BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI

7th Day of December, 2009

PRESENT

Mr. Justice. P.V. Reddi (Chairman)
Mr. J. Khosla (Member)

A.A.R. No.813 of 2009

Name & address of the applicant	:	Geofizyka Torun Sp.zo.o. Chrobrego 50, 87-100, Torun Poland
Commissioner concerned	:	Director of Income-tax, (International Taxation), Range-II New Delhi
Present for the applicant	:	Mr. N. Venkatraman, Sr. Advocate Mr. Achin Goel, Advocate Mr. Taranpreet Singh, CA Mr. Hitesh Jain, CA Mr. Lalit Mohan, CA Mr.Sanjay Aggarwal, CA
Present for the Department	:	Mr. Girish Dave, CCIT, Mumbai Mr. Virendra Singh, DIT(Int.Taxation)-2,Delhi Mr. S.M.J. Abidi, Addl.DIT(Int.Taxn),Dehradun

R U L I N G
[By Hon'ble Chairman]

1. The applicant is a Company incorporated in Poland and a 'tax resident' of Poland. The applicant provides geophysical services to international oil and gas industry. The applicant conducts seismic surveys and provides on-shore seismic data acquisition and other associated services such as processing and interpretation of such data to global and oil companies. Seismic data acquisition has been explained to mean acquisition of data/information relating to earth structure in

order to identify the existence of hydrocarbons underneath. Such services are aimed at increasing the exploration success of its customers and assisting them in maximizing the production from their existing reservoirs. It is explained that seismic surveys can paint the picture of the sub-surface in order to better target oil and gas reserves. The results would help assessing the potential for tapping oil and gas at the particular spot. It is further stated that seismic surveys are conducted to gather data to understand the size and location of oil fields so that the risks involved in exploratory drilling could be reduced. The applicant states that the main objective of seismic data acquisition is “to gather good quality seismic data in the block area so as to obtain meaningful geological sub-surface information and to indicate any direct (bright spot) or indirect evidence for the occurrence of hydrocarbons”. Further, according to the Petroleum Tax Guide, published by the Govt. of India, topographical and seismic surveys, analysis, studies and their interpretation and investigations relating to the sub-surface geology including test drilling and drilling of exploration/appraisal wells are part of “exploration operations”. Accordingly, the applicant submits that for any oil and gas exploration activity, seismic survey is

the first and important step. The applicant states that it has been providing the seismic data acquisition, processing and interpretation services to various oil and gas exploration and production companies in India. The names of four major customers including ONGC are mentioned in the application. It is, therefore, the contention of the applicant that the activities/services related to seismic data acquisition clearly fall within the ambit of Section 44BB of the Income Tax Act, 1961 ('the Act') and therefore the computation of income should be done in terms of that Section.

2. Advance ruling is sought on the following question framed by the applicant:

> *"Whether income derived by the applicant in India is covered under the provisions of Section 44BB of the Income Tax Act, 1961?*

3. It has been brought to our notice that the applicant has been filing returns and subjected to assessments in India.

4 The facts stated in the application regarding the scope of services rendered by the applicant and their inter-relation to the exploration of oil and gas are not in dispute. The only question is whether the applicant can take recourse to Section 44BB and have the benefit of computation under that provision. The Revenue contests the applicability of Section

44BB. The contention of the Revenue is two-fold. Firstly, the services contemplated in Section 44BB are services other than those coming within the purview of Explanation 2 to Section 9(1)(vii) of the Act. The services extended by the applicant fall under Explanation 2. Secondly, the income by way of fees for technical services chargeable under section 9(1)(vii) has to be computed under Sec. 44DA in a case like this where the service provider has a 'Permanent establishment' in India. In this context, the Revenue contends that the exclusion clause in Explanation 2 does not apply in the case of the applicant because it is not undertaking a mining or like project. Such project is undertaken by someone else and certain technical services are rendered by the applicant to the business enterprise that takes up the project. In short, the Revenue contends that Section 44BB would come into play only if the assessee goes out of the purview of Section 9(1)(vii) read with Explanation 2.

