* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30th October, 2012
% *Date of Decision: 6th December, 2012*

\+ **W.P. (C) 6830/2011**

DIRECTOR OF INCOME TAX-II .....Petitioner
Through: Mr. N. P. Sahni, Sr. Standing Counsel.

versus

OHM LIMITED .....Respondent
Through: Mr. Salil Kapoor with Mr. Vikas Jain, Mr. Sanat Kapoor and Mr. Ankit Gupta, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

The short question which arises in this writ petition is whether the assessee, which is the respondent herein, falls to be assessed under section 44BB of the Income Tax Act, 1961 ('Act', for short) as claimed by it or under section 44DA of the Act as claimed by the petitioner which is the Revenue.

2. The respondent-assessee is a company incorporated under the laws of the United Kingdom and is a tax-resident of that country. It is engaged in the business of providing geophysical services to oil and gas exploration industry; it conducts electromagnetic survey, processing and interpretation of data. The data so collected through the survey is used in off shore oil industry. Two companies namely Petro Gas E & P, LLC and CGG Veritas Services SA awarded contracts to the assessee for procuring data, processing and interpreting the data in respect of an off shore exploration block in India. The respondent is paid for mobilisation as well as de-mobilisation of its vessels from the site area and for providing services in connection with the prospecting for extraction or production of mineral oils.

3. The assessee applied to the concerned authority under Section 197 of the Act for issuance of a certificate for receiving payments after deduction of tax at the lesser rate of 4.223% as per the provisions of section 44BB. It contended that Section 44BB was applicable to the revenues earned in respect of services in connection with the prospecting for extraction or production of mineral oils and not any of the other provisions of the Act. Under Section 44BB, 10% of the gross revenues are deemed to be profits of the business and the effective tax thereon would amount to 4.223% (of such profits). The concerned authority competent to issue the certificate under section 197 did not accept the assessee's contention and passed an order, directing the assessee to receive payments after suffering tax deduction at source at the rate of 10% (+ surcharge + education cess) in respect of all revenues received from Petro Gas and CGG Veritas.

4. Aggrieved by the order passed under Section 197 of the Act as above, the assessee filed an application before the Authority for Advance Ruling (AAR) under section 245Q of the Act. The assessee claimed that oil and gas exploration activity was directly related to and was part of the exploration/ prospecting activities for mineral oil (i.e. Petroleum and Natural Gas) and such services clearly fell within the ambit of Section 44BB and 10% of the revenues which were deemed to be the profits from such activities was taxable at 4.223%. The AAR accepted the assessee's claim and it is the correctness of the conclusion of the AAR that is called in question in the present writ petition.

5. The main contention of the learned Senior Standing Counsel for the Revenue is that the AAR erred in its decision that Section 44BB would apply to the present case and that it failed to note that the appropriate provision to be applied was Section 44DA read with section 9(1)(vii), Explanation 2. On the other hand the contention urged on behalf of the assessee is that it is Section 44BB which is the more specific of the two sections and which made "special provision for computing profits and gains in connection with the business of exploration, etc. of

mineral oils" that was applicable and not Section 44DA which made "special provision for computing income by way of royalties, etc. in case of non-resident".

6. The relevant statutory provisions read as under: -

"*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 44DA 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."

"***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 :

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

(2) Every non-resident (not being a company) or a foreign company shall keep and maintain books of account and other documents in accordance with the provisions contained in section 44AA and get his accounts audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and furnish along with the return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

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) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(c) "permanent establishment" shall have the same meaning as in clause (iiia) of section 92F.

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 chargeable under the head "Salaries".

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

7. When Section 44BB was first inserted by the Finance Act, 1987 with retrospective effect from 01.04.1983, it was applicable to all assessees irrespective of their residential status. By Finance Act, 1988, the provision was specifically confined in its applicability to non-residents only and the amendment made to that effect was also made with retrospective effect from 01.04.1983. Section 44DA was inserted by the Finance Act, 2003 w. e. f. 01.04.2004 and it applies to a non-residents only. The other amendments which we have to notice is that the second proviso to Section 44DA was inserted by the Finance Act, 2010, w. e. f. 01.04.2011; by the same Act a reference to section 44DA was inserted in the proviso to sub-section (1) of section 44BB.

