

Revenue earned by a non-resident from providing seismic services taxable under section 44BB if such income is effectively connected with PE of non-resident in India

July 25, 2014

In brief

In a recent decision, the Delhi High Court (HC) held that revenue earned by a non-resident under a contract for providing seismic services in India for assessment year (AY) 2008-09 would be subject to tax under section 44BB of the Income-tax Act, 1961 (the Act) if it was effectively connected with the permanent establishment (PE) of the non-resident in India.

In detail

Facts

- PGS Geophysical AS (the taxpayer)¹ had entered into a contract with BG Exploration and Production India Limited, and another contract with Reliance Industries Limited, for the provision of acquiring and processing three-dimensional marine seismic data (collectively referred to as the seismic services) in respect of an offshore exploration block in India.
- The taxpayer computed its taxable income at the rate of 10% of the gross receipts

under section 44BB for AY 2008-09.

- The Tax Officer (TO) held that the seismic services provided by the taxpayer were technical in nature, and that the related income therefrom fell within the definition of fees for technical services (FTS) under section 9(1)(vii) of the Act. The TO felt that the FTS was taxable under the provisions of section 115A(1)(b) of the Act, and not under section 44BB(1) of the Act.
- The Income-tax Appellate Tribunal (Tribunal) while disposing the taxpayer's appeal, directed the TO to ascertain whether the taxpayer had a PE in

India, and to determine taxability of the taxpayer in accordance with the decision of its co-ordinate bench in the case of CGG Veritas Services, SA².

Issue before the High Court

Whether the revenue earned by the taxpayer under the contract for the provision of seismic services in India was taxable under section 44BB of the Act?

Taxpayer's contentions

- Income from the provision of seismic services would be covered under section 44BB of the Act and not

¹ PGS Geophysical AS v. ADIT [TS-436-HC-2014(DEL)]

² CGG Veritas Services, SA v. ADIT [2012] 18 taxmann.com 13 (Delhi-Trib)

under section 44DA(1)³ of the Act since these services were provided in connection with the prospecting, extraction or production of mineral oil in India. In this regard, the taxpayer relied on the earlier decision of the Delhi HC in the case of OHM Ltd⁴.

The taxpayer did not contest the TO's finding that the income from the provision of seismic services was covered by the definition of FTS under section 9(1)(vii) of the Act⁵.

Revenue's contentions

- The seismic services provided by the taxpayer were technical in nature, and were therefore covered under section 44DA instead of section 44BB of the Act.
- The amendment made to section 44BB(1) of the Act with effect from April 1, 2011, expressly excluding the application of the provisions

³ Section 44DA of the Act *inter alia* provides that fees for Technical Services (FTS) received by a non-resident from the government or an Indian concern, shall be subject to tax as business income if such FTS is effectively connected with a permanent establishment or fixed place of business of such resident in India through which it carries out its business in India.

Effective from April 1, 2010, section 44DA of the Act and section 44BB of the Act have been amended to expressly provide that the provisions of section 44BB will not be applicable to cases where the provisions of section 44DA of the Act are applicable for computing profits or gains or other income referred to in section 44DA.

⁴ DIT v. OHM Limited [2012] 28 taxmann.com 120 (Delhi)

⁵ Explanation 2 to section 9(1)(vii) of the Act defines FTS to mean 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.

of section 44BB of the Act to cases where the provisions of section 44DA of the Act were applicable, was clarificatory in nature and would therefore apply retrospectively.

- The decision in the case of OHM Limited which was heavily relied upon by the taxpayer, has been challenged by the revenue before the Supreme Court.

High Court's ruling

The HC followed its earlier decision in the case of OHM Limited and held that income from provision of services in connection with the prospecting, extraction or production of mineral oil for the period between April 1, 2004 and March 31, 2011 would be taxable under section 44BB of the Act if it was effectively connected with the PE of the non-resident in India.

The HC also clarified that if the aforesaid income was in the nature of FTS and it was not effectively connected with the PE of the non-resident, then it would not be taxable under section 44BB(1) of the Act.

The HC held that existence of a PE was not a necessary condition specified in section 44BB of the Act, but it was a necessary condition for the application of section 44DA(1) of the Act and for excluding the application of section 115(A)(1)(b) of the Act.

In the present case, the taxpayer was engaged in business for providing services in connection with prospecting for mineral oils. Further, the taxpayer had not challenged the TO's finding that the income from the aforesaid services was FTS. Therefore, if the income earned by the taxpayer from the provision of seismic services was considered to be in the nature of FTS and fell within the ambit of section 44DA(1) of the Act, then it would be taxable under section 44BB(1) of the Act.

On facts, the HC directed the TO to:

- examine whether the taxpayer had a PE in India, and whether the income earned by the taxpayer under the contracts with its clients was effectively connected with the aforesaid PE; and
- tax the aforesaid income under section 44BB(1) of the Act if the above conditions were satisfied, and if not, tax it under section 115(A)(1)(b) of the Act.

The HC also held that the income from the provision of services in connection with prospecting, extraction or production of mineral oil from April 1, 2011 onwards, was taxable under section 44DA(1) of the Act if the same was effectively connected with the PE of the non-resident.

The takeaway

This decision provides relief to non-resident oilfield service providers, since it has held that the income earned by them from providing services to the government/ Indian concern, which is effectively connected with their PE in India, will be taxable under section 44BB of the Act until AY 2010-11.

However, it is interesting to note the observation made by the HC that income covered within the scope of section 44DA(1) of the Act would be excluded from section 44BB(1) of the Act from AY 2011-12 onwards. This observation is in contradiction to its earlier decision in OHM Limited wherein it had been held that the type of services contemplated under section 44BB were more specific than those contemplated under section 44DA of the Act; consequently the revenue earned by the non-resident from provision of these specific services was covered under section 44BB of the Act.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

Tax & Regulatory Services – Direct Tax

Shyamal Mukherjee, *Gurgaon*
+91-124 330 6536
shyamal.mukherjee@in.pwc.com

Ketan Dalal, *Mumbai*
+91-22 6689 1422
ketan.dalal@in.pwc.com

Rahul Garg, *Gurgaon*
+91-124 330 6515
rahul.garg@in.pwc.com

Ahmedabad

President Plaza
1st Floor Plot No 36
Opp Muktidham Derasar
Thaltej Cross Road, SG Highway
Ahmedabad, Gujarat 380054
+91-79 3091 7000

Bangalore

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai 600 006
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Andhra Pradesh
Phone +91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata - 700 091, West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road (Station Road),
Bandra (West), Mumbai - 400 050
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City, Gurgaon
Haryana -122002
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
+91-20 4100 4444

For more information

Contact us at
pwctr.knowledgemanagement@in.pwc.com

About PwC

PwC helps organisations and individuals create the value they're looking for. We're a network of firms in 157 countries with more than 184,000 people who are committed to delivering quality in Assurance, Tax and Advisory services.

PwC India refers to the network of PwC firms in India, having offices in: Ahmedabad, Bangalore, Chennai, Delhi NCR, Hyderabad, Kolkata, Mumbai and Pune. For more information about PwC India's service offerings, please visit www.pwc.in.

*PwC refers to PwC India and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details. Tell us what matters to you and find out more by visiting us at www.pwc.in



For private circulation only

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PwCPL, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it. Without prior permission of PwCPL, this publication may not be quoted in whole or in part or otherwise referred to in any documents.

© 2014 PricewaterhouseCoopers Private Limited. All rights reserved. In this document, "PwC" refers to PricewaterhouseCoopers Private Limited (a limited liability company in India having Corporate Identity Number or CIN : U74140WB1983PTC036093), which is a member firm of PricewaterhouseCoopers International Limited (PwCIL), each member firm of which is a separate legal entity.