BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI

15th Day of February, 2012

A.A.R. No.936 of 2010

PRESENT

Mr. Justice P.K.Balasubramanyan (Chairman)
Mr. V.K. Shridhar (Member)

Name & address of the applicant	Global Industries Asia Pacific Pte.Ltd. 41, Science Park Road, #03-24/28 The Gemini, Singapore Science Park II, Singapore,117610.
Commissioner concerned	Director of Income-tax (International Taxation)- II, New Delhi
Present for the applicant	Mr. Percy Pardiwalla, Advocate Mr. Prashant Shah, C.A. Mr. Atulan Saha, C.A. Mr. R.Satish Kumar, C.A.
Present for the Department	Mr. Shelendra Srivastava, I.T.O.

RULING
(By V K Shridhar)

The applicant is a Singapore Company and has a tax residency certificate issued by the Singapore Tax Authorities. During the year 2008-09, it has signed contracts with Indian Oil Corporation Ltd.(IOCL) and Larsen & Toubro (L&T). The applicant submits that it does not have an office or any other premises in India for executing these contracts. It is stated that the contract with the IOCL involves residual offshore construction work in the navigational waters of Paradip Port Trust, Orissa, and the contract with L&T involves installation work in the waters of Mumbai High South field. The scope of work in each of the contract is as under.

Contract with IOCL:

The contract is made on 5.9.2008 to execute the work of **"RESIDUAL OFFSHORE CONSTRUCTION WORK at PARADEEP, GROUP-1- INSTALLATION OF SPM INCLUDING ANCHOR CHAINS, FLOATING AND SUBSEA HOSES"**. In layman's term, it is installation of a system which acts as a complete terminal for discharge of crude oil from vessels stationed in the sea to the onshore tank farm. The total nominal contract value for the purpose of calculating the security deposit is US $ 18,598,140. The remunerations are to be calculated on the basis of the rates indicated in the schedules including service tax. For undertaking the above operations resources including vessels were mobilized to India. The work is to be completed by 28.11.2008. The applicant submits that its presence in India in the FY 2008-09 is only for 41 days and that would not constitute a Permanent Establishment (PE) in terms of the Tax Treaty with Singapore (DTAA).

Contract with L&T:

On 17.03.2008, L&T entered into contract No**. MR/OW/MH/MHSRP-II/T-1/13/2007 with Oil and Natural Gas Corporation Ltd. (ONGC) for the Mumbai High South Redevelopment Project Phase-II (MHSRPII).**The contract was subcontracted to the applicant on 23.04.2008 to execute the work of installation and construction services for Single Point Mooring (SPM) in the waters of Mumbai High South field. It is stated elsewhere that it is a contract for installation of bridge, pipelines and cables. The consideration for the contract is US $ 72.5 million on lump sum basis for each specifically identified activity, including service tax. For undertaking the construction work vessels were mobilized to India. The work which started on 3.12.2008 was completed on 19.5.2009. The applicant submits that its presence in India in FY 2008-09 is for 119 days and in FY 2009-10 for 49 days and would not constitute a PE in terms of the DTAA. Alternatively, the applicant submits that if the benefits under the DTAA are not granted then the receipts are taxable under 44BB of the Income-tax Act, 1961(Act).

It is stated that the assessing officers issued orders to withhold tax by treating the payments under the contract with IOCL as Royalty under the Act/ Article 12 of the DTAA by grossing up, and, the payments under the contract with L&T under section 44BB of the Act.

2. The applicant seeks advance ruling on the following questions:-

1. *Whether on the facts and in law, can the consideration, including mobilization and demobilization revenues, for services provided by the Applicant to Indian Oil Corporation Limited ('IOCL') and to Larsen & Toubro ('L&T') be construed to be in the nature of 'Fees for Technical Services' ('FTS') under section 9(1)(vii) of the Act?*

2. *If the answer to question 1 is in affirmative, whether on the facts and in law, can the consideration, including mobilization and demobilization revenues, for services provided by the Applicant to IOCL and L&T be construed to be in the nature of FTS under Article 12 of the India-Singapore Double Tax Avoidance Agreement ('Tax Treaty').*

3. *Whether on the facts and in law, can the consideration for services provided by the Applicant be construed to be in the nature of 'Royalty' under section 9(1) of the Act and/or under Article 12 of the Tax Treaty?*

4. *Whether on the facts and in law, can the Applicant be considered as having a Permanent Establishment (PE) in India for previous year ('PY') 2008-09 and PY 2009-10 under Article 5 of the Tax Treaty (in respect of its contract/s with IOCL and/or L&T?*

5. *If the answer to question 1 and / or 2,3 and 4 is not in the affirmative, can it be said that the Applicant is not taxable in India on income earned from its contracts with IOCL and L&T during the PY 2008-09 and PY 2009-10?*

6. *If answer to question 1,2,3 or 4 is in the affirmative, whether on the facts and in law, can the income derived by the Applicant in respect of*

the contract with L&T be computed in accordance with provisions of section 44BB of the Act?

