IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 1116/DEL/2014
[Assessment Year: 2010-11]

The Dy. C.I.T. Circle-2(2) New Delhi	Vs.	M/s Technip UK Ltd. C/o 712- 713, Tulsiani Chambers, Free Press Journal Road, Nariman Point Mumbai PAN : AACCT8268N

C.O No. 305/Del/2014
ITA No. 1116/DEL/2014
[Assessment Year: 2010-11]

M/s Technip UK Ltd. C/o 712, 713, Tulsiani Chambers, Free Press Journal Road, Nariman Point Mumbai PAN : AACCT8268N	Vs.	The Dy. CIT Circle-2(2) New Delhi
[Appellant]		[Respondent]

Date of Hearing : 05.12.2018
Date of Pronouncement : 17.12.2018

Assessee by : Shri Ajay Vohra, Adv,
Shri Gaurav Barchha, CA &
Sh. Raman Jain, CA

Revenue by : Shri G. K. Dhall, CIT-DR

ORDER

PER N.K. BILLAIYA, AM:-

This appeal by the Revenue and Cross Objection by the assessee are preferred against the order of the Commissioner of Income Tax [Appeals] – DRP-II, New Delhi dated 23/12/2013 pertaining to A.Y. 2010-11.

2. The grounds of appeal raised by the Revenue are as under:

"1. Whether on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel ('DRP') has erred in directing the Assessing Officer to apply the deemed profit rate of 10% u/s 44BB of the Income Tax Act, 1961 ('the Act') on the revenues earned by the assessee from a non-resident company on account of provision of services for executing contracts with M/s Reliance Industries Ltd ('RIL').

2. Whether on the facts and in the circumstances of the case, the Hon'ble DRP has erred in holding that the amount received by the assessee from M/s Aker Installation FP AS ('Aker') on account of the services rendered was not in the nature of Fee for Technical Services ('FTS') as defined u/s 9(l)(vii) of the Act and was not taxable under the provisions of sec 44DA r.w.s. 115A of the Act.

3. Whether on the facts and in the circumstances of the case, the Hon'ble DRP has erred in holding that the revenues earned by the assessee on account of provision services to a nonresident company were in connection with prospecting etc of mineral oil and hence eligible for treatment u/s 44BB of the Act, without adjudicating the aspect of eligibility in terms of second limb of the exclusionary proviso (Explanation to section 9(l)(vii) of the I T Act, 1961) i.e. "for a project undertaken by the recipient" in terms of the proposition confirmed by Hon'ble Delhi High Court in DIT V Rio Tinto Technical Services [2012-TII-01-HC- DEL-INTL].

4. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in holding that the case of the assessee is covered by CBDT's Instruction No. 1862 dated 22.11.1990, not appreciating the fact that the said Instruction No. 1862 was not issued u/s 44BB but was issued to clarify the expression "mining or like project" in Expn 2 below section 9(l)(vii)(b) of the Act and the second limb of the exception ("for a project undertaken by

the recipient") was not the subject matter of the said Instruction.

5. Whether on the facts and in the circumstances of the case, the Hon'ble DRP has erred in not appreciating the fact in the present case the services were not rendered by the assessee directly to an entity (M/s RIL) which is engaged in prospecting etc of mineral oil and is directly a member of the Production Sharing Contract.

6. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in holding that no distinction can be made between receipts from Production Sharing Participants ('PSC Partners') and Non-Production Sharing Participants ('Non-PSC' Partners') and between services rendered by first-leg and second-leg vendors, ignoring the fact that the receipts from second-leg are in respect of contracts which are entered into with companies not directly engaged in Oil Production and Exploration and, therefore, are liable to tax u/s 9(l)(vi)/9(l)(yii) read with section 44DA and not section 44BB of the IT Act, 1961.

7. Whether on the facts and circumstances of the case the Hon'ble DRP has erred in its interpretation of the legislative intent behind the scheme of taxation envisaged in 9(l)(vii) read with sections 44DA and 44BB , ignoring the decisions in the cases of M/s Rolls Royce Pvt Ltd [2007-TII-03-HC-UKHAND-INTL] and M/s ONGC As Agent of M/s Foramer France [(2008) 299 ITR 438 Uttarakhand].

8. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in ignoring the distinct scheme of taxation of FTS/ royalty and disregarding the insertion of provisos in section 44BB/44DA/ 115A and the rationale behind the introduction of said clarificatory provisos in the Finance Bill 2010 in holding that the income of the assessee company was covered under the provisions of section 44BB.

9. Whether on the facts and in the circumstances of the case, the Hon'ble DRP has erred in not appreciating that since sections 44DA/115A are special provisions for taxation of income in the nature of royalties and FTS and if a special provision is made respecting a certain matter that matter is excluded from the general provision under the rule of "Generallia specialibus non derogant".

10. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in holding that the provisions of section 44BB of the Act are more special provisions which shall prevail over the provisions of section 9(l)(vii) read with sections 44DA and 115A of the Act, not appreciating the fact that both set of provisions are special in nature which operate in their own clearly defined spheres and therefore, once a particular receipt or income takes on the character of FTS as defined in section 9(1(vii), it cannot be considered for treatment u/s 44BB of the Act.

11. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in holding that sections 44DA and section 115A apply only to cases where the income by way of Royalty or FTS is earned by a non-resident by way of royalty or FTS from Government or an Indian entity and where an income is received by a non-resident from another non-resident, the provisions of section 44DA/115A do not apply.

12. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in not appreciating that proviso to section 44BB is not inserted 'per majorem cautelam' but explains and clarifies the main provision as the terms services or facilities used therein are not defined and the two terms used are too general in nature and thus once the payments take the character of FTS u/s 9(l)(vii), they go outside the purview of section 44BB and have to be taxed as FTS at applicable FTS rates as prescribed under the Act and /or DTAA.

13. Whether on the facts and circumstances of the case, the Hon'ble DRP has erred in not appreciating the fact that proviso to section 44DA brought about by the Finance Act 2011 was only clarificatory in nature and its application has to be read into the main provisions with effect from the time the main provision came into effect in view of the decision of the Hon'ble Supreme Court in the case of Sedco Forex International Drilling v/s CIT."

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. Briefly stated, the facts of the case are that the assessee is a company incorporated under the laws of the United Kingdom. The assessee is primarily engaged in the business of, inter alia, construction of turnkey oil production facilities. The assessee is a non-resident for the purposes of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] and a tax resident of the UK for purpose of the Agreement for Avoidance of Double Taxation ("DTAA") signed between India and the UK ("India-UK DTAA").

5. Reliance Industries Limited (RIL), a company incorporated under the laws of India, had secured government approval for the commercial development of the MA D6 oil field in Block No. KG DWN 98/3 off-shore Kakinada (MA D6 block). RIL has entered into a contract with Aker

Installation FP AS (Aker), a company incorporated under the laws of Norway, for the installation of manifolds, umbilicals, flexible. The assessee has been sub-contracted by Aker a portion of the contract for installation of Subsea facilities necessary for the first phase of MA D6 block development. The sub contracted scope comprises of in-country and out-country services. A copy of the contract entered into between Aker and the assessee is enclosed at pages 1 to 373 of the PB.

6. In the return of income filed for the relevant assessment year, the assessee offered to tax, income of Rs. 21,68,74,624/- earned under the said contract (consisting of in-country receipts of Rs. 15,88.61,653/- and out-country receipts of Rs. 5,80,12,971/-) under the provisions of section 44BB of the Act viz. presumptive basis, since the activities performed were 'in connection with prospecting for, extraction and production of mineral oil'. The **assessee** has, accordingly, computed its income tax liability under the Act and filed its return of income on presumptive basis determining its taxable income at 10 percent of in-country and out-country receipts under section 44BB of the Act.

7. During the course of assessment proceedings under section 143(3) of the Act, the AO while disregarding the applicability of section 44BB of the Act proposed to tax the entire receipts earned by the assessee as business profits under Article 7 of the India-UK DTAA. Further, the AO applied Rule of the Income-tax Rules, 1962 to assess the profits of the assessee @ 25% of the gross receipts earned by the assessee and passed the draft assessment order dated 30.03.2013 computed income of the assessee at Rs. 54,21,86,560/- against returned income of Rs. 21,68,74,624/-.

8. The assessee raised objections before the DRP and the DRP, vide directions dated 23.12.2013 framed order u/s 144C(5) of the Act, deleted the proposed additions by the Assessing Officer. The gist of the directions read as under:

> *"Under the provisions of section 44BB of the Act the presumptive rate of taxation is applicable to a non-resident engaged in the business of "providing services or facilities in connection with or supplying plant and machinery on hire used, or to be used in the prospecting for, or extraction or production of mineral oils". The activities being performed by*

the assessee cannot be said to be not 'in connection with' prospecting etc of mineral oil as it is an integral part of the operation for prospecting etc of mineral oil.

The assessee provided key technical personnel viz Project Director, Project Engineering Manager, HSE Manager, Quality Engineer, Interface Manager, Contract Administration Manager, Lead Design Engineer, Lead Installation Engineer, Operations Manager, Onshore Construction Manager etc to conduct the works in respect of installation planning, installation engineering, load out, transportation, installation, testing and pre- commissioning of the facilities and commissioning report etc. Therefore, the operation of highly specialized work could be done only with the assistance of personnel provided by the assessee. In view of the above, the assessee's claim that the activities are an integral part of the operation in connection with prospecting etc of mineral oil cannot be rejected.

Provisions of section 44BB also do not contain any thing to support the AO's contention regarding the so-called 'second leg contract' so as to deny the applicability of the section to the assessee. What is required under the section is that the services/facilities provided by the assessee should be "in connection with" prospecting etc of mineral oil. Nowhere it is mandated that the services should be provided directly by the

party who is engaged in prospecting etc. of mineral oil or is directly a member of the Production Sharing Contract.

Hon'ble Jurisdictional High Court in D1T vs. OHM Ltd. (2012) 212 Taxman 440 (Delhi) has held that section 44BB of the Act being a more specific provision shall prevail over the general provisions of the Act and that the services rendered by the sub-contractor of the ofl-shore rigs of a contractor is part and parcel of activities for extraction etc of mineral oils and would be covered u/s 44BB of the Act.

Assessee's claim for applicability of Section 44BB was accepted by the AO for A.Y. 2009- 10.

Consequently, the AO passed final assessment order dated 02.01.2014, under section 143(3) r.w.s. 144C(1) of the Act and accepted the returned income filed by the assessee."

9. The bone of contention is taxability of the contract receipts u/s 44BB of the Act which reads as under:

“Section 44BB

(l) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting/or, 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 44 D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections. …………………………………………………”

As per the provisions of section 44BB of the Act, the following conditions are required to be cumulatively satisfied for claiming taxability under this deeming section:

- *The recipient of income should be a non-resident;*
- *The non-resident should be engaged in the business of provision of services or facilities or should supply plant and machinery on hire;*

- *The services rendered or the plant and machinery provided on hire should be used* ***'in_connection with'*** *prospecting, extraction and production of mineral oil; and ; and*

- *The income from services rendered should not be taxable under the provisions of section 42, or section 44D, or section 115A or section 293 of the Act.*

Section 44BB of the Act is a special, specific and exclusive provision providing for deemed / presumptive basis of taxation in case of non-residents providing, inter alia, services or facility in connection with prospecting for or exploration or production of mineral oils in India. The words 'in connection with' are of the widest amplitude and would include services or facilities provided by a non-resident to a person, who is engaged in exploration or production of mineral oil; it is not necessary that the person providing such services or facility must itself be engaged in such activities."

10. All that is required is the interpretation of "in connection with". In this regard, the following judicial precedents need special consideration:

- *In the case of Geofizyka Torun Sp zoo |2010] 320* ***ITR*** *268 (AAR) the assessee was engaged in conducting seismic surveys and providing onshore seismic data acquisition and other*

associated services such as processing and interpretation of such data. The AAR held that that the expression 'in connection with' used in section 44BB, has to be provided an expansive meaning to include a variety of services relating to exploration, extraction and production of mineral oil.

