NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 731 OF 2007

OIL & NATURAL GAS CORPORATION LIMITED ...APPELLANT (S)

VERSUS

COMMISSIONER OF INCOME TAX & ANR. ... RESPONDENT (S)

WITH

CIVIL APPEAL NOs.729 OF 2007, 733 OF 2007, 736 OF 2007, 737 OF 2007, 738 OF 2007, 740 OF 2007, 741 OF 2007, 6008 OF 2007, 6016 OF 2007, 6023 OF 2007, 925 OF 2008, 1239 OF 2008, 1240 OF 2008, 1514 OF 2008, 1515 OF 2008, 1516 OF 2008, 1517 OF 2008, 1518 OF 2008, 1519 OF 2008, 1520 OF 2008, 1521 OF 2008, 1522 OF 2008, 1523 OF 2008, 1524 OF 2008, 1527 OF 2008, 1528 OF 2008, 1529 OF 2008, 1531 OF 2008, 1532 OF 2008, 1533 OF 2008, 1535 OF 2008, 2008 OF 2008, 2012 OF 2008, 4321 OF 2008, 7226 OF 2008, 7227 OF 2008, 7230 OF 2008, 2794 OF 2009, 2795 OF 2009, 2796 OF 2009, 2797 OF 2009, 1722 OF 2010 AND CIVIL APPEAL NO. 6174 OF 2010

J U D G M E N T

RANJAN GOGOI, J.

1. The issue that arise for consideration in this group of appeals is common and may be summarized as follows.

> "Whether the amounts paid by the ONGC to the non-resident assessees /foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as "fees for technical services" under Section 44D read with Explanation 2 to Section 9(1)(vii) of the Income Tax Act or will such payments be taxable on a presumptive basis under Section 44BB of the Act"?

2. The appellant-ONGC has been assessed in a representative capacity on behalf of the different foreign companies with whom it had executed separate agreements for services to be rendered by such companies in connection with prospecting, extraction or production of mineral oils by ONGC.

3. The primary/assessing authority took the view that the assessments should be made under Section 44D of the Act and not Section 44BB of the Income Tax Act (hereinafter referred to as the 'Act'). The Appellate Commissioner and the Income Tax Appellate Tribunal disagreed with the views of the assessing authorities leading to the institution of separate appeals before the High Court

of Uttrakhand in respect of each of the assessments made for the years in question. The High Court considered the facts of Civil Appeal No. 731 of 2007 (Income Tax Appeal No. 239 of 2001 before the High Court) as the lead case and on the grounds and reasons assigned in the impugned order dated 15.12.2005, the High Court overturned the view taken by the Appellate Commissioner and the learned Tribunal and held the payments made to be liable for assessment under Section 44D of the Act. Aggrieved, the ONGC has filed the present group of appeals.

4. We have heard Shri Arvind P. Datar, learned senior counsel appearing for the appellant and Shri Guru Krishna Kumar, learned senior counsel for the Revenue.

5. As the facts of Civil Appeal No. 731 of 2007 corresponding to I.T.A. No. 239 of 2001 has been considered in detail by the High Court and the view expressed in the said proceeding have been followed in all the other appeals before the High Court, it may be necessary to notice in detail the said facts arising in the appeal in question.

6. The appellant-ONGC and a non resident/foreign company one M/s. Foramer France had entered into an agreement by which the non-resident company had agreed to make available supervisory

staff and personnel having experience and expertise for operation and management of drilling rigs Sagar Jyoti and Sagar Pragati for the assessment year 1985-86 and the drilling rig Sagar Ratna for the assessment year 1986-87. Faced with the different views taken by the authorities under the Act, as mentioned above, the High Court proceeded to analyse the different clauses of the contract between the parties. A consideration of such analysis made by the High Court would go to show that it had come to light before the High Court that the contract between the parties visualized operation of the oil rigs including drilling operations by the personnel made available under the contracts/agreements, which fact was further stated on affidavit before the High Court by an authorized official of the ONGC in the following terms.