7. *If answers to 1,2,4 and 6 is in the affirmative, whether and based on the facts and in law, can it be said that the consideration received by the Applicant for mobilization and demobilization of the vessels and resources to the extent of the distance travelled outside India be considered as not attributable to activities carried out in India and hence, not liable to tax in India?*

3. The Revenue submits that the consideration for both the contracts is fee for technical services under the Act and under the DTAA. The services of installation of SPM under the IOCL contract is a post wellhead operation. The services of providing transportation of bricks, pipeline, cable etc. for construction under the L&T contract is also a post exploration services. It is argued that even if it is prospecting for, or extraction or production of mineral oils but being a sub contract, cannot be taxed under section 44BB of the Act. The services imparted are technical in nature and taxable as FTS in view of the decision in the case of Rolls Royce Pvt. Ltd. (2007-TII-03-HC-UKHAND-INTL). As regards the existence of a PE, it is stated that the impugned services can be provided only if the applicant has an office in India. Lastly, the mobilization and demobilization expenses to the

extent of distance travelled beyond the territorial waters of India are taxable in India being part of the composite contract for the activities carried out in India.

4. We may mention here that while passing an order under section 197 of the Act, the Revenue took the stand that the IOCL contract is based on barge/vessel operating in offshore construction. The applicant had supplied the vessel on the agreed rent and fell in the category of clause (iva) to Explanation 2 under section 9(1) of the Act and also under Article 12 under DTAA as royalty. Regarding the L&T contract the Revenue and the applicant's authorised representative took a common stand that the receipts are taxable under section 44BB of the Act.

5. The applicant submits that the two contracts are for installation and the consideration represent business receipts. The tender and work documents of the contract with IOCL shows that the SPM installed would be discharging the crude oil. The contract with L&T is a combination of construction, assembly and installation work and the nature of the contract is more of a joint venture with L&T than a sub-contract. Being a construction and mining project, the consideration received is not a fee for technical services as it is covered under the exception provided in Explanation 2 of section 9(1)(vii) of the Act. The installation work carried out did not make available technical knowledge, experience, skill and know-how to IOCL and L&T, which in turn could enable them to apply the technology possessed by the applicant elsewhere in order that the consideration

should qualify as 'fees for technical services' under Article 12.4(b) of the DTAA. The consideration under the two contracts is business receipts and would be taxable only if the applicant has a PE in terms of the DTAA.

6. Learned Counsel submitted that the applicant does not have a PE under the contract with IOCL, being an installation project. The project for installation would have a PE only if it continues for a period of more than 183 days in FY 2008-09 in view of Article 5.3 of the DTAA. The period of the contract was for 41 days i.e. from 15.11.08 to 4.1.09. Article 5.5 of the DTAA would apply for L&T project as the services and the facilities provided under the contract were in connection with the exploration, exploitation or extraction of mineral oil in India. Since the applicant's contract was for 168 days i.e. from 3.12.08 to 19.5.09, the applicant would not have a PE in India. It is further submitted that Article 5.3 and 5.5 being specific, would apply in determining the PE under the DTAA rather than the general provision under Article 5.1 of the DTAA. Alternatively, the contract with L&T, carried out for ONGC, is an integral part of the process of extraction or production of mineral oil and would fall within the ambit of Section 44BB of the Act.

Contract with IOCL:

7. IOCL is setting up an offshore crude oil receiving facility having Single Point Mooring (SPM) terminal about 20 km. off the coast of Paradip in the east

coast of India. The facility available will unload the crude oil from Very-Large Crude Carriers (VLCCs) to meet the crude oil requirement of its refineries located in the eastern part of India. It is stated that the major part of the crude receiving facility has been completed comprising of laying 20 km. of offshore pipeline, installation of PLEM, spool piece connection of the 48" lying with the PLEM, hydrostatic testing of 48" pipeline, driving on six number of anchor piles with chains,2.8 km for a effluent discharge is already laid. The IOCL in its letter dated 17.7.2008 informed the applicant about the residual offshore construction of Paradip Port and informed that the anticipated residual work is divided into 3 groups:

Group 1. Installation of SPM including anchor chains, floating and subsea hoses.

Group 2. Work of post trenching of 48" and 14" pipeline.

