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

*Reserved on: 04.09.2019*
*Pronounced on: 13.03.2020*

\+ **W.P.(C) 1370/2019**

PARADIGM GEOPHYSICAL PTY LTD. ..... Petitioner

Through: Mr. Piyush Kaushik, Advocate with Mr. Shailesh Kumar, Advocate.

versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-3, NEW DELHI ..... Respondent

Through: Mr. Ruchir Bhatia, Senior Standing Counsel.

**CORAM: JUSTICE VIPIN SANGHI**
**JUSTICE SANJEEV NARULA**

**J U D G M E N T**

**SANJEEV NARULA, J.**

1. The present petition under Article 226 of the Constitution of India seeks *inter alia* quashing of the order dated 01.11.2018 passed by Commissioner of Income Tax (International Taxation)-3, New Delhi, under Section 264 of Income Tax Act, 1961 (hereinafter 'the Act') for AY 2012-13 (hereinafter 'subject AY') and consequential direction to the Respondent to assess petitioner's income under Section 44BB of the Act on presumptive basis.

**BRIEF FACTS:**

2. Petitioner-assessee is a company incorporated under the laws of Australia and is a tax-resident of that country. It is engaged in the business of developing and providing customized software enabled solutions and annual maintenance services. The solutions provided by the Petitioner are used by the oil and gas industry in relation to excavation, extraction, production activities and seismic analysis.

3. Petitioner opted to be taxed on presumptive basis under section 44BB(1) of the Act, whereby 10% of the aggregate of receipts is deemed to be profits and gains of business and is subjected to tax. The assessee filed its return of for the assessment year 2012-2013, declaring a total income of Rs. 19,71,61,430/- arising *inter alia*, from the business of providing services or facilities in connection with extraction or production of mineral oils. The case was picked up for scrutiny and notice under Section 143(2)/142(1) was issued by the Assessing Officer (hereinafter, 'AO'). Eventually, the AO held that in accordance with terms of the contract, the nature of services provided by the Petitioner fell within the purview of Royalty/ Fees for Technical Services (hereinafter, referred to as 'FTS') and is liable to be taxed under section 44DA instead of section 44BB, and proposed to compute the total income of Petitioner at Rs. 4,92,90,360/- as against total income of Rs. 1,97,16,140, offered to tax by the Petitioner. On 05.03.2015, a draft assessment order was issued by the AO under Section 143(3)/144C (1) of the Act proposing to tax the revenues received by the Petitioner under section 44DA of the Act, estimating 25% of gross receipts as "business

income" taxable under section 28 to 43C of the Act. Thereafter, the final assessment order was passed on 11.05.2015, under Section 44C(3)(b)/143(3), confirming the addition/adjustment proposed in the Draft Assessment Order.

4. The Petitioner neither filed any objection before the Dispute Resolution Panel against the Draft Assessment Order, nor did it file an appeal before the Commissioner of Income Tax (Appeal). Instead, it chose to exercise the alternate remedy by filing a Revision Petition under Section 264 of the Act before Commissioner of Income Tax (International Taxation)-3 New Delhi (hereinafter, 'CIT'), claiming that the Petitioner was wrongfully denied the benefit of assessment under Section 44BB-the special provision under the Act for computing income arising *inter alia* on account of providing services or facilities in connection with oil and gas operations.

5. The CIT declined to interfere with the final assessment order and rejected Petitioner's revision petition, primarily on the ground of maintainability, without dealing with the merits of the case. The writ petition [ W.P.(C) No. 6052/2017] impugning the said order was allowed, order of the CIT was quashed and the matter was remanded to the Respondent with a direction to examine the case on merits, with liberty to the Petitioner to challenge the same in case of an adverse outcome. Subsequently, vide order dated 01.11.2018, the case was decided on merits and Petitioner's claim of taxation on presumptive basis under Section 44BB was rejected, and the view of the AO that Petitioner's case would fall within the ambit of section

44DA of the Act was upheld. Aggrieved with the aforesaid order, the Petitioner has filed the present writ petition.

**SUBMISSIONS OF THE PARTIES**

6. Mr Piyush Kaushik, learned counsel for the assessee, contended that the impugned order dated 01.11.2018 is fundamentally flawed, as the respondent has failed to appreciate the applicability of the decision of the Supreme Court in case of ***Oil and Natural Gas Corporation Ltd (ONGC) v. CIT (2015) 376 ITR 306 SC,*** wherein it was held by the Supreme Court that the income falling within the ambit of Section 44D of the Act would be liable to be taxed under Section 44BB(1) of the Act, if it was in connection with extraction or production of mineral oils, since Section 44BB is a special provision. Mr. Kaushik further elaborated his submissions by making a detailed analysis of the decision of the Supreme Court in the case of ***ONGC v. Commissioner of Income Tax & Anr*** (supra)**.** He submitted that in the said case, the court considered an identical issue as to whether such services/facilities fall within the purview of Section 44BB, or Section 44D of the Act. The nature of services involved in the said case comprised of the following:

> *"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 repair 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****"*

(*Emphasis supplied*)"

7. Mr. Kaushik argues that the Supreme Court after a detailed examination of the nature of services has held that if services are inextricably linked with prospecting and extraction of mineral oil, Section 44BB would apply and the Petitioner's case is squarely covered by the said decision.

8. Mr. Kaushik submits that, indisputably, the impugned order acknowledges that the Petitioner is engaged in the business of developing and providing software-enabled solutions to oil and gas industry, *inter alia*, for undertaking seismic analysis; and also providing customized software solutions that help in meeting specific business objectives of entities engaged in oil exploration. He submitted that although the provision has undergone amendment yet the aforesaid decision of the Supreme Court is pertinent, notwithstanding the fact that it was rendered in the context of the unamended provisions. The amendments to the Act do not obliterate the intent of the special provision-Section 44BB, and the position in law remains unaltered and undisturbed. In this regard, he places reliance on the decision of ***Director of Income Tax-II***

***v. OHM Ltd [2012] 28 Taxmann 120 (Del)*** which approved the decision of the Authority for Advanced Ruling in ***Geofizyka Torun sp Z.O.O, In re : [2010] 320 ITR 268.*** He submits that in light of the aforesaid decision, there can be no ambiguity that the insertion of the Second Proviso to Section 44DA, as well as the amendment in the First Proviso to Section 44BB, introduced by the Finance Act, 2010 could only be interpreted to mean that services that are general in nature would fall within the purview of Section 44DA. The said amendments do not, in any manner, have the effect of altering or effacing the separate identity of Section 44BB. The general provisions should yield to the specific provision as has been held in the case of ***J.K. Cotton Spinning & Weaving v. State of Uttar Pradesh & Ors. [1961 AIR 1170 SC]***. A 'proviso' must be read harmoniously and cannot be divorced from the main section as laid down in the case of ***CIT v. Ajax Products Ltd. [55 ITR 741 SC]*** and therefore, an interpretation which advances the scheme of the Act should be adopted.