8. In coming to its decision that Section 44BB is the appropriate section which is applicable to the assessee, the AAR followed its earlier decision in *Geofizyka Torun Sp. Zo.o*, (2010) 320 ITR 268 where it was held, after detailed discussion, as follows: -

> "*If the business is of the specific nature envisaged under 44BB, the computation provision therein would prevail over the computation provision in section 44DA. In other words the income received by a non-resident business man for the technical services provided in relation to prospecting and extraction of mineral oil, will be governed by S. 44BB for the purposes of computation. If all the services that are in the nature of technical services within the meaning of Explanation 2 to section 9(1)(vii) are to be computed in accordance with 44DA, very little purpose will be served by incorporating special provision in 44BB for computing the profits in relation to the services connected with the exploration and extraction of mineral oils. The provision will then operate in a very limited field.*" *(refer Para 8.1)*

It was then observed that:

> "*It is not our view that section 44BB will become otiose or altogether redundant, but it is our view that its scope and content will be unduly curtailed by adopting the*

interpretation sought to be placed by the revenue." *(refer para 9.8)*

9. In our view there is no error in the view taken by the AAR. A similar view has been taken by a Division Bench of this Court in *Director of Income Tax v. Jindal Drilling and Industries Ltd.*, (2010) 320 ITR 104. In that case the question was whether the services rendered by the non-resident company for transportation and checking up of rigs, review of design and issuance of suitability certificate to the assessee, which was a resident company, were covered under section 9(1)(vii) read with Explanation 2 thereto or under section 44BB of the Act. The question arose in the context of tax deduction at source on the remittance by the assessee, the resident company, to the non-resident company. The contention of the Revenue in that case was that the remittance represented, "fee for technical services" within the meaning of Explanation 2 below Section 9(1)(vii). The contention of the assessee, on the other hand, was that the remittance represented income for rendering of services of the nature described in section 44BB of the Act. Though there is no express reference to section 44DA in the decision, there is reference to Explanation 2 to Section 9(1)(vii) of the Act, which is found to be incorporated into section 44DA. In substance, therefore, the contention of the Revenue in the case before us is identical to its contention before the Division Bench of this Court in the decision cited supra. It was held by this Court as under:

"*The Tribunal concluded that a reading of the provisions of section 44BB as well as Explanation 2 to section 9(1)(vii) of the said Act clearly showed that the consideration in question paid or payable by the assessee to NDAL for the services rendered was covered by the provisions of section 44BB and not by section 9(1)(vii) of the Act.*

This conclusion of the Tribunal is based on the finding that the nature of services rendered by NDAL to the assessee at its off-shore rigs on the high seas were part and parcel of the activities engaged in by the assessee at the off-shore rigs set up for exploration, prospecting and production of mineral oil from the sea bed. The Tribunal found as a fact that the movement of the rigs from one well to another was a very technical and

cumbersome process requiring technical expertise which was provided by NDAL. This involved various processes starting with soil testing and evaluation of available data, after which the foreign technical personnel assessed the risk involved and certified as to whether the rig could be moved from one site to another. The services provided were, therefore, considered as being in connection with the exploration or prospecting or production of mineral oil. Section 44BB clearly involves the services rendered by a non-resident in connection with the prospecting or extraction or production of mineral oils. The Tribunal found as a fact that the nature of services rendered by NDAL to the assessee were covered under this expression. It is also to be noted that the nature of services rendered by the NDAl to the assessee were specifically excluded by Explanation 2 to section 9(1)(vii) of the said Act which expressly uses the following words "but does not include consideration for any construction, assembly, mining or like project undertaken by the resident."

So, the sums of money received by the NDAL from the assessee were not includible in the definition of fees for technical services as provided in section 9(1)(vii) read with Explanation 2 thereto. Such receipts were, however, specifically provided for in section 44BB of the said Act. Both the Commissioner of Income-tax (Appeals) and the Tribunal have also arrived at this conclusion. We fully agree with their conclusion. No substantial question of law arises for our consideration. The appeals are dismissed."

10. The relevant portion of the order of the AAR in the case of *Geofizyka Torun (supra)*, which order was adopted and followed by it in its impugned order is as below: -

