

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 08.04.2016

+

ITA 612/2012

PGS EXPLORATION (NORWAY) AS

..... Appellant

versus

ADDITIONAL DIRECTOR OF INCOME TAX

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ajay Vohra, Senior Advocate with Mr S.S. Tomar, Advocate.

For the Respondent: Mr Raghvendra Singh and Mr Rahul Chaudhary, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. PGS Exploration (Norway) AS (now known as 'PGS Geophysical AS'), a company incorporated under the laws of Norway (hereafter 'the Assessee'), has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter 'the Act') impugning the order dated 20.04.2012 passed by the Income Tax Appellate Tribunal (hereafter 'the Tribunal') in ITA No. 4056/Del/2011. The said appeal was directed against the assessment order dated 29.07.2011 passed under Section 144C read with Section 143(3) of the Act pursuant to directions of the Dispute Resolution Panel (hereafter 'DRP') issued on 18th July, 2011.

2. The principal controversy involved in the present appeal relates to

whether the consideration received by the Assessee for services rendered by the Assessee to entities resident in India is “fees for technical services” within the meaning of Explanation 2 to Section 9(1)(vii) of the Act; and, whether the same is taxable under section 115A or Section 44BB of the Act.

3. The present appeal was admitted on 08.01.2013 and the following questions of law were framed:

1. Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the activity of 2D/3D seismic survey carried on by the appellant in connection with exploration of oil, was in the nature of "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) of the Act?
2. Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that income of the appellant, in the nature of "fees for technical service" was liable to tax in India under section 44BB of the Act only if the appellant had permanent establishment ("PE") in India in the relevant assessment year?

4. Briefly stated, the relevant facts necessary to consider the disputes involved are as under:-

4.1 The Assessee is a company incorporated under the laws of Norway and is principally engaged in the business of providing Geophysical services worldwide. These services include the services of acquiring and processing two dimensional and three dimensional seismic data (both on land and offshore). The acquisition of seismic data is the primary method of exploring for hydrocarbon deposits.

4.2 M/s B.G. Exploration and Production India Limited (in short 'BG') and Reliance Industries Limited (in short 'RIL'), who had been granted exploration licenses, engaged the services of the Assessee for acquiring and processing three dimensional marine seismic data with respect to an offshore block awarded to the said companies.

4.3 The Assessee opted to be taxed on presumptive basis under Section 44BB(1) of the Act at the rate of 10% of the gross revenue. In conformity with the same, the assessee also applied to the Income Tax Authorities for authorizing deduction of tax at source (hereafter 'TDS') at lower rates. RIL also filed an application for deducting TDS at a lower rate on the basis that the tax on income of the Assessee from the contracts in question was to be computed under Section 44BB of the Act. These applications were accepted and the concerned officers issued orders under Section 197/195 of the Act, authorizing deduction of TDS at the rate of 4.223% of the gross amounts payable by the contracting oil companies (BG and RIL) to the Assessee for the financial year 2007-2008.

4.4 The Assessee also filed its return of income for the Previous Year 2007-2008 (AY 2008-09) on 30.09.2008 declaring a total income of ₹26,87,46,256/-. The return filed by the assessee was picked up for scrutiny.

5. The Assessing Officer (hereafter 'the AO') rejected the contention of the Assessee that its income was liable to be taxed on a presumptive basis under Section 44BB(1) of the Act. The AO held that the services provided by the Assessee were technical in nature and the consideration payable to

the Assessee for rendering services in terms of the contracts in question was “fees for technical services” within the scope of Section 9(1)(vii) of the Act. Accordingly, the AO held that the tax on such income was to be computed under the provisions of Section 115A of the Act and not under Section 44BB(1) of the Act. A draft assessment order to the aforesaid effect was made by the Assessing Officer on 24.12.2010.

6. The Assessee filed its objections to the said draft assessment order before the DRP, which were rejected by an order dated 18.07.2011; the DRP directed the AO to complete the assessment as per the draft assessment order. Thereafter, on 29.07.2011, the AO passed the final assessment order computing the Assessee’s taxable income at ₹2,68,74,62,560/-.