9. Per contra, Mr Ruchir Bhatia, the learned counsel appearing for the Revenue, contended that the Petitioner engages in supply of software services that develop 2D/3D images and graphs of the seismic marine data, as well as maintenance for such software. These activities are carried out at the backend and can be done from any place. There is no need for this software to be deployed on-site or drilling-site and, therefore, the Petitioner cannot derive benefit of Section 44BB of the Act. Further, Petitioner is not transferring the ownership in the software to the purchasers vis-a-vis Oil India ltd. (OIL), ONGC, RIL etc. It only grants a licence to use the said software as per Clause 1, Section II of Contract No.

CONT/GL/GPHY/275/10-11 dated 14.7.2011 between the petitioner and OIL, a Govt of India enterprise. He also refers to Clause 4 of the Work order No. 048/31035461 dated 5.4.2011 from RIL, (Software License Agreement) to purchase Order No. 048/7272379 from RIL. Thus, the services provided by the Petitioner fall under the broad definition of Royalty which is defined under Explanation 2 to section 9(1) clause (vi) and, consequently, the same will be assessed under Section 44DA. It was further submitted that supply of software was held to be "Royalty" by the High Court of Karnataka in the case of ***Commissioner of Income Tax v. Synopsis International Old Ltd.*** **(2012) 28 taxmann.co 162 (Kar).** He also submitted that Section 44BB was inserted in the Act w.e.f. 01.04.1983. Section 44DA was added in the year 2004 and subsequently, the Second Proviso was inserted by virtue of the Finance Act, 2010 w.e.f. 01.04.2011 whereby it was stipulated that '*the provisions of Section 44BB shall not apply in respect of income falling under the provisions of Section 44DA'*. The intention behind insertion of the Second Proviso to Section 44DA was to curtail the applicability of Section 44BB. Any interpretation of section 44BB that will render section 44DA as superfluous, must be avoided. He submitted that it is a settled legal position that any interpretation which renders the provision otiose or redundant is to be avoided, and the provision should give a meaningful interpretation. In support of this submission, he placed reliance upon ***Commissioner of Wealth Tax v. Kripashankar Dayashankar Worah*** **[1971] 81 ITR 763** and ***Sole Trustee, Loka Shikshana Trust v. Commissioner of Income Tax*** **[1975] 101 ITR 234 (SC).** Mr. Bhatia also relied upon the relevant excerpts of the Finance Bill, 2010, to highlight the *legislative intent* behind insertion of the Second Proviso to Section 44DA

10. 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. Mr Bhatia further contended that the decision of the Supreme Court in ***ONGC v CIT*** (supra) must be read in the context of the facts of that case. In the said case, the Supreme Court arrived at a finding that the services provided to the ONGC by contractors did not qualify as "Fees for Technical Services" in view of exclusionary part of Explanation 2 to Section 9(1)(vii). That being the case, the Court held that the services are to be taxed under Section 44BB. The question whether the services provided are 'royalty', or not, was not an issue before the Hon'ble Court and hence, the said judgment is not applicable in the facts of the present case. Additionally, he submitted that ***ONGC*** (supra) applies to Assessment Years prior to the amendment of 2010 whereby the second proviso to Section 44DA was inserted w.e.f. 01.04.2011. The present case is not weighed down by the ***ONGC*** case (supra).

## ANALYSIS & CONCLUSION:

### LEGAL POSITION VIZ. SECTION 44BB AND SECTION 44DA AFTER AMENDMENT INTRODUCED UNDER FINANCE ACT, 2010.

11. The pivotal controversy in the present case surrounds the interpretation of Section 44BB and 44DA of the Act. These provisions have undergone amendments over the years, the last one being introduced by the Finance Act, 2010. Since assessee has argued at length that this legal position remains unaltered, we feel that this aspect in law needs to be clarified as it

would also be germane for the decision in the present case. It is, thus, imperative to first examine the effect and consequence of the said amendments, particularly to determine if the legal position has undergone any change with respect to the applicability of the provisions, after the effective date i.e. April 01, 2011 since the return of income filed by the Petitioner pertains to the assessment year 2012-13. For the sake of convenience, the relevant provisions are reproduced hereunder:

> [1]***"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][2], 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]***[3] *section section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*

[1]Inserted by the Finance Act, 1987 w.r.e.f. 1-4-1983

[2]Inserted by the Finance Act, 1988 w.r.e.f. 1-4-1983

[3] Inserted by Finance Act, 2010 w.e.f 1-04-2011

*(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.***[4]

***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.]***[5]

Therefore, if, *inter alia*, Section 44DA applies for the purpose of computing profits or gains or any other income referred in section 44DA, then Sub Section (1) of Section 44BB would not apply. The nature of income dealt with by Section 44DA is either Royalty, or Fees for Technical Services.

[4]Inserted by Finance Act, 2003 w.e.f 1-04-2004

[5]Inserted by Finance Act, 2010 w.e.f 1-04-2011

Thus, it needs examination whether the nature of income derived by the Petitioner either qualifies as "Royalty" or "Fees for Technical Services".