"*As already discussed, section 44BB which was inserted into the Act with effect from April 1, 2004, is a special, specific and exclusive provision dealing with the computation of profits of non-resident assessees engaged in the business of providing services in connection with or supplying plant and machinery on hire to be used "in the prospecting for, or extraction or production of, mineral oils". It is in the company of three other sections (which we have referred to earlier as 44BB series) specially providing for computation of profits of the non-residents/ foreign companies engaged in the specified types of business. True, profits arising from the business specified in section 44BB may also fall within the ambit of fees for technical services chargeable under section 9(1)(vii). But, the question is which is the appropriate*

computation provision that is applicable? As between the competing provisions, namely section 9(1)(vii) read with section 44DA and section 44BB, section 44BB being a more specific provision, that provision should prevail for the purposes of computation. Section 44DA, it may be recalled, provides for the method of computation of income by way of fees for technical services received by a non-resident or a foreign company carrying on business through a permanent establishment in India. If the non-resident is engaged in the business of providing services in connection with the prospecting, etc., of mineral oils, the computation provisions relating to fees for technical services will have to yield to section 44BB. It may be noticed that in a case of business governed by section 44BB, normally, the enterprise concerned would be having a permanent establishment in India. It is difficult to envisage a situation of a person being engaged in providing services or facilities in connection with prospecting and extraction of mineral oils not having a fixed place of business from where the operations are carried on. Thus, the existence of permanent establishment is a common feature both in section 44DA as well as section 44BB, though there is an explicit reference to permanent establishment under section 44DA. Thus, rendering of technical services through permanent establishment may be a common feature of both the sections, i.e., section 44BB and section 44DA, though in the case of section 44DA, it is explicitly mentioned. But, what is important is the nature of business and it is that factor which serves as an indicator to apply one of the two sections. If the business is of the specific nature envisaged by section 44BB, the computation provision therein would prevail over the computation provision in section 44DA. In other words, the income received by a non-resident businessman for the technical services provided in relation to prospecting and extraction of mineral oil, will be wholly governed by section 44BB for the purposes of computation. If all the services that are in the nature of technical services within the meaning of Explanation 2 to section 9(1)(vii) are to be computed in accordance with section 44DA, very little purpose will be served by incorporating a special provision in section 44BB for computing the profits in relation to the services connected with exploration and extraction of mineral oils. The provision will then operate in a very limited field. "

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 non-resident, 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.

12. The second proviso to sub-section (1) of Section 44DA inserted by the Finance Act, 2010 w. e. f. 01.04.2011 makes the position clear. Simultaneously a reference to Section 44DA was inserted in the proviso to sub-section (1) of section 44BB. It should be remembered that section 44DA also requires that the non-resident or the foreign company should carry on business in India through a permanent establishment situated therein and the right, property or contract in respect of which the royalty or fees for technical services is paid should be effectively connected with the permanent establishment. Such a requirement has not been spelt out in Section 44BB; moreover, a flat rate of 10% of the revenues received by the non-resident for the specific services rendered by it are deemed to be profits from the business chargeable to tax in India under Section 44BB, whereas under Section 44DA, deduction of expenditure or allowance wholly and exclusively incurred by the non-resident for the business of the permanent establishment in India and for expenditure towards reimbursement of actual expense by the permanent establishment to its head office or to any of its other offices is allowed from the revenues received by the non-resident. Because of the different modes or methods prescribed in the two sections for computing the profits, it apparently became necessary to clarify the position by making necessary amendments. That perhaps is the reason for inserting the second proviso to sub-section (1) of Section 44DA and a reference to section 44DA in the proviso below sub-section (1) of Section 44BB. A careful perusal of both the provisos shows that

they refer only to computation of the profits under the sections. If both the sections have to be read harmoniously and in such a manner that neither of them becomes a useless lumber then the only way in which the provisos can be given effect to is to understand them as referring only to the computation of profits, and to understand the amendments as having been inserted only to clarify the position. So understood, the proviso to sub-section (1) of Section 44BB can only mean that the flat rate of 10% of the revenues cannot be deemed to be the profits of the non-resident where the services are of the type which do not fall under that section, but are more general in nature so as to fall under Section 44DA. Similarly, the second proviso to sub-section (1) of Section 44DA can only be interpreted to mean that where the services are general in nature and fall under the sub-section read with Explanation 2 to Section 9(1)(vii) of the Act, then an assessee rendering such services as provided in Section 44BB cannot claim the benefit of being assessed on the basis that 10% of the revenues will be deemed to be the profits as provided in Section 44BB. In other words, the amendment made by the Finance Act, 2010 w. e. f. 01.04.2011 in both the sections, cannot have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation or to take away the separate identity of Section 44BB. We do not, therefore, see how these amendments can assist the Revenue's contention in the present case, put forward by the learned Senior Standing Counsel. We, therefore, agree with the AAR that in the present case the profits shall be computed in accordance with the provisions of section 44BB of the Act and not section 44DA.

13. In the result the writ petition fails and is dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

DECEMBER 06, 2012/hs