IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 40 of 2007

The Commissioner of Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil and Gas Expat Services Inc. Dehradun
…… Respondent

Income Tax Appeal No. 33 of 2007

The Commissioner of Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil and Gas Expat Services Inc. Dehradun
…… Respondent

Income Tax Appeal No. 41 of 2007

The Commissioner of Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil and Gas Expat Services Inc. Dehradun
…… Respondent

Income Tax Appeal No. 49 of 2007

The Commissioner of Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil and Gas Expat Services Inc. Dehradun
…… Respondent

Income Tax Appeal No. 129 of 2007

Commissioner Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil & Gas International Inc.
…… Respondent

AND

Income Tax Appeal No. 128 of 2007

Commissioner Income Tax,
Dehradun and another …….. Appellants

Versus

M/s Enron Oil & Gas International Inc.
…… Respondent

Present: Mr. Hari Mohan Bhatia, Advocate for the appellants.
Mr. S.K. Posti, Advocate for the respondent.

Coram: Hon'ble Barin Ghosh, C.J.
Hon'ble U.C. Dhyani, J.

BARIN GHOSH, C.J. (Oral)

All these appeals raise similar questions of law and facts and, accordingly, are taken up together and are decided by this common judgment.

2. Contents of Section 44BB of the Income Tax Act, 1961 (hereinafter referred to as "the Act") are the mandate of legislation. The same cannot be contradicted in any manner or in any form. In the instant case, an instrumentality of the Union of India was a party to a tripartite contract. Under the contract, cost to cost services were to be provided by the assessee respondent in the instant case. It is contended that in such view of the matter, the payments, thus, received by the assessee are outside the scope of Section 44BB of the Act. To us, it appears that 10 per cent of any remuneration received by an assessee of the nature mentioned in

Section 44BB of the Act must be deemed to be profits of the assessee and chargeable to tax under the head profits and gains of business or profession. In order to claim that the profit, in fact, was lower than the profits and gains specified under Section 44BB i.e. less than 10 per cent of such remuneration, it is the requirement that the assessee must keep and maintain books of accounts and other documents as required under sub-section (2) of Section 44AA and to have his accounts audited and to furnish a report of such audit as required under Section 44AB of the Act. In the instant case, assessee did not maintain any such books of accounts nor got the same audited. On the other hand, solely on the basis of the contract, which recorded that the assessee will be remunerated for providing service at no profit, it was assumed by the appellant that the assessee made no profit at all. It appears to us that whether the assessee made any profit or it did not make any profit is of no consequence. 10 per cent of its remuneration, as mentioned in Section 44BB is deemed to be profit and to be taxed under the head profits and gains of business or profession. If the assessee was of the view that it has not earned any profit by providing such service, the only way available to the assessee was to maintain books of accounts and to have the same audited and to furnish the audit report in respect thereof. It is submitted by the learned counsel for the respondent that a view contrary to our view, as expressed above, has been taken in Income Tax Appeal No. 89 of 2007 and connected Appeals by a Division Bench of this Court. In that case, the Division Bench was not concerned with a tripartite agreement, inter se, three individuals, one of which is an instrumentality of the Union of India, another an Indian public limited liability company and the third, a non-resident company, as is the case in the instant case. There the learned Judges dealt with Article 7 of DTAA, i.e. Article 7 of an international treaty. The learned Judges of this High Court, in the case referred to above, in paragraph 19 observed that Article 7 of the said international treaty applies to business profits

arising to a US enterprise which has a permanent establishment ("PE") in India and that in determining the profits attributable to PE, deduction shall be allowed for expenses incurred in relation to earning of such income. In the instant case, there is no dispute that the assessee, a US enterprise, has no permanent establishment in India. According to the Division Bench of this Court, unless there is a permanent establishment of a US enterprise in India, such an enterprise will not come within the taxable jurisdiction in India. In other words, by the said international treaty, the Government of India has accepted that a non-resident engaged in the business of providing services and facilities, as mentioned in Section 44BB, if is a US enterprise, will only come within the purview of Section 44BB, if it has a permanent establishment in India.

3. We hold that Article 7 of DTAA requires a non-resident US enterprise to have a permanent establishment in India for being taxed in India, otherwise it is not taxable in any view of the said treaty, even it received any remuneration in connection with any matter provided in Section 44BB of the Act. In the judgment referred to above, the Division Bench stated in so many words that the assessee was not having any permanent establishment in India during the relevant years. The said fact was culled out with certainty from the facts determined by the fact finding authorities, namely, the Assessing Officer and the Appellate Commissioner. In the instant case, there is no such finding for the relevant year. However, from the judgment of this Court, referred to above, it appears that in Income Tax Appeal No. 7 of 2009 for the assessment year 2000-2001, the assessee was M/s Enron Oil & Gas Expat Services Inc., Dehradun, and that, in the said appeal, the Division Bench of this Court granted relief to the assessee on the basis of the fact recorded that the assessee had no permanent establishment in India.

4. We, accordingly, hold that the matters, in the instant case, are also covered by the said judgment of this Court and following the same, we dismiss these appeals.

(U.C. Dhyani, J.)
26.11.2012

(Barin Ghosh, C.J.)
26.11.2012

P. Singh