5. Let us look into the relevant provisions in order to appreciate the respective contentions. Section 44BB reads thus:

> **44BB. Special provision for computing profits and gains in connection with the business of exploration, etc. of mineral oils.**

(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 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.

xx xx xx xx xx

[(3) Notwithstanding anything contained in sub-section (1) an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.]

Explanation: For the purposes of this section, -

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) "mineral oil" includes petroleum and natural gas.

5.1. Then, we may refer to clause (vii) of Section 9(1) dealing with income by way of fees for technical services (for short 'f.t.s') payable by a resident etc. Such income is deemed to accrue or arise in India. Explanation 2 to clause (vii) defines 'f.t.s' thus:

> ***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, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

5.2. Section 44DA which was inserted by the Finance Act, 2003 is another special provision for computing income by way of royalty or f.t.s received by a non-resident or foreign company which carries on business in India through a Permanent Establishment. It is the case of the Revenue that the applicant is liable to be taxed under section 9(1)(vii) of the Act read with section 44DA but not section 44BB.

5.3. There is one more section which deserves notice. That is section 115A which bears the heading "tax on dividends, royalty and technical service fees in the case of foreign companies". *Inter alia*, the applicable rates are specified therein. Apparently, section115A is attracted where the non-resident or foreign company receiving income by way of royalties or FTS does not

have a permanent establishment in India because the income referred to in sub-section (1) of section 44DA stands excluded by section 115A(1)(b). Though the Commissioner in his comments has relied on that section, at the time of hearing, it was pointed out by the Revenue's representative that it is section 44DA that governs and not Sec. 115A and the arguments were advanced on that basis.

6. In order to resolve the issue, the competing provisions that enter into the arena of interpretation are Sections 44BB and Section 9(1)(vii) [together with Explanation 2] read with section 44DA. In the light of rival contentions, the first and the foremost point to be considered is whether the income received by the applicant falls squarely within the ambit of section 44BB or not. Section 44B series, i.e. 44B, 44BB, 44BBA and 44BBB are special provisions for computation of income from certain specified categories of business carried on by the non-residents/foreign companies. Section 44B relates to shipping business. 44BB is concerned with the business of exploration and extraction of mineral oils. Section 44BBA is related to the business of operation of aircrafts and lastly, section 44BBB is a provision concerning the business of civil construction etc. in certain turn-key power projects. In all these four provisions, income liable to be taxed is a certain percentage of the amount paid or payable whether in or out of India

as specified in sub-section (2) or sub-section (1), as the case may be. Moreover, Sections 44BB and 44BBB have another provision which entitles the assessee to claim lower profits and gains if he maintains the books of accounts etc. as per the requirements of section 44AB (2) and gets them audited as per section 44AB. That is how the scheme of special computation provisions relating to specified categories of business of non-residents have been evolved by the Act. Section 44BB is aligned to such a scheme, qualifying itself to be called a special and specific provision governing the taxation of non-residents engaged in the specified types of business.

6.1. We are of the view that the case of the applicant neatly fits into Section 44BB and all the ingredients of that section are satisfied. To attract the first part of section 44BB, the non-resident must be (a) engaged in the business of providing services or facilities; (b) such provision of services/facilities must be 'in connection with' the prospecting for or extraction or production of mineral oils. Both these ingredients are present in relation to the activities undertaken by the applicant in India. Firstly, it does not admit of any doubt that the applicant is engaged in the business of providing services (technical services) to the oil sector industries. It is not some sporadic or isolated activities that are being carried on by the applicant. The applicant claims to have many clients in