Group 3. All balance works required to complete the 14" affluent pipeline.

8. The technical details of work required involving Group 1, 2 & 3, environmental data pertaining to Paradip, survey details of the laid PLEM and anchor chains undertaken during June '08 were enclosed. The expected time of completion of Group 1, 2 & 3 was stated to be 4,4 and 6 weeks, respectively, plus 2 weeks for commissioning of documentation from the date of complete mobilization of spread at project site. The IOCL desired that Group 1 and 2 work is completed in all respects and the system is commissioned before December, 2008

as these are required to commission the PHCPL project. Accordingly, it was expected the bidder should mobilize the spread to start the work by beginning of November 2008. It was emphasized that completion of work in entirety shall be the responsibility of the bidder and the bidder is to ensure that the work is completed by March 2009. Accordingly, the applicant was requested to submit the offer for all the three Groups. It was also clarified that offer for any one Group or more than one Group will also be evaluated. Even part offer for work under Group 2 may also be evaluated. IOCL gave the contract to the applicant on 5.9.2008 whereby the applicant accepted the above tender for the said work. The present application relates to Group-1-Installation of SPM whereby the residual work to be completed is installation of SPM Buoy, which is to be secured in position with the existing 6 stud less, 345 meter long, weighing 70 tons anchor chains kept in a heap near the pile locations. The scope of work under the contract required connection of the Buoy at respective hawser location in the buoyers tensioning of the chains right from the pile location upto PLEM location. After connecting SPM buoy with the anchor chains, it is to be connected to the PLEM with two strings. Any technical clarification during installation is to be provided by SBM installation supervisor available on board the vessel.

9. The payment under the arrangement is as per the Schedule of Rate (SOR) annexed to the letter of acceptance-dated 04.09.2008. The payment is divided

under seven heads. The character of amount payable is linked to the nature of work and amount is **not lump sum** for the whole contract. As per para 1.0 of Letter of Acceptance (LOA), the lump sum amount has been considered only for the purpose of security deposit. However, lump sum amount is also fixed for mobilization and demobilization, built documentation. Only the amount for SPM installation and leak testing is variable as per note 4 and 5 to the SOR, indicating that the payments are according to the number of day(s).

10. In the SOR, the payment for various items is as under: (US $)

(i)	Mobilization and demobilization of Marine Spread	12,980,959
(ii)	Pre and post erection work	877,288
(iii)	Actual installation work	4,652,381
(iv)	Documentation, Misc	87,512

In the Note 1 to SOR, it is stated that pre and post survey will be performed using Tow Tug which arrives five days earlier than Comanche. The bill of entry in the Custom's record is under the caption 'Temporary importation– one unit used self propelled work barage'. The contract provides the mode of payment in INR and in India by crossed account payee cheque and sent to the registered office of the applicant or other office notified in his behalf or delivered to the authorised representative. The applicant has chosen to bifurcate the receipts under the above mentioned heads of income. It does not want the entire receipts to be labeled under installation. It is because only 25% of the receipts are in the nature of installation work and the rest is related to the use of the vessels to carry out the installation work. It cannot be said that it is a contract for installation alone. If during the activities of installation, income in the nature of royalty or fees for technical services or interest or of any other nature arises, then such an income has to be assessed under that head of income. Thus, what IOCL is paying is for each of the items separately, even though it is a composite contract. The Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd., 288ITR 410, relied on the fact that the consideration of each portion of the contract is separately specified and therefore it can be separated from the whole. The fact, that the contract is lump sum fixed price was also acknowledged. Here the contract is loaded in favour of mobilization expenses. The contract is a divisible one, segregating the mobilization segment and other segments. Nothing in law could prevent the parties to enter into a contract which provides for mobilization and demobilization for a separate consideration though they are meant to be utilized in the process of installation of SPM bouy. It has been observed in State of Madras Vs. Richardson (1968) 21 STC 245 that even in a transaction which is in the nature of works contract, a contract of sale of material that is ultimately utilized in the works, can be inferred. Where in the composite contract the receipts are bifurcated as offshore supplies and services, onshore supplies and services, it was held in the case of Ishikawajima that the receipts are taxable independent of each other and on the basis of the source and nature of the receipt. Here we have noted that 68% of the total consideration relates to mobilization and demobilization, 25% on actual installation and the rest relates to pre and post execution work and drawing/design documentation. Considering the entire payment, the payment made for use of equipment i.e. the barges and stated as mobilization and demobilization expenses determine the predominant character and nature of the payment. Though the purpose of the contract is to install the buoy but the form of payment is for the use of equipment. The payment for mobilization and de-mobilization relates to use of equipment for undertaking installation work and falls under the definition of royalty under Article 12.3(b) of the DTAA. The installation is to be carried out by locating the ends of anchor chains, cross tensioning of the anchor chains, add to the length of the anchor chain where it is falling short of the desired length, towing and setting up the Buoy from the port to the location and fixing the chain to the SPM Buoy, testing the leakages of the floating hose strings, affixing the umbilical to the valves outlets and installing all end connection, installing navigational aids, pressure gauge. As installation is ancillary and subsidiary to the use of equipment or enjoyment of the right for such use, the payment for installation would fall under the definition of fees for technical services as per Article 12.4(a) of the DTAA.

