

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "H" NEW DELHI)
BEFORE SHRI I.C. SUDHIR AND SHRI J.S. REDDY

ITA No. 749/Del/2013
Assessment Year: 2009-10

ADIT,
International Taxation,
Dehradun.

Vs. TDI Brooks Intl. Inc.
C/o. Nangia & Co.,
75/7, Rajpur Road,
Dehradun.
(PAN: AACCT3238J)
(Respondent)

(Appellant)

Revenue by: Shri Sanjeev Sharma, CIT(DR)
Assessee by: Shri Amit Arora, CA

Date of hearing : 25.03.2015
Date of pronouncement: 22:05.2015

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER

The Revenue has questioned first appellate order on the following grounds:

- “1. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in holding that the Revenues for providing services for geophysical and geological interpretation of 3D and 2D seismic data are not Fees for Technical Services.
2. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in applying the decision of the ITAT in the case of M/s. CGG Veritas overlooking the fact that the ITAT has clearly held that interpretation of seismic data are in the nature of FTS.

3. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in holding that the income of the assessee even though in the nature of FTS and not covered under the exclusionary proviso there under i.e. not having been rendered for a project undertaken by the recipient were taxable under sec. 44BB.

4. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in applying the decision of ITAT in the case of M/s. CGG Veritas holding that the assessee company had a PE and was thus covered under it when the said decision is binding only in case of assessee not having a PE and the said decision has not been accepted by the Department and an MA has been filed, while appeal was not filed purely on account of tax effect considerations.

5. Whether the CIT(A) has erred in the ignoring decisions of jurisdictional High Court in the case of CIT vs. ONGC as an agent of M/s. Foramer France and CIT vs. M/s. Rolls Royce Pvt. Ltd. (2007-TII-03-High Court Uttrakhand-Intt) holding that FTS is not eligible for 44BB.

6. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in ignoring the distinct scheme of taxation of FTS/royalty and holding that the income of the assessee was taxable under the presumptive provisions of sec. 44BB, disregarding the insertion of proviso in sec. 44BB/44DA/115A and the rationale behind the introduction of said clarificatory proviso's in the Finance Bill 2010.

7. Whether the CIT(A) has erred in not appreciating that proviso to sec. 44BB is not inserted 'per majorem cautelam' but explains and clarifies the main provision as the term services or facilities used therein are not defined and the two terms used are too general in nature and thus once the payments are characterized as royalty u/s. 9(1)(vi), they go outside the purview of sec. 44BB and have to be taxed as Royalty.

8. Whether the CIT(A), has erred in not appreciating that assessee's reliance on Jindal Drilling is misplaced since S 44DA being the special provision for taxation of income in the nature of royalties and FTS where these are effectively connected with a PE, in the nature of royalties and FTS where these are effectively connected with a PE, then if a special provision is made respecting a certain matter that matter is excluded from the general provision under the Rule of "Generalia specialibus non derogant".

9. Whether the CIT(A) erred in holding that retrospectivity cannot be read into amendments relying on the case of BJ Services Co. Middle East Ltd. vs. DDIT not appreciating the fact that proviso to sec. 44DA/44BB brought in by the Finance Act, 2011 was only clarificatory in nature and its application has to be read into the Act in view of the decision of the Apex Court in the case of Sedco Forex International Drilling vs. CIT."

2. The issue involved in the above grounds is as to whether the services rendered in connection with 2D and 3D Seismic Data are in the nature of fees for technical services (FTS) or should fall under sec. 44BB of the Act?

3. We have heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

4. The facts in brief are that during the year, the assessee received revenue on account of the contract entered into with ONGC for providing services of seismic survey to the data correction supervision for the purpose of hydrocarbon reservoir exploitation, possible leak point identification and core site selection from available 2D and 3D seismic data, core acquisition with USBL System, sample processing, prevention and transportation, laboratories analysis and interpretation and report. During the course of assessment proceedings, the assessee was asked to explain why looking at the nature of services, receipt may not be treated as fees for technical services and tax accordingly. The Assessing Officer did not agree with the explanation of the assessee and held that the assessee is rendering technical services and, therefore, its income is not covered under sec. 44BB of the

Income-tax Act, 1961 and taxable as fees for technical services. The Learned CIT(Appeals) on the other hand following the decision of Delhi Bench of the ITAT in the case of CGG VERITAS - ITA No. 4653/Del/2010 – order dated 25.01.2012 has held that the income is assessable under sec. 44BB of the Act and not as fee for technical services.

