INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE

SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 2090/Del/2023	Assessment Year: 2012-13
ITA No. 2305/Del/2022	Assessment Year: 2019-20
ITA No. 2091/Del/2023	Assessment Year: 2020-21
ITA No. 3102/Del/2023	Assessment Year: 2021-22

Computer Modelling Group Ltd., 3710, 33 Street NW, Calgary, Canada	**Vs.**	ACIT, Circle International Taxation-1(2)(1), New Delhi
PAN :AADCC9658E		
(Appellant)		**(Respondent)**

Assessee by	Shri Manuj Sabharwal, Adv.
Department by	Shri Vizay B. Vasanta, CIT-DR

Date of hearing	14.03.2024
Date of pronouncement	03.05.2024

ORDER

PER ASTHA CHANDRA, JUDICIAL MEMBER

These four appeals have been filed by the assessee. The appeal in ITA No. 2090/Del/2023 is directed against the order of the Ld. Commissioner of Income-Tax (Appeals), Delhi- 42 **("CIT(A)")** pertaining to assessment year **("AY")** 2012-13. The remaining three appeals in ITA Nos. 2305/Del/2022, ITA No. 2091/Del/2023 and ITA No. 3102/Del/2023 are directed against the assessment order(s) dated 28.07.2022, 26.05.2023 and 12.09.2023 passed by the ACIT, Circle Int. Taxation-1(2)(1), under section 143(3) read with section 144C(13) of the Income-Tax Act, 1961 **(the "Act")** pursuant to the directions of the Ld. DRP, pertaining to AYs 2019-20, 2020-21 and 2021-22

respectively. Since all the four appeals involve common issues, these were heard together and are being disposed of by this common order.

2. The assessee has raised the following grounds of appeals:

Assessment Year 2012-13

1. That the Ld. AO has grossly erred in treating the Appellant as an eligible assessee in terms of Section 144C of the Act and accordingly, passed draft assessment order under Section 144C of the Act, and thereafter passing the impugned final assessment order, beyond the period of limitation as prescribed under Section 153 of the Act, thereby making the assessment proceedings barred by limitation.

2. That, on the facts and in the circumstances of the case and in law, the order passed by the Ld. CIT(A) under Section 250 of the Act, taxing the receipts amounting to Rs. 3,64,35,459/-under Section 44BB of the Act, is wrong and bad in law as the same cannot be taxed at all, in the absence of any Permanent Establishment ('PE') of the Appellant in India in terms of the beneficial provisions under India-Canada DTAA.

3. That the Ld. CIT(A) has grossly erred in law by blindly relying upon the directions passed by the Ld. DRP for AY 2019-20 and AY 2020-21 and totally ignoring the true characterization of the receipts of the Appellant and allowing relief due to beneficial provisions of India-Canada DTAA.

4. That the Ld. CIT(A) has grossly erred on facts and in law while placing heavy reliance on the Hon'ble Supreme Court ruling in the case of ONGC vs CIT [2015] 59 taxmann.com 1 (SC), without appreciating the aspect that eligibility of the taxpayers to the beneficial provisions of DTAA (India-Canada DTAA in the present case), was not the substantial question of law framed and adjudicated by their lordships.

5. That, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has grossly erred in not admitting the additional evidence filed by the appellant under Rule 46A of the Income Tax Rules, 1962.

6. Without prejudice to the aforesaid grounds, the Appellant further raises the below mentioned grounds:

(A) That on the facts and in the circumstances of the case and in law, receipts of Rs. 2,78,83,604 received on account of software license fee cannot be taxed as Royalty under Article 12(3) of India-Canada DTAA.

(B) That on the facts and in the circumstances of the case and in law, receipts of Rs. 85,51,856 received on account of software maintenance/ support services and training services, cannot be taxed as Fee for

Technical Service ('FTS')/ Fee for Includes Service ('FIS') under Article 12(4) of India-Canada DTAA.

7. That, on the facts and circumstances of the case and in law, the Ld. AO has erred in proposing to charge consequential interest under section 234A of the Act

8. That on the facts and circumstances of the case and in law, the Ld. CIT(A) had grossly erred in law by holding that interest under section 234B of the Act, is consequential in nature as the same should not be charged at all, in light of law laid down in case of Director of Income-tax, New Delhi vs. Mitsubishi Corporation [2021] 130 taxmann.com 276 (SC), per which interest shall be chargeable prior to the Financial Year 2012-13 in case of non-residents

9. That, on the facts and the circumstances of the case and in law, the Ld. AO has erred in initiating penalty under section 271(1)(c) of the Act.

Assessment Year 2019-20

1. That, on the facts and in the circumstances of the case and in law, the order passed by the Ld. AO under s. 143(3) read with s. 144C(13) of the Act, taxing the receipts amounting to Rs. 7,94,63,248/- under s. 44BB of the Act, is wrong and bad in law as the same cannot be taxed at all in terms of the beneficial provisions under India-Canada DTAA.

