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* IN THE HIGH COURT OF DELHI AT NEW DELHI
14.
\+ ITA 835/2015

ONGC VIDESH LIMITED ..... Appellant
Through: Mr Pawan Kumar and Mr Prakash Kumar, Advocates.

versus

ITO, INTERNATIONAL TAXATION, TDS, WARD 2(1), NEW DELHI ..... Respondent
Through: Mr Rahul Chaudhary, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Sharad Aggarwal, Advocate.

WITH

15.
\+ ITA 836/2015

ONGC VIDESH LIMITED ..... Appellant
Through: Mr Pawan Kumar and Mr Prakash Kumar, Advocates.

versus

ITO INTERNATIONAL TAXATION, TDS, WARD 2(1), NEW DELHI ..... Respondent
Through: Mr Rahul Chaudhary, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Sharad Aggarwal, Advocate.

WITH

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16.
+ **ITA 837/2015**

ONGC VIDESH LIMITED ..... Appellant
Through: Mr Pawan Kumar and Mr Prakash Kumar, Advocates.

versus

ITO, INTERNATIONAL TAXATION, TDS, WARD 2(1), NEW DELHI ..... Respondent
Through: Mr Rahul Chaudhary, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Sharad Aggarwal, Advocate.

WITH

17.
+ **ITA 838/2015**

ONGC VIDESH LIMITED ..... Appellant
Through: Mr Pawan Kumar and Mr Prakash Kumar, Advocates.

versus

ITO, INTERNATIONAL TAXATION, TDS, WARD 2(1), NEW DELHI ..... Respondent
Through: Mr Rahul Chaudhary, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Sharad Aggarwal, Advocate.

AND

18.
+ **ITA 839/2015**

ONGC VIDESH LIMITED ..... Appellant

Through: Mr Pawan Kumar and Mr Prakash Kumar, Advocates.

versus

ITO, INTERNATIONAL TAXATION, TDS, WARD 2(1), NEW DELHI ..... Respondent

Through: Mr Rahul Chaudhary, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Sharad Aggarwal, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER

% **03.03.2016**

1. These appeals – five in number – have been filed by ONGC Videsh Limited (hereafter 'the Assessee') under Section 260A of the Income Tax Act, 1961 (hereafter 'the Act') impugning a common order dated 16th November, 2012 passed by the Income Tax Appellate Tribunal (hereafter 'the ITAT') in respect of five appeals pertaining to Assessment Years (AYs) 2007-08 to 2009-10. The said appeals were directed against a common order dated 25th March 2009 passed by the Commissioner Income Tax (Appeals) [hereafter 'the CIT(A)'] upholding separate orders passed by the Assessing Officer (hereafter 'AO') rejecting the Assessee's application for a certificate of non-deduction of tax at source under Section 197 of the Act, in respect of

remittance to M/s Wood Mackenzie Ltd, UK.

2. Since the issue involved in these appeals is common, the same were heard together.

3. The controversy involved in the present appeals relates to the consideration payable by the Assessee to M/s Wood Mackenzie Ltd, UK (hereafter 'WML') for access to the database; the issue involved is, essentially, whether such payments fall within the definition of Royalty under Section 9(1) (vi) of the Act.

4. The Assessee had earlier filed appeals (being ITA Nos. 343/2013, 352/2013, 362/2013, 360/2013 & 361/2013) against the impugned order dated 16th November, 2012 which came up for hearing on 23rd March, 2015. At the said hearing, the Assessee pointed out that it had filed applications under Section 254(2) of the Act for rectification of the impugned order. This Court noted the aforesaid contention and dismissed the said appeals as withdrawn with liberty to the Assessee to urge any question including the ones raised in those appeals in the light of the final order that may be made by the ITAT in the applications filed under Section 254(2) of the Act.

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5. The applications filed by the Assessee under Section 254(2) of the Act were dismissed by a common order dated 19th May, 2015 as the ITAT was of the view that the said applications were in the nature of seeking a review of the impugned order, which was not permissible under Section 254(2) of the Act.

6. Thereafter, the Assessee filed the present appeals which were admitted on 11th December, 2015 and the following questions of law were framed:-

> "i) Whether the subscription fees paid by the Appellant to Wood Mackenzie was in the nature of Royalty for imparting of information concerning industrial, commercial or scientific experience?
>
> ii) Whether the payment made by the Assessee, even if for the purposes of the overseas business, would be covered by the exclusion provided under Section 9 (1) (vi) (b) of the Act read with Article 13 of the Indo-UK DTAA Treaty?"

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

8. The Assessee is a wholly owned subsidiary of Oil and Natural Gas Corporation Limited (hereafter 'ONGC'), a company incorporated under the Companies Act. ONGC is a Public Sector Enterprise and majority of

its shares are held by the Government of India. The Assessee is the overseas arm of ONGC; it is engaged in the business of exploration of hydrocarbon deposits and development of the said resource outside India to augment the Oil Security of India. As a part of its business, the Assessee acquires participating interest in oil and gas projects outside India and participates in the exploration, development and production activities relating to the oil and gas sector outside India. It is not disputed that the Assessee does not carry out any exploration or production activities in India.

9. The Assessee entered into a Research Agreement dated 14th June, 2006 with WML for accessing information, researched data and other material pertaining to oil and gas exploration projects in various countries. WML specialises in research relating to mining and energy sector and its research, information and data collected and processed by WML, is accessible on payment of subscription charges. In terms of the aforesaid agreement, WML has granted access to certain information and data relating to specified areas which are termed as "Products" on payment of the agreed consideration. In terms of the agreement, the

Assessee is granted a licence to use the information so made available. However, the Assessee is required to maintain the confidentiality of the information and data accessed by it and is not permitted to disclose the same to any unauthorised person. The proprietary rights in relation to the information and data (Products) vests with WML and admittedly, the Assessee acquires no proprietary interest in that data or information. The Assessee has merely the right to access the information and use the same for its business.

10. The Assessee made a number of applications seeking a certificate for non-deduction of tax at source under section 197 of the Act, which were declined. The applications filed by the Assessee before the AO are more or less similar and, therefore, for addressing the issues raised in the present appeals, only the facts pertaining to ITA 835/2015 which pertains to AY 2007-08 are noticed. The said appeal arises from an application dated 22nd February, 2008 filed by the Assessee for determining the taxability of subscription payable with reference to WML's invoice dated 21st January, 2008 for 7500 GBP. By way of aforesaid application, the Assessee requested for issuance of certificate for non-deduction of tax at

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source in respect of Global Upstream Services and Complementary GEM Services provided by WML. The AO disposed of the said application by an order dated 13th March, 2008 passed under Section 195/197 of the Act; he held that the amount payable by the Assessee to WML constituted 'Royalty', which was taxable under Section 9(1) (vi) of the Act as well as under Article 13(3) of the Double Taxation Avoidance Agreement between India and United Kingdom. Accordingly, he directed the Assessee to deduct tax at the rate of 10% on the amount of the invoice of 7500 GBP. Since in terms of agreement, the Assessee was obliged to make the remittance net of taxes, the Assessee was directed to deduct income tax at the rate of 11.11% on the gross amount to effectively discharge its obligation.

11. Aggrieved by the aforesaid order, the Assessee filed an appeal under Section 248 of the Act before the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)']. The aforesaid application was taken up for hearing alongwith other similar appeals preferred by the Assessee in respect of remittance relating to AYs 2007-08, 2008-09 and 2009-10. By a common order dated 25th March, 2009, the CIT(A) rejected the

aforesaid appeals and upheld the orders as passed by the AO. The Assessee carried the said order in appeal before the ITAT which was disposed of by the common order impugned herein.

12. At the outset, we must observe that although the Assessee had also contended, in the alternative, that the said payments fall within the exclusionary clause under Section 9(1)(vi)(b) of the Act as the information and the services of WML were utilised wholly for the purposes of business carried on by the Assessee outside India, the said contention was not expressly dealt with by the ITAT. The applications filed by the Assessee under Section 254(2) of the Act seeking that the aforesaid ground be specifically considered were also rejected. The ITAT principally proceeded to adjudicate whether the consideration payable to WML would fall within the scope of Royalty (without considering the exclusionary clause). The ITAT held that WML had granted certain rights regarding its proprietary information and further had also agreed to provide two days training programme per annum during the period of the contract for 20 individuals. The ITAT further held that the information obtained by the Assessee was of a technical nature and was covered

within the definition of Royalty under Section 19(1)(iv) and (vi) read with Article 13(3) of the Double Taxation Avoidance Agreement with United Kingdom.

13. It is relevant to note that the ITAT had, in the impugned order specifically, noted that: *"For the purposes of their overseas business, ONGC Videsh Limited (in short, OVL) needed information in relation to economic conditions along with other aspects, specially overview of oil and gas industry in different countries. Accordingly, OVL subscribed a website of a company, WM, which is a global energy and mining research unit by way of a research agreement dated 14.06.2006."*

14. The aforesaid finding clearly indicates that the ITAT had accepted that the Assessee required access to the information and services of WML for the purposes of its business outside India. However, the ITAT failed to consider whether by virtue of the aforesaid finding, the amount payable by the Assessee would fall outside the scope of Royalty as defined under Section 9(1)(vi) of the Act in terms of sub-clause (b) thereof.

15. At this stage, it is necessary to refer to sub-clause (b) of clause (vi) of sub-section (1) of Section 9 of the Act, which reads as under:-

> "9. (1) The following incomes shall be deemed to accrue or arise in India:-
>
> xxxx xxxx xxxx xxxx
>
> (vi) income by way of royalty payable by –
>
> xxxx xxxx xxxx xxxx
>
> (b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or"

16. It is apparent from the above that any royalty payable by a resident in respect of any right, property or information used or services utilised for the purposes of business carried on outside India would stand excluded from the scope of the expression 'income by way of royalty' which is deemed to accrue or arise in India.

17. The ITAT had itself found that information and services of WML was subscribed by the Assessee for its business outside India and the same is also not disputed by the revenue. Thus, even if the payment is considered as Royalty, it would be excluded from the scope of Section 9(1) (vi) by virtue of the exclusion provided in sub-clause (b) of clause

(vi) of Section (1) of Section 9 of the Act. Therefore, the question (ii) must be answered in the affirmative; that is, in favour of the Assessee and against the Revenue.

18. In view of our decision as to question (ii), it is not necessary to decide the question whether the subscription fee paid to WML is otherwise in the nature of royalty. The said question is, therefore, left open.

19. The appeals are, accordingly, allowed; however, in the circumstances, the parties are left to bear their own costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 03, 2016
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