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Income from seismic data procurement and processing services relating to oil exploration taxable under the presumptive scheme

In brief

In a recent decision¹, the Delhi High Court, while dismissing the writ petition filed by the tax department against the ruling of the Authority for Advance Rulings (AAR), held that revenue earned by a non-resident under a contract for providing seismic data procurement, processing and interpretation services in India would be subject to tax under section 44BB of the Income-tax Act, 1961 (the Act).

¹ DIT v. OHM Limited [TS-879-HC-2012(Del)]

Facts

- OHM Limited (the assessee), a company incorporated in the United Kingdom, is engaged in the provision of geophysical services such as electromagnetic survey, processing and interpretation of data which is used in the offshore oil industry.
- The assessee had secured contracts from Petrogas E&P, LLC and CGG Veritas Services SA for provision of data procurement, processing and interpretation services (collectively referred to as seismic services) in respect of an offshore exploration block in India.

- The assessee applied for a certificate under section 197 of the Act for receiving payments, after withholding of tax at a lower rate of 4.223% under the provisions of section 44BB of the Act. The revenue authorities rejected the assessee's claim and passed an Order for withholding of tax at 10% (plus surcharge and cess).
- The assessee filed an application before AAR under section 245Q of the Act claiming that its activities were directly related to and formed part of the exploration/prospecting of mineral oil and are covered by section 44BB of the Act. The AAR² accepted the claim of the assessee and held revenue earned by the assessee from providing seismic services in India to be taxable under section 44BB of the Act at an effective tax rate of 4.223%. The revenue authorities filed a writ petition before the High Court against the aforesaid ruling.

Issue before the High Court

Whether the AAR was correct in ruling that the revenue to be earned by the assessee under contract for provision of seismic services in India would be taxable under section 44BB of the Act?

Revenue's contentions

The seismic services provided by the assessee were technical in nature and were therefore covered under section 44DA of the Act³ read with explanation 2⁴ to section 9(1)(vii) of the Act instead of under section 44BB of the Act.

² OHM Ltd., *In re* [2011] 335 ITR 423 [AAR]

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.

Assessee's contentions

Income from seismic services would be covered by section 44BB of the Act and not section 44DA of the Act, since section 44BB, which provides for computing profits and gains in connection with the business of exploration of mineral oil, etc, is more specific than section 44DA of the Act.

High Court decision

The High Court upheld the ruling of the AAR that the revenue to be earned by the assessee under contract for provision of seismic services in India would be taxable under section 44BB of the Act.

In the above context, the High Court, made the following observations:

Specific provision (section 44BB) v. general provision (section 44DA)

- The High Court held that there was no error in the view taken by the AAR since it had applied a specific provision over a general provision. The High Court observed that section 44BB of the Act is a specific provision for computing income of non-residents from provision of services or facilities in connection with or supplying plant and machinery or hire, used or to be used in prospecting or extraction or production of mineral oil in India. Section 44DA of the Act is a broader and more general provision which provides for

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 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.

assessment of income of a non-resident by way of royalty or fees for technical services (FTS), where the right, property or contract in respect of which the royalties or FTS are paid is effectively connected with the permanent establishment or fixed place of profession of the non resident in India.

- The High Court observed that section 44BB of the Act does not contain any reference to permanent establishment in India and that the type of services contemplated under section 44BB of the Act are more specific than that contemplated under section 44DA of the Act. Therefore, revenue earned by the non-resident from provision of specific services is covered under section 44BB of the Act.
- In this context, the High Court noted that it is a well settled rule of interpretation, embodied by the maxim “*Generallia specialibus non derogant*” that if a special provision is made respecting a certain matter, that matter is excluded from the general provision.
- The High Court also noted that it is a well settled rule of interpretation i.e. the “*Rule of Harmonious Construction*” which provides 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. In this context, the High Court placed reliance on the decision of the Supreme Court in the cases of Venkataramana Devaru⁵ and South India Corporation (P) Ltd.⁶.
- The High Court observed that if the revenue’s contentions (that section 44DA of the Act covers all types of services provided by a non-resident) were to be

accepted, then the provisions of section 44BB of the Act would become redundant and this would therefore violate the rule of harmonious construction.

- The High Court also held that there was no error in the view taken by the AAR since a similar view was taken by a division bench of the Delhi High Court in the case of Jindal Drilling and Industries Ltd.⁷.

Effect of amendment to section 44BB and section 44DA by the Finance Act, 2010

- The High Court also noted the amendments made to section 44BB and section 44DA by the Finance Act, 2010 introducing provisos to expressly exclude application of the provisions of section 44BB to cases where provisions of section 44DA of the Act were applicable.
- The High Court held that the aforesaid amendment was necessary since both sections 44BB and section 44DA of the Act provide for different mode of computation (gross basis of tax at 10% under section 44BB *vis-a-vis* net income taxation under section 44DA of the Act).
- The High Court held that harmonious construction of the aforesaid sections in a manner to not to render any provision otiose, would only be possible if the aforesaid provisos were understood to be referring to the mode of computation of profits under the respective sections.
- The High Court concluded that the introduction of the provisos by the Finance Act, 2010 would not alter the fundamental nature of both the sections and does not take away the separate identity of section 44BB of the Act.

⁵ Venkataramana Devaru v. State of Mysore [1958] AIR SC 255

⁶ South India Corporation (P) Ltd. v. Secretary, Board of Revenue Trivandrum [1964] AIR SC 207

⁷ DIT v. Jindal Drilling and Industries Ltd. [2010] 320 ITR 104 (Del HC)

Conclusion

This is a landmark decision in the context of the taxability of seismic services provided in connection with offshore exploration of mineral oil in India since there were contradictory decisions of the AAR and the Tribunals on the subject prior to the decision and the High Court has given a clear verdict in favour of the applicability of section 44BB of the Act to the income from aforesaid services.

The conclusion reached by the High Court on the subject of the applicability of the provisions of section 44BB *vis-a-vis* the provisions of section 44DA after the amendment made in the aforesaid sections by the Finance Act, 2010, are also critical and may be useful to other oil and gas service providers which satisfy the other conditions prescribed under section 44BB of the Act.

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