

Assessee rendering Fracturing Flow Services for extraction of mineral oil couldn't be treated as FTS

Summary – The Mumbai ITAT in a recent case of Production Testing Services Inc., (the Assessee) held that Prospecting for or extraction or production of mineral oil is not to be treated as technical services for purpose of Explanation 2 of section 9(1)(vii) and, therefore, payments received by assessee for rendering of Fracturing Flow Back Services for extraction or production of mineral oil as sub-contractor would not fall within realm of 'fees for technical services'

Prospecting for extraction or production of mineral oil is not to be treated as technical services for purpose of Explanation 2 of section 9(1)(vii), and would rather be covered by section 44BB

Facts

- A company, incorporated in Scotland and having a project office in Mumbai BJ was awarded a contract for Fracturing Flow Back Services by Oil and Natural Gas Commission B.J. in turn sub-contracted the work to the assessee, and the assessee received an amount from B.J. and the assessee as per the provisions of section 44BB offered (10 per cent of the total receipts) for tax during the year under consideration and out of the tax deducted at source under section 194J on the aforesaid amount, the assessee after adjusting its tax liability, claimed a refund.
- However, the Assessing Officer during the course of the assessment proceedings, being of the view that as B.J. was carrying out Fracturing Flow Back Services and various operations at the Oil rigs pursuant to the contract with ONGC, the assessee who was sub-contracted the said work was indirectly performing the services for ONGC. The Assessing Officer further held that Fracturing Flow Services were technical services that were provided by the assessee for prospecting extraction or production of mineral Oil.
- The Assessing Officer further took note of the fact that even the TDS certificates filed by the assessee pertained to deduction of tax at source on fees for technical fees under section 194J and brought same to tax under section 115A as FTS.
- DRP upheld the findings of the Assessing Officer.
- On appeal:

Held

- After perusing contract, it is clear that the contractor, B.J. was solely responsible for the manner in which the work assigned to it was performed. As the contents of the aforesaid contract clearly stated that if any sub-contractor was engaged by the contractor for performing the contract, then he shall be under the complete control of the contractor and there shall be no contractual relationship between any such sub-contractor and the company, viz. ONGC. In the backdrop of the aforesaid clear terms of the contract, now when the assessee who was engaged as a sub-contractor had nothing to do with the company, viz. ONGC, therefore, the Assessing Officer/DRP were wrong in

concluding that the amount received by the assessee for rendering Fracturing Flow Back Services were indirectly received from ONGC. Thus, the aforesaid observations of the Assessing Officer/DRP were set aside and the amount under consideration was received by the assessee from B.J.

- Pursuant to the judgment of the Supreme Court in the case of *Oil & Natural Gas Corpn. Ltd. v. CIT* [2015] 376 ITR 306/233 Taxman 495/59 taxmann.com 1, it stands settled as on date that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of *Explanation 2* of 9(1)(vii), and would rather be covered by section 44BB. After the aforesaid judgment the issue that prospecting for extraction or production of mineral oil is not to be treated as technical services for the purpose of *Explanation 2* to section 9(1)(vii) stands settled and is no more found to be *res integra*. Section 115A(b) clearly presupposes existence of 'fees for technical services', which further as per the *Explanation (a)* contemplated therein refers to *Explanation 2* of section 9(1)(vii). That now when pursuant to the judgment of the Supreme Court in the case of *Oil & Natural Gas Corpn. Ltd. (supra)*, the issue that prospecting for or extraction or production of mineral oil is not to be treated as technical services for the purpose of *Explanation 2* of section 9(1)(vii), therefore, it can safely be concluded that the payments received by the assessee from rendering of Fracturing Flow Back Services for extraction or production of mineral oil would not fall within the realm of 'fees for technical services' and thus, as the pre-condition for invoking of section 115A is in itself found to be missing, the same would not be attracted to the case of the assessee. The contention of the assessee that as it had received the amounts for rendering the services of Fracturing Flow Back Services from B.J., which itself was a foreign company, the said sums not having been received by the assessee from Government or an Indian concern, therefore, for the said reason also excluded the applicability of the provisions of section 115A and section 44DA. The assessee had received the amount from B.J and not from ONGC, therefore, the aforesaid contention of the assessee carries substantial force. Thus, on the said count also since the assessee had not received the amount for rendering of services of Fracturing Flow Back Services in extraction or production of mineral oil from the Government or an Indian concern, the applicability of the provisions of section 115A and section 44DA to the facts of the case of the assessee would stand excluded.
- Thus, the order of the Assessing Officer is set aside assessing the amount of Rs. 2,65,46,753/ received by the assessee from B.J. for rendering of Fracturing Flow Back Services at the oil rigs to tax as per the provisions of section 115A. Now when section 44BB contemplates special and specific provisions for computing 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, therefore, the Fracturing Flow Back Services rendered by the assessee in connection with extraction or production of mineral oil would squarely be covered by the provisions of section 44BB. Thus, the order of the Assessing Officer is set aside.