> ***"That under the said agreement, Foramer was required, through its personnel listed in Exhibit-A to the said agreement, to carry out inter-alia the drilling operations specified in clause 4.3 to 4.10 of the said agreement."***

Despite the above, the High Court took the view that under the agreement payment to M/s. Foramer France was required to be made at the rate of 3450 USD per day and that the contract clearly

contemplated rendering of technical services by personnel of the non-resident company. Specifically, taking the view that the contract did not mention that the personnel of the non-resident company was also carrying out the work of drilling of wells and as the company had received fees for rendering service the payments made were liable to be taxed under the provisions of Section 44D of the Act. As already noticed, in the rest of the appeals before the High Court the aforesaid decision dated 15.12.2005 passed in I.T.A. No. 239 of 2001 was followed on the basis that the facts in all the appeals were similar to those involved in I.T.A. No. 239 of 2001.

7. It will be convenient and in fact necessary for the purposes of present adjudication to take a careful note of the provisions of Sections 44BB, 44D and also clause (vii) of Explanation 2 to Section 9(1) of the Income Tax Act, 1961 (hereinafter for short the 'Act').

> **"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 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.]

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.]"

"44D. Special provision for computing income by way of royalties, etc., in the case of foreign companies.-

Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company,—

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received [from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern] before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of,

or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received [from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern] after the 31st day of March, 1976 [but before the 1st day of April, 2003];

(c) [***]

(d) [***]

Explanation.—For the purposes of this section,—

(a) "fees for technical services" shall have the same meaning as in [Explanation 2] to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B;

(c) **"royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;**

(d) royalty received [from Government or an Indian concern in pursuance of an agreement made by a foreign company with Government or with the Indian concern] after the 31st day of March,

1976, shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976.]"

"<u>9. (1) (vii)</u> income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

[Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.]

[Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

[<u>Explanation 2</u>.—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".]

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

[Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not, —

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.]"

8. A careful reading of the aforesaid provisions of the Act goes to show that under Section 44BB(1) in case of a non-resident providing services or facilities in connection with or supplying plant

and machinery used or to be used in prospecting, extraction or production of mineral oils the profit and gains from such business chargeable to tax is to be calculated at a sum equal to 10% of the aggregate of the amounts paid or payable to such non-resident assessee as mentioned in Sub-section (2). On the other hand, Section 44D contemplates that if the income of a foreign company with which the government or an Indian concern had an agreement executed before 1.4.1976 or on any date thereafter the computation of income would be made as contemplated under the aforesaid Section 44D. Explanation (a) to Section 44D however specifies that "fees for technical services" as mentioned in Section 44D would have the same meaning as in Explanation 2 to Clause (vii) of Section 9(1). The said explanation as quoted above defines "fees for technical services" to mean consideration for rendering of any managerial, technical or consultancy services. However, the later part of the explanation excludes from consideration for the purposes of the expression i.e. "fees for technical services" any payment received for construction, assembly, mining or like project undertaken by the recipient or consideration which would be chargeable under the head "salaries". Fees for technical services,

therefore, by virtue of the aforesaid explanation will not include payments made in connection with a mining project.

9. Before the High Court, a Circular No. 1862 dated 22.10.1990 having a bearing on the subject was placed for consideration by the appellant-assessee. The aforesaid instruction may be conveniently reproduced herein below.

> **"Subject: Definition of "fees for technical services" in Explanation to Section 9(1) (vii) of the Income Tax Act, 1961 whether prospecting for or extraction of production of mineral oil are "mining" operations-clarification regarding.**
>
> **The expression "fees for technical services" has been defined in Explanation 2 to Section 9(1) (vii) of the Income Tax Act, 1961 as under:**
>
> **"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".**
>
> **2. 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 projects' occurring in Explanation 2 to Section 9(1) (ii) of the Income Tax Act would cover rendering of services like imparting of training and**

carrying out drilling operations for exploration or exploitation of oil and natural gas.

3. In view of the above opinion, the consideration for such services will not be treated as fees for technical services for the purpose of Explanation 2 to Section 9(1) (vii) of the Income-tax Act, 1961. Payments for such services to a foreign company, therefore, will be income chargeable to tax under the provisions of section 44BB of the Income-tax Act, 1961 and not under the special provision for the taxation of fees for technical services contained in section 115A read with section 44D of the Income-tax Act, 1961.