India and it has been engaged in the said activities since many years. In fact, it has come to light at the time of hearing that the applicant has been filing returns and is being assessed to tax from 2002-03 onwards and even for the year 2009-10 return has been filed. It is an undisputed and undeniable fact that the activities or operations of the applicant in India have the characteristics of 'business' and the applicant is engaged in the said business in India and other countries. The next question is whether the applicant provides services in connection with the prospecting for or extraction of mineral oils. Here again, there is hardly any room for doubt. The expression 'in connection with' is important and has to be construed to have expansive meaning. While explaining the meaning of similar and inter-changeable expressions viz. "pertaining to" and "in relation to", the Supreme Court observed in the case of *Doypack Systems Pvt.Ltd.*[*]*:*

> "*48. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might both have a direct significance as well as an indirect significance depending on the context, see State Wakf Board vs. Abdul Aziz (AIR 1968 Madras 79, 81 paragraphs 8 and 10, following and approving Nitai Charan Bagchi vs. Suresh Chandra Paul (66 C.W.N. 767), Shyam Lal vs. M. Shayamlal (A.I.R. 1933 All. 649) and 76 Corpus Juris Secundum 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621*

[*] 1988 (36) ELT 201 (SC)

where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction."

6.2. In the decision of British Columbia Appellate Court, Vancouer in *Nanaimo Community Hotel Ltd. vs. Canada,* [**] which arose under the Excise Profits Tax Act, 1940, the following passage is instructive of the real import of the phrase "in connection with":

> *"Mr. Cunlifee argues that that section presupposes that an assessment has been made, and that as I understand him, the words "in connection with" mean "consequent upon." I do not think that is the correct construction to be put upon these words. One of the very generally accepted meanings of "connection" is "relation" between things one of which is bound up with or involved in another"; or again "having to do with". The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had? I think section 66 is sufficient to oust the jurisdiction of this Court to deal with a decision on which an assessment is subsequently made."*

In that case, the court was with interpreting section 66 of the Income War Tax Act which reads as under:

> *"66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act."*

[**] 1944 (4) DLR, 638

6.3. In *V.A. Vasumathi v. CIT*[***] the Kerala High Court observed while interpreting Section 48(1) of the Income-tax Act that the words "in connection with such transfer" mean intrinsically related to the transfer and the expenditure has to be connected with the transfer.

7. Keeping the above exposition of the phrase *"in connection with*", it is crystal clear that the services offered by the applicant is in connection with the prospecting for or extraction of mineral oils, which business is carried on by the applicant's employers viz. those in the business of oil and gas production. The real, intimate and proximate nexus between the services performed by the applicant in India and the prospecting for or extraction of mineral oils (which expression includes petroleum and natural gas) is very much present in the instant case.The seismic survey and data acquisition, as stated by the applicant, is a prelude and a very critical component of the oil and gas exploration activity. Without seismic data acquisition and interpretation, it is impracticable to carry out the activity of prospecting which is a step in aid to exploration. It would be difficult to locate hydro-carbons without conducting seismic survey and the utilization of data emerging from it. The services of the nature undertaken by the applicant have a direct and definite bearing on the prospecting/exploration activities

[***] 123 ITR 94

and they are integral to the said activities undertaken by petroleum and gas enterprises. It can by no means be said that the geophysical services have nothing to do or only remotely connected with the exploration of mineral oils. In fact, there is no serious dispute on this aspect.

7.1. However, the Revenue's representative, in order to exclude the application of Section 44BB, harps on the argument that the expression 'services' occurring in that section are other than the technical/consultancy services covered by Explanation 2 to Section 9(1)(vii). Thus, a restricted interpretation is sought to be placed on the word 'services' employed in Section 44BB by pressing into service the Explanation. We find it difficult to accept the Revenue's contention. There is no compelling reason to assign a narrow and restricted meaning to the expression 'services' and confine it to services other than technical, consultancy or managerial services. In the absence of any words of limitation or exclusion, the word 'services' shall be understood in its plain and ordinary sense. If the Legislature wanted to give a restricted meaning to the expression 'services' in order to take the technical services out of the purview of section 44BB, explicit words to that effect would have been deployed, especially in view of the fact that Section 44BB is a later provision. On the other hand, the contextual setting and the company in which the expression 'services' is found is suggestive