Contract with L&T:

11. While describing the scope of work under the contract, the applicant has stated in para 3 to Annexure III to the application that the contract with L & T is : "installation of bridge, pipelines, cable installation, riser guard and riser installation, pipeline crossings, free span connection, riser clamps installation, tie-in spool installation, J-tube (including clamps thereof) etc, etc" In preamble of the agreement it is stated that the applicant has the expertise, technical knowhow, availability of equipment and personnel. The recital in Clause 2 of the subcontract states that applicant shall provide equipment, personnel, supervision and all other things required for the performance of sub contract work which is on the basis of a back – to – back agreement between L&T and ONGC. A lump sum price of US $ 72.5 million is to be paid in a nominated bank account outside India.

12. In Annexure IV to the application, while giving interpretation of law or facts with reference to Question No. 6, the applicant states that the scope of work mentioned supra are the activities carried out for ONGC in connection with extraction or production of, mineral oils in India as a part of overall construction project and falls within the ambit of Section 44BB of the Act. The learned counsel for the applicant submits that contract with L&T(subcontract) is in connection with prospecting for, or extraction or production of, mineral oils and would constitute PE only if the services or facilities are provided for a period of more than 183 days

in the fiscal year under Article 5.5 of the DTAA. It is the case of the applicant that the computation of the period of 183 days shall be from the time the vessels of the applicant gain port clearance till the time the said vessels leave the shores of India. As the vessels were not in India for more than 183 days, the applicant claims that it would not have a PE in India and no liability is attracted under Section 44BB of the Act.

13. Article 5.5 of the DTAA states:

"Notwithstanding the provisions of paragraphs 3 and 4, and enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in that Contracting State for a period of more than 183 days in any fiscal year in connection with the exploration, exploitation or extraction of mineral oils in that Contracting State."

The scope of Article 5.5 is wide and deals with provision of "services or facilities" in connection with the exploration, exploitation or extraction of mineral oils. Article 5.5 should be distinguished from Article 5.3 which deals with 'building site or construction, installation or assembly project.' While for a PE to exist under Article 5.3, the question would relate to the duration of installation and under Article 5.5, the question that needs to be answered is the duration for which services or facilities were provided. We are to examine the subcontract and other material on record to find the answer.

14. On a bare perusal of the documents on record, it is obvious that the applicant and L&T were under negotiation with regard to the services in question even prior to L&T entering into the contract with ONGC on 17.03.2008. In fact, a list of 45 emails, exchanged prior to 17.03.2008, is on record. While the details of the emails are not on record, the captioned subject-line clearly shows that they relate to finalization of various details with reference to the project. Thus, it is not surprising that the subcontract between L&T and the applicant was entered into on 23.04.2008, only after due diligence by L&T and ONGC. In fact, it was the submission of the counsel for the applicant that L&T and the applicant will be jointly performing the contractual obligations and the relation between them is something akin to a Joint Venture. This is also evident from the responsibility matrix whereby in a number of tasks the L&T will assist the applicant and vice versa.

15. We have noted that the subcontract includes within its ambit not only installation but a number of pre-installation and post-installation services including surveys to be carried out by the applicant. Appendix A to the subcontract includes the details of applicant's scope of work. Under clause 2 of Appendix A, L&T would be furnishing various pre-engineering survey reports to applicant for review

and comments. In fact, some of the surveys would be performed by the applicant alone. The Scope of work includes various preparatory services including services in relation to drawing, design engineering as elaborated under clause 3 of the Appendix A. Under Clause 4 of the Appendix A, the applicant has also certain responsibilities for procurement. In fact the applicant has submitted in the written submission that 'for undertaking operations, resources including vessels were mobilized to India.' While the applicant has stressed on the arrival of these resources and vessels in India, clearly the resources were arranged for at an earlier date according to the size and description decided mutually. Thus, the services and facilities being rendered by the applicant go beyond installation and include pre-installation services, post-installation services, procurement and transportation.

