Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2235 OF 2008

Larsen & Toubro Limited, a company incorporated under the Indian Companies Act, 1913 and having it registered office at L&T House, Ballard Estate, Mumbai 400001. ...Petitioner

Versus

1. Girish Dave, Director of Income-tax (International Taxation) having its office at 1st Floor, Scindia House, N.M. Marg, Ballard Pier, Bombay 400 038.
2. Vinay Sinha, Deputy Income-tax (International Taxation) 4(1) Mumbai having its office at 133 Scindia House, N.M. Marg, Ballard Pier, Bombay 400 038.
3. Union of India, Aaykar Bhavan, Maharshi Karve Road, Mumbai 400 010 ...Respondents

Mr. Percy Pardiwalla, Senior Advocate, a/w Mr. Vikram Trivedi, Mr. Sunil Tilokchandani, Ms. Nipa Ghosh & Ms. Neha Javeri, i/b M/s. Manilal Kher Ambalal & Co., for the Petitioner.

Mr. Suresh Kumar, for the Respondents.

CORAM: K. R. SHRIRAM & N. J. JAMADAR, JJ

RESERVED ON: 17th FEBRUARY, 2022

PRONOUNCED ON: 28th FEBRUARY, 2022

JUDGMENT: (PER : N. J. JAMADAR, J.)

1. Rule. Rule made returnable forthwith, and with the consent of the Counsels for the parties, heard finally.

2. This petition under Article 226 of the Constitution of India takes exception to an order dated 18th July, 2008, passed by Director of Income-tax (International Taxation), Mumbai, under Section 264 of the Income Tax Act, 1961 ("the Act, 1961"), whereby the application preferred by the petitioner against the order dated 15th February, 2008, passed by Deputy Director of Income-tax (International Taxation) 4(1), Mumbai ("the Assessing Officer") under Section 195 of the Act, 1961, came to be rejected.

3. The background facts leading to this petition can be summarized as under:

(a) The petitioner is a public limited company and an engineering conglomerate and carries out varied business activities through independent divisions. On 6th February, 2006, the petitioner had entered into a contract with the Oil and Natural Gas Corporation Ltd. ("ONGC"), whereunder the petitioner was awarded the contract for survey (pre-engineering, pre-construction/pre-installation and post-installation), design engineering, procurement, fabrication, load out, tie-down/seas fastening tow out/sail out, transportation, installation, hook-up modifications of existing facilities, testing, pre-commissioning, commissioning of the BCP Booster Compressor Platform Project situated at an offshore location on Bombay high. On 28th

February, 2006, the petitioner along with Samsung Heavy Industries Company Limited entered into another agreement with ONGC to execute the wok of survey, design engineering etc. under the Vasai East Development Project.

(b) To execute the contractual obligations, the petitioner had to transport certain equipment from its yard to offshore sites. For the said purpose, the petitioner had to take on hire barges and tugs from six non-resident assessees, namely: Off-shore Charters Pte. Ltd., Tickwink Pte. Ltd., Girino Enterprises Pte. Ltd., Airmat Singapore Pte. Ltd., Ellisons Imexports Pte. Ltd. and Atlantic Off-shore Services LLC. The barges were taken on a bare boat charter and the tugs were taken on a time charter. Thus, illustratively, Charter Party was entered into between the petitioner and Ticwink Pte. Ltd. – a time charter, and between the petitioner and Atlantic Off-shore Services LLC Ltd. – a bare boat charter.

(c) Since the barges and tugs were to be used for transportation of equipment from the petitioner's yard to offshore site, where the platform was to be erected, the petitioner was of the view that if the income that accrued to the vessel owner would be chargeable to tax in India, the same would have to be computed in accordance with the methodology provided for,

in Section 44BB of the Act, 1961. Thus, the petitioner submitted an application to the Deputy Director of Income-tax (International Taxation) – the Assessing Officer under Section 195(2) of the Act, 1961, seeking permission to remit the charter hire after deducting tax at source at the rate of 4.223%, on the income component of the charter hire, which was estimated at 10% of the gross amount. Documents were tendered and further submissions were made before the Assessing Officer in support of the said claim.

