IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 13 of 2015

M/s Fugro Geoteam AS …….. Appellant

Versus

The Additional Director of Income-tax,
International Taxation, Dehradun …….. Respondents

Present: Mr. S.K. Posti, Advocate for the appellant.
Mr. H.M. Bhatia, Advocate for the respondent.

Coram : Hon'ble K.M. Joseph, C.J.
Hon'ble V.K. Bist, J.

JUDGMENT

Date: 31st March, 2015

K.M. Joseph, C.J. (Oral)

The appeal has been filed under Section 260A of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act'). The assessee is foreign company incorporated under the laws of Norway. It is engaged in the activities relating to acquisition of 3D sesismic data under contracts with Reliance Industries Ltd. and ONGC. The relevant assessment year is 2008-2009. The return of income was filed on 28.11.2008 declaring income of ₹18,27,42,870/- from contract receipt under Section 44BB of the Act. It was selected for scrutiny. The assessee's claim for being taxed under Section 44BB was rejected and its income has been taxed as fees from technical services. Appellant/assessee moved an objection before the Dispute Resolution Panel. The Panel affirmed the view taken by the assessee. Assessee filed an appeal. After the matter received the attention at the hands of the Income Tax Appellate Tribunal and the contention of the appellant not being accepted, appellant is before us.

2. We have heard learned counsel for the appellant and also learned counsel for the Department.

3. The questions of law, which have been raised, are as follows:-

"a. Whether on facts and in the circumstances of the case, the Honble Tribunal erred in law in not appreciating the true construction of Section 44BB of the Act ?

b. Whether on the facts and circumstances of the case and in law, the Tribunal erred in law in holding that the mobilization/demobilization fee amounting to ₹28,21,23,166/- received by the appellant on account of services provided/vessel operated outside India were to be included in calculating the aggregate amount referred to in sub-section (2) of Section 44BB of the Act ?

c. Whether on the facts and in the circumstances of the case and in law the findings of the Tribunal can be said to be perverse ?

4. According to the Department, the question of law stands answered by virtue of decision of this Court reported in **(2008) 299 ITR 238 (Uttarakhand)** *(Sedco Forex International Inc. versus Commissioner of Income Tax and another)*.

5. Learned counsel for the appellant would, however, contend that the substantial question of law, which is raised in this case, specifically, namely, substantial question of law No.2, which is, whether the income of the appellant received outside India can be brought to tax under Section 44BB of the Act has not been answered by the said judgment.

6. Per contra, learned counsel for the revenue submits that the questions are answered. We allowed the learned counsel for the appellant to argue the matter on merits. He drew our attention to sub-section (2) of Section 5 of the Act. According to him,

Section 5 is a charging Section. Section 44BB is the computation Section. Therefore, computation section cannot go against the charging section, runs the argument of the appellant. In other words, he would submit that it is the case where the appellant has received income in the form of mobilization advance both within the territory of India as defined in the Act as also beyond the territory of India or rather outside India. In regard to the mobilization advance which was received within the territory of India, there can be no objection and the appellant offered it also. But the objection is taken to the said amount being the subject matter of levy under Section 44BB for the reason that if that was permitted that would be in the teeth of the provision contained under sub-section (2) of Section 5 of the Act. Sub-section (2) of Section 5, no doubt, relates to a charge of Income-Tax in respect of the income of the non-residents. It certainly proclaims that the tax is to be levied with reference to either receipt or accrual with reference to the territory of India. In other words, unless there is a receipt or accrual of income by the non-resident within the territory of India there cannot be no levy of tax. Section 44BB of the Act, on the other hand, reads as follows:-

> "**44BB**. **Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils:-** (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 not-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 assesse 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."

7. Sub-section (1) of Section 44BB proclaims that in respect of a non-resident which the appellant claims it is, if it is to be computed under section 44BB it will be assessed as provided in sub-section (2) of the Act. It starts with a non-obstante clause but the non- obstante clause is confined in its field to Sections 28 to 41 and 43 & 43A of the Act. One of the arguments of the learned counsel for the appellant is that the non-obstante clause does not take within its fold Sections 4 and 5 and since Sections 4 and 5 stand, it is not open to the authorities to have a parallel system of taxation contrary to Sections 4 and 5. We are unable to accept any of the contentions of the appellant. The appellant is admittedly a non-resident. Section 44BB provides for special scheme for taxation in respect of the income of a non-resident and relating to the activities which are mentioned therein. It provides for taxation with reference to pre-ordained criteria which are mentioned in the provision itself. In other words, the mechanism is specified by the statute. The amounts received or payable to the assessee, who is a non-resident, whether in India or outside India, have to be included for the purpose of calculating the income under Section 44BB. This is a special provision which may be availed of by the non-resident or he may choose to be governed by the provisions contained in Sections 4 & 5 read with Sections 28 to 42. Section 28 deals with the computation of income under the head of income profits and gains. This is a special mechanism to obviate the procedure of regular assessment which would have to be made if the assessee did not invoke the aid of Section 44BB. This is clear from the provision of sub-section (3) of Section 44BB, as sub-section (3) of Section 44BB provides that it is open to the assessee to claim lower profits and gains, if he keeps and maintains such books of account and other documents as required under sub-section (2) of Section 44AA

and gets the accounts audited and furnish a report. There is no case for the appellant that the appellant is invoking the aid of sub-section (3) of Section 44BB. In view of the admitted position that the appellant does not claim the benefit of sub-section (3) of Section 44BB, we do not see how the appellant can be heard to argue that the amount which he has received by way of mobilization advance outside India should not be included for the purpose of calculating the income under section 44BB in the teeth of the clear provision contained in sub-section (2) of Section 44BB. On our understanding, the provisions contained in Section 5 (2) of the Act will not stand on the way of the Authorities insisting on the amount of mobilization advance received by the appellant outside India being included. The provisions contained in sub-section (2) of Section 44BB, clearly provides for reckoning the amount received outside India also for calculating the amount. The question is answered against the appellant.

8. In such circumstances, there is no merit in the appeal. The appeal is dismissed. No order as to costs.

(V.K. Bist, J.)
31.03.2015

(K.M. Joseph, C.J.)
31.03.2015

P. Singh