of inference that far from excluding technical/consultancy services, they were also intended to be brought within the ambit of Section 44BB. The word 'services' followed by an expansive phrase 'in connection with' are relatable to Prospecting for and exploration of mineral oil. That means, all services associated with Prospecting for and exploration activities are brought within the scope and reach of Section 44BB. Another category of assessees governed by Section 44BB are those supplying plant and machinery on hire. Both these two categories of assesses covered by Section 44BB engage themselves in core activities pertaining to prospecting and exploration of oil and gas and the Parliament thought it fit to accord a special treatment to the income derived by these two categories of non-residents in India.

7.2. The Revenue submits that the exclusionary provision in Explanation 2 to Section 9(1)(vii) has no application here for the reason that the applicant has not undertaken any mining or like project and, therefore, the main part of the definition in FTS continues to govern the applicant' services. It may be recalled that the second part of the Explanation excludes "consideration for any construction, assembly, mining or like project" undertaken by the recipient. In other words, it is contended on behalf of the Revenue that the exclusion would be applicable only to those who have taken up main project but not to those who rendered technical or

consultancy services to the enterprise promoting the main project. It is pointed out that the reason for exclusion of the construction, assembly, mining or the like project from the ambit of Explanation 2 can be gathered from CBDT circular No. 202 dated 5.7.1976 [105 ITR st 25] explaining the changes brought out by the Finance Act, 1976. The CBDT stated that the consideration from such projects has been excluded from the definition (of f.t.s) on the ground that such activities virtually amount to carrying on business in India for which considerable expenditure will have to be incurred by a non-resident and accordingly, it will not be fair to tax such consideration in the hands of a foreign company on gross basis or to restrict the expenditure incurred for earning the same to 20 per cent of the gross amount as provided in the new Section 44D. The same rationale should logically apply to the non-residents engaged in the business of providing services for the specified projects in India. Be that as it may, there was no occasion for the CBDT to consider in 1976 the implications of the exclusion clause vis-à-vis the specified service providers because Section 44BB was not there at that time.

7.3. After section 44BB was introduced, the Circular (Instruction No. 1862) issued by the CBDT on 22nd October, 1990 governs a case like the present one and it furnishes an answer to the Revenue's contention that the technical services rendered for

exploration of mineral oil/ natural gas are outside the ambit of Explanation 2 to Section 9(1) (vii). These instructions were issued after obtaining the opinion of the learned Attorney-General of India. The following two paragraphs in the circular are relevant:

> *"The question whether prospecting for, or extraction, or production of, mineral oil can be termed as 'mining' operations was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like project', occurring in Explanation 2 section 9(1)(vii) of the Income-tax Act would cover rendering of services like 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 44BB 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 of the Income-tax Act, 1961."*

7.4. The Circular which can be traced to the power vested in the CBDT under section 119(7) of the Act is binding on the department. The executive understanding of the relevant statutory provisions is reflected in this circular which has held the field for nearly two decades. This circular has been relied upon by the Income-tax Appellate Tribunal in a number of cases in order to reach the conclusion that Section 44BB governs the cases in which the services (including technical services) are rendered in relation to the prospecting for or exploration of oil [*vide AC(IT) vs. Paradigm Geophysical (P) Ltd.[(2008) 25 SOT 94]; ONGC vs. DC(IT) (ITA No.*

2145/D/2004); DC(IT) vs. Schlumberger Seaco Inc. (50 ITD 346); DIT (Intrnl.Taxation) vs. Jindal Drilling Industries Ltd. (ITA No. 3416(Del) of 2003]. The order of the Tribunal in Jindal Drilling Industries Ltd. was affirmed by the High Court of Delhi in *DIT vs. Jindal Drilling Industries Ltd*[*]*.* The learned Judges held that the sums received by NDAL – a non-resident company from the Indian assessee were not includible in the definition of FTS and section 44BB is the appropriate provision to be applied. NDAL rendered the services of jacking up of rigs, review of design and issuance of suitability certificate.