4. By an order dated 31st December, 2007, the Assessing Officer accepted the stand of the petitioner and directed the petitioner to withhold tax at the rate of 4.223% on the entire payment to the OFFSHORE CHARTERS PTE LTD. ("OCL"), one of the non-resident assessee, opining that Section 44BB of the Act had a clear application. It was further clarified that the said certificate was to be valid for payments due till 31st March, 2008, unless cancelled earlier with intimation.

5. On 28th January, 2008, the Assessing Officer again sought clarification as to how the income of the recipient would be governed by the provisions of Section 44BB of the Act, 1961, and also directed the petitioner to explain as to why the transaction be not treated in the nature of "Royalty" as defined in Section

9(1)(iv) read with Clause (iva) of Explanation 2 and why the taxability of the same be not governed by Section 115A.

6. The petitioner, through its representative, appeared before the Assessing Officer and furnished the necessary clarification and documents. However, by an order dated 15th February, 2008, under Section 195 of the Act, 1961, the Assessing Officer held that the petitioner was required to withhold taxes at the rate of 11.729% of the invoice amount paid to the non-resident assessee. In the process, the Assessing Officer recorded that the payments to be made by the petitioner for hire of tugs and barges was for commercial equipments and, therefore, it would fall within the meaning of royalty in terms of Clause (iva) of Explanation 2 to Section 9(1)(vi) and would be exigible to tax at the rate of 10% in view of Section 115A of the Act, 1961 as well as Article 12 of the Singapore Treaty. It was further observed that Section 44BB was inapplicable as the said dispensation was applicable only to a person, who renders services or supplies plant and machinery to a party in the business of actual exploration of mineral oil and since the petitioner was not engaged in the business of exploration of mineral oil and was only assisting ONGC in the said business, the provisions of Section 44BB were inapplicable to a sub-contractor or service provider, like the petitioner.

7. Being aggrieved, the petitioner preferred an application under Section 264 before the Director of Income Tax (International Taxation) – respondent no.1. Relevant documents and submissions were placed before respondent no.1 as well. By the impugned order, respondent no.1 was persuaded to reject the application holding that the equipment hired by the petitioner (barges and tugs) were mere transport facilities used for transport of equipment from petitioner's yard to offshore site. Placing reliance on a decision of Income Tax Appellate Tribunal (Delhi) in ***O.N.G.C. vs. Inspecting Assistant Commissioner*[1]*,*** respondent no.1 held that Section 44BB was not applicable where equipment is used to merely transport men and material to the offshore sites.

8. Being further aggrieved by and dissatisfied with the aforesaid view of respondent no.1 declining to extend the benefit of Section 44BB of the Act, 1961, the petitioner has invoked the writ jurisdiction of this Court.

9. The substance of the petition is that the authorities committed a manifest error in arriving at the conclusion that the payments made by the petitioner to non-resident assesses (vessel owners) would amount to "Royalty" within the meaning of Clause (iva) of Explanation 2 to Section 9(1)(iv) of the Act, 1961

1 1989 (29) ITD 422 Del.

and that the provisions contained in Section 44BB of the Act would not govern the case of the petitioner.

10. We have heard Mr. Pardiwalla, the learned Senior Counsel for the petitioner, and Mr. Suresh Kumar, the learned Counsel for the respondent – revenue, at length. With the assistance of the learned Counsels for the parties, we have also perused the material on record including the orders passed by the Assessing Officer and respondent no.1 – Director of Income Tax.

11. Mr. Pardiwalla, the learned Counsel for the petitioner, submitted that the authorities fell in error in recording that Section 44BB of the Act, 1961 did not govern the facts of the case as, according to the authorities, it was a case of mere transportation of equipment from the yard to offshore location. The authorities misdirected themselves in concluding that the payment was in the nature of "