

Proviso has prospective effect which excludes applicability of sec. 44B due to operation of sec. 44DA

Summary – The Delhi ITAT in a recent case of Iranian Offshore Engineering & Construction Company., (the Assessee) held that Insertion of section 44DA in proviso to section 44BB is with effect from 1-4-2011

Facts

- The assessee-company was incorporated in accordance with the laws of Iran. It entered into a turnkey contract with ONGC, at its Mumbai High South Field Offshore sites under RSPPM project. The scope of work consisted of survey (including pre-engineering, pre and post construction surveys) engineering , procurement, fabrication, anti corrosion and weight coatings (in case of rigid pipelines) transportation, laying of rigid pipelines with associated risers, hook up, pre commissioning, commissioning, testing of pipelines with associated risers, modification of platforms and third party inspection.
- The assessee filed its return wherein taxable income was offered under section 44BB.
- The Assessing Officer completed assessment under section 44DA by making additions in respect of revenue generated outside India.
- The Commissioner (Appeals) set aside assessment order holding that entire amount received by assessee was taxable under section 44BB.
- On revenue's appeal:

Held

- Section 44BB deals specifically with income arising out of business of providing services or facilities in the prospecting for, or extraction or production of mineral oils and applies to a non-resident and not to an assessee who has a permanent establishment in India or has a fixed place of profession situated in India. The claim of the department is that the assessee is not covered by section 44BB and it falls either under sections 115A or under section 44DA. This view cannot be accepted in view of the insertion of the Proviso to sub-section (1) of section 44BB by the Finance Act, 2010 which is operative with effect from 1-4-2011.
- Section 44BB deals with all kinds of services in connection with prospecting for extraction or production of minerals oils whereas section 44DA deals with, amongst others, fees for technical services from a non-resident, not being a company, or a foreign company, after 1-4-2004 and section 115A deals with technical service fees in case of a foreign company. Therefore it cannot be concluded that income received by a non-resident assessee for providing services or facilities in the prospecting for, or extraction or production of mineral oils would be covered by section 44D or 44DA for those assessment years before insertion of Proviso to sub-section (1) of section 44BB.

- Moreover, the Supreme Court in the case of *ONGC Ltd. v. CIT* [[2015](#)] [59 taxmann.com 1/233 Taxman 495](#) has set at rest the entire controversy by holding that provisions of various services in connection with the prospective for, or extraction or production of mineral oils, is taxable on presumptive basis under section 44BB of the Act. The services carried on by assessee are in connection with the prospecting for mineral oils and, therefore, following the decision of Supreme Court, the findings of Commissioner (Appeals) are upheld.
- Where the dominant purpose of agreement is for prospecting, extraction or production of mineral oil, though there may be certain ancillary works contemplated thereunder, the payments received by a non-resident assessee or foreign companies under the such contracts are assessable under the provisions of section 44BB and not section 44D.
- Thus, for the year under consideration, the gross receipts of assessee are taxable under section 44BB because, insertion of section 44DA in the proviso to section 44BB is with effect from 1-4-2011, and has been held to be prospective in nature.
- In view of above discussion, the appeal raised by the revenue stands dismissed.