7.5. The scope and implications of the Circular becomes more clear if it is read in the context of the question referred for the opinion of Attorney-General. It reads:

> "(ii) whether the expressions "mining project" or "like project" occurring in Explanation 2 to Section 9(1)(vii) of the I.T.Act would cover rendering of services like imparting training and carrying out drilling operations for exploration or exploitation of oil and natural gas;
>
> (iii) whether the provisions of Section 44BB will be applicable in respect of services of the type rendered by M/s. Scan Drilling Company Limited."

The answers given to both the questions were in the affirmative. No doubt, there is no specific discussion on the distinction pointed

[*] (2009) 182 Taxman 59.

out by Revenue i.e., the distinction between those who carry out the entire project and the independent service providers to the project. On that account, however, the Circular cannot be brushed aside.

8. Irrespective of the said circular and even assuming that the applicant is not strictly covered by the exclusion clause in Explanation 2 to Sec. 9(1)(vii), let us consider whether Revenue's contention has any merit.

8.1. As already discussed, Section 44BB which was inserted into the Act w.e.f. 1st April, 2004 is a special, specific and exclusive provision dealing with the computation of profits of the non-resident assesses 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 44B 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 44BB 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 9(1)(vii) read with Section 44DA and 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 method of computation of income by way of f.t.s received by a non-resident or a foreign company carrying on business through a PE 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 f.t.s 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 PE 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 of business from where the operations are carried on. Thus, the existence of PE is a common feature both in 44DA as well as 44BB, though there is an explicit reference to PE under Section 44DA. Thus, rendering of technical services through PE may be a common feature of both the Sections, i.e., 44BB and 44DA, though in the case of S.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 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 S.44BB for the purposes of 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 44DA, very little purpose will be served by incorporating a special provision in 44BB for computing the profits in relation to the services connected with exploration and extraction of mineral oils. The provision will then operate in a very limited field.

9. We may now refer to the decisions from which support was sought to be drawn by the Revenue.

9.1. The first one is the case of *Hotel Scopevista Ltd. Vs. AC(IT) [ITA No.124/Del/2006 dated 20.9.2007]* decided by ITAT, Delhi Bench. In *Scopevista* case, the question was whether the payments for the various services rendered by a foreign company in relation to the construction of hotel were chargeable under Section 9(1)(vii) of the Act and whether tax was liable to be deducted at source by the appellant – assessee. The Delhi Bench of the Tribunal held that the payee had provided managerial, technical and consultancy services in connection with the construction project in India and such services were chargeable to tax as f.t.s under Section 9(1)(vii) read with Explanation 2. It was then held that the exclusion clause in Explanation (2) has no

application because 'consideration for construction project' will mean consideration for actual construction activities undertaken in India and not consideration for any services in connection with the construction project. Whether the services rendered right from the designing stage upto the construction stage are covered by the exclusion clause in Explanation 2 is a moot point. But, we need not go into that aspect. Irrespective of that reasoning, Section 44BB cannot in any case be applied to construction services as they are not included within the fold of Section 44BB. That is why the Tribunal observed that the decisions dealing with the provisions of Section 44BB stood on a different footing. At the same time, the Tribunal while referring to the earlier orders of Tribunal, explained that various services in connection with exploration of mineral oil such as geological and geophysical studies and providing expert personnel were covered under the provisions of Section 44BB. Thus, the decision of Tribunal in *Hotel Scopevista Ltd.,* far from supporting the Revenue, clearly negates the contention of Revenue on the scope of S.44BB.

