

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.07.2014

+ **ITA 612/2012**

PGS GEOPHYSICAL AS

..... Appellant

versus

ADDITIONAL DIRECTOR OF INCOME TAX

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ajay Vohra with Ms Kavita Jha,
Mr Mukesh Butani and Ms Bhoomika.

For the Respondent: Mr Sanjeev Sabharwal, Sr Standing Counsel
with Mr Ruchir Bhatia, Jr Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

1. The appellant has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') impugning the order dated 20.04.2012 passed by the Income Tax Appellate Tribunal in ITA No. 4056/Del/2011 (hereinafter referred to as the 'impugned order').

2. Briefly stated the relevant facts are as under:-

2.1 The appellant is a company incorporated under the laws of Norway and is principally engaged in the business of providing Geophysical services worldwide which includes the services of acquiring and processing two dimensional and three dimensional seismic data (both onland and offshore). M/s B.G. Exploration and Production India Limited (in short

BG) and Reliance Industries Limited (in short RIL), who had been granted exploration licenses, engaged the services of the assessee for acquiring and processing three dimensional marine seismic data with respect to offshore block awarded to the said companies.

2.2 The appellant (assessee) opted to be taxed on presumptive basis under Section 44BB(1) of the Act at the rate of 10% of the gross revenue. The assessee, accordingly, also applied to the Income Tax Authorities for authorizing withholding tax at lower rates and was granted orders under Section 197 of the Act, authorizing deduction of income tax at source at the rate of 4.223% of the gross amounts payable by the contracting oil companies (BG & RIL) to the assessee for the financial year 2007-2008. The assessee also filed its return of income for the previous year 2007-2008 (AY 2008-09) on 30.09.2008 declaring a total income of ₹26,87,46,256/-. The return filed by the assessee was picked up for scrutiny.

2.3 The Assessing Officer (in short AO) rejected the contention of the assessee that its income was liable to be taxed on a presumptive basis under Section 44BB(1) of the Act. The Assessing Officer held that the services provided by the assessee were technical in nature and its income from providing services fell within the definition of “fees for technical services” as defined by provisions of Section 9(1)(vii) of the Act, which was liable to be taxed under the provisions of Section 115A of the Act and not under Section 44BB(1) of the Act. A draft assessment order to the aforesaid effect was made by the Assessing Officer on 24.12.2010. The appellant preferred objections before the Dispute Resolution Panel (in short DRP) with respect to the said draft assessment order. The DRP rejected the assessee’s

objections by its order dated 18.07.2011 and directed the Assessing Officer to complete the assessment as per the draft order. Subsequently, a final assessment order was made on 29.07.2011 and the assessee's income was computed at ₹2,68,74,62,560/-.

2.4 Aggrieved by the assessment order dated 29.07.2011, the assessee preferred an appeal before the Tribunal, *inter alia*, on the ground that the nature of income of the assessee would not fall within the definition of 'fees for technical services' by virtue of Explanation (2) to Section 9(1)(vii) of the Act and that income was liable to be taxed under Section 44BB(1) of the Act.

2.5 By the impugned order, the Tribunal remitted the matter to the Assessing Officer for a fresh adjudication, directing the Assessing Officer to first determine whether the assessee had a Permanent Establishment (in short PE) in India and, thereafter determine the taxability of the income in accordance with law and taking into consideration the ruling of Tribunal in the case of M/s CGG Veritas Services SA: ITA No. 4653/Del/2010, which was extensively quoted from in the impugned order.

2.6 Thereafter, the assessee preferred the present appeal and articulated the following questions of law in its memorandum of Appeal.

- “a) *Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the activity of 2D / 3D seismic survey carried on by the appellant in connection with exploration of oil, was in the nature of “fees for technical services” in terms of Explanation 2 to section (9)(1)(vii) of the Act?*

- b) *Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that income of the appellant, in the nature of “fees for technical services” was liable to tax in India under section 44BB of the Act only if the appellant had permanent establishment (“PE”) in India in the relevant assessment year?*
- c) *Whether on the facts and circumstances of the case, the Tribunal erred in law in following the decision of the co-ordinate Bench in the case of CGG Veritas Services SA, ignoring other decided judicial precedents?*
- d) *Whether on the facts and circumstances of the case, the findings arrived at by the Tribunal are perverse, in as much as no reasonable person correctly informed of the position in law would come to such a conclusion?”*

3. Although, the assessee had articulated the questions of law as quoted above, the learned counsel for the assessee did not advance any contention relevant to those questions and made submissions limited to the question-whether the income from business of providing services in connection with prospecting for, or extraction or production of mineral oils would be liable to be taxed under Section 44BB(1) of the Act as opposed to Section 44DA(1) of the Act. And, whether an existence of a PE in India is a necessary condition for applicability of Section 44BB(1) of the Act.

4. It was contended by the learned counsel for the assessee that income falling within the ambit of Section 44DA(1) of the Act would be liable to be taxed under Section 44BB(1) of the Act if it was in connection with prospecting for, or extraction or production of mineral oils. It was submitted that this question was covered by the decision of the this Court in **Director of Income Tax-II v. OHM Ltd.: [2012] 28 taxmann 120 (Del)**

which had approved the ruling of the Authority for Advanced Ruling (in short AAR) in **Geofizyka Torun sp Z.O.O, In re** :[2010] 320 ITR 268.

5. The learned counsel for the Revenue contested the submissions made on behalf of the assessee and submitted that “fees for technical services” received by a non-resident from an Indian concern would be taxable under Section 44DA(1) of the Act, if the assessee carried on the business through a PE in India. He submitted that this was clarified by the amendment introduced in the proviso to Section 44BB(1) of the Act by the Finance Act, 2010 with effect from 01.04.2011. He submitted that even though the period in question was prior to the said amendment, nonetheless, since the amendment was clarificatory, the same would be instructive in determining whether the income from “fees for technical services” was liable to be taxed under Section 44DA(1) of the Act even if the same was in connection with prospecting for, or extraction or production of, mineral oils. He submitted that a Special Leave Petition under Article 136 of the Constitution of India had been preferred by the Revenue against the judgment of this Court in **OHM Ltd** (*supra*).

6. We have heard the learned counsel for the parties.

7. At the outset, we must note that although the assessee had been contesting that the income received by it was not “fees for technical services” as defined under Section 9(1)(vii) of the Act as being excluded by virtue of explanation 2 thereto, and the said ground had also been urged in the Memorandum of Appeal, the said issue was not agitated before us. On the contrary, the learned counsel for the assessee has proceeded on the basis

that the income received by the assessee during the relevant year was “fees for technical services” and contended that since the assessee had received the income in connection with the business of prospecting for mineral oil, it was taxable under Section 44BB(1) of the Act, even though it fell within the scope of section 44DA(1) of the Act. It was contended that section 44BB(1) of the Act applied specifically to the mineral oil exploration/production industry, while section 44DA(1) of the Act applied, *inter alia*, to all cases of royalty and fees for technical services which were connected with a PE of a foreign company in India. It was further contended that existence of a PE in India was not a necessary condition for applicability of section 44BB(1) of the Act.

8. Therefore, only the following question of law needs to be addressed in this appeal:

“whether the income tax chargeable on the income of the assessee for the Assessment Year 2008-2009, which falls within the scope of section 44DA(1) of the Act is liable to be computed in accordance with section 44BB of the Act”

9. Before proceeding further, it would be necessary to refer to Section 44BB of the Act. The said section as existing on the statute book during the assessment year 2008-09 is reproduced below:-

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

44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in

the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head “Profits and gains of business or profession” :

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 sub-section (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.”*

10. A plain reading of proviso to Section 44BB(1) of the Act indicates that it would not apply in a case where provisions of Section 115A of the Act are applicable for computing profits and gains or other income referred to in that Section. It is, thus, necessary to refer to Section 115A of the Act for ascertaining the nature of income that is taxable therein and consequently, expressly excluded from the ambit of Section 44BB(1) of the Act by virtue of the proviso thereto. The relevant extract of Section 115A of the Act is quoted below:-

“Tax on dividends, royalty and technical service fees in the case of foreign companies.

115A. (1) Where the total income of—

xxxx xxxx xxxx xxxx xxxx

(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 but before the 1st day of June, 2005;*
- (AA) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of ten per cent if such royalty is received in pursuance of an agreement made on or after the 1st day of June, 2005;*
- (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 but before the 1st day of June, 2005; and*
- (BB) 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 ten per cent if such fees for technical services are received in pursuance of an agreement made on or after the 1st day of June, 2005; 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;*
- (b) “foreign currency” shall have the same meaning as in the Explanation below item (g) of sub-clause (iv) of clause (15) of section 10;*
- (c) “royalty” shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;*
- (d) “Unit Trust of India” means the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963).”*

11. A plain reading of Section 115A(1)(b) of the Act indicates that income by way of fees for technical services other than income referred to in Section 44DA(1) of the Act would be computed in the manner as specified therein. Explanation (a) to Section 115A(1) of the Act expressly provides that the expression “fees for technical services” would have the same meaning as in Explanation 2 to Section 9(1)(vii) of the Act which reads as under:-

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

12. The assessee had urged, before the AO, DRP and the Tribunal, that the income received by it in pursuance of the contracts entered into with

BG and RIL would not fall within the definition of “fees for technical services” by virtue of Explanation 2 to Section 9(1)(vii) of the Act. However, the finding of the AO and the Tribunal that the income of the assessee was “fees for technical services” was not contested before this court. Thus, in view of the said finding, the income of the assessee would be taxable under Section 115A(1)(b) of the Act unless it fell within the exclusion provided therein i.e. that such income was referred to in Section 44DA (1) of the Act. Section 44DA(1) of the Act 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.”

13. A plain reading of Section 44DA(1) of the Act indicates that said provision would be applicable, *inter alia*, in respect of income by way of fees for technical services by a foreign company only in cases where the foreign company carries on business through a PE in India. In order to tax a foreign company within the parameters of section 44DA(1) the following conditions are required to be met:

- (a) The foreign Company should receive such fees for technical services from Government or an Indian concern in pursuance of an agreement with the Government/Indian Concern;
- (b) The foreign company carries on business in India through a PE in India, or performs professional services from a fixed place of profession in India; and
- (c) The contract in respect of which income by way of fees for technical services is received is effectively connected with the PE in India.

14. If the aforesaid conditions are met, the income of the appellant would fall within the scope of Section 44DA(1) of the Act and, consequently, would be excluded from the scope of Section 115A(1)(b) of the Act. Thus, whilst the existence of PE is not a condition specified in section 44BB(1) of the Act, it is a necessary condition for applying section 44DA(1) of the Act and, consequently a necessary condition to exclude the application of section 115A(1)(b) of the Act. Thus, as stated earlier, section 44BB(1) of the Act would not be applicable with respect to incomes which

are included under section 115A of the Act. It necessarily follows that in respect of income from technical services, section 44BB(1) of the Act would not be applicable unless the income falls within the scope of 44DA(1) of the Act, which could only be applied if an assessee being a foreign company, had a PE in India.

15. In the event the conditions of section 44DA(1) of the Act were satisfied, the tax on income of the appellant for the relevant year would be liable to be computed in accordance with section 44BB(1) of the Act, in accordance with the view expressed by this court in ***OHM*** (*supra*).

16. This Court in the case of ***OHM*** (*supra*) had considered the conflict between the provisions of Section 44DA(1) and 44BB(1) of the Act and affirmed the view expressed by the AAR in ***Geofizyka*** (*supra*) and held that Section 44BB of the Act, being industry specific was a special provision and would, thus, override the provisions of Section 44DA(1) of the Act in respect of income which fall within the ambit of Section 44DA(1) of the Act but had arisen in respect of business carried on in connection with prospecting for, or extraction or production of mineral oils. The relevant extract of the said judgment reads as under:-

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

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

result would be opposed to the very essence of the rule of harmonious construction. In South India Corporation (P) Ltd. v. Secretary, Board of Revenue Trivandrum, AIR 1964 SC 207 it was held that a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific.”

17. Following, the aforementioned decision of this court in ***OHM*** (*supra*), we accept the contention advanced on behalf of the assessee that since the assessee is clearly engaged in business for providing services in connection with prospecting for mineral oils, its income if it falls within the ambit of Section 44DA(1) of the Act would be taxable under Section 44BB(1).

18. The contention advanced on behalf of the Revenue that “fees for technical services” earned by a foreign company in respect of a contract which is connected with the PE of such foreign company in India would be taxable under Section 44DA(1) of the Act irrespective of whether the same is connected with extraction/production of mineral oils, cannot be accepted. By virtue of Finance Act, 2003, such income was excluded from the ambit of Section 115A(1)(b) of the Act w.e.f. 01.04.2004. Although, with effect from said date such income was taxable under Section 44DA(1) of the Act but in certain cases where such income was earned by the assessee by carrying on a business of providing services in connection with prospecting for, or extraction or production of mineral oils, the said income would also fall within the express language of Section 44BB(1) of the Act and in view of the decision of this Court in ***OHM*** (*supra*) the provisions of Section 44BB(1) of the Act would be applied in preference to Section 44DA(1) of

the Act, in those cases. This conflict between Section 44BB(1) and 44DA(1) of the Act was resolved by the Finance Act, 2010 by introduction of a reference to Section 44DA in the proviso to Section 44BB(1) of the Act w.e.f. 01.04.2011 and simultaneously introducing a second proviso to Section 44DA(1) which reads as under:

“Provided further that the provisions of section 44BB shall not apply in respect of the income referred to in this section.”

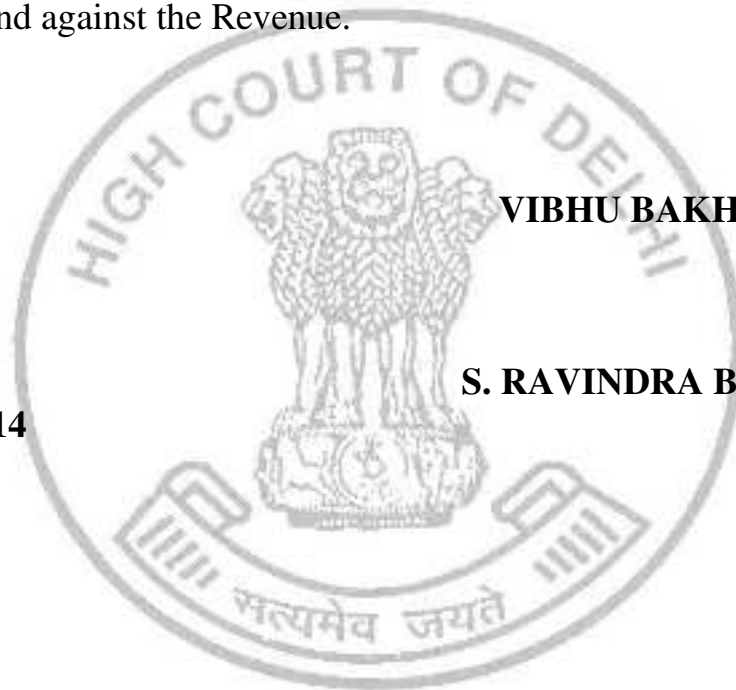
19. Thus, after 01.04.2011, income falling within the scope of Section 44DA(1) of the Act would be excluded from the scope of Section 44BB of the Act. However, during the period from 01.04.2004 to 01.04.2011 i.e. period when income falling within Section 44DA(1) of the Act was excluded from the ambit of Section 115A(1)(b) of the Act but was not expressly excluded from the scope of Section 44BB(1) of the Act, the same was liable to be taxed under Section 44BB(1) of the Act. Since the Assessment Year 2008-09 falls within the period, the income of the assessee, to the extent it falls within the scope of section 44DA(1) of the Act and stands excluded from section 115A(1)(b) of the Act, would be computed in accordance with section 44BB(1) of the Act.

20. Having stated the above, we must clarify that the income falling within Section 115A(1)(b) of the Act which does not fall within the four corners of Section 44DA(1) of the Act would also not be taxable under Section 44BB(1) of the Act, for the reason that by virtue of proviso to Section 44BB(1) of the Act, the same is excluded. Accordingly, the AO would specifically have to determine (a) whether the assessee had a PE in India during the relevant period; and (b) if so, whether the contracts entered

into by the appellant with BG and RIL were effectively connected with the appellant's PE in India. It is only, if the AO finds that the said two conditions were satisfied, that the income of the assessee would be computed under Section 44BB(1) of the Act. However, if such conditions are not satisfied then the income tax payable by the appellant would be computed in accordance with Section 115A(1)(b) of the Act.

21. For the above reasons, the question of law is answered in favour of the assessee and against the Revenue.

JULY 09, 2014
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VIBHU BAKHRU, J

S. RAVINDRA BHAT, J