT(A) has erred on the facts and law in adding a sum of Rs. 3,04,18,274/- to the gross receipts of the appellant without appreciating the fact that the vessel was operating outside India and therefore, the said amounts are not chargeable to tax in India.*
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> *2. On the facts and circumstances of the case, the Ld. CIT (A) erred in making a transfer pricing adjustment of Rs. 55,37,033/- deriving the margin (PLI) at 10.12% as per search of comparables made by him without considering the comparable margin submitted by the assessee.*
>
> *3. On the facts and circumstances of the case, the Ld. CIT (A) has erred on the facts and law in treating the total gross receipts of Rs. 11,59,84,960/- of the appellant to be taxed under Article 13 of DTAA between India and Norway as Fees for Technical Services instead of taxing it under section 44BB of the Income Tax Act, 1961.*

5. During the course of hearing, regarding ground no. 1, the Ld. AR submitted that Section 9(l)(i) read with Explanation 1 and section 9(l)(vii) of the Act defines the scope for taxability of income earned by foreign companies. Under both the sections, income of the non- resident is deemed to accrue or arise in India only where the operations are carried out in India or the services utilized in a business/profession carried on by such person in India or for the purpose of earning any income from any source in India. He further submitted that in the present case the assessee has provided crew to operate the vessel and for management of the vessel owned by Siem Offshore Inc. He elaborated that Siem Offshore Inc. has given vessels on time charter basis to EMGS. The Ld. AR averred that since the vessel was physically outside India in November 2007 (26 days), December 2007 (31 days) and January 2008 (15 days), the business activities were outside India, the services were utilized outside India and the source of income was also outside India. Therefore the revenues received by the assessee for this period did not accrue or arise in India and hence was not taxable in India. The Ld. AR also relied on the decision of Mumbai Bench of the Tribunal in case of ACIT v Jindal Drilling Leasing and submitted that it has been held that mobilization charges received by the foreign company would be taxable in India only to the extent the same relates to the distance travelled by the equipment within the Indian territorial waters (i.e. 200 nautical miles from the appropriate base line) and consequently mobilization charges received towards travel of equipments beyond such territorial waters will not be taxable

in India.

6. Ground no. 2 was not pressed by the Ld. AR and hence the same is dismissed as withdrawn.

7. Regarding ground no. 3 pertaining to the issue as to whether the revenues earned should be taxed as Fees for Technical Services (FTS) or under the provisions of section 44BB, Ld. AR submitted that Siem Offshore Inc had leased a vessel under a time charter agreement to Electromagnetic Geo Services AS ('EMGS') to assist EMGS in its exploration of seabed and subsoil (EMGS has entered into a contract with Oil and Natural Gas Corporation Ltd). In connection with Siem Offshore Inc's contract with EMGS, Siem Offshore Inc has entered into a management contract with Siem for management of vessel and provision of crew to operate the vessel. Siem received revenues under the contract with Siem Offshore Inc for providing services and facilities in connection with prospecting for, or extraction or production of mineral oils. The Ld. AR submitted that in light of these facts, the revenues of Siem Offshore AS should be taxed under the provision of section 44BB of the Act and not as FTS as per the provisions of section 9(1) (vii). The Ld. AR further submitted that Section 9(l)(vii) of the Act defines the scope for taxability of income which is in the nature of FTS. As per the provisions of the Act, FTS paid by a non-resident is deemed to accrue or arise in India where the services are utilized in a

business/ profession carried on by such person in India or for the purpose of earning any income from any source in India. He submitted that under the Act, any consideration for rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) is taxable as FTS. The Ld. AR submitted that as per the definition of FTS as provided in the Income Tax Act, consideration for services undertaken for any construction, assembly, mining or like project are specifically excluded from the purview of FTS. The Ld. AR further submitted that the words construction, assembly, mining or like project are not defined in the Act. However, the meaning of such words has been clarified in Instruction no 1862 dated October 22, 1990 of the Central Board of Direct Taxes ('CBDT). He drew our attention to Instruction No. 1862 which reads as under:

Instruction no 1862

CBDT had referred this matter to Attorney General of India. Based on the Attorney General's opinion, the CBDT issued Instruction No 1862 which read as follows:

"The question whether prospecting for, or extraction or production of mineral oil can be termed as 'mining' operations, was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like project' occurring in Explanation 2 to Section 9(l)(vii) of the Income-tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of Oil And Natural Gas.