9.2. The other decision of the Tribunal referred to by the learned Departmental Representative is the case of *DC(IT) vs. ONGC as agent of Foramer France*[*]. Even this decision is not contrary to the earlier decisions of the Tribunal in regard to the interpretation of

[*] (1999) 70 ITD 468

Section 44BB. That was a case in which the non-resident company supplied supervisory staff and personnel having expertise in operation and management of drilling rigs. The Commissioner (Appeals) held that the consideration received from such services rendered for the project undertaken by ONGC is liable to be taxed under Section 44BB and not as fees for technical services under Section 44D. The Revenue came up in an appeal to the Tribunal. The Tribunal dismissed the appeal following the view taken in earlier cases and the circular of CBDT referred to earlier. The only observation that can perhaps be pressed into service by the Revenue is what is stated in paragraph 6.5 to the effect that Section 44BB will not be redundant if the technical/consultancy services in relation to the project are kept out of the reach of Section 44BB. In making this observation, the Tribunal was inspired by the ruling of this Authority in Advance Ruling P.No.6 of '95 regarding which there will be discussion in the next para.

9.3. We shall now refer to the ruling of this Authority in [*]P No.6 of 95 on which reliance was placed by the Revenue.

9.4. In that case, the applicant – a foreign company entered into three agreements with X, an oil company in India for rendering technical and consultancy services. Broadly, the services rendered under the three agreements were: (1) Indepth reservoir

[*] 1998, 100 Taxman, 2006

management study of the offshore-oil field on behalf of X which involved simulation studies, barometric estimates, evaluation of reservoir performance and handing over the data generated during the study to X on computer media. (2) Review of hydrocarbon reserves and analysis and review of data, maps reserves etc. and (3) Assisting and advising X on the methodology of evaluating the tenders. This Authority rejected the contention of the applicant's counsel that the payments made by X to the applicant in terms of the three agreements would be taxable under Section 44BB. The Authority accepted the Revenue's contention that in view of the proviso to Section 44BB, the income derived by the applicant has to be computed as per the provisions of Section 44D read with Section 115A. As the rate of tax prescribed in the DTAA was 20% as against 30% prescribed under Section 115A, it was held that the applicant was entitled to the benefit of reduced rate of tax under DTAA.

9.5. The ratio of this ruling rests on a statutory provision, namely, Section 44D with which we are not concerned. Section 44D which is a special provision for computing income by way of royalties and fees for technical services in the case of foreign companies starts with a non-obstante clause "notwithstanding anything to the contrary contained in Sections 28 to 44C". Section 44BB is thus

enveloped by the non-obstante clause. It is in this context that the AAR very rightly stated the legal position as follows:

> "**15.3** A perusal of these provisions would make it clear that these are special provisions which have to be read together, for computing and taxing income by way of royalties and fees for technical services in the case of foreign companies. Section 44D starts with an overriding expression 'notwithstanding anything to the contrary contained in sections 28 to 44C….'. This means that section 44D has application in respect of royalties and technical fees in the course of a business and that its special provisions take precedence over sections 28 to 44C and override these provisions. That means section 44BB is also superseded in respect of computation of income by way of royalties or fees for technical services received from an Indian concern ('X' in this case). The proviso to section 44BB excluding the application of that section to cases covered by section 44D is consistent with and complementary to this. This double safeguard provided by statute shows that section 44D includes within its purview also royalties and technical service fees arising in the course of business."