7. Aggrieved by the assessment order dated 29.07.2011, the Assessee preferred an appeal before the Tribunal, *inter alia*, on the ground that the nature of its income did not fall within the definition of ‘fees for technical services’ under Explanation 2 to Section 9(1)(vii) of the Act and that tax on its income was liable to be computed under Section 44BB(1) of the Act. The Tribunal disposed of the aforesaid appeal by an order dated 20.04.2012, which is impugned herein (‘the impugned order’).

8. By the impugned order, the Tribunal concurred with the AO/DRP that the consideration received by the Assessee was ‘fees for technical services’ falling within the scope of Explanation 2 to Section (9)(1)(vii) of the Act. The Assessee's contention that services in question fell within the scope of "construction, assembly, mining or like project" and, therefore, the

consideration received for the said services was excluded from the scope of 'fees for technical services', was rejected by the Tribunal. The Tribunal then proceeded to consider whether tax on Assessee's income from the contracts in question would be computed under Section 44DA of the Act or Section 115A of the Act and following its earlier decision in **CGG Veritas Services SA: ITA No. 4653/Del/2010**, held that the answer to the aforesaid issue would be dependent on whether the Assessee had a permanent establishment (hereafter 'PE') in India. The Tribunal quoting from its earlier decision in ***CGG Veritas Services SA (supra)*** held as under:-

- “(i) Fee for technical services rendered in connection with prospecting for or extraction or production of mineral oil having business PE or fixed place of profession – (section 44DA);
- (ii) Fee for technical services rendered in connection with prospecting for or extraction or production of mineral oil without having business PE or fixed place of profession – (section 115A);
- (iii) Other fee for technical services having business PE or fixed place of profession – (section 44DA);
- (iv) Other fee or technical services without business PE or fixed place of profession – (section 115A);”

9. Since the issue whether the Assessee had a PE in India was not considered by the Authorities below, the Tribunal remitted the matter to the AO for decision afresh and further directed the AO to first determine whether the Assessee had a PE in India and, thereafter determine the tax payable in accordance with its ruling in ***CGG Veritas Services SA (supra)***.

Submissions

10. It was contended by Mr Vohra, learned senior counsel appearing for the assessee that income falling within the ambit of Section 44DA(1) of the Act would be liable to be taxed under Section 44BB(1) of the Act if it was in connection with prospecting for, or extraction or production of mineral oils because Section 44BB was a special provision. It was further submitted that this issue was squarely covered by the decision of the this Court in **Director of Income Tax-II v. OHM Ltd.:** [2012] 28 taxmann 120 (Del) which had approved the ruling of the Authority for Advanced Ruling in **Geofizyka Torun sp Z.O.O, In re :** [2010] 320 ITR 268.

11. Mr Vohra further contended that consideration received for the services rendered by the Assessee would not fall within the expression ‘fees for technical services’ as such services were inextricably linked with prospecting and extraction of mineral oil and thus, would fall within the exclusion as provided under Explanation 2 to Section 9(1)(vii) of the Act. He further submitted that the said issue was squarely covered in favour of the Assessee by a recent decision of the Supreme Court in **Oil and Natural Gas Corporation Limited v. Commissioner of Income Tax & Anr.:** Civil Appeal 731/2007, decided on 01.07.2008.

12. Mr Raghvendra Singh, the learned counsel appearing for the Revenue, contested the submissions made on behalf of the assessee and submitted that “fees for technical services” received by a non-resident from an Indian concern would be taxable under Section 44DA(1) of the Act, if the assessee carried on the business through a PE in India. He submitted

that the amendment introduced in the proviso to Section 44BB(1) of the Act by the Finance Act, 2010 with effect from 01.04.2011, specifically excluded the incomes falling within the scope of Section 44DA of the Act from its scope. He submitted that even though the period in question was prior to the said amendment, nonetheless, the amendment would be applicable as it was only clarificatory. He urged that the said amendment would be instructive in determining whether the income from “fees for technical services” was liable to be taxed under Section 44DA(1) of the Act even if the same was in connection with prospecting for, or extraction or production of, mineral oils. Insofar as the decision of this Court in ***OHM Ltd.*** (*supra*) is concerned, he submitted that a Special Leave Petition under Article 136 of the Constitution of India had been preferred by the Revenue against the said judgment.