12. Section 9 of the Act deals with "Income deemed to accrue or arise in India". The relevant extract of section 9(1)(vi) and 9(1)(vii) read as follows:

> *"9(1) The following incomes shall be deemed to accrue or arise in India:-*
>
> *.....*
>
> *(vi) income by way of royalty payable by—*
>
> *(a) the Government ; or*
>
> *(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or*
>
> *(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :*
>
> ***Provided** that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government :*

***Provided further*** *that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.*

*.....*"

Explanation 2 (to 6) to Section 9(1)(vi) are relevant and read as follows:

*"**Explanation 2**.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but **excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains")** for—*

***(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;***

*(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*

*(iii)* ***the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;***

*(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;*

*(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;*

*(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*

*(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).*

***Explanation 3.—For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data.***

***Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.***

*Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—*

*(a) the possession or control of such right, property or information is with the payer;*

*(b) such right, property or information is used directly by the payer;*

*(c) the location of such right, property or information is in India.*

*Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "**process**" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;"*

(*Emphasis supplied*)

Section 9(1)(vii) deals with "income by way of fees for technical services" and reads as follows:

> *"(vii) income by way of fees for technical services payable by—*
>
> *(a) the Government ; or*
>
> *(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or*
>
> *(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :*
>
> ***Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.*
>
> *Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.*
>
> *Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consi-deration) 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"."*

The interplay between Section 44DA(1) and 44BB(1) of the Act has been a

subject matter of several judgments. We need not engage ourselves with an elaborate analysis of the said provisions, as they existed prior to amendments, and it would suffice to note that the conflict between the two provisions has been noticed in several decisions. Revenue has always maintained its stand that both set of provisions are special in nature which operate in their own clearly defined spheres; once a particular receipt of income takes on the character of Royalty/FTS as defined in section 9(1) (vi)/ 9(1) (vii), it cannot be considered for treatment under Section 44BB and has to be taxed under Section 115A/44DA of the Act. That being said, there are several judgments of this court, wherein it has been held that Section 44BB is a specific provision and incase the income falls within the ambit of Section 44DA(1) of the Act, it would be liable to be taxed under Section 44BB(1) of the Act, provided it was in connection with extraction or production of mineral oils. This conflict or inconsistency now stands resolved by virtue of the amendments introduced under the Finance Act, 2010. Though the insertions are stated to be clarificatory, however the rationale behind the introduction of the amendments has to be examined to appreciate the legislative intent envisioned under the Finance Act, 2010.

13. Section 44 BB is a special provision for computing profits and gains of a non-resident from 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 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 situated in India. One more distinction between sections 44 DA and 44 BB is that, in section 44 BB one does not find any reference to a permanent establishment in India and the services contemplated therein are more specific than what is contemplated in section 44 DA. Thus, Section 44BB is a special provision in so far as it relates to the applicability of the provision in the context of the specified services. Section 44DA applies where such non-resident carries on business in India through a permanent establishment stipulated therein or performs services from a fixed place of profession, such income shall be computed under the head "*profit and gains of business or profession*" in accordance with the provisions of the Act, subject to the condition that no deduction shall 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 in India or in respect of amounts, if any, paid by the permanent establishment to its head office or to any of its other offices. Section 115A of the Act provides the rate of taxation in respect of income of a non-resident, in the nature of royalty or fees for technical services, other than the income referred in Section 44DA i.e. income in the nature of royalty and fees for technical services which is not connected with the permanent establishment of the non-resident.

14. There is another Section that needs to be referred, for the sake of

comprehensive understanding i.e. Section 44D of the Act, inserted in the first place vide Finance Act, 1976[6] for taxability of income in the nature of royalty and fee for technical services. Later, a special provision was introduced by way of Section 44BB vide Finance Act, 1987. However, even when 44D was appearing in the statute book, Section 44BB contained a proviso which excluded applicability of Section 44BB to cases that were covered by Section 44D. However, it is pertinent to note that there was no similar proviso appearing under Section 44D. Finance Act, 2003 provided a

[6] For the sake of reference, the same is reproduced as under:

"44D. Special provisions for computing income by way of royalties, etc., in the case of foreign companies. -Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company, -

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received from an India concern in pursuance of an agreement made by the foreign company with the Indian concern before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent. of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received from an Indian concern in pursuance of an agreement made by the foreign company with the Indian concern after the 31st day of March, 1976.

Explanation : For the purposes of this section, -

(a) "fees for technical services" shall have the same meaning as in Explanation to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B;

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

(d) royalty received from an Indian concern in pursuance of an agreement made by a foreign company with the Indian concern after the 31st day of March, 1976, shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976.."

sunset clause to the operation of Section 44D with effect from 1st April 2003. Simultaneously, from the said date, a similar provision by way of Section 44DA was introduced. It is significant to note that both the provisions i.e. Section 44D as well as Section 44DA pertain to the same subject matter i.e. taxation of income by way of "*royalties and fees for technical services*".

15. The aforesaid provisions further underwent change by way of amendments introduced by the Finance Act, 2010 w.e.f. 01.04.2011. By way of the said Act, a reference to Section 44DA was inserted in the proviso to sub Section (1) of Section 44BB. Simultaneously, a second proviso to sub Section (1) of Section 44DA was inserted to the following effect:

> "***Provided further*** *that provisions of Section 44BB shall not apply in respect of the income referred to in this Section*".

16. Keeping in mind the legislative history of amendments in the two provisions, the aforesaid amendments are significant and changed the position with respect to the applicability of the said provisions. A taxing statute is to be construed strictly. The position that existed prior to the amendments was different. There was no proviso which restricted the applicability of Section 44BB in respect of the income falling within the scope of Section 44DA (1) of the Act. However, now that the proviso has been inserted, it has fundamentally restricted the applicability of section 44BB. This proviso has to be given due consideration and a meaning, recognizing the legislative intent. A plain reading of section 44BB (1) shows that it applies to an assessee who is engaged in the business of providing services or facilities in connection with, or supplying plant and machinery

on hire use, or to be used, in the prospecting for, or extraction or production of mineral oils. However, the proviso thereto carves out an exception that the sub-section shall not apply in a case where the provisions of section 44DA apply for the purpose of computing profits or gains or any other income referred to in those sections. Further, a reading of section 44DA makes it clear that it applies to the character of income which is in the nature of royalty or fees for technical services. The legislative intent behind the amendment is also evident from the memorandum to the Finance Bill 2010 which reads as under:

> "*Under the existing provisions contained in section 44BB(1) of the Income-tax Act, income of a non-resident taxpayer who is 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 is computed at ten per cent of the aggregate of the amounts paid.*
>
> *Section 44DA provides the procedure for computing income of a non-resident, including a foreign company, by way of royalty or fee for technical services, in case the right, property or contract giving rise to such income are effectively connected with the permanent establishment of the said non-resident. This income is computed as per the books of account maintained by the assessee.*
>
> *Section 115A provides the rate of taxation in respect of income of a non-resident, including a foreign company, in the nature of royalty or fee for technical services, other than the income referred to in section 44DA i.e., income in the nature of royalty and fee for technical services which is not connected with the permanent establishment of the non-resident.*
>
> *Combined effect of the provisions of sections 44BB, 44DA and*

*115A is that if the income of a non-resident is in the nature of fee for technical services, it shall be taxable under the provisions of either section 44DA or section 115A irrespective 'of the business to which it relates.* ***Section 44BB applies only in a case where consideration is for services and other facilities relating to exploration activity which are not in the nature of technical services. However, owing to judicial pronouncements, doubts have been raised regarding the scope of section 44BB vis-a-vis section 44DA as to whether fee for technical services. relating to the exploration sector would also be covered under the presumptive taxation provisions of section 44BB.***

***In order to remove doubts and clarify the distinct scheme of taxation of income by way of fee for technical services, it is proposed to amend the proviso to section 44BB so as to exclude the applicability of section 44BB to the income which is covered under section 44DA. Similarly, section 44DA is also proposed to be amended to provide that provisions of section 44BB shall not apply to the income covered under section 44DA.***

*These amendments are proposed to take effect from 1st April 2011 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years.*"

This proviso reinforces the legislative intent to carve out an exception to the character of the income referred to in this section i.e. royalty and fees for technical services. The principles relating to interpretation of statute, emphatically lay down that statute should be interpreted to preserve the legislative intent. A reading of the overall scheme of section 44BB and 44DA leaves no manner of doubt that section 44BB applies if the assessee is engaged in the business of providing services or facilities in the prospecting for, or extraction or production of minerals oils. However, if income earned by such assessee takes the color of royalty or FTS, then the computation for

the purposes of determining "*profits and gains of business or profession*" is to be done as per the provisions of section 44DA of the Act. Therefore, now in the current scenario if the income of the assessee is Royalty or FTS, then the same would be taxed under Section 9(1)(vi)/(vii) read with Section 115A or 44DA, as the case may be.

***Judgments relied upon by the Parties***

17. Now, let us reflect upon the case laws relied upon by the parties. In ***Oil and Natural Gas Corporation (ONGC) v. Commissioner of Income Tax and Anr.*** (supra)**,** the "*pith and substance*" test was applied in respect of the position that existed prior to the amendments taken note of hereinabove and, therefore, the said judgment does not deal with the situation that we are faced with on question of interplay of the two provisions. Furthermore, in the said case, the Supreme Court concluded that the services provided to ONGC by Contractors in the batch of appeals do not qualify as FTS, in view of the exclusionary part of Explanation 2 to Section 9 (1) (vii). In that view of the matter, the Court held that the services are to be taxed under Section 44BB. The Court, thus did not have the occasion to consider the import, effect and purpose of proviso to Section 44BB, that existed during the relevant time. This is evident from the following observations made in the said judgment:-

> *"**8.** A careful reading of the aforesaid provisions of the Act goes to show that under Section 44BB(1) in case of a non-resident providing services or facilities in connection with or supplying plant and machinery used or to be used in prospecting, extraction or production of mineral oils the profit and gains from such business chargeable to tax is to be calculated at a sum equal to 10% of the aggregate of the amounts paid or*

*payable to such non-resident assessee as mentioned in Sub-section (2). On the other hand, Section 44D contemplates that if the income of a foreign company with which the government or an Indian concern had an agreement executed before 1.4.1976 or on any date thereafter the computation of income would be made as contemplated under the aforesaid Section 44D. Explanation (a) to Section 44D however specifies that "fees for technical services" as mentioned in Section 44D would have the same meaning as in Explanation 2 to Clause (vii) of Section 9(1). The said explanation as quoted above defines "fees for technical services" to mean consideration for rendering of any managerial, technical or consultancy services. However, the later part of the explanation excludes from consideration for the purposes of the expression i.e. "fees for technical services" any payment received for construction, assembly, mining or like project undertaken by the recipient or consideration which would be chargeable under the head "salaries". Fees for technical services, therefore, by virtue of the aforesaid explanation will not include payments made in connection with a mining project.*

*xxxxxxxxxxx*

***13.** The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act 1948. While construing the somewhat pari materia expressions appearing in the Mines and Minerals (Development and Regulation) Act 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development)*

*Act, 1948. Reading Section 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct. The said details are set out below.*

| ***S.No.*** | ***Civil Appeal No.*** | ***Work covered under the contract*** |
|---|---|---|

| | | |
|---|---|---|
| 1. | 4321 | Drilling of exploration wells and carrying out seismic surveys for exploratory drilling. |
| 2. | 740 | Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel. |
| 3. | 731 | Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel. |
| 4. | 1722 | Furnishing supervisory staff with expertise in operation and management of Drilling unit. |
| 5. | 729 | Capping including subduing of well, fire fighting. |
| 6. | 738 | Capping including subduing of well, fire fighting. |
| 7. | 1528 | Analysis of data to prepare job design, procedure for execution and details regarding monitoring |
| 8. | 1532 | Study for selection of enhanced Oil Recovery processes and conceptual design of Pilot Tests. |
| 9. | 1520 | Engineering and technical support to ONGC in implementation of Cyclic Steam Stimulation in Heavy Oil Wells. |
| 10. | 2794 | Assessment and processing of seismic data along with engineering and technical support in implementation of Cyclic Steam Stimulation. |
| 11. | 1524 | Conducting reservoir stimulation studies in association with personnel of ONGC. |
| 12. | 1535 | Laboratory testing under simulated reservoir conditions. |
| 13. | 1514 | Consultancy for optimal exploitation of hydrocarbon resources. |
| 14. | 2797 | Consultancy for all aspects of Coal Bed Methane. |
| 15. | 6174 | Analysis of data of wells to prepare a job design. |
| 16. | 1517 | Geological study of the area and analysis of seismic information reports to design 2 dimensional seismic surveys. |
| 17. | 7226 | Opinion on hydrocarbon resources and foreseeable potential. |
| 18. | 7227 | Opinion on hydrocarbon resources and foreseeable potential. |
| 19. | 7230 | Opinion on hydrocarbon resources and foreseeable potential. |
| 20. | 6016 | Opinion on hydrocarbon resources and foreseeable potential. |

| | | |
|---|---|---|
| 21. | 6008 | Evaluation of ultimate resource potential and presentations outside India in connection with promotional activities for Joint Venture Exploration program. |
| 22. | 1531 | Review of sub-surface well data, provide repair plan of wells and supervise repairs. |
| 23. | 733 | Repair of gas turbine, gas control system and inspection of gas turbine and generator. |
| 24. | 741 | Repair and inspection of turbines. |
| 25. | 737 | Repair, inspection and overhauling of turbines. |
| 26. | 736 | Inspection, engine performance evaluation, instrument calibration and inspection of far turbines. |
| 27 | 1522 | Replacement of choke and kill consoles on drilling rigs. |
| 28. | 1521 | Inspection of gas generators. |
| 29. | 1515 | Inspection of rigs. |
| 30. | 2012 | Inspection of generator. |
| 31. | 1240 | Inspection of existing control system and deputing engineer to attend to any problem arising in the machines. |
| 32. | 1529 | Inspection of drilling rig and verification of reliability of control systems in the drilling rig. |
| 33. | 2008 | Expert advice on the device to clean insides of a pipeline. |
| 34. | 2795 | Feasibility study of rig to assess its remaining useful life and to carry out structural alterations. |
| 35. | 925 | Engineering analysis of rig. |
| 36. | 1519 | Imparting training on cased hold production log evaluation and analysis. |
| 37. | 1533 | Training on well control. |
| 38. | 1518 | Training on implementation of Six Sigma concepts. |
| 39. | 1516 | Training on implementation of Six Sigma concepts. |
| 40. | 6023 | Training on Drilling project management. |
| 41. | 2796 | Training in Safety Rating System and assistance in development and audit of Safety Management System. |

| | | |
|---|---|---|
| 42. | 1239 | To develop technical specification for 3D Seismic API modules of work and to prepare bid packages. |
| 43. | 1527 | Supply supervision and installation of software which is used for analysis of flow rate of mineral oil to determine reservoir conditions. |
| 44. | 1523 | Supply, installation and familiarization of software for processing seismic data. |

> ***The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act****. On the basis of the said conclusion reached by us, we allow the appeals under consideration by setting aside the orders of the High Court passed in each of the cases before it and restoring the view taken by the learned Appellate Commissioner as affirmed by the learned Tribunal."*
>
> [*Emphasis supplied*]

The above noted judgment assumes significance, though on a different aspect, which we shall elucidate and expound later in this judgment.

18. The judgement of this Court in ***Director of Income Tax v. OHM Ltd.*** [2013] 352 ITR 406 (Del) also does not help the Petitioner. In the said case, the assessee was engaged in the business of providing geophysical services to oil and gas exploration industry; conducting electromagnetic, processing

and interpretation of data, which so collected through the survey was used in offshore oil industry. In the said case, assessee claimed that the oil and gas exploration activity was directly related and was part of exploration/prospecting activities for mineral oil and such services fell within the ambit of Section 44BB. Authority for Advance Ruling followed its earlier decision and decided in favour of the assessee. Revenue in the challenge, contended that the authority had erred in having failed to note that the appropriate provision to be applied was Section 44DA read with Section 9 (1) (vii), Explanation 2 of the Act. The Court in the said case agreed with the view taken by the Authority for Advance Rulings and referred to its earlier decisions of ***Director of Income Tax. v. Jindal Drilling & Industries Ltd.*** [2010] 320 ITR 104 (Delhi) and also to another order of Authority for Advance Ruling in the case of ***Geofizyka Torun Sp.zo.o In Re*** (2010) 320 ITR 268 (AAR), and concluded that the view taken by the Authority was correct and held that Section 44DA is broader in scope as compared to Section 44BB. In that context, the Court considered the effect of second proviso to Sub Section (1) of Section 44DA inserted by Finance Act, 2010 and held 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 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*."

[*Emphasis Supplied*]

19. Petitioner has strongly relied upon the aforesaid observations to argue that this Court had explicated that the second proviso does not efface the applicability of Section 44BB, and notwithstanding the second proviso to section 44DA, the legal position remains unaffected. Before commenting on this contention, it is also necessary to take note of a later decision of this court in ***PGS Exploration (Norway) AS v. Additional Director of Income Tax*** [2016] 383 ITR 178 (Delhi), where the court also had the occasion to

consider the aforesaid case of ***Director of Income Tax v. OHM Ltd*** (Supra). In the said case, the Court upheld the contention advanced on behalf of the assessee that since it is engaged in business of providing services in connection with prospecting for mineral oils, its income, even if it falls within the ambit of Section 44DA (1) of the Act, would be taxable under Section 44BB (1). However, at the same time, the court considered the effect of the amendments introduced by the Finance Act, 2010 and held as under:

> "*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.*"

20. The aforesaid observations, in our view, rightly interpret the position in law. For that matter, the Petitioner is misinterpreting the earlier judgment of this Court *in* ***Director of Income Tax v. OHM*** (supra), to contend that Section 44BB being a specific provision will override the provisions of section 44DA of the Act. Section 44BB of the Act qualifies a business activity whilst section 44DA applies to the nature of income. Even in ***OHM***

***Ltd.*** (supra), the Court has taken a view that is in concurrence with our opinion. In the said judgment, the Court in para 12 notes as under:

> *"**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."*

In the above extracted portion, the court has held that in case the services are in the nature of Royalty or FTS so as to fall under section 44DA, then an assessee is rendering such services as provided in section 44BB, he cannot claim the benefit of being assessed on the basis that 10 percent of the revenue will be deemed to be the profits as provided in section 44BB. This legal viewpoint stands reaffirmed and reinforced in ***PGS Exploration (Norway) AS v. Additional Director of Income Tax*** (supra).

21. The upshot of the above discussion is that 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. If the income of a non-resident

is in the nature of fees for technical services or royalty, it shall be taxable under the provisions of either Section 44DA or Section 115A.

***The definition of FTS and the exception therein***

22. There is yet another important factor that needs to be illuminated. It is to be borne in mind that as per the explanation to Section 44DA, the expression "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub Section (1) of Section 9. This definition excludes "mining or like projects" from the ambit of the definition of "fees for technical services". The CBDT circular No. 1862, dated 22.10.1990, also clarifies that a rendition of services like training and carrying out drilling operations for exploration/exploitation of oil and natural gas would also be covered within the phrase "mining or like projects" and therefore shall fall outside the ambit of "technical services". The relevant portion of the said circular reads as under:-

> "**1.** The expression "fees for technical services" has been defined in *Explanation 2* to section 9(1)(*vii*) of the Income-tax Act, 1961 as under :
> "*Explanation 2* : For the purpose 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.** The question *whether prospecting for, or extraction or production of, mineral oil can be termed as 'mining' operations,* was referred to the Attorney General of India for his opinion. The Attorney General has opined that *such operations*

*are mining operations and the expressions 'mining project' or 'like project' occurring in* Explanation 2 *to section 9(1)(*vii*) of the Income-tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas.*

**3.** In view of the above opinion, *the consideration for such services will not be treated as fees for technical services for the purpose of* Explanation 2 *to section 9(1)(*vii*) of the Income-tax Act, 1961. Payments for such services to a foreign company, therefore, will be income chargeable to tax under the provisions of section 44BB of the Income-tax Act, 1961 and not under the special provision for the taxation of fees for technical services contained in section 115A, read with section 44D of the Income-tax Act, 1961.*"

This definition of FTS remains unchanged and circular No. 1862 dated 22.10.1990 is still in force. Thus, in a nutshell, if the services provided by the assessee constitute services for "mining or like project", the consideration therefore it would be excluded from the scope of "*fees for technical services*". It is well settled that when there are two provisions in an enactment which cannot be reconciled with each other, the doctrine of harmonious construction should be applied and attempt should be so interpret the provisions, if possible, giving effect to both. It is the duty of the courts to avoid "a head on clash" between two sections of the same Act and, "*whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise*." It should not be lightly assumed that "*Parliament had given with one hand what it took away with the other*". The provisions of one section of a statute cannot be used to defeat those of another "*unless it is impossible to effect reconciliation between them*". Despite the amendments introduced in Section 44BB and 44DA, the

legislature has not amended the definition of FTS and it remains unchanged. It has to be given the meaning that emerges from Explanation 2 clause (vii) of sub Section (1) of Section 9. As a result, if the services are rendered for '*mining or like project*', the same would not qualify as FTS. Thus, if the income of an assessee is not covered under the definition of FTS, it would get excluded from the purview of Section 44DA.

23. With the above clarity on the legal position, we now proceed to examine the nature of activities performed by the assessee and the income derived therefrom. This is necessary to answer the crucial question in the present case as to whether the receipts from the activities rendered by the assessee fall under Section 44BB or fall within the purview of Section 44DA after the amendment introduced by the Finance Act, 2010.

## CATEGORISATION OF THE INCOME OF THE PETITIONER: WHETHER ROYALTY OR FTS

### *Observations of the CIT w.r.t categorization of the income of the assessee*

24. First and foremost, the CIT in the impugned order has not returned a categorical finding as to whether the income, or which part of the Petitioner's income, falls under Royalty and FTS and that has constricted us to conclusively decide the issue for the reasons explained hereinafter. We are disappointed to note that the CIT has not taken any definite stand. The draft assessment order proposed under Section 143 (3) read with Section 143 (1) of the Act, held that the income of the assessee has been considered in the nature of Royalty/FTS. The assessment was also finalized in the above

terms. Petitioner challenged the assessment order by way of a revision under Section 264 of the Act where the following ground was urged:

> "*Ground No. 1- Claim of section 44BB incorrectly denied.*
>
> *On the facts and circumstances of the case, the Ld. AO erred in law and on the facts of the case in holding that the income on account of receipts from provision of software enabled solutions to the oil and gas industry* ***along with providing annual maintenance services of the software is in the nature of fees for technical services/ royalty payments under section 9(1)(vii)/9(1)(vi) of the Income Tax Act, 1961 (the 'Act')*****.**"

25. The CIT considered the contentions raised by the Petitioner and rejected the aforesaid ground *inter alia* holding as under:

> "*On a comprehensive consideration of the entire conspectus of the factual matrix of the case and the extant legal position on the issues involved, there is no merit in Ground Nos. 1 & 2 of the assessee i.e. Claim of applicability of Section 4488 to the assessee's receipts instead of Section 44DA adopted by the Assessing Officer & estimating income @ 25% of the Gross revenue/ receipts and is therefore rejected. The natures of services rendered are not even wholly connected to drilling and prospecting. The logic of the ONGC decision does not apply in this case. In any case, the 44DA adopted by the Assessing Officer & estimating income @25% of the Gross revenue/ receipts and is therefore rejected.* ***The natures of services rendered are not even wholly connected to drilling and prospecting. The logic of the ONGC decision does not apply in this case. In any case, the provisions of section 44DA read with amended provisions of 9(1)(vi) and 9(1)(vii) clearly indicate that the amount should be assessed under section 44DA as Royalty/FTS. Further, the consistent stand of the Department is that assessee's income from software licencing & its maintenance is taxable in terms***

***of Section 44D/44DA and not under Section 44BB of the IT. Act, 1961***."

26. From the aforesaid conclusion, it becomes evident that the CIT has held that the amount received by the assessee should be assessed under Section 44DA as 'Royalty/FTS'. CIT examined the activities performed by the assessee as listed out on the assessee's website and concluded that the assessee is providing software services for processing of raw seismic data. It is noted that the assessee provides software to develop 2D/3D and graphs of the seismic information available and also the maintenance of such software. CIT has concluded that the activities are carried at back end and can be done at any place. On this basis, the CIT held that that there was no need for the assessee's software at onsite/drilling site and thus since the services provided by the assessee were not directly involved in mining or like operation, the same were NOT out of the purview of FTS. This is an erroneous approach. It was necessary for the CIT to have given a categorical finding as to the nature of receipt in the hands of the assessee. In our considered opinion, the CIT fell in error on this aspect. Although, the CIT is correct in holding that the "mining or like project" are out of the purview of FTS, and consequently the same would not fall within the ambit of Section 44DA (1), however the scope of technical services cannot be broadened by giving a restrictive interpretation to the expression "mining or like project", appearing in Explanation 2 to clause (vii) of sub Section (1) of Section 9. The CIT, perhaps in an attempt to give meaning to the combined effect of the provisions of Section 44BB, Section 44DA and Section 115A has endeavoured to give such an interpretation. However, such a view is flawed, in as much as, the scope of expression "mining or like project" has been

confined only to situations where services are performed onsite i.e. at the site of mining/drilling. We are unable to find any rationale in this reasoning. In the impugned order, it has been noted that the software supplied by Petitioner helps to ascertain the drilling spot where there is a maximum probability for finding oil. The impugned order also records that the assessee is regularly hired by Oil and Gas exploration companies such as ONGC; Reliance Industries Ltd. Gujarat State Petroleum Corporations; Oil India Ltd etc. for availing the aforesaid services. It has been further noted in para 4.3 (a) that "*the services of the assessee prima facie appear to be covered by judgment of the Apex Court in the case of ONGC v. CIT (supra), as it is one of the 44 work/activity identified by the Court for applying Section 44BB instead of Section 44D*". Reference here may be made to the judgment of the Supreme Court in the case of ***ONGC*** (supra)**.** In the said case, the Court applied the doctrine of pith and substance in respect of each contract/agreement, to ascertain whether the dominant purpose of the agreements was prospecting, extraction or production of mineral oils. On that basis, the Court held that the payments made by ONGC and received by non-resident assesses or foreign companies under the contracts is more appropriately assessible under the provisions of Section 44BB and not Section 44D of the Act. The relevant portion of the said judgment reads as under:

> *"**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."*

27. The aforesaid observations of the Supreme Court, where an identical issue was involved, has not been appreciated in the right perspective by the CIT. If the nature of services rendered have a proximate nexus with the extraction of production of mineral oils, it would be outside the ambit of the definition of FTS. In the instant case, since the nature of services rendered by the Petitioner gets excluded from the definition of "FTS", in light of what is discussed above, the next logical question that arises for consideration is whether the Petitioner can claim the benefit of Section 44BB. The answer to this question is contingent on factual determination, as the legal position has changed from April 01, 2011. It is now required to be considered whether the receipts in the hands of the assessee qualify to be "royalty" or not? If the answer to this question is in the affirmative, then in that event, the relevant provision would now be 44DA(1).

***The purview of the definition of "Royalty"***

28. On this aspect, the CIT has also made certain observations that the assessee is not transferring the ownership in the software to the purchaser

and is only granting a license to use the same. It has been further held that under Clause (v) of Explanation 2 to Section 9 (1) (vi) of the Act, transfer of all or any rights in respect of any copyright is 'Royalty'. It has been held that if the software continues to be owned by the licensor, the use thereof would amount to 'Royalty'. The relevant paragraphs (l) and (m) of the impugned order, read as under:-

> *"I) Under clause (v) of Explanation-2 to Section 9(1)(vi) of the Act, transfer of all or any rights in respect of any copyright is royalty. The term "in respect of' has been interpreted by SC/HC and given very wide meaning in the following cases:*
>
> *(i) SC in Shahdara (Delhi) Saharanpur Light Railway Company Limited Ltd v. Upper Doab Sugar Mills Limited and another reported in AIR 1960, page 695;*
>
> *(ii) Bombay HC in Anusua Vithal and Others v J.H Mehata Additional Authroity under Payment of wages Act, Bombay and another reported in AIR 1960 (Bombay) page 201;*
>
> *(iii) Patna High Court in CIT Bihar and Orissa Patna vs Chunilal Rameshwar Lal reported in AIR 1968 (Patna) page 64.*
>
> *Relying on these judgments, Karnataka HC in the case of Synopsis International Old Limited (212 Taxman 454) held that the expression 'in respect of used in Explanation 2 denotes the intention of the Parliament to give a broader meaning and wider connotation that covered all the income from transfer of all or any of the rights in respect of a copyright. The HC also observed that when the meaning of the words used are clear, unambiguous, merely because it is a fiscal legislation, the meaning cannot be narrowed down and it cannot be interpreted so as to give benefit to the assessee only. Then it would be re-writing the section, under the guise of interpreting a fiscal*

*legislation, which is totally impermissible in law. When the legislature has advisedly used the words 'in respect of', the intention is clear and manifest, the said phrase being capable of a broader meaning, the same is used in the section to bring within the tax. net all the incomes from the transfer of all or any of the rights in respect of a copyright. Thus, it was held that license fee for use of software amount to transfer of all or any of the rights in respect of a copyright.*

*m)When licence is granted to allow use of the software by making copy of the same and to store it in the hard disk of the designated computer and to take back up copy of the software, it is clear that what is transferred is right to use the software, an exclusive right, which the owner of the copyright i.e., the licensor owns and what is transferred is only right to use copy of the software for the internal business as per the terms and conditions of the agreement. It is also to be noted that what is supplied in such cases is the copy of the software of which the respondent supplier continues to be the owner (and not the end user) and what is granted under the licence is only right to copy the software as per the terms of the agreement, which, but for the licence would amount to infringement of copyright u/s. 52 of the Copyright Act, 1957. The software continues to be owned by the licensor. On these facts, the use of software will amount to royalty even under the Indian Copyright Act, 1957 and also under LT. Act, 1961 in all the 4 categories as given under:*

*i. End user of distributors like IBM India Limited, Rational Software Corporation India Limited, Sunrays computers Private Limited, LG Soft India Pvt Ltd, M Tech India Private Limited, etc.; or*

*11. End user of Resident supplier of embedded software like Alcatel Lucent India, Microsoft Corpn. India; or in. End user of Non-resident supplier of embedded software like ZTE Corporation, Nokia Network OY, Ericsson; or*

*IV. End user of -Nonresidcnt supplier of software - other than embedded software like Citrix Systems Asia Pacific Limited, Synopsis International Limited, etc.*"

29. Both the sides have referred to several case laws in support of their contentions on the plea pertaining to the concept of income from royalty. The Petitioner has impugned the decision of the CIT, contending that the income from facilities/services of specialized software will not fall within the purview of royalty under Section 9 (1)(vi) of the Act. CIT has essentially relied upon the judgment of Karnataka High Court in the case of ***Commissioner of Income Tax and Anr. v. Synopsis International Old Ltd. (2012) 208 Taxmann.com 162 (Kar)*** to hold that the expression "in respect of" used in Explanation 2 denotes the intention of the parliament to give a broader meaning and wider connotation that covers all the income from transfer of all or any of the rights in respect of copyright. The Petitioner on the other hand has contended that this Court has specifically dissented from the views expressed by the Karnataka High Court. In this regard, reliance has been placed on the decision of this Court in ***CIT v. Alcatel Lucent Canada*** (2015 372 ITR 476 (Del); ***CIT v. ZTE Corporation*** (2017) 392 ITR 80 (Del); ***Income Tax v. Ericsson A.B.*** 343 ITR 470 (Del) and ***Director of Income Tax v. Intrasoft Ltd.*** (2014) 220 Taxman 273 (Del). We need not go into this vexed question at this stage because of lack of clarity on facts.

30. In the assessment order, the assessing officer has taken note of the contracts entered into by the Petitioner with other parties. A perusal of the same indicates that such contracts are in the nature of annual maintenance contract of upgradation, maintenance in support of software licenses; supply of software; AMC for software. The nature of activity/scope of services

under the contract executed by the Petitioner with various companies also indicates the same position. The relevant portion of the order reads as under:-

> "*The nature of activities/scope of work under the contract with various companies is found to be as follows:-*
>
> a. *Under the contracts/service orders With Calm India Ltd scope of work includes "AMC for Paradigm Software" provided by the assesee alongwith AMC for renewal* of *Paradigm Software and supply of "Paradigm Software license".*
>
> *b. Under the contracts/service orders with ONGC Ltd. MAT/IMP/E""/2(769)/2009-10 scope of work includes providing service» for up-gradation, maintenance and support of Paradigm Interpretation Software provided by the assessee alongwith AMC for*
> *site specific Geolog Paradigm Software at ONGC site in some contracts*
>
> *c. Under ONGC contract 4050006697, assessee* has *supplied developed application software alongwith provision of SKUA software suite license.*
>
> *d. Under ONGC contract MATIIMPIE-I/I2(769)1200iJ-10 and MATIIMPIE-II/2(2772)1201Q-11 awarded by Oil and Natural Gas Corporation Limited for the provision of annual maintenance contract for SKVA Suit* of *software under corporate licensing.*
>
> e. *Under ONGC contract 4050007265 assessee has supplied CRAM software alongwith provision of software license for GEOPIC.*
>
> f. *Purchase order number 048fl218157 with Reliance Industries Limited is for supply of perpetual software license and supply of software to be installed at Rellence facilities in India which comprise of Geolog Software. The assessee also providing*

*software maintenance services alongwith troubleshooting services and provision of license key. The assessee is also providing software familiarization support and consultancy services by provision of personnel or providing training, AMC for software is also provided,*

*g. Work order number 04813101650 With Reliance Industries Limited is for supply of perpetual software license and supply of software to be installed at Reliance facilities alongwith AMC for maintenance and support services of software in India alongwith supply of all enhancement and additions* to *the Software.*

*h. Service Order number 8300000785 with Gujarat* State *petroleum Corporation Ltd for provision of AMC of paradigm software. The* assessee i*s also providing installation and training with respect to the* software *provided.*

*i. Quotation no.* US1O-D14Q1; Quotation *no. US-10-014R2-JS-Q2; Quotation no. us..1()"014R2-JS-Q3 and Quotation no. US-10-014R2-JS-Q4 & with Fugro Geoscience India Pvt Ltd for provision of software license access and support· service agreement.*

*j. Contract number OIUCCO/GPHY/GLOBAU275110-11 With Oil India Limited for provision of AMC and support services* of *paradigm software. The* assessee *is also providing services of its engineers who are deputed* to *site of OIL in India for the contract and maintenance services*"

31. From the above it manifests that the contracts executed by the assessee are composite contracts and there is no bifurcation with respect to the nature of consideration relating to the services rendered. The assessee has not segregated its activities into supply of software and maintenance/support services. The entire income derived under the contracts was offered for

taxation under section 44BB. Revenue in its note of arguments has contended that 'supply of software' is 'royalty' and 'other services' are 'FTS' and accordingly Petitioner is liable to pay tax under Section 44DA of the Act. Whether the services of updating the software/renewal of license or warranty services or maintenance of software are inextricably and essentially linked to the supply of the software and are ancillary services is a question of fact that would require determination after examining the dominant purpose of such contracts. In our opinion, there is no factual clarity on this aspect. We do not find any such distinction/segregation that can be inferred with respect to the receipts in the hands of the assessee under the contracts executed by it, referred above. The CIT being a fact-finding body has failed to give a reasoned order with respect to the nature of income and its subsequent application.

***Directions***

32. In view of the afore-going discussion, we set aside the impugned order and the matter is remanded to the file of the Ld. CIT to assess the Petitioner's income and tax payable thereon by first determining the nature of the income/receipts in the hands of the assessee in light of the observations made in this judgment. The CIT, would be required to give a finding of fact on the following aspect:

> *Whether the income from services provided by the Assessee including the supply of software as well as ancillary services such as maintenance and installation would be covered under the definition of Royalty under the Explanation 2 to section 9(vi) of the Income Tax Act?*

If the answer to the above question is in the affirmative, the income would be taxable under section 44DA.

On the contrary, if the answer is in the negative, the income of the assessee would not be taxable under section 44DA but section 44BB [as held in ***ONGC*** (supra) as well as CBDT Circular No. 1862 dated 22.10.1990] since it is excluded from the definition of Fees for Technical Services under the Explanation 2 to section 9(vii) of the Act, being covered under the exception relating to mining and like activities provided in the definition of FTS.

Lastly, though this ground has not been raised by the assessee, however, it is required to be examined whether the assessee's case would be covered under the India-Australia DTAA. Article 12(3) of the said DTAA provides the definition of Royalty. The Petitioner is granted liberty to claim benefit under the said DTAA before the Ld. CIT if it wishes to do so. Besides, in the event the answer to the question is in the affirmative, the assessee shall also be at liberty to assail such findings on merit, as we have refrained ourselves from determining whether the income of royalty is excluded from the definition under the Act.

33. The writ petition is allowed in the above terms.

**SANJEEV NARULA, J**

**VIPIN SANGHI, J**

**MARCH 13, 2020**/*ss/nk/ks*