9.6. It was further observed that if special provisions like Section 44BB and 44D had not been included in the Act, such rendering of technical services would have been taxable only as business income under the provisions of Section 28 to 44C. Then, it was observed "*Section 44BB and section 44D have, thus, both to be given effect to and the only way of doing it is by restricting section 44BB to income that does not fall within the scope of section 44D; it is this that is made clear by the proviso to section 44BB(1) which specifically excludes any profits and gains of business or other income falling under section 44D from the purview of section 44BB.*" Thus, in a case where the disputed income fell within the scope of Section 44D, resort to Section 44BB could not have been

taken because of the non-obstante provision in section 44D as well as the proviso to Section 44BB. Therefore, in the case decided by this Authority in P 6 of 1995, the competition was between Section 44BB and Section 44D read with Section 115A. Section 44DA was not on the statute book at that time. Admittedly, Section 44D does not come into play in the instant case as the agreement between the foreign company and the Indian concern was subsequent to 1.4.2003. In relation to the agreements after that date, Section 44DA would apply. But, there is nothing in Section 44DA which has the effect of superseding or overriding Section 44BB. Both these provisions should be harmoniously read. If so read, the profits derived from business of providing services in connection with the prospecting for or extraction or production of mineral oil are squarely and exclusively governed by Section 44BB, irrespective of the nature of services, provided the services are intimately connected to Prospecting and exploration of oil. Therefore the ruling in P6 of 1995 cannot be called in aid by the Revenue to sustain its plea.

9.7. The learned Revenue's representative however relied on the observations at paragraph 16.2.2 in an apparent bid to meet the argument that Section 44BB will be rendered otiose if the interpretation sought to be placed by the Revenue is accepted. In

this context, the following passage is relied upon by the Revenue's representative:

> "It was sought to be made out that the above interpretation will render section 44BB altogether redundant. This is not correct for section 44BB will continue to apply to several types of cases in relation to the prospecting for or extraction or production of mineral oils. It is possible to conceive of services or facilities provided in this connection the consideration for which may not amount to 'royalty' or 'fees for technical services' within the scope of the definition in section 9(1)(vi) and (vii). Consideration for the supply of plant and machinery on hire referred to in section 44BB will not be in the nature of 'royalty'. Consideration for any construction, assembly, mining or like project is excluded from the compass of the definition of 'fees for technical services' within the meaning of *Explanation* to section 9(1)(vii). There is, therefore, a wide range of income falling under section 44BB which will not fall within section 44D. The exclusion of royalty and fees for technical services from the scope of section 44BB will not, therefore, render section 44BB otiose or redundant, as suggested. On the other hand, the proviso in section 44BB will be meaningless if royalty and technical service fees arising out of a business cannot at all fall within the purview of section 44D."

9.8. These observations have to be appreciated in the context of the controversy that had arisen in that case. The fields of operation of the two provisions, namely, sections 44D and 44BB had to be demarcated in that case. In doing so, primacy had to be given to section 44D which undoubtedly took precedence over section 44BB. The last sentence in the above passage underscores the real reason behind the observations made and that reason does not hold good in a situation where section 44BB has to be considered *de hors section* 44D. Secondly, the said observation: "*there is therefore wide range of income falling under Section 44BB*" is not quite clear. The sentence occurs after the observation that consideration for construction, assembly, mining or like project is

excluded from the definition of fees for technical services. Does it mean that what all is excluded from the definition of f.t.s will enter the domain of Section 44BB? We do not think so because any such view would be *ex facie* contrary to the relevant statutory provision i.e, Section 44BB. In any case we are not bound to give effect to a passing observation made in a different context. Lastly, it is not our view that Section 44BB will become otiose or altogether redundant, but it is our view that its scope and content will be unduly curtailed by adopting the interpretation sought to be placed by the Revenue and we have given sufficient reasons for adopting that view.

9.9. Thus, the ruling of this Authority in P.No.6 of 1995 has no bearing on the present case and the reliance placed by the Revenue on the said decision is misplaced.

10. In the result, the Question raised in the application is answered in the affirmative. The income has to be computed in terms of Section 44BB.

Accordingly, the Ruling is given and pronounced on this the 7th day of December, 2009.

sd/-	sd/
(J.Khosla)	**(P.V. Reddi)**
Member	**Chairman**