

Sec. 44BB being specific provision would prevail over provisions dealing with royalty/FTS: Delhi ITAT

Summary – The Delhi ITAT in a recent case of RPS Energy Pty Ltd., (the Assessee) held that Sections 9, 44BB, 44DA and 115A relating to royalty/FTS operate in different fields; where assessee is imparting services which could be a simple royalty or FTS, then same would be taxed under section 9(1)(vi)/(vii) read with section 115A, but where assessee is imparting any services in relation to exploration of mineral oil then royalties/FTS would be taxable under section 44BB

Facts

- The assessee, a foreign company, had entered into a contract with a company named (RIL) and a company incorporated in Australia (BHP) to provide personnel for carrying on geophysical and geological services for prospecting for mineral oils.
- The Assessing Officer observed that assessee in the return had considered deemed profit and gains against gross receipt from business, under section 44BB at 10 per cent and no accounts were maintained by it.
- The Assessing Officer came to the conclusion that assessee was a contractor to RIL and BHP were rendering services in the nature of FTS as per provisions of section 115A, read with section 9(1)(vii).
- DRP while dealing with the objections decided the issue in favour of assessee by holding that the income received by assessee during the year under consideration, on account of services rendered should be brought to tax by applying deemed profit rate of 10 per cent under section 44BB.
- On revenue's appeal:

Held

- Section 44BB is a special provision for computing profits and gains of a non-resident in connection with business of providing services or facilities in connection with, or supplying plant and machinery on hire, used or to be used, in the prospecting for or extraction or production of mineral oils, including petroleum and natural gas.
- Section 44DA applies to non-residents only, however it is broader and more general in nature and provides for assessment of income of a non-resident by way of royalty or fees for technical services where such non-resident carries on business in India through a permanent establishment situated therein or performs services from a fixed place of profession situated in India and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with the permanent establishment or fixed place of profession.
- One more peculiar difference between sections 44DA and 44BB is that, in section 44BB one does not find any reference to a permanent establishment in India and the services contemplated therein are more specific than what is contemplated in section 44DA.

- The submission advanced by assessee is that the income received by assessee represented income for rendering of services in the nature, as more particularly described in section 44BB, whereas department advocated that income received would represent 'fees for technical services', within the meaning of *Explanation 2* to section 9(1)(vii). It is observed that it is not the case of revenue that assessee has a permanent establishment in India and, therefore, section 44DA would not be of any relevance.
- Now coming to the applicability of *Explanation 2* to section 9(1)(vii) which defines 'fees for technical services' to mean any consideration received for 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.
- Sections 44BB, 44DA and 115A relating to royalty/FTS operate in different fields. Where assessee is imparting services which could be a simple royalty or FTS then the same would be taxed under section 9(1)(vi)/(vii) read with section 115A, but where assessee is imparting any services in relation to exploration of mineral oil then the royalties/FTS would be taxable under section 44BB; as section 44BB being specific provision in relation to specific services, it would prevail over the other provisions dealing with royalties/FTS.
- Under such circumstances, the payments received by assessee have to be assessed under the specific provision of section 44BB and not section 115A.