

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 118 of 2007

- (1) Commissioner Income Tax, Dehradun.
- (2) Assistant Commissioner of I. Tax Circle-I,
Dehradun.

.....Appellants.

Versus

ONGC as representative assessee of
M/s Reservoir Characterization Research
& Consulting (UK) Ltd. U.K.

.....Respondent.

Sri Arvind Vashistha, learned counsel for the appellants.
Sri Udyog Shukla, learned counsel for the respondent.

Hon'ble Prafulla C. Pant, J.

Hon'ble Dharam Veer, J.

[Oral- Prafulla C. Pant, J.]

This appeal, preferred under Section 260A of the Income Tax Act, 1961, is directed against the judgment and order dated 09.02.2007, passed by Income Tax Appellate Tribunal, Delhi Bench 'E' (hereinafter referred as ITAT), whereby the order dated 26.08.2004, passed by Commissioner of Income Tax Appeals (hereinafter referred as CIT (Appeals), Dehradun, is set aside. CIT (Appeals) dismissed the appeal of the assessee and affirmed the

assessment order passed by the Assessing Officer under Section 143(3) of Income Tax Act, 1961.

(2) Heard learned counsel for the parties.

(3) Brief facts of the case are that Oil & Natural Gas Commission Limited (hereinafter referred as ONGC) is representative of the non-resident company (hereinafter referred as NRC)-respondent assessee in the case. The assessee has rendered its services to ONGC for the purposes of exploration, extraction and production of mineral oils. During the year under consideration, the assessee NRC was engaged by ONGC for rendering services in connection with maintenance of ResPrep, ResGram, ResMod, and ResSeis being four modules of software.

(4) The case of assessee is that tax is to be charged on the income of assessee under Section 44BB of Income Tax Act, 1961, while that of the revenue / present appellant, is that the assessee has rendered the technical services for which he has been paid fee and his case is covered under Section 115A read with Section 44D of the Act.

(5) The question of law involved in this appeal is that whether in respect of the receipts for the aforementioned services rendered by NRC, the tax is chargeable under Section 44BB of Income Tax Act, 1961, or under Section 115A read with section 44D of the Act?

(6) Before Further discussions, we think it just and proper to quote the relevant provision of law referred by the parties. Sub section (1) of Section 44BB of Income Tax Act, 1961 reads as under: -

"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 of 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."*

The above sub-section (1) of Section 44BB of the Act contains the proviso quoted above which provides that the sub-section would not apply where the provisions of 42, 44D, 115A or 293A are applicable in computing the profits and gains or income of the assessee. Learned counsel for the appellants has argued that since the assessee has only rendered technical services for which he has been paid the

fee as such his case is covered under section 115A read with Section 44D of the Income Tax Act, 1961. Section 44D contains special provision for computing income by way of royalties or fee for technical services, in the case of foreign companies. Section 115A of the Act provides the rates of tax on dividends, royalties and technical service fee in the case of foreign companies. In both the sections an explanation has been added clarifying that expression "fees for technical services" shall have same meaning as in the case of explanation 2 to clause (vii) of sub-section (1) of Section 9 of the Act. Said explanation 2 of clause (vii) of sub-section (1) of Section 9 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 chargeable under the head "Salaries".

(7) Learned counsel for respondent argued that the services rendered by the assessee respondent relate to upgradation of plant and machineries for the purposes of drilling and oil exploration. However, it is not the case of the respondent assessee that the plants and machineries were supplied by it during the Assessment Year, as such the

services rendered by NCR assessee is nothing but the technical services rendered by it in the work of oil exploration for which he has charged the fee.

(8) In the above circumstances, we are of the opinion that CIT (Appeals) has not committed any error of law in passing the order dated 26.08.2004 and uphold the view taken by the CIT (Appeals) and that of Assessing Officer whereby the assessee as a technical service provider has been directed to pay tax at the rate of 15 per cent under Section 44D read with Section 115A of Income Tax Act, 1961, instead of 10 percent chargeable under Section 44BB of the Act. The appeal is allowed. Impugned order dated 09.02.2007, passed by ITAT in ITA No. 5098/Del/2004, is set aside. The substantial question of law accordingly stands answered.

(Dharam Veer, J.) (Prafulla C. Pant, J.)
10.04.2008

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