2. That, on the facts and circumstances of the case and in law, the Ld. AO and Ld. DRP erred in not holding that:

(A) Rs. 2.34,14,794 received on account of sale of software license cannot be taxed as Royalty under Article 12(3) of India-Canada DTAA, particularly in view of Engineering Centre of Excellence Private Limited v CIT (2021] 125 taxmann.com 42 (SC).

(B) Rs. 5,50,38,725 and Rs. 10,08,728 received on account of software maintenance/support services and training services respectively, cannot be taxed as FIS under Article 12(4) of India Canada DTAA, as the said receipts do not satisfy the make available criteria.

3. That, the Ld. AO/ DRP has grossly erred in not considering the evidence provided by the Appellant and also without providing the result of investigation/enquiry conducting against the Appellant.

4. That, the Ld. AO has grossly erred in taxing the receipt under s. 115JB of the Act, which are not applicable in the absence of a Permanent Establishment in India under India Canada DTAA especially in the light of explanation 4(i) of section 115JB of the Act.

5. That, on the facts and circumstances of the case and in law, the Ld. AO has erred in not granting the claim of credit of taxes deducted at source ('TDS credit') of Rs. 1,03,99,424 appearing in Form 26AS.

6. That, on the facts and circumstances of the case and in law, the bl. AO has erred in proposing to charge interest under sections 234A, and 2341B of the Act.

7. That, on the facts and the circumstances of the case and in law, the Ld. AO has erred in initiating penalty under section 270A of the Act, and that too without issuing any penalty notice.

Assessment Year 2020-21

1. That, on the facts and in the circumstances of the case and in law, the order passed by the Ld. AO under Section 143(3) read with Section 144C(13) of the Act, taxing the entire receipts amounting to Rs. 13,48,56,543/-under Section 44BB of the Act, is wrong and bad in law as the same cannot be taxed at all in the absence of any Permanent Establishment ('PE') of the Appellant in India in terms of the beneficial provisions under India-Canada DTAA.

2. That the Ld. DRP has grossly erred on in law by blindly relying upon the directions passed by it for AY 2019-20 and totally ignoring the true characterization of the receipts of the appellant and allowing relief due to beneficial provisions of India Canada DTAA

3. That the Ld. DRP and Ld. AO have grossly erred on facts and in law while placing heavy reliance on the Hon'ble Supreme Court ruling in the case of ONGC vs. CIT [2015] 59 taxmann.com 1 (SC), without appreciating the aspect that eligibility of the taxpayers to the beneficial provisions of DTAA (India-Canada DTAA in the present case), was not the substantial question of law framed at all and was not adjudicated by their lordships.

4. Without prejudice to the aforesaid grounds, the Appellant further raises the below mentioned grounds:

(A) That on the facts and in the circumstances of the case and in law, receipts of Rs. 8,90,83,246 received on account of software license fee cannot be taxed as Royalty under Article 12(3) of India-Canada DTAA.

(B) That on the facts and in the circumstances of the case and in law, receipts of Rs. 4,57,73,297 received on account of software maintenance/ support services and training services, cannot be taxed as Fee for Technical Service ('FTS') / Fee for Included Service ('FIS') under Article 12(4) of India-Canada DTAA.

5. That, on the facts and circumstances of the case and in law, the Ld. AO has erred in not granting complete interest due under Section 244A of the Act as the Appellant shall be eligible to interest under Section 244A of the Act from first day of AY i.e. 1 April 2020 till the date of receipt of actual refund in the bank account of the Appellant.

6. That, on the facts and the circumstances of the case and in law, the Ld. AO has erred in initiating penalty under section 270A of the Act.

Assessment Year 2021-22

1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. AO under s. 143(3) read with s. 144C(13) of the Act is wrong and bad in law as the same is not accompanied by the notice of demand under Section 156 of the Act.

2. That on the fact and in circumstances of the case and in law, the final assessment order passed by the Ld. AO is void and liable to be quashed, in the absence of the Document Identification Number (DIN) mentioned on the directions of the Ld. DRP as mandated by the CBDT circular 19 of 2019.

3. That, on the facts and in the circumstances of the case and in law, the order passed by the Ld. AO under s. 143(3) read with s. 144C(13) of the Act, taxing the receipts amounting to Rs. 10,37,32,010/- under s. 44BB of the Act, is wrong and bad in law as the same cannot be taxed at all in terms of the beneficial provisions under India- Canada DTAA.

4. That the Ld. DRP has grossly erred on in law by blindly relying upon the directions passed by it for AY 2019-20 and AY 2020-21 and totally ignoring the true characterization of the receipts of the appellant and allowing relief due to beneficial provisions of India-Canada DTAA.