4. A copy of the statement of the case dated 16.3.1990 (without annexures) and a copy of the Attorney General's opinion dated 13.5.90 are enclosed.

5. These instructions may brought to the notice of all the officers in your region.

[F.No.500/6/89-FTD dt.22.10.90 from CBDT]"

10. Before us the opinion of the learned Attorney General has been placed by the learned counsel for the appellants at great length to contend that the views expressed by the learned Attorney which had been accepted by the CBDT were based on an exhaustive consideration of the provisions of the Mines Act, 1952 and the Mines and Minerals (Regulation and Development) Act, 1957 read with the relevant Entries in the Union and the State List in the 7th Schedule to the Constitution of India. It is urged that the eventual

test is one of pith and substance of the agreement, namely, whether the works contemplated or services to be rendered under the agreement is directly and inextricably linked with the prospecting, extraction or production of mineral oil. It is submitted on behalf of the appellants that the agreements in question satisfy the above test for which purpose the appellants have categorized the different contracts under 8 heads which may be conveniently set out at this stage hereinbelow.

1. **Carrying out seismic surveys and drilling for oil and gas**

2. **Services starting/re-starting/enhancing production of oil and gas from wells**

3. **Services for prospecting for exploration of oil and or gas**

4. **Planning and supervision of repair of wells**

5. **Repair, Inspection or Equipment used in the exploration, extraction or production of oil and gas**

6. **Imparting Training**

7. **Consultancy in regard to exploration of oil and gas**

8. **Supply, Installation, etc. of software used for oil and gas exploration"**

11. It is also urged on behalf of the appellants that the instruction/Circular dated 22.10.1990 issued by the CBDT was

binding on the primary authority on the ratio of the decision of this Court in ***K.P. Varghese* Vs. *Income Tax Officer, Ernakulam and Others***[1]. It has been further pointed on behalf of the appellants that even under the provisions of Section 3D of the Oil Fields (Regulation and Development) Act 1948 a mining lease means a lease granted for the purposes of searching for, winning, working, getting, making merchandisable, carrying away or disposing of mineral oils or for the purpose connected therewith and such a lease includes an exploring or prospecting lease. Reference has also been made to the Petroleum and Natural Gas Rules, 1959 framed under Section 5 of the aforesaid Act. Under Rule 4 of the said Rules no person can prospect for petroleum except pursuant to a Petroleum Exploration License (PEL) granted under the Rules and no person can mine petroleum except in pursuance of a Petroleum Mining License (PML) granted under the Rules. It is pointed out that under Rule 7 of the Rules of 1959 a petroleum mining license (PML) entitles the licensee to carry out construction and maintenance in and on such land, works, buildings, plants, waterways, roads, pipelines etc. as may be necessary for full enjoyment of the PML. On the said basis it is argued that rendering

[1] (1981) 4 SCC 173

any service in connection with prospecting and extraction is an integral part of mining and that the expression "mining" in the Explanation 2 to Section 9(1) of the Income Tax Act, in the absence of any definition under the Income Tax Act, has to be understood as per the provisions of the Oil Fields (Regulation and Development) Act, 1948 read with the Petroleum and Natural Gas Rules, 1959.

12. Opposing the contentions advanced on behalf of the appellants, Shri Gurukrishna Kumar, learned senior counsel for the Revenue has urged that the opinion of the Attorney General relied upon and the CBDT Circular has no relevance to the present case inasmuch as the agreements between ONGC and the non-resident companies made it abundantly clear that what is paid to the non-resident company are fees for technical services rendered. Though such services may have some connection with the prospecting, extraction or production of mineral oil, the primary service rendered by the non-resident companies on the basis of the agreements is not for prospecting, extraction or production of mineral oil but various ancillary services like training of personnel etc. which may have a somewhat remote connection with the business of prospecting, exploration or production of mineral oils. Learned counsel for the revenue has even suggested that if it is held

that the High Court ought to have examined each agreement or contract to find out its real purpose and intent the revenue would have no objection if the matters are remanded for a complete exercise to be made on the above basis.