- *In the case of ACIT vs Paradigm Geophysical Private limited [2008] 117 TTJ 812 (Delhi) the assessee had entered into a contract with Reliance Industries Limited for undertaking seismic data processing activities. On the issue of determining whether the activities would be covered by the provisions of section 44BB of the Act, the ITAT held that any consideration of whatever nature received in connection with prospecting for, or extraction or production of mineral oil would be taxed on presumptive basis as per section 44BB of the Act, considering that the scope of the said section is very wide and would cover all kinds of services including services in the nature-of managerial, technical or consultancy.*

- *The AAR in* ***the case of*** *Lloyd Helicopters International Pty Ltd [2001] 249 ITR 162 has held that provision of helicopter services for transporting men to the area where exploration activities are undertaken would be categorized under section 44BB of the Act, thus giving a wide interpretation to the scope of the said section.*

- *A similar ruling was given by the AAR in the case of Seabird Exploration FZLLC [2010] 320 ITR 286 wherein the AAR relying upon its own decision in the case of Geofizyka (supra) held that consideration received on seismic data acquisition and onboard processing would be subject to tax as per the provisions of section 44BB of the Act.*

- *Also, the AAR in the case* ***of*** *Wavefield Inseis Asa |2009|320 ITR 290, relying upon its own decision in the case of Geoilzyka (supra) held that consideration received from provision of seismic ships on hire for undertaking seismic data acquisition activities would be subject to tax as per the provisions of section 44BB of the Act.*

- *The Delhi Tribunal in the case of McDermott International Inc vs. DCIT [1994] 49 ITD 590 (Delhi) observed that services or facilities that provide link or relate to the main activity of oil prospection, exploration/ or production of mineral oil shall fall within the ambit of section 44BB of the Act.*

11. A perusal of the provisions of section 44BB of the Act shows that it specifically included cases specifically excludes cases where provisions of section 42 or44D or I15A or 293A of the Act are applicable for the purpose of computing income in accordance with those sections.

Moreover, Section 42 of the Act applies to companies engaged in the business of prospecting for, or extraction or production of mineral oil, in relation to which it has entered into an agreement with the Central Government, i.e., exploration and production companies. Section 293A grants power to the Government to make exemption to certain companies in respect of taxability of their income. Section 44D of the Act applies to contracts entered into by non-residents before 01.04. 2003. Further, section 115A of the Act, inter-alia, provides that fees for technical services received by a non-resident, pursuant to an agreement made by such non-resident with the Government or an Indian concern is taxable @ 10 percent.

12. In our understanding of the law, the aforesaid sections are not applicable in the present case due to the following reasons:

- *Section 42 and section 1 I5A of the Act are not applicable since the assessee has entered into a contract with Aker, which is a non-resident company for the purposes of the Act.*
- *Section 44D of the Act is not applicable since the assessee has entered into the contract on 13.11.2007. i.e. after 31.03.2003*

The assessee's scope of work in relation to the activities under the Contract involves rendition of services in relation to installation of manifolds, umbilicals, flexible risers and flowlines and control systems in the D6 block and the associated engineering necessary for the installation of facilities in the In the first oil phase of the MA D6 oil field development. Accordingly, the services rendered by connection with exploration, extraction and production of mineral oil are taxable 1 44BB of the Act.

13. The Revenue insists that the provisions of section 44DA r.w.s. 9(1)(vii) of the Act squarely apply on the facts of the case in hand. Section 44DA of the Act as introduced by the Finance Act, 2003, w.e.f. 1.04.2004 reads as under:

"44 DA. (l) 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 31 si day of March, 2003, where such non-resident (not being a company) or a foreign company carries oh 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 "

Section 44DA of the Act provides that where income by way of 'royalty' or 'fees for technical services' is received by a foreign company carrying on business in India through a 'permanent establishment' and the right, property or contract in respect of which the 'royalty' or 'fees for technical services' are paid to effectively connected with such permanent establishment, then, tax on such income shall be computed under the head 'profits and gains of business or profession' as per the net basis of taxation, i.e., income shall be computed after reducing expenses from receipts.

"Explanation 2:- For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, ministry or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"

The question whether extraction of mineral oil and activities in connection therewith would be covered within the sweep of the exclusionary clause "mining or like project", was clarified vide

*Instruction No.**1862 dated 28.2.98** issued by the **CBDT** wherein it was stated that mining project or like project would include rendering of services like imparting of training for carrying out drilling operation in connection with extraction of mineral oil, in the following terms:*

> *"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 and the expressions 'mining project' or 'like project', occurring in Explanation 2 section 9(l)(vii) of the Income-tax Act would cover rendering of services tike imparting of training and carrying drilling operations for exploration or exploitation of natural gas**.*
>
> *In view of the above opinion, the consideration for services will not be treated as fees for technical services for purposes of Explanation 2 to section 9(1)(vii) of the Income-tax Act, 1961. The payments for such services to a foreign company will, therefore, be income chargeable to tax under the provisions of Section 44 BB of the Income-tax Act, 1961 and not under the special provisions for the taxation of fees for technical services contained in Section 115A read with Section 44D Income-tax Act, 1961. "(emphasis supplied)."*

Accordingly, such services would be outside the purview of "fees for technical services" under section 9(l)(vii) of the Act."

14. The Supreme Court in the case of **Oil and Natural Gas** Corporation Limited vs. CIT 376 ITR 306 held as under:

"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 11 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 Ad, Regard must also be had to the fad 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. "

15. It is worth mentioning here that by Finance Act, 2010, amendment was brought in the proviso to section 44BB of the Act w.e.f 1.04.2011 whereby Section 44DA of the Act was inserted therein indicating that the provisions of Section 44BB shall not apply in respect of income referred to in that section. Finance Act 2010 itself specifically mentions that the above amendment shall take effect from 1st April 2011 and will,

accordingly, apply to the assessment year 2011-12 and subsequent years. Memorandum explaining the provisions of Finance Bill, 2010 also makes it clear that these amendments assessment order proposed to take effect from 01.04.2011 and will, accordingly, apply to the assessment year 2011-12 and subsequent years.

16. The Hon'ble Delhi High Court in the case of DIT vs. OHM Ltd. 352 ITR 406 held that income received from services rendered in connection with providing services in relation to extraction and production of mineral oil should be taxable under section 44BB as opposed to section 44DA of the Act and the amendment to the aforesaid sections by the Finance Act, 2010 could not have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation, so to take away the separate identity of Section 44BB of the Act. Relevant extracts of the said decision are 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 several 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 Ad, 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. Stale 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 (I) 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 (I) 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 fir 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 subsection (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 subsection (l) of Section 44BB can only mean that the fiat 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 44 DA can only be interpreted to mean that where the services are general in nature and fall under the subsection 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, mil 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. " (emphasis supplied).

17. The second contention of the Revenue is that section 44BB of the Act is not applicable to second level contractors.

18. A plain reading of section 44BB of the Act envisages a non-resident service provider not merely engaged in the business of providing services or facilities in connection with prospecting, extraction or production of mineral oils but providing such services / facilities to a person / entity engaged in such activities. The said section does not distinguish between the main contractor or a sub-contractor. If the intention of the Legislature was to restrict the benefit of section 44BB of the Act to the main contractor only, then, the words after 'the assessee engaged in the business of 'providing services or facilities in connection therewith' or 'supplying plant and machinery on hire' ought to have been omitted. Hence, where the provision does not create any discrimination between the person who actually does the activity of prospecting for or extraction or production, and the person

who renders services in connection therewith, the section cannot be narrowly construed."

19. It would not be out of place to refer to the decision of the co-ordinate bench in assessee's own case in ITA No. 4284/DEL/2013. Though the said decision of the co-ordinate bench was in respect of the order framed u/s 263 of the Act, but the findings are very much relevant to the case in hand. The relevant extract of the said decision of the co-ordinate bench reads as under:

> *"In the instant case, ground for which the DIT assumed jurisdiction u/s 263 of the Act are that provisions of section 44BB of the Act does not cover second leg contract and the said section is not application to sub-contracts engaged in providing technical services to contractors for those undertaking projects in oil exploration, that income received by the assessee was clearly covered u/s 44DA of the Act and hence not taxable u/s 44BB of the Act and that the A.O has not taxed out country receipts and that contract was a composite one and the A.O in the order did not discuss the taxability of the total receipts with regard to the admitted PE of the assessee in India.*

57. From the various decisions filed by the assessee in the paper book, we find it has been held in various decisions that section 44BB of the Act are applicable to second level contractor/sub-contractor. We find the Delhi Bench of the Tribunal in the case of Louis Dreyfus Armateures SAS [supra] has held as under:

"60. A reading of the aforesaid judicial precedence clarify that sec. 44BB does not distinguish between the main contractor or a sub-contractor as has been interpreted by the AO and the DRP. The conclusions of the A.0 and the DRP are erroneous on account of the reason that the provision clearly envisages the non-resident assessee to be engaged in the business of supplying plant and machinery on hire. The only condition imposed, to say. is that such plant and machinery has to be used or should be used for the purposes of prospecting or extraction or production of mineral oils. The language in section 44BB in our view is clear so also the Legislative intention. It is a trite law that has already held by the Hon'ble Supreme Court in B. Parmannand v.Mohan Koikal [2011] 4 SCC 266 that "the language employed in a statute is the determinative factor of the Legislative intend. It is well settled principle of law that the Court cannot read anything into a statutory vision which is plan and unambiguous". If the legislatures intention as contended by the Revenue was to restrict the benefit of sec. 44BB only to the main contractor or ONGC, then the words after 'the assessee engaged in the business of supplying plant and machinery on hire' or 'providing services or facilities' ought to e been omitted. Hence, where the provision does not create any discrimination between the person who

actually does the activity of prospecting for or extraction or production, and the person who supplies the plants and machinery, the narrow interpretation of the provision is thus not permitted. The basic condition to satisfied in the said provision is that the plant or machinery supplied or lented on hire by the assessee, non-resident should be used in the prospecting for or extraction or production of minerals oils or where equipment has been supplied, such equipment should have been used for the purposes of prospecting for or extraction or fiction of mineral oils. Having regard to the above we are of the considered opinion that the fetter assumed by authorities below while interpreting the provisions of Section 44BB of the Act are manifestly it and there is nothing in the said provision so as to disentitle a sub-contractor from invoking the said provision. Accordingly we do not find any fault in the claim of the assessee that revenues received under the charter agreements with CGG for providing two seismic survey vessels are in consideration with prospecting extractions or production of mineral oils and therefore taxable u/s 44BB of the Act."

58. The various other decisions relied on by the ld. counsel for the assessee also support the proposition that the provision of section 44BB of the Act are held to be applicable to the tax payer being a second leg contractor/sub-contractor. Further, it has been held in various decisions including the decision of the Hon'ble Delhi High Court in the case of DIT Vs. OHM Ltd. reported in 352 ITR 406 that the services rendered in relation to

extraction and production of mineral oil are taxable u/s 44BB of the Act.

59. So far as the receipts of out-country services as taxable in India is concerned, we find in terms of section 90(2) of the Act, provisions of the Act are over ridden by the provisions of DTAA to the extent more beneficial to the non-resident assessee. Article 7(1) and 7(2) of the Indo-UK DTAA provides that profits attributable to PE in India shall be only profits arising from activities carried out by the PE in India. Therefore, we find merit in the submission of the ld. counsel for the assessee that assessee's income taxable in India shall only be so much of profits under contract as is attributable to the PE in India. The Hon'ble Supreme Court in the case of Carborandum Co vs CIT [supra] has held that if, however, all the operations are not carried out in India, the profits and gains of the business deemed to accrue or arise in the taxable territories shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in India.

60. Similar view has been taken by the Hon'ble Supreme Court in the case of CIT Vs. Hyundai Heavy Industries Co. Ltd reported in 291 ITR 482 [SC]. So far as the allegation of the ld. DIT that the A.O has not gone through the contract is concerned, we find the assessee has filed details including the copy of the contract before the A.O who, after analyzing the same has accepted the returned income.

61. We find the A.O in the instant case, after going through the various details filed by the assessee has taken a possible view. It has been held in various decisions that where the A.O has taken a possible view, the assessment order cannot be held as erroneous and prejudicial to the interest of revenue. We find the Hon'ble Delhi High Court in the case of CIT Vs Sunbeam Auto reported in 332 ITR 167 has held as held as under:

"12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the CIT under s. 263 of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even

inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. (supra), law on this aspect was discussed in the following manner:

"........From a reading of sub-s. (1) of section, it is clear that the power of suo motu revision can be exercised by the CIT only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the ITO is 'erroneous insofar as it is prejudicial to the interests of the Revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-s. (1). The consideration of the CIT as to whether an order is erroneous insofar as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the CIT acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The CIT cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induces repose in and set at rest judicial and quasi-judicial controversies

as it must in other spheres of human activity. [see Parashuram Pottery Works Co. Ltd. vs. ITO 1977 CTR (SC) 32 : (1977) 106 ITR 1 (SC) at p. 10]. ....

From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the CIT simply because, according to him, the order should have been written more elaborately This section does not visualise a case of substitution of the judgment of the CIT for that of the ITO, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The CIT, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the CIT he would have estimated the income at a figure higher than the one determined by the ITO. That would not vest the CIT with power to reexamine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion. ....

There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. ....

We may now examine the facts of the present case in the light of the powers of the CIT set out above. The ITO in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the ITO on being satisfied with the explanation of the assessee. Such decision of the ITO cannot be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard........."

13. When we examine the matter in the light of the aforesaid principle, we find that the AO had called for explanation on this very item, from the assessee and the assessee had furnished his explanation vide letter dt. 26th Sept., 2002. This fact is even taken note of by the CIT himself in para 3 of his order dt. 3rd Nov., 2004. This order also reproduces the reply of the respondent in para 3 of the order in the following manner: "

The tools and dyes have a very short life and can produce upto maximum 1 lakh permissible shorts and have to be replaced thereafter to retain the accuracy. Most of the parts

manufactured are for the automobile industries which have to work on complete accuracy at high speed for a longer period. Since it is an ongoing procedure, a company had produced 10,75,000 sets whose selling rates is inclusive of the reimbursement of the dyes cost. The purchase orders indicating the costing include the reimbursement of dyes cost are being produced before your Honour. Since the sale rate includes the reimbursement of dye cost and to have the matching effect, the cost of the dyes has been claimed as a revenue expenditure."

14. This clearly shows that the AO had undertaken the exercise of examining as to whether the expenditure incurred by the assessee in the replacement of dyes and tools is to be treated as revenue expenditure or not. It appears that since the AO was satisfied with the aforesaid explanation, he accepted the same. The CIT in his impugned order even accepts this in the following words : "AO accepted the explanation without raising any further questions, and as stated earlier, completed the assessment at the returned income."

15. Thus, even the CIT conceded the position that the AO made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the CIT was that the AO should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.

16. Having put the records straight on this aspect, let us proceed further. Is it a case where the CIT has concluded that the opinion of the AO was clearly erroneous and not warranted on the facts before him and, viz., the expenditure incurred was not the revenue expenditure but should have been treated as capital expenditure Obviously not. Even the CIT in his order, passed under sec. 263 of the Act, is not clear as to whether the expenditure can be treated as capital expenditure or it is revenue in nature. No doubt, in certain cases, it may not be possible to come to a definite finding and therefore, it is not necessary that in all cases the CIT is bound to express final view, as held by this Court in Gee Vee Enterprises (supra). But, the least that was expected was to record a finding that order sought to be revised was erroneous and prejudicial to the interest of the Revenue. [See Seshasayee Paper (supra)]. No basis for this is disclosed. In sum and substance, accounting practice of the assessee is questioned. However, that basis of the order vanishes in thin air when we find that this very accounting practice, followed for number of years, had the approval of the IT authorities. Interestingly, even for future assessment years, the same very accounting practice is accepted.

62. We find the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar reported in 335 ITR 83 has held that where it was discernible from record that the A.O has applied his mind to the issue in question, the ld. CIT cannot invoke section 263 of the Act merely because he has different opinion. Relevant observation of the High Court reads as under:

63. We find the Hon'ble Delhi High Court in the case of Vikas Polymer reported in 341 ITR 537 has held as under:

"We are thus of the opinion that the provisions of s. 263 of the Act, when read as a composite whole make it incumbent upon the CIT before exercising revisional powers to : (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfilment of these twin conditions that the CIT may pass an order exercising his power of revision. Minutely examined, the provisions of the section envisage that the CIT may call for the records and if he prima facie considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interest of the Revenue, he may after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. The twin requirements of the section are manifestly for a purpose. Merely because the CIT considers on examination of the record that the order has been erroneously passed so as to prejudice the interest of the Revenue will not suffice. The assessee must be called, his explanation sought for and examined by the CIT and thereafter if the CIT still feels that the order is erroneous and prejudicial to the interest of the Revenue, the CIT may pass revisional orders. If, on the other hand, the CIT is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the Revenue, he may choose not to exercise his power of

revision. This is for the reason that if a query is raised during the course of scrutiny by the AO, which was answered to the satisfaction of the AO, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the AO called for interference and revision. In the instant case, for example, the CIT has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the CIT that the AO had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the CIT was duly reflected in the respective assessments of the partners who were I.T. assessees and the unsecured loan taken from M/s Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of the said chit fund which was also an assessee."

64. Since in the instant case the A.O after considering the various submissions made by the assessee from time to time and has taken a possible view, therefore, merely because the DIT does not agree with the opinion of the A.O, he cannot invoke the provisions of section 263 to substitute his own opinion. It has further been held in several decisions that when the A.O has made enquiry to his satisfaction and it is not a case of no enquiry and the DIT/CIT wants that the case could have been investigated/ probed in a particular manner, he cannot assume

jurisdiction u/s 263 of the Act. In view of the above discussion, we hold that the assumption of jurisdiction by the DIT u/s 263 of the Act is not in accordance with law. We, therefore, quash the same and grounds raised by the assessee are allowed."

20. Considering the facts of the case in hand in the light of the judicial decisions discussed elsewhere, we decline to interfere with the directions of the DRP.

21. The appeal filed by the Revenue is dismissed.

<u>CO No. 305/DEL/2014</u>

22. In its cross objection, the assessee has objected to the levy of interest u/s 234B of the Act.

23. Before us, the ld. AR vehemently stated that the Revenue's receivables by an assessee are subject to deduction of tax at source. Thereafter, the question of payment of advance tax and subsequent levy of interest u/s 234B of the Act does not arise at all.

24. Per contra, the ld. DR strongly supported the orders of the authorities below.

25. In our understanding of the law, as per the provisions of section 234B of the Act, the assessee who is liable to pay advance tax u/s 208 of the Act will be liable to interest u/s 234B of the Act if he fails to pay such tax or advance tax paid by him falls short of 90% of the assessed tax. As per provisions of section 208 r.w.s 209(1) of the Act, advance tax payable has to be computed after reducing from the estimated tax liability the amount of tax deductible/ collectible at source on income which is included in computing the estimated tax liability. Such balance tax liability is the advance tax payable under section 208 of the Act.

26. The Hon'ble Delhi High Court in the case of DIT v. GE Packaged Power Inc.: 373 1TR 65, held that no interest under section 234B of the Act can be levied on the assessee-payee on the ground of non-payment of advance tax because the obligation was upon the payer to deduct the tax at source before making remittances to them. The relevant extracts of the decision are reproduced hereunder:

"22. This Court, therefore, holds that Jacobs (supra) applies in such situations; Alcatel Lucent (supra) can be explained as a decision turning upon its facts; its seemingly wide observations, limited to the circumstances of the case. This Court, therefore, holds that the view taken by ITAT was correct; the primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax under Section 201 of the Act.

23. For the above reasons, this Court finds that no interest is leviable on the respondent assessees under Section 234B, even though they fled returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees were liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded an assessee-in-default under Section 201 and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs. "

27. It may be pointed out that the Finance Act, 2012, w.e.f. 1.4.2012 added proviso below section 209(1)(d) of the Act. But the said proviso is applicable from assessment year 2013-14 and, therefore, prospective in operation.

28. In our understanding, the insertion of the proviso cannot be considered to have retrospective effect so as to expose a non-resident company to levy of interest u/s 234B of the Act for the assessment years prior to assessment year 2013-14. In the light of the above, we direct the Assessing Officer to not charge interest u/s 234B of the Act.

29. In the result, the cross objection is allowed.

30. To sum up, in the result, the appeal of the Revenue is dismissed, whereas the cross objection of the assessee is allowed.

The order is pronounced in the open court on 17.12.2018.

Sd/-
[KULDIP SINGH]
JUDICIAL MEMBER

Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 17th December, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	.12.2018
Date on which the typed draft is placed before the dictating Member	.12.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	