5. That the Ld. DRP and Ld. AO have grossly erred on facts and in law while placing heavy reliance on the Hon'ble Supreme Court ruling in the case of ONGC vs. CIT [2015] 59 taxmann.com 1 (SC), without appreciating the aspect that eligibility of the taxpayers to the beneficial provisions of DTAA (India-Canada DTAA in the present case), was not the substantial question of law framed at all and was not adjudicated by their lordships.

6. Without prejudice to the aforesaid grounds, the Appellant further raises the below mentioned grounds:

(A) That on the facts and in the circumstances of the case and in law, receipts of Rs. 20,59,241 received on account of software license fee cannot be taxed as Royalty under Article 12(3) of India-Canada DTAA.

(B) That on the facts and in the circumstances of the case and in law, receipts of Rs. 10,16,72,770 received on account of software maintenance / support services and training services, cannot be taxed as Fee for Technical Service ('FTS') / Fee for Included Service ('FIS') under Article 12(4) of India-Canada DTAA.

7. That, on the facts and circumstances of the case and in law, the Ld. AO has erred in wrong grant of interest due under Section 244A of the Act as the Appellant shall be eligible to interest under Section 244A of the Act from first day of AY i.e. 1 April 2021 till the date of receipt of actual refund in the bank account of the Appellant.

3. We shall take up AY 2012-13 as the lead case. Our findings on the main issues recorded in AY 2012-13 shall apply mutatis-mutandis to the common issues in AY 2019-20, 2020-21 and 2021-22.

4. The facts in brief are that the assessee is a foreign company and is a tax resident of Canada. It is engaged in the business of supply of reservoir simulation software to oil companies such as ONGC, Oil India, Vedanta, etc. along with related software maintenance support services and training services for acquainting with the operation of such software. On examining the list of non-filers, the Ld. Assessing Officer **("AO")** found that the assessee has not filed its return for AY 2012-13 despite receipts from M/s. Cairn Energy India Pty. Ltd.; M/s. Prize Petroleum Company Ltd.; M/s. Shell India Market Pvt. Ltd. and M/s. Reliance Industries Ltd. on which TDS has been deducted. He therefore issued notice on 29.03.2019 under section 148 of the Act. It was served but compliance was not made. He, then issued notice(s) to the above concerns under section 133(6) of the Act seeking details about the amount paid/accrued to the assessee, nature of products/services rendered by the assessee to them as well as the contract/agreement under which such payments have been made. Based on the inputs so obtained, the Ld. AO concluded that the assessee is providing products and services which are being used to support exploratory activities in oil and gas exploration and production. Applying the provisions of section 44BB of the Act, he computed the income of the assessee at Rs. 36,43,546/- equivalent to the 10% of the aggregate amount of Rs. 3,64,35,459/- received/receivable respectively by the assessee. Accordingly, a draft assessment order was passed on

30.12.2019. Since the assessee did not file any objection before the Ld. DRP, the Ld. AO passed the final assessment order on 21.02.2020 under section 144C/144/147 of the Act determining the income at Rs. 36,43,550/- taxable @ 40% as per the provisions of the Act.

5. The assessee carried the matter in appeal before the Ld. CIT (A) challenging ex-parte assessment under section 147 of the Act as also the addition of Rs. 36,43,550/- made under section 44BB of the Act asserting that the assessee being non-resident company (resident of Canada) is entitled to be assessed in accordance with the provisions of the Act or provisions of the Double Taxation Avoidance Agreement between India and Canada **("India-Canada DTAA")** whichever is more beneficial at the option of the assessee. Vide written submission dated 12.10.2022, assessee filed application for admission of additional evidence under Rule 46A of the Income Tax Rules, 1962 **(the "Rules")** and written submission which have been reproduced by the Ld. CIT (A) at pages 3 to 40 of his order in para 5 which he forwarded to the Ld. AO for examination and comments. The remand report dated 28.09.2021 submitted by the Ld. AO is reproduced in para 7 of the Ld. CIT (A)'s order on which the assessee submitted rejoinder through e-filing on 08.10.2021 reproduced by the Ld. CIT (A) in para 8 at pages 41 to 46 of his order.

5.1 Ld. CIT (A) declined to admit the additional evidence rejecting the explanation of the assessee that it being a foreign company was not familiar with the return filing procedure or tax assessment procedure and related law in India as it does not have any office/base in India and it was unable to understand why it had received notices in respect of alleged escapement of income under section 147 of the Act. The Ld. CIT (A) also held reassessment proceedings under sections 147/148 of the Act as valid.

5.2 On the issue of addition, the Ld. CIT (A) concurred with the directions dated 19.04.2023 of the Ld. DRP in respect of similar addition made in AY 2019-20 and 2020-21 wherein the decision of Hon'ble Supreme Court in the case of ONGC vs. CIT (2015) 376 ITR 306 (SC) has been relied upon to

assess the income of the assessee under section 44BB of the Act. Similar addition is made in AY 2021-22 as well.