13. The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act 1948. While construing the somewhat pari materia expressions appearing in the Mines and Minerals (Development and Regulation) Act 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Section 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically

relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act. The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act. We

do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct. The said details are set out below.

S. No.	Civil Appeal No.	Work covered under the contract
1.	4321	Drilling of exploration wells and carrying out seismic surveys for exploratory drilling.
2.	740	Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.
3.	731	Drilling, furnishing personnel for manning, maintenance and operation of drilling rig and training of personnel.
4.	1722	Furnishing supervisory staff with expertise in operation and management of Drilling unit.
5.	729	Capping including subduing of well, fire fighting.
6.	738	Capping including subduing of well, fire fighting.

7.	1528	Analysis of data to prepare job design, procedure for execution and details regarding monitoring.
8.	1532	Study for selection of enhanced Oil Recovery processes and conceptual design of Pilot Tests.
9.	1520	Engineering and technical support to ONGC in implementation of Cyclic Steam Stimulation in Heavy Oil Wells.
10.	2794	Assessment and processing of seismic data along with engineering and technical support in implementation of Cyclic Steam Stimulation.
11.	1524	Conducting reservoir stimulation studies in association with personnel of ONGC.
12.	1535	Laboratory testing under simulated reservoir conditions.
13.	1514	Consultancy for optimal exploitation of hydrocarbon resources.
14.	2797	Consultancy for all aspects of Coal Bed Methane.
15.	6174	Analysis of data of wells to prepare a job design.
16.	1517	Geological study of the area and analysis of seismic information reports to design 2 dimensional seismic surveys.
17.	7226	Opinion on hydrocarbon resources and foreseeable potential.
18.	7227	Opinion on hydrocarbon resources and foreseeable potential.
19.	7230	Opinion on hydrocarbon resources and

		foreseeable potential.
20.	6016	Opinion on hydrocarbon resources and foreseeable potential.
21.	6008	Evaluation of ultimate resource potential and presentations outside India in connection with promotional activities for Joint Venture Exploration program.
22.	1531	Review of sub-surface well data, provide repair plan of wells and supervise repairs.
23.	733	Repair of gas turbine, gas control system and inspection of gas turbine and generator.
24.	741	Repair and inspection of turbines.
25.	737	Repair, inspection and overhauling of turbines.
26.	736	Inspection, engine performance evaluation, instrument calibration and inspection of far turbines.
27.	1522	Replacement of choke and kill consoles on drilling rigs.
28.	1521	Inspection of gas generators.
29.	1515	Inspection of rigs.
30.	2012	Inspection of generator.
31.	1240	Inspection of existing control system and deputing engineer to attend to any problem arising in the machines.
32.	1529	Inspection of drilling rig and verification of reliability of control systems in the drilling rig.

33.	2008	Expert advice on the device to clean insides of a pipeline.
34.	2795	Feasibility study of rig to assess its remaining useful life and to carry out structural alterations.
35.	925	Engineering analysis of rig.
36.	1519	Imparting training on cased hold production log evaluation and analysis.
37.	1533	Training on well control.
38.	1518	Training on implementation of Six Sigma concepts.
39.	1516	Training on implementation of Six Sigma concepts.
40.	6023	Training on Drilling project management.
41.	2796	Training in Safety Rating System and assistance in development and audit of Safety Management System.
42.	1239	To develop technical specification for 3D Seismic API modules of work and to prepare bid packages.
43.	1527	Supply supervision and installation of software which is used for analysis of flow rate of mineral oil to determine reservoir conditions.
44.	1523	Supply, installation and familiarization of software for processing seismic data.

The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with

prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act. On the basis of the said conclusion reached by us, we allow the appeals under consideration by setting aside the orders of the High Court passed in each of the cases before it and restoring the view taken by the learned Appellate Commissioner as affirmed by the learned Tribunal.

14. Consequently, all the appeals are allowed with no order as to the costs.

.....J.
[RANJAN GOGOI]

.....J.
[PINAKI CHANDRA GHOSE]

NEW DELHI;
JULY 01, 2015.