5. In support of the grounds, the Learned CIT(DR) has basically placed reliance on the assessment order. He submitted that while deciding the issue, the Learned CIT(Appeals) has simply ignored the decision of Hon'ble jurisdictional High Court in the case of CIT vs. ONGC – 2007.TII.03.H.C.UKHAND-INTL. The Ld.CIT(DR) pointed out that the Delhi Bench of the ITAT in the case of Siem Offshore A.S. & Ors. Vs. ADIT – ITA No. 1295/Del/2013 (A.Y. 2008-09) and ors. Vide order dated 09.09.2014 in view of the decision of Hon'ble Delhi High Court in the case of PGS Geophysical A.S. vs. ADIT – ITA Nos. 612 of 2012, order dated 09.07.2014 has set aside the matter to the file of the Assessing Officer to verify the varying nature of the contract to decide the issue afresh regarding the eligibility of assesee for the benefit made available u/s 44BB of the Act. Learned CIT(DR) submitted that the Hon'ble Delhi High Court in the case of PGS Geophysical A.S. (supra) has been pleased to hold that the receipt of

the assessee can be taxed under sec. 44BB only if the assessee has a PE in India during the relevant period and the contract entered into by the assessee in India was effectively connected with the PE in India.

6. The Learned AR on the other hand pointed out that the issue raised in the present appeal regarding the eligibility of the assessee to claim taxability under sec. 44BB(1) of the Act is now fully covered in favour of the assessee by the decision of Hon'ble Delhi High Court in the case of PGS Geophysical AS vs. ACIT – 269 CTR 433 (Del.) holding that 2D and 3D Seismic Services shall come within the ambit of section 44BB of the Income-tax Act, 1961. He submitted further that in the present case the Assessing Officer himself in para No. 7 of the assessment order has accepted that the assessee is having PE in India. The other condition laid down by the Hon'ble High Court for the eligibility of claiming taxability under sec. 44BB of the Act that Revenue of the assessee is effectively connected with PE in India is also fully satisfied since the Assessing Officer himself has taxed assessee's income under sec. 44DA of the Act after examining the aspect of PE and effective connection with the PE in India regarding revenue of the assessee. The Learned AR also referred the decision of Delhi Bench of the ITAT in the case of M/s. Fugro Geotem AS Vs. ADIT- ITA No. 5823/Del/2011-

order dated 21.11.2014 holding that 2D and 3D Seismic Services shall come within the ambit of sec. 44BB of the Act. He referred para No. 5 of the said decision. He submitted further that facts in the case of CIT vs. ONGC (supra) are distinguishable, hence, it is not applicable in the present case.

7. Considering the above submission, we agree that facts in the case of CIT vs. ONGC (supra) relied upon by the Learned CIT(DR) are different as in that case the assessee was rendering services for inspection of the existing control system of three units, whereas in the present case, the assessee was providing services in connection with 2D and 3D seismic data. Having almost similar facts, and the identified issue as to whether the assessee is eligible for claiming the benefit of taxability under sec. 44BB(1) of the Act is now covered by the decision of Hon'ble Delhi High Court in the case of PGS Geophysical AS vs. ACIT (supra) wherein the Hon'ble High Court has been pleased to hold that if the Assessing Officer finds that (i) the assessee had a PE in India during the relevant period and (ii) if the first condition is satisfied and the Assessing Officer finds that contract entered into by the assessee with the contractor were effectively connected with the assessee's PE in India then the income of the assessee would be computed under sec. 44B(1) of the Act. In the present case, there is no dispute that the assessee is having PE in India as it is evident from the contents from page No. 7 of the

assessment order wherein the Assessing Officer has noted as “the PE of assessee in India is not disputed as the assessee has filed the return under sec. 44BB offering its income as taxable in India”. So far as the other conditions that the Revenue of the assessee is effectively connected with PE in India is concerned, it is found that the Assessing Officer has already examined the effective connection of the Revenue of the assessee with the PE in India while holding that the income of the assessee is taxable under sec. 44DA of the Act. The Delhi Bench of the ITAT in the case of Fugro Geoteam AS vs. ADIT (supra) has noted that the ruling of AAR in the case of Geophzika Torun SP. GO. Has been confirmed by the Hon'ble Delhi High Court in the case of DIT vs. OHM Ltd. (2012)- 28 Taxman 120 (Del.). The said judgment of the Hon'ble Delhi High Court in the case of Director of Income-tax vs. OSM Ltd. (supra) was followed by the Hon'ble High Court in the assessment year 2008-09 in the case of PGS Geophysical AS (supra). In the light of above judgments of Hon'ble jurisdictional High Court, the ITAT held that for the relevant assessment year i.e. 2008-09, the assessee is entitled to declare its income under the provisions of sec. 44BB of the Act. We thus respectfully following the above cited decisions hold that the assessee is eligible to claim taxability of its income under the provisions of sec. 44BB of the Act. The Learned CIT(Appeals) was thus

justified in holding so. The First Appellate Order in this regard is upheld. The issue is thus decided in favour of the assessee and the ground Nos. 1 to 9 involving the issue are accordingly rejected.

7. In result, the appeal is dismissed.

Decision pronounced in the open court on 22 .05.2015

Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER

Sd/-
(I.C. SUDHIR)
JUDICIAL MEMBER

Dated: 22 /05/2015
Mohan Lal

Copy forwarded to:

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

ASSISTANT REGISTRAR

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