6. Aggrieved, the assessee is in appeal before the Tribunal and the main issue of taxing the entire receipts of the assessee by applying the provisions of section 44BB of the Act is common in all the AYs presently involved.

7. The Ld. AR made common submissions for all the four AYs under consideration. The Ld. AR submitted that section 44BB of the Act is a computation provision and provides that notwithstanding anything contained in section 28 to 41 and section 43 and 43A of the Act, 10% of the gross receipt of a non-resident engaged in the business of providing services or facilities in connection with supplying plant and machinery on hire which is used or to be used in prospecting for or extraction of, mineral oils shall be deemed to be the profits and gains of business. The section provides a presumptive taxation rate for computation of profits but also does not override provisions of sections 5, 9 or section 90 of the Act. He referred to the decision of Hon'ble Supreme Court in Sedco Forex International vs. CIT 399 ITR 1 (SC).

7.1 The Ld. AR submitted that there is no finding or allegation of a Permanent Establishment (PE) of the assessee in India and the assessment order does not make any reference to the aspect of PE at all despite the assessee claiming no PE status. Even otherwise, in any case, the Hon'ble Supreme Court in ADIT vs. E-Funds (2018) 13 SCC 294 held that burden of proving the existence of PE lies on the Revenue which has not been discharged at all. The Ld. AR relied upon the decision of the Tribunal in Baker Hughes Energy Technologies UK Ltd. [TS-299-ITAT-2023] in support of this proposition. He pointed out that the said decision relies upon the decision of the Tribunal dated 10.09.2010 in R&B Falcon Offshore Ltd. vs. ACIT in ITA No.389/Del/2002. He referred to para 11 thereof wherein it is held that in the absence of PE, section 44BB has no application. The Ld. AR

stated that the Hon'ble Delhi High Court in DIT vs. OHM Ltd. (2012) 28 taxmann.com 120 (Del.) has upheld the decision of Geofizyka Torun, which held that the existence of PE is a condition precedent for applicability of section 44BB of the Act. Para 10 thereof is relevant.

7.2 The Ld. AR refuted the Revenue's view as to the applicability of section 44BB of the Act relying on the decision of the Hon'ble Supreme Court in ONGC's case (supra) for the reasons that- (a) cases covered in ONGC batch belonged to those assessee's who were undisputedly present in India on the rights or some other presence (indicating PE in India); (b) question before the Hon'ble Supreme Court was whether FTS in connection with extraction of like projects (akin to mining projects) would fall under section 44BB or 44D of the Act; and (c) the question before the Hon'ble Supreme Court was not with regard to treaty entitlement qua non-resident assessees.

7.3 The Ld. AR drew our attention to the key terms and conditions of the agreements with various customers as regards software license fee whereby software license was granted on non-transferable, non-exclusive basis to use the license technology; the licensee was prohibited to do anything by way of reverse engineering or otherwise and title and ownership of the licensed technology remained with the assessee. Moreover, it was stipulated that the licensee shall not at any time sell publish, transfer, gift or otherwise disclose any licensed technology in any form or manner to any third party.

7.4 The Ld. AR, without prejudice to the above contentions, further submitted that in para 18 of its order dated 19.11.2018 in assessee's own case for AYs 2006-07 to 2010-11 (copy placed in the Paper Book), the Tribunal held that nature of payment as received by the assessee through ONGC on account of software license fee cannot be characterized as 'royalty'. It is stated by the Ld. AR that the order (supra) of the Tribunal has been accepted by the Revenue and no appeal there against has been filed. The Ld. AR submitted that facts continue to remain the same in AYs presently under

consideration. He also submitted that this issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. (2021) 125 taxmann.com 42 (SC).

7.5 The Ld. AR stated that software maintenance service and training do not qualify as 'make available' within the meaning of the expression contained in Article 12(4)(b) of the India-Canada DTAA for the reasons that – (i) the Indian customer is not able to apply any expertise technology contained therein or use knowledge of its own without recourse to the service provider; (ii) the Indian customer is not at liberty to use the technical knowledge, skill, know-how and process of the assessee in its own right; and (iii) the Indian customer is unable to perform the services on its own and have to necessarily seek services of the assessee time and again.

7.6 The Ld. AR highlighted the key terms and conditions of the agreement with various customers as regards software maintenance fee; agreement with ONGC with regard to maintenance service and as regards training services placed reliance on the decision dated 11.03.2024 of the Hon'ble Delhi High Court in SFDC Ireland Ltd. vs. CIT [TS-175-HC-2024(Del)] and several other decisions.