16. Under clause 3 of the Sub-contract, the sub-contract is effective as of 23rd day of April, 2008 and shall remain in full force until all the obligations under the contract have been discharged. Several provisions under the Sub-contract deal with the question of delay and amount to be paid in case of standbys. Under Clause 19, applicant has provided a twelve months guarantee with relation to materials and workmanship provided by it. Under Clause 25, a performance guarantee is to be given by the Parent company of the applicant to L&T within 30 days of the signing of the sub-contract. It is pertinent to note that the performance guarantee shall be valid till the end of warranty period. A performance guarantee is typically taken to

ensure the performance of the obligations of a Party under a contract. Hence, unless performance of contractual obligations commence, a performance guarantee will not be required to be tendered. Thus, it is clear that the services under the sub-contract commenced not later than 23.04.2008, which is date on which the subcontract was concluded and continued even after the vessels left the shores of India in lieu of the services to be provided post-installation including surveys. Hence, the obligations under the contract continued to exist even after the vessels left the shores of India. The applicant's plea of counting the duration of services from 3rd December, 2008 when the applicant's vessels were mobilized to India till 19th May, 2009 when the vessels left the shores of India is untenable and unacceptable.

17. It is to be remembered that there is a stark difference between preliminary and preparatory services under an agreement. While the negotiations prior to 17.03.2008 could be termed as preliminary and could be ignored for the purposes of Article 5.5, the rest of the activities of the applicant including surveys, drawing, designs and getting materials ready and transportation are preparatory in nature. The duration of performing these preparatory activities cannot be excluded while calculating the duration of provision of services or facilities under Article 5.5. Moreover, Article 5.5 is a deeming provision and its import is such that the said Article can be attracted even on provision of services simpliciter without the

presence of an office building, in the Country where the services are being provided. It seems to us that even if the Applicant was not mobilizing any vessels, it would have a PE in India if it provided services or facilities in connection with the exploration, exploitation or extraction of mineral oils in India in the nature of drawing, design and the like.

18. We are of the view that the Agreement with L&T falls within the ambit of Section 44BB of the Act as the same deals with a case where the assessee is "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". The applicant has provided services or facilities in connection with the exploration, exploitation or extraction of mineral oils for more than 183 days during the fiscal year. Hence the applicant has a PE in India in terms of Article 5.5 of the DTAA and falls within the ambit of Section 44BB of the Act and not under as Fees for Technical Services under the Act or under Article 12 of the DTAA regarding this contract.

19. Once an assessee comes under Section 44BB (1) of the Act, the provision itself deems its profits and gains as 10% of the aggregate of the amounts specified in sub-section (2). Sub-section 2 (a) specifies that that aggregate amount is the amount paid or payable whether in or out of India to the assessee on account of provision of services in India. In the scenario, there is no scope for splitting up the

amount payable to the assessee. If the assessee wants to seek such a splitting up it has to go under section 44BB(3) of the Act. Section 44BB does not close its doors to an applicant who desires to know which part of its income accrues or arises in India and how much. The applicant can exercise its rights provided it opts to get the income computed under section 44BB(3) of the Act. The scheme of computation of income under this section does not provide any leeway to apply simultaneously both the sub-sections (1) and (3) of section 44BB to the income arising from the business activities falling under the ambit of section 44BB(1) of the Act. It even goes to the extent that if a part of the income falls under 'Royalties' or 'Fees for Technical Services', there is no scope to assess such receipts under these heads, once it is held that the income is from its oil exploration and production activities as envisaged under section 44BB. We are of the view that the applicant has to first exercise the option to get its income computed under section 44BB(3). In view thereof, the entire mobilization/demobilization revenues received by the applicant would be taxable in India.

Que.1 & 2 Out of the consideration for services provided by the applicant, only a part of the consideration under the IOCL contract is in the nature of Fees for Technical Services under section 9(1)(vii) of the Act and under Article 12 of DTAA with Singapore.

Que. 3 Out of the consideration for services provided by the applicant only a part of the consideration under the contract with IOCL is

	in the nature of Royalty under section 9(1) of the Act and under Article 12 of the DTAA.
Que. 4	The applicant has a PE in India in respect of its contract with L&T.
Que. 5	The income derived by the applicant in respect of both the contracts is taxable in India.
Que.6	The income derived by the applicant in respect of the contract with L&T is taxable in India under section 44BB of the Act.
Que.7	The consideration received by the applicant for mobilization and demobilization is taxable in India under section 44BB of the Act.

Accordingly, ruling is given and pronounced on 15th day of February, 2012.

(P.K.Balasubramanyan) Chairman

(V.K.Shridhar) Member