13. Mr Singh further contended that the decision of the Supreme Court in ***Oil and Natural Gas Corporation Limited*** (*supra*) must be read in the context of the facts of that case. He submitted that the subject matter of the aforesaid decision was whether certain services fell within the scope of mining and not whether the services were in connection with a "like project". He argued that in the present case, the Assessee itself had not claimed that its services were in connection with a mining project and, therefore, the said decision would have no application to the facts of the present case.

Reasoning and Conclusion

14. Before proceeding further, it would be necessary to refer to Section

44BB of the Act. The said Section as in force during AY 2008-09 is reproduced below:-

“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 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.”*

15. A plain reading of proviso to Section 44BB(1) of the Act indicates that it would not apply in a case where provisions of Section 115A of the Act are applicable for computing profits and gains or other income referred to in that Section. It is, thus, necessary to refer to Section 115A of the Act for ascertaining the nature of income that is taxable therein and consequently, expressly excluded from the ambit of Section 44BB(1) of the Act by virtue of the proviso thereto. The relevant extract of Section 115A of the Act is quoted below:-

“Tax on dividends, royalty and technical service fees in the case of foreign companies.

115A. (1) Where the total income of –

xxxx xxxx xxxx xxxx xxxx

(b) a non-resident (not being a company) or a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DA received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of,—

(A) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of thirty per cent if such royalty is received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where such royalty is received in pursuance of an agreement made after the 31st day of May, 1997 but before the 1st day of June, 2005;

(AA) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of ten per cent if such royalty is received in pursuance of an agreement made on or after the 1st day of June, 2005;

(B) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of

thirty per cent if such fees for technical services are received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where such fees for technical services are received in pursuance of an agreement made after the 31st day of May, 1997 but before the 1st day of June, 2005; and

(BB) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of ten per cent if such fees for technical services are received in pursuance of an agreement made on or after the 1st day of June, 2005; and

(C) the amount of income-tax with which it would have been chargeable had its total income been reduced by the amount of income by way of royalty and fees for technical services.

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) “foreign currency” shall have the same meaning as in the Explanation below item (g) of sub-clause (iv) of clause (15) of section 10;*
- (c) “royalty” shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;*
- (d) “Unit Trust of India” means the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963).”*

16. It is relevant to note that at the material time, the proviso to Section 44BB(1) did not expressly exclude the incomes covered under Section

44DA of the Act. However, any income falling under Section 115A of the Act was expressly excluded from the scope of Section 44BB(1) of the Act. By virtue of the Finance Act, 2010, the proviso to Section 44BB(1) of the Act was amended with effect from 01.04.2011 to specifically exclude from its scope, incomes referred to under Section 44DA of the Act. The question whether any income falling within the scope of Section 44DA of the Act would necessarily have to be excluded from the scope of Section 44BB(1) of the Act in respect of the period prior to 01.04.2011 will be addressed a little later. However, at this stage, it is necessary to observe that it is indisputable that any income referred to under Section 115A would, indisputably, fall outside the scope of Section 44BB(1) of the Act during the relevant Assessment Year.

17. A plain reading of Section 115A(1)(b) of the Act indicates that income by way of fees for technical services other than income referred to in Section 44DA(1) of the Act would be computed in the manner as specified therein. Explanation (a) to Section 115A(1) of the Act expressly provides that the expression “fees for technical services” would have the same meaning as in Explanation 2 to Section 9(1)(vii) of the Act which reads as under:-

“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 under the head “Salaries”. ”

18. Thus, the income of an assessee would be taxable under Section 115A(1)(b) of the Act unless (a) it fell within the exclusionary clause of Explanation 2 to Section 9(1)(vii) of the Act, that is, where the consideration received by the assessee is for "construction, assembly, mining or like project" undertaken by it; or (b) it fell within the scope of Section 44DA (1) of the Act. At this stage it is necessary to refer to Section 44DA(1) of the Act, which reads as under:-

“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.”

19. A plain reading of Section 44DA(1) of the Act indicates that said provision would be applicable, *inter alia*, in respect of income by way of fees for technical services by a foreign company in cases where the foreign company carries on business through a PE in India. Thus, in order to compute the tax payable by a foreign company within the parameters of section 44DA(1), the following conditions are required to be met:

- (a) The foreign Company should receive such fees for technical services from Government or an Indian concern in pursuance of an agreement with the Government/Indian Concern;
- (b) The foreign company carries on business in India through a PE in India, or performs professional services from a fixed place of profession in India; and
- (c) The contract in respect of which income by way of fees for technical services is received is effectively connected with the PE in India.

20. If the aforesaid conditions are met, the income of the appellant would fall within the scope of Section 44DA(1) of the Act and, consequently, would be excluded from the scope of Section 115A(1)(b) of the Act. Thus, whilst the existence of PE is not a condition specified in section 44BB(1) of the Act, it is a necessary condition for applying section 44DA(1) of the Act and, consequently a necessary condition to exclude the application of section 115A(1)(b) of the Act. However, both Sections

44DA(1) and Section 115(1)(b) apply to 'fees for technical services' and any income which falls outside the scope of the said expression would also fall outside the scope of Section 44DA and assuming the said income is not royalty, it would also fall outside the scope of Section 115A of the Act and none of the two provisions could be applied for computing the tax payable on such income.

21. In this view, the primary issue to be addressed is whether the consideration received by the Assessee for providing Geophysical services would fall within the exclusion provided in Explanation 2 to Section 9(1)(vii) of the Act. In our view, the aforesaid question is no longer *res integra* and is squarely covered by the decision of the Supreme Court in ***Oil and Natural Gas Corporation Limited*** (*supra*). The said decision was rendered in a batch of matters concerning several non-resident assesseees who claimed that their service fell within the expression "mining or like projects" and thus, the consideration received by them for such services stood excluded from the scope of 'fees for technical services'. The said assesseees classified the contracts entered into by them under eight heads which are reproduced below:-

- “1. Carrying out seismic surveys and drilling for oil and gas.
2. Services starting/re-starting/enhancing production of oil and gas from wells
3. Services for prospecting for exploration of oil and or gas.
4. Planning and supervision of repaid of wells.

5. Repair, Inspection or Equipment used in the exploration, extraction or production of oil and gas.
6. Imparting Training.
7. Consultancy in regard to exploration of oil and gas.
8. Supply, Installation, etc. of software used for oil and gas exploration.”

22. In its judgement, the Supreme Court referred to a Circular No.1862 dated 22.10.1990 which in turn referred to the Attorney General's opinion that prospecting for or extraction or production of mineral oil could be termed as 'mining operations' and consequently provided that expression "mining projects" or like projects" as occurring in Explanation 2 to Section 9(1)(vii) of the Act would also cover *"rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas"*. And, after examining various contracts involved in the appeals before it, the Supreme Court held that the contracts were inextricably connected with prospecting, extraction or production of mineral oil and, accordingly, proceeded on the basis that consideration for such services was not fees for technical services. The Supreme Court held that even though there may be certain ancillary works contemplated under the contracts in question but since the dominant purpose of each of such contract is for prospecting, extraction or production of mineral oils, the income from such services were to be computed under Section 44BB of the Act.

23. In view of the above, the first question - Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the

activity of 2D/3D seismic survey carried on by the appellant in connection with exploration of oil, was in the nature of "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) of the Act – must be answered the affirmative, that is, in favour of the Assessee and against the Revenue.

24. In view of our decision that the consideration for services rendered by the Assessee cannot be construed as “fees for technical services”, the second question does not arise. However, since the counsel have advanced their respective contentions on the said question, we consider it appropriate to address the same on the assumption that the consideration received by the Assessee for the services rendered is 'fees for technical services'.

25. This Court in the case of **OHM** (*supra*) had considered the conflict between the provisions of Section 44DA(1) and 44BB(1) of the Act and affirmed the view expressed by the AAR in **Geofizyka** (*supra*) and held that Section 44BB of the Act, being industry specific was a special provision and would, thus, override the provisions of Section 44DA(1) of the Act in respect of any income that had arisen in respect of business carried on in connection with prospecting for, or extraction or production of mineral oils and which also fell within the ambit of Section 44DA(1) of the Act. The relevant extract of the said judgment reads as under:-

“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 nonresident, 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.”