8. The Ld. CIT-DR relied on the orders of the Ld. CIT (A)/DRP/AO.

9. We have heard the Ld. Representative of the parties, considered their submissions and the material placed on record. It is an admitted fact that the assessee does not have a PE in India and that being a resident of Canada it is governed by the beneficial provisions of the India-Canada DTAA. The Revenue has not been able to bring anything on record to prove the contrary. The main grievance of the assessee relates to taxability of its impugned receipts from Indian customers by applying the provisions of section 44BB of the Act despite the fact that the assessee does not have any presence (PE) in India. Section 44BB does not override the provisions of section 90 and therefore, a non-resident assessee can opt to be governed by the applicable treaty if more beneficial to it, which is now a settled position of law.

10. We have perused the decisions relied upon by the assessee to substantiate its contention that for applicability of section 44BB of the Act, existence of a PE is must. In OHM Ltd. (supra), the Hon'ble jurisdictional Delhi High Court relying upon the decision of the AAR in the case of Geofizyka Torun in para 10 of its order held as under:

"10. The relevant portion of the order of the AAR in the case of Geofizyka Torun (supra), which order was adopted and followed by it in its impugned order is as below:

> *"As already discussed, section 44BB which was inserted into the Act with effect from April 1, 2004, is a special, specific and exclusive provision dealing with the computation of profits of non-resident assessees engaged in the business of providing services in connection with or supplying plant and machinery on hire to be used "in the prospecting for, or extraction or production of, mineral oils". It is in the company of three other sections (which we have referred to earlier as 44BB series) specially providing for computation of profits of the non- residents/foreign companies engaged in the specified types of business. True, profits arising from the business specified in section 4488 may also fall within the ambit of fees for technical services chargeable under section 9(1)(vii). But, the question is which is the appropriate computation provision that is applicable? As between the competing provisions, namely section 9(1)(vii) read with section 44DA and section 44BB, section 44BB being a more specific provision, that provision should prevail for the purposes of computation. Section 44DA, it may be recalled, provides for the method of computation of income by way of fees for technical services received by a non-resident or a foreign company carrying on business through a permanent establishment in India. If the non-resident is engaged in the business of providing services in connection with the prospecting, etc., of mineral oils, the computation provisions relating to fees for technical services will have to yield to section 44BB. It may be noticed that in a case of business governed by section 44BB, normally, the enterprise concerned would be having a permanent establishment in India. It is difficult to envisage a situation of a person being engaged in providing services or facilities in connection with prospecting and extraction of mineral oils not having a fixed place o business from where the operations are carried on. Thus, the existence of permanent establishment is a common feature both in section 44DA as well as section 44BB, though there is an explicit reference to permanent establishment under section 44DA. Thus rendering of technical services through permanent establishment may be a common feature of both the sections, i.e., section 44BB and section 44DA, though in the case o section 44DA, it is explicitly mentioned. But, what is important is the nature of business and it is that factor which serves as an indicator to apply one of the two sections. If the business is of the specific nature envisaged by section 44BB, the computation provision therein would prevail over the computation provision in section 44DA. In other words, the income received by a non-resident businessman for the technical services provided in relation to prospecting and extraction of mineral oil, will be wholly governed by section 44BB for the purposes o computation. If all the services that are in the nature of technical services within the meaning of Explanation 2 to section 9(1)(vii) are to be computed in accordance with section 44DA, very little purpose will be served by incorporating a special provision in section 44BB for computing the profits in relation to the services connected with exploration an extraction of mineral oils. The provision will then operate in a very limited field."*

11. The decision of Hon'ble Delhi High Court in OHM Ltd. (supra) have subsequently been followed by the Hon'ble Delhi High Court in the case of PGS Exploration (Norway) AS vs. ADIT (2016) 68 taxmann.com 143 wherein the Hon'ble Court held as under:

> *"29. Having stated the above, we must clarify that the income falling within Section 115A(1)(b) the Act which does not fall within the four corners of Section 44DA(1) of the Act would also no taxable under Section 4488(1) of four corners by virtue of proviso to Section 4488(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 conditions are satisfied, that the income of the assessee would be computed under Section only, if the AO finds that the said two 44BB(1) of the Act. However, if such condition of the asst satisfied then the income tax payable b the appellant would have to be computed in accordance with Section 115A(1)(b) of the Act.*
>
> *30. Therefore, if it is accepted that the Tribunal was right in finding that the consideration received by the Assessee from BG and RIL was fees for technical services, in our view, the Tribunal's decision to remit the matter to the AO for determining whether the Assessee had a P in India and whether the consideration received by it was connected with that PE, would have to be sustained.*
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> *31. Accordingly the second question - Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that income of the appellant, in the nature of "fees for technical service was liable to tax in India under section 4488 of the Act only if the appellant had Permanent Establishment ("PE") in India in the relevant assessment year is answered in the negative, that is, in favour of the Revenue and against the Assessee."*

12. We have also perused the order of the Co-ordinate Bench of the Tribunal in Baker Hughes Energy Technologies UK. Ltd. (supra), wherein the Tribunal in its order has rejected the applicability of section 44BB of the Act in the absence of any finding on the existence of a PE of the assessee in India. The Tribunal recorded its observations and findings in para 7 and 8 thereof which is reproduced below:

> "*7. We have carefully considered the submissions and perused the records. We will first address the issue whether section 44BB will apply in absence of PE. Section 44BB reads as under:-*
>
> > *"44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee , being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant*

and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :

Provided *that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*

(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.