In view of the above opinion, the consideration for such services will not be treated as fees for technical services for the purpose of Explanation 2 to Section 9(l)(vii) of the Income-tax Act, 1961. Payments for such services to

a foreign company, therefore, will be income chargeable to tax under the provisions of Section 44BB of the Income-tax Act, 1961 and not under the special provisions for the taxation of fees for technical services contained in Section 115A read with Section 44D of the Income-tax Act, 1961. "

8. Concluding his arguments, the Ld. AR pleaded that Ground Nos. 1& 3 of the appeal may be allowed.

9. In response, the Ld. DR for the Revenue submitted that as far as Ground No. 1 is concerned, assessee's contention is not legally tenable. He submitted that gross payments were intricately linked to the services/works rendered by the assessee and arise due to the execution of contract in India, under the terms and condition of the contract between the assessee and Siem Offshore Inc. He submitted that the vessel was hired for the contract and it was only for this purpose that the vessel and the crew were involved in the said contract and thus it was improper on the part of the assessee to offer revenues only on partial invoice on a prorate basis of applicability. He submitted that the revenues earned for the vessel and the crew cannot be said to be not there for beyond 200 nautical miles and out of Indian waters. As the contract for provision of crew was a continuing contract, so the intervening periods of absence of the vessel from the Indian territorial waters cannot be considered as not liable to tax. He submitted that the entire contractual amount should be treated as part of taxable gross receipts. He also submitted that in any case, the receipts under section 44BB (as offered by assessee) are to be taxed on gross basis i.e. all the amounts

which are received against the execution of the contract would come under the purview of gross receipts.

10. Regarding ground no. 3 of the appeal, the Ld. DR submitted that where the main provision is clear, its effect cannot be cut down by the proviso. But where it is not clear, the proviso can properly be looked into, to ascertain the meaning and scope of the main provision. He placed reliance on the decision of Hon'ble Supreme Court in the case of Hindustan Ideal Insurance Co Ltd v L I C of India 1963 AIR SC 1083. He further submitted that proviso to Section 44BB explains and clarifies the main provision as the terms "Services or facilities "used therein are not defined and the two terms used are too general in nature. He submitted that the proviso thus restricts the applicability of the substantive provision of section 44BB in relation to those persons who are either engaged in the business for prospecting, etc., for mineral oil (Section 42) or foreign companies who received fee for technical services from an Indian concern etc., (44D) or in the cases of non-residents and foreign companies receiving fee for technical services (Section 115 A) and persons covered by the notification issued by the Central Government (Section 293A). He further submitted that Proviso would be rendered useless if we are to hold that Section deals with all sorts of services be it of general nature, as a class in itself as well services of technical, consultancy or managerial nature which form a distinct and separate species of services. The Ld. DR further submitted that the phrase *"In connection with"* used in section

44BB only broadens the scope of the section to cover services which are not of technical nature and enacts a special provision for determination of tax liability of persons engaged in providing such services which would be outside the scope of technical services. The Ld. DR also submitted that Instruction No. 1862 dated 22-10-1990 dealing with the interpretation of the term *"Mining or like project",* has been issued in an entirely different context as can be seen from the statement of the case referred for the opinion of learned Attorney General and the opinion of Learned AG. He, accordingly, pleaded for upholding the order of the Ld. CIT (A).

11. We have considered the rival submissions and gone through the facts of the case. As far as the issue of inclusion of Rs.3,04,18,274/- in gross receipt for the purposes of computing is concerned, we are of the considered opinion that the contention of the assessee is incorrect. Gross payments are intricately linked to the services/works rendered by the assessee and arise due to the execution of contract in India, under the terms and conditions of the contract between the assessee and Siem Offshore Inc. The vessel was hired by the contract and it was only for this purpose that the vessel and the crew were involved in the said contract. Thus, it is improper on the part of the assessee to offer to tax its revenues only on a pro-rata basis based upon the number of days the vessel was stationed within 200 nautical miles from the Indian shore line. As the contract for the provision of crew was a continuing contract, it

cannot be said that revenues were not earned for the period the vessel was out of the territorial waters of India. Hence, the entire contract amount is to be considered for the purpose of calculating the gross receipts and all receipts received against the execution of the contract would come under the purview of gross receipts. Thus, gross amounts for the months of November 2007, December 2007 and January 2008 are to be included in the gross receipts. We accordingly uphold the action of the Assessing Officer and the Ld. CIT (A) on this issue and decline to interfere.

12. As far as ground no. 3 of the appeal is concerned, in order to properly appreciate the controversy, it is necessary first to consider various sections dealing with Royalty, FTS and their fields of operation. The Finance Act, 1976 effected three basic changes as regards assessment of nonresidents. **(a)** It inserted clauses (v), (vi) and (vii) in Section 9(1) deeming interest, royalty and technical fees to accrue or arising in India, making the non-resident/ recipient chargeable to tax in cases where there was no tax liability under the pre-existing law; **(b)** It inserted sections 44C and 44D denying deductions, entirety or in part in respect of expenses wholly and exclusively incurred for the purpose of nonresident business or for earning the royalty or technical fees. **(c)** It inserted section 115A, prescribing new rates of tax for dividends, royalty and technical fees in case of foreign company.

13. By Finance Act, 2001 w.e.f. 1-4-2002, in Explanation 2, dealing with definition of 'royalty, clause (iv-a) was inserted in Section 9(l)(vi), which reads

"(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB." "(iv-a) The use or right to use, any industrial, commercial or scientific equipment but not including the amounts referred to in section 44B". Thus, the use or right to use any industrial, commercial or scientific equipment was coming within the ambit of the term 'royalty' taxable u/s 9(l)(vi). However, if the same was with reference to the amounts, referred to in section 44BB, then the same was excluded from section 9(l)(vi).

14. In section 9(l)(vii), dealing with FTS, Explanation 2 was inserted by the Finance No. 2, Act 1977 w.e.f. 1-4-1977, which defines FTS as *"Explanation (2) - For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries".*

15. As per CBDT Instruction no. 1862 dated 22-10-1990 [165 ITR 161 (St.)], consideration for mining includes rendering of services like imparting of training for carrying out drilling operations in connection with the extraction of mineral oils undertaken by recipient. Thus, the consideration, inter alia, for mining was excluded from section 9(l)(vii), provided the same was undertaken

by assessee itself.

16. From the above exclusionary clause it is evident that the Royalty and FTS in respect of incomes contemplated u/s 44BB were taxable u/s 9(l)(vi) and 9(l)(vii) till the date of insertion of exclusionary clauses. Thus, royalty and FTS which was for the nature of services contemplated u/s 44BB were excluded from sections 9(l)(vi) and 9(l)(vii) and brought under section 44BB which is a special provision for computing profits and gains in connection with the business of exploration etc. of mineral oils. Section 44BB was inserted by the Finance Act 1987 with retrospective effect from 1-4-1983.

17. We also proceed to analyse various provisions dealing with Royalty and FTS apart from the basic sections being section 9(l)(vi) and 9(l)(vii). Section 44D was inserted in Chapter IV by the Finance Act, 1976 w.e.f. 1-6-1976. This section is reproduced hereunder:

> **"Special provisions for computing income by way of royalties, etc., in the case of foreign companies**
>
> ***44D.*** *Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company, -*
>
> *(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received*

*

[from Government or a Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern] before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received [from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern] after the 31st day of March, 1976 [but before the 1st day of April, 2003];

(c)[***]

(d)[***]

Explanation.-For the purposes of this section,-

(a) "fees for technical services" shall have the same meaning as in [Explanation 2] to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B;

(c) "royalty" shall have the same meaning as in [Explanation 2] to clause (vi) of sub-section (1) of section 9;

(d) royalty received [from Government or an Indian concern in pursuance of an agreement made by a foreign company with Government or with the Indian concern] after the 31st day of March, 1976, shall be deemed to have been received in pursuance of an

agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of subsection (1) of section 9, to have been made before the 1st day of April, 1976.]

18. Noticeable features of this section are that it is special provision for computation of income by way of royalty or fees for technical services. Thus it is a computation provision. This section is applicable to only that portion of royalty which consists of lump sum consideration for the transfer outside India, or for imparting of information outside India in respect of any data, documentation, drawing or specification relating to patent, invention, model, design, secret formula or process or trade mark or similar property. Thus, it primarily deals with considerations paid as royalty for transfer of Intellectual Property Rights (IPR) outside India even if IPR was with respect to oil exploration. The operation of this section was up to 31-3-2003. It follows, therefore, that royalty/ FTS received by a non-resident for transfer of intellectual property rights contemplated u/s 44D, if paid for the nature of services contemplated u/s 44BB after 31-3-2003, would be taxable u/s 44BB.

19. Section 44DA, inserted by the Finance Act, 2003, w.e.f. 1-4-2004, reads as under:

Special provision for computing income by way of royalties, etc., in case of non-residents

"44DA(1) The income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an

agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of profession 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 place of profession, as the case may be, shall be computed under the head "Profits and gains of business or profession" in accordance with the provisions of this Act:

Provided *that no deduction shall be allowed-*

(i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or

(ii) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices.

(2) Every non-resident (not being a company) or a foreign company shall keep and maintain books of account and other documents in accordance with the provisions contained in section 44AA and get his accounts audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and furnish along with the return of income, the report of such audit in the prescribed form duly signed and verified by such

accountant.

Explanation.-For the purposes of this section,-

(a) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(b) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(C) "permanent establishment" shall have the same meaning as in clause (iiia) of section 92 F.]

20. Therefore, it follows that if royalty/ FTS is received by a non-resident who is engaged in the business of providing services or facilities in connection with, or supplying P&M on hire used, or to be used, in the prospecting for, or extraction or production of mineral oils then this will be taxed u/s 44BB but if it is received on account of having PE/ fixed place in India then it will be taxed u/s 44DA from 1-4-2011 onwards. It is noticeable that there is no requirement of PE in section 44BB and, therefore, if the payment of royalty/FTS to non-resident has no nexus with PE and is paid for the nature of activities contemplated u/s 44BB, the same would continue to be taxable u/s 44BB.

21. Section 115A, substituted by Finance Act, 1994 w.e.f. 1-4-1995, reads as under:

Tax on dividends, royalty and technical service fees in the case of

foreign companies

115A. (1) Where the total income of-

"(b) [a non-resident (not being a company) or a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DA] received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of-

(A) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of thirty per cent if such royalty is received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where such royalty is received in pursuance of an agreement made after the 31st day of May, 1997;

(B) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of thirty per cent if such fees for technical services are received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where

such fees for technical services are received in pursuance of an agreement made after the 31st day of May, 1997; and

(C) the amount of income-tax with which it would have been chargeable had its total income been reduced by the amount of income by way of royalty and fees for technical services.

Explanation.-For the purposes of this section,-

(a) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9 ;

(c) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9 ;

(3) No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing his or its income referred to in sub-section (1).

22. Noticeable features of section 115A are that Section 115A (b) w.e.f. 1-4-04 covers the cases of royalty/ FTS other than referred to in section 44DA (1). The rate of tax is as under:

(i) 30% if in pursuance to agreement made after 31/3/76 to 31/5/97;

(ii) 20% if in pursuance to agreement made between 1-6-97 to 31/5/2005;

(iii) 10% if in pursuance to agreement made on 1-6-2005 or thereafter.

No deduction is allowable in respect of any expenditure or allowance u/s 28 to 44C and 57.

23. Section 44BB inserted by the Finance Act, 1987 with retrospective effect

from 1-4-1983 reads as under:

> **Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils**
>
> **"44BB.** *(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee [being a non-resident] engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in subsection (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.*
>
> **Provided** *that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*
>
> *(2) The amounts referred to in sub-section (1) shall be the following, namely:-*
>
> *(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of 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 India; and*
>
> *(b) the amount received or deemed to be received in India by*

or on behalf of the assessee on account of the provision of 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 outside India.

(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under subsection (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

Explanation.-For the purposes of this section,-

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) "mineral oil" includes petroleum and natural gas.

24. It is seen that the basic ingredients of this section are that the non-resident assessee should be engaged in the business of providing services or facilities in connection with the prospecting or extraction or production of mineral oils. Non-resident assessee should be engaged in the business of supply plant and machinery on hire used or to be used, in prospecting for or extraction or

production of mineral oils. The amount being 10% of gross receipts would be assessable as "business income. However, a proviso was also inserted which, inter alia, excluded the royalty or FTS contemplated u/s 44D or section 115A. Section 44DA was inserted by Finance Act 2010 w.e.f. 1-4- 2011. From the combined reading of these sections it is evident that all the sections relating to royalty/FTS operate in different fields and that is the reason for insertion of proviso to sections 44BB/44DA/115A. Where the assessee was imparting services which entitled it to royalty or FTS simpliciter then the same continues to be assessed u/s 9(1)(vi)/(vii) read with section 115A of the Act. However, where the assessee is imparting services in relation to oil exploration, the Royalty/FTS would be taxable u/s 44BB. Specific services are contemplated only under section 44BB and, therefore that being special provision, the same will prevail over all other provisions dealing with royalty/FTS. In no other section dealing with royalty/FTS, specific services are provided. In this regard, one may also refer to section 293A of the Act which empowers the Central Government to grant exemptions in relation to participation in the business of prospecting for or extraction etc. of mineral oil. In fact separate notifications have been issued by the Government in exercise of its power conferred u/s 293A to give relief to the assessees in connection with the business of exploration and extraction of mineral oil. Considering the pressing requirement of the oil industry, sections 42 and 293 A were inserted in the Act in view of the high expenditure involved in the business of oil exploration. When viewed in the

back drop of this objective, we find that section 44BB has been couched in such a manner so as to encompass within its ambit all services connected with oil exploration. Thus, in our opinion, if a non-resident is engaged in the business of providing services or facilities in connection with the prospecting for extraction or production of mineral oil, then 10% of the aggregate of the amounts received/accrued will be deemed to be the profits and gains of such business chargeable to tax in terms of provisions of section 44BB of the Act.

25. A reference can also be made to the decision of the Hon'ble Apex Court in ONGC vs. CIT & Anr. in Civil Appeal No 731 of 2007 wherein the Hon'ble Apex Court in its Order dated 01/07/2015 has allowed the appeal of ONGC on the substantial question of law framed which reads as, *" Whether the amounts paid by the ONGC to the non-resident assesses/foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as 'fees for technical services' under section 44D read with Explanation 2 to section 9(1)(vii) of the Income Tax Act or will such payments be taxable on a presumptive basis under section 44BB of the Act?"*

26. The Hon'ble Apex Court has answered the question as under, *"Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident*

assessee or the foreign company is to be assessed under section 44BB or section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of section 44BB and not section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil."

27. Thus, on the facts of the case and respectfully following the ratio of the judgment of the Hon'ble Apex Court in ONGC vs. CIT & Anr. in Civil Appeal No 731 of 2007, it is our considered opinion that the revenues of the assessee should be taxed under the provision of section 44BB of the Act. Hence, ground no. 3 of the assessee's appeal is allowed.

28. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 11th of March, 2016.

Sd/-	Sd/-
(S.V. MEHROTRA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: the 11th of March, 2016

'GS'

Copy forwarded to: -

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

By Order

ASSTT. REGISTRAR