26. Following the aforementioned decision, we accept the contention advanced on behalf of the Assessee that since it is clearly engaged in business of providing services in connection with prospecting for mineral oils, its income - if it falls within the ambit of Section 44DA(1) of the Act - would be taxable under Section 44BB(1).

27. The contention advanced on behalf of the Revenue that “fees for technical services” earned by a foreign company in respect of a contract which is connected with the PE of such foreign company in India would be taxable under Section 44DA(1) of the Act, irrespective of whether the same is connected with extraction/production of mineral oils, cannot be accepted. By virtue of Finance Act, 2003, such income was excluded from the ambit of Section 115A(1)(b) of the Act w.e.f. 01.04.2004. Although, with effect from said date such income was taxable under Section 44DA(1) of the Act but in certain cases where such income was earned by the assessee by carrying on a business of providing services in connection with prospecting for, or extraction or production of mineral oils, the said income would also fall within the express language of Section 44BB(1) of the Act and in view of the decision of this Court in **OHM** (*supra*), the provisions of Section

44BB(1) of the Act would be applied in preference to Section 44DA(1) of the Act, in those cases. This conflict between Section 44BB(1) and 44DA(1) of the Act was resolved by the Finance Act, 2010 by including a reference to Section 44DA in the proviso to Section 44BB(1) of the Act with effect from 01.04.2011 and simultaneously introducing a second proviso to Section 44DA(1) which reads as under:

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

28. Thus, after 01.04.2011, income falling within the scope of Section 44DA(1) of the Act would be excluded from the scope of Section 44BB of the Act. However during the period from 01.04.2004 to 01.04.2011 tax on any income from fees for technical services falling within Section 44DA(1) of the Act - which was excluded from the ambit of Section 115A(1)(b) of the Act but was not expressly excluded from the scope of Section 44BB(1) of the Act - would be computed under Section 44BB(1) of the Act. Since the Assessment Year 2008-09 falls within this period, the income of the assessee, to the extent it falls within the scope of section 44DA(1) of the Act and stands excluded from section 115A(1)(b) of the Act, would be computed in accordance with section 44BB(1) of the Act.

29. Having stated the above, we must clarify that the income falling within Section 115A(1)(b) of the Act which does not fall within the four corners of Section 44DA(1) of the Act would also not be taxable under Section 44BB(1) of the Act, for the reason that by virtue of proviso to Section 44BB(1) of the Act, it is expressly excluded. Accordingly, if the

consideration received by the Assessee for services rendered is found to be 'fees for technical services', the AO would specifically have to determine (a) whether the assessee had a PE in India during the relevant period; and (b) if so, whether the contracts entered into by the appellant with BG and RIL were effectively connected with the Assessee's PE in India. It is only, if the AO finds that the said two conditions are satisfied, that the income of the assessee would be computed under Section 44BB(1) of the Act. However, if such conditions are not satisfied then the income tax payable by the appellant would have to be computed in accordance with Section 115A(1)(b) of the Act.

30. Therefore, if it is accepted that the Tribunal was right in finding that the consideration received by the Assessee from BG and RIL was fees for technical services, in our view, the Tribunal's decision to remit the matter to the AO for determining whether the Assessee had a PE in India and whether the consideration received by it was connected with that PE, would have to be sustained.

31. Accordingly the second question - Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that income of the appellant, in the nature of "fees for technical service" was liable to tax in India under section 44BB of the Act only if the appellant had Permanent Establishment ("PE") in India in the relevant assessment year – is answered in the negative, that is, in favour of the Revenue and against the Assessee.

32. In view of the aforesaid, the impugned order and the assessment

order are set aside and the matter is remanded to the file of the AO to assess the Assessee's income and the tax payable thereon by applying the provisions of Section 44BB of the Act.

VIBHU BAKHRU, J

**APRIL 8, 2016
RK**

S. RAVINDRA BHAT, J