Following sub-section (4) shall be inserted after sub-section (3) of section 44BB by the Finance Act, 2023, w.e.f. 1-4-2024:

(4) Notwithstanding anything contained in sub-section (2) of section 32 and sub-section (1) of section 72, where an assessee declares profits and gains of business for any previous year in accordance with the provisions of sub-section (1), no set off of unabsorbed depreciation and brought forward loss shall be allowed to the assessee for such previous year.

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."

8. Thus, a reading of the above section shows that the section provides that notwithstanding anything contained in sections 28 to 41 and section 43 & 43A, 10% of the gross receipt of a non-resident

engaged in the business of providing services or facilities or supplying plant & machinery on hire which is used in prospecting for or extraction of mineral oils shall be deemed to be the profits & gains of business. Thus, this section has rightly been contended by ld. Counsel of the assessee that it is a computation provision. Thus, this section provides a presumptive taxation rate for computation of profits but does not override provision of sections 5, 9 or section 90 of the Income-tax Act, 1961. Case law referred by the ld. Counsel for the assessee in this regard i.e. Sedco Forex International vs. CIT 399 ITR 1 (SC) fully supports this proposition. In this regard, Hon'ble Supreme Court had expounded that sections 4, 5 & 9 are to be kept in mind, where assessment is done u/s 44BB. It is settled proposition that unless Revenue is able to prove that the assessee has a PE in India, its business profits cannot be subject to tax in India. This view is supported by ITAT decision in the case of R&B Falcon Offshore Ltd. In this case, ITAT clearly held that in absence of a PE, section 44BB has no application. We may refer to this ITAT order para 11 wherein it has been held as under :-

> *"11. Ground nos.3, 4, 5 7 6 are in regard to computation of income and the application of presumptive scheme of taxation/s 44BB of the Act. This section provides for computation of business income on a presumptive basis at 10% of the aggregate amount paid or payable to the assessee. This machinery provision will admittedly come into operation only when the income is liable to be computed under the Act. That can be done only if the assessee has a PE in India. We have already decided the matter of PE against the revenue and in favour of the assessee. Therefore, there is no question of computation of business income in this case."*

As to when does the specific PE come into existence or how the offshore supply of equipment is attributable to the PE has not been identified by the AO. Assessee's counsel has specifically mentioned that there is no finding in the assessment order as to which consortium member and which office of such consortium member constitutes PE of the assessee in India. Assessee has challenged the aforesaid finding before the DRP. DRP did not address the issue but held that the issue of PE is academic, therefore, need not be answered. This view is quite contradictory to the above decision. As referred in Hon'ble Supreme Court decision in the case of ADIT vs. E-Funds (2018) 13 SCC 294, burden of proving the existence of PE lies on the Revenue which has not been discharged. In this view of the matter, assessee succeeds that there is no finding of PE in this case, hence section 44BB will not apply. Since the assessee succeeds on this plank, other limb of arguments is not being adjudicated as they are now of academic interest."

13. In the case of CIT vs. Enron Oil & Gaspat Services Inc., Dehradun (2013) 29 taxmann.com 419 (Uttrakhand), the Hon'ble High Court of Uttrakhand decided the question that whether payment received by the assessee, a US enterprise providing services and facilities as mentioned in

section 44BB of the Act would be chargeable to tax on the factual matrix of the present case. The facts in this case were that the assessee company was a non-resident US enterprise providing cost-to-cost services as mentioned under Section 44BB of the Act, under a Tripartite Contract. The assessee company claimed that the payment received by it were outside the scope of section 44BB as cost-to-cost services were provided under the contract and that as per Article 7 of the DTAA, a non-resident engaged in the business of providing services and facilities, as mentioned in section 44BB, will come within the purview of section 44BB only if it has a PE in India and in the instant case, assessee did not have PE in India. The Hon'ble Uttrakhand High Court dismissed the appeals of the Revenue by observing and recording his findings in paras 2 and 3 of its decision (supra) which are reproduced below for ready reference:

> *"2. Contents of Section 44BB of the Income Tax Act, 1961 (hereinafter referred to as "the Act") are the mandate of legislation. The same cannot be contradicted in any manner or in any form. In the instant case, an instrumentality of the Union of India was a party to a tripartite contract. Under the contract, cost to cost services were to be provided by the assessee respondent in the instant case. It is contended that in such view of the matter, the payments, thus, received by the assessee are outside the scope of Section 44BB of the Act. To us, it appears that 10 per cent of any remuneration received by an assessee of the nature mentioned in Section 44BB of the Act must be deemed to be profits of the assessee and chargeable to tax under the head 'profits and gains of business or profession'. In order to claim that the profit, in fact, was lower than the profits and gains specified under Section 44BB i.e. less than 10 per cent of such remuneration, it is the requirement that the assessee must keep and maintain books of accounts and other documents as required under sub-section (2) of Section 44AA and to have his accounts audited and to furnish a report of such audit as required under Section 44AB of the Act. In the instant case, assessee did not maintain any such books of accounts nor got the same audited. On the other hand, solely on the basis of the contract, which recorded that the assessee will be remunerated for providing service at no profit, it was assumed by the appellant that the assessee made no profit at all. It appears to us that whether the assessee made any profit or it did not make any profit is of no consequence. 10 per cent of its remuneration, as mentioned in Section 44BB is deemed to be profit and to be taxed under the head 'profits and gains of business or profession'. If the assessee was of the view that it has not earned any profit by providing such service, the only way available to the assessee was to maintain books of accounts and to have the same audited and to furnish the audit report in respect thereof. It is submitted by the learned counsel for the respondent that a view contrary to our view, as expressed above, has been taken in Income Tax Appeal No. 89 of 2007 and connected Appeals by a Division Bench of this Court. In that case, the Division Bench was not concerned with a tripartite agreement, inter se, three individuals, one of which is an instrumentality of the Union of India, another an Indian public limited liability company and the*

third, a non-resident company, as is the case in the instant case. There the learned Judges dealt with Article 7 of DTAA, i.e. Article 7 of an international treaty. The learned Judges of this High Court, in the case referred to above, in paragraph 19 observed that Article 7 of the said international treaty applies to business profits arising to a US enterprise which has a permanent establishment ("PE") in India and that in determining the profits attributable to PE, deduction shall be allowed for expenses incurred in relation to earning of such income. In the instant case, there is no dispute that the assessee, a US enterprise, has no permanent establishment in India. According to the Division Bench of this Court, unless there is a permanent establishment of a US enterprise in India, such an enterprise will not come within the taxable jurisdiction in India. In other words, by the said international treaty, the Government of India has accepted that a non-resident engaged in the business of providing services and facilities, as mentioned in Section 44BB, if is a US enterprise, will only come within the purview of Section 44BB, if it has a permanent establishment in India.

3. We hold that Article 7 of DTAA requires a non-resident US enterprise to have a permanent establishment in India for being taxed in India, otherwise it is not taxable in any view of the said treaty, even it received any remuneration in connection with any matter provided in Section 44BB of the Act. In the judgment referred to above, the Division Bench stated in so many words that the assessee was not having any permanent establishment in India during the relevant years. The said fact was culled out with certainty from the facts determined by the fact finding authorities, namely, the Assessing Officer and the Appellate Commissioner. In the instant case, there is no such finding for the relevant year. However, from the judgment of this Court, referred to above, it appears that in Income Tax Appeal No. 7 of 2009 for the assessment year 2000-2001, the assessee was M/s Enron Oil Gas Expat Services Inc., Dehradun, and that, in the said appeal, the Division Bench of this Court granted relief to the assessee on the basis of the fact recorded that the assessee had no permanent establishment in India."

14. In view of the factual matrix in relevant AYs under consideration and the decisions (supra) of the Hon'ble jurisdictional Delhi High Court and the Hon'ble Uttrakhand High Court and also following the decision of the Co-ordinate Bench of the Tribunal (supra), we are of the view that the impugned receipts of the assessee are not taxable in India under the provisions of section 44BB of the Act for the reason that the assessee does not have a PE in India in the relevant AYs under consideration and that being a resident of Canada, the assessee is governed by the more beneficial provisions under the India-Canada DTAA. It is the claim of the Revenue that the assessee's case is covered by the decision of the Apex Court in the case of ONGC vs. CIT (2015) 59 taxmann.com 1 (SC). We do not agree with this contention of the Revenue as in our considered view, the assessee's case is distinguishable on

facts as the substantial question of law determined in ONGC's case was not concerning the eligibility of tax payers to the beneficial provisions of tax treaty but the taxability of income in the nature of FTS whether under the provisions of section 44D or 44BB of the Act. The Revenue has not been able to bring on record anything to establish the existence/ presence of a PE of the assessee in India either before us or before the lower authorities. It is not even the case of the Revenue that the assessee has PE in India in the relevant AYs under consideration. In this view of the matter, non-existence of PE of the assessee in India is unquestionable. Since the assessee does not have a PE in India in the relevant AYs, its business income (impugned receipts) under dispute in the relevant AYs is not taxable under section 44BB of the Act.

15. The assessee has also, without prejudice to the above, claimed that the impugned receipts are not in the nature of royalty/ FTS in terms of the provisions of Article 12 of the India-Canada DTAA. It is not in dispute that the impugned receipts partake the character of business income of the assessee for the relevant AYs under consideration. In this view of the matter, the question of treating the impugned receipts as royalty or FTS is irrelevant and becomes academic in nature. Having said so, as per Article 7 of DTAA, the impugned receipts being the business profit/income of the assessee during the relevant AYs under consideration are not taxable in India in the absence of a PE of the assessee in India. Accordingly, ground No. 2, 4 and 6 in AY 2012-13, ground No. 1 and 2 in AY 2019-20, ground No. 1, 3 and 4 in AY 2020-21 and ground No. 3, 5 and 6 in AY 2021-22 are allowed.

16. In AY 2019-20 in ground No. 5, the assessee has challenged the non-granting of TDS credit in respect of TDS deducted on impugned receipts. We direct the Ld. AO to grant TDS credit to the assessee in accordance with law.

17. In AY 2020-21 and 2021-22 (ground No. 5 and ground No. 7 respectively), the assessee has challenged the denial of complete interest

under section 244A of the Act. We direct the Ld. AO to grant interest to the assessee in accordance with law.

18. Ground No. 7 in AY 2012-13 and ground No. 6 in AY 2019-20 relating to levy of interest under section 234A of the Act is consequential in nature.

19. In ground No. 8 in AY 2012-13 and ground No. 6 in AY 2019-20, the assessee has challenged the levy of interest under section 234B of the Act on the ground of its inapplicability in case of a non-resident.

19.1 The proviso inserted in section 209(1)(d) of the Act by the Finance Act, 2012 w.e.f. 01.04.2012 reads as under:-

> *"Provided that for computing liability for advance tax, income-tax calculated under clause (a) or clause (b) or clause (c) shall not, in each case, be reduced by the aforesaid amount of income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income* ***without deduction of tax*** *or it has been received or debited by the person responsible for collecting tax without collection of such tax."*

19.2 It can be seen from the above that proviso inserted in section 209(1)(d) of the Act by the Finance Act, 2012 w.e.f. 01.04.2012 would apply only in a scenario where person responsible for deducting tax has paid or credited such income without deduction of tax. In the case(s) at hand, the Ld. AR has submitted that the income (impugned receipts) has been received by the assessee after deduction of tax at source and therefore the said proviso to section 209(1)(d) of the Act is not applicable. As per section 209(1)(d) of the Act r.w. proviso thereto, where in case of a non-resident company, tax deductible at source has been paid, it would not be permissible for the Revenue to charge any interest under section 234B for alleged failure to pay advance tax by such assessee.

19.3 Before us, the assessee has relied upon the case of Mitsubishi Corporation 130 taxmann.com 276 (SC), wherein the Hon'ble Supreme Court held that proviso to Section 209(1) issued by Finance Act, 2012 providing that if a non-resident assessee received any amount on which tax was

deductible at source, assessee could not reduce such tax while computing its advance tax liability, was applicable prospectively after FY 2012-13. Therefore, during relevant AYs under consideration, since assessee was a non-resident, and entire tax was to be deducted at source on payment made by payer to it and there was no question of advance tax payment by assessee, accordingly, no interest under Section 234B could be levied upon assessee. Accordingly, in view of the aforesaid decision clarifying the position that proviso to Section 209(1) issued by Finance Act, 2012 was applicable prospectively after FY 2012-13, there was no liability for the assessee to pay interest under Section 234B of the Act for the impugned AYs, since the entire income was tax deductible at source in the hands of the payer. This issue also now stands settled in favour of the assessee by the Hon'ble Delhi High Court in the appeal filed by the Revenue against the decision of the Coordinate Bench of the Delhi Tribunal in the case of Amadeus IT Group SA vs. ACIT (ITA No. 1742/Del/2023) dated 16.10.2023.

19.4 Respectfully following the decision(s) (supra) in the case of Mitsubishi Corporation and Amadeus IT Group SA, we hold that levy of interest under section 234B of the Act is not called for. Accordingly, ground No. 8 in AY 2012-13 and ground No. 6 in AY 2019-20 are hereby allowed.

20. Ground No. 9 in AY 2012-13 relating to initiation of penalty proceedings under section 271(1)(c), ground No. 7 in AY 2019-20 and ground No. 6 in AY 2020-21 relating to initiation of penalty proceedings under section 270A are premature in nature and do not require adjudication at this stage.

21. The remaining grounds in all the concerned AYs (i.e. ground No. 1, 3, 5 in AY 2012-13; ground No. 3, 4 in AY 2019-20; ground No. 2 in AY 2020-21 and ground No. 1, 2, 4 in AY 2021-22) have either become academic or have not been pressed/ argued before us and hence, they have not been adjudicated upon and dismissed as such.

22. In the result, all the four appeals of the assessee for AY 2012-13, 2019-20, 2020-21 and 2021-22 are allowed for statistical purposes.

Order pronounced in the open court on 3rd May, 2024.

Sd/-	**Sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Dated: 03/05/2024

***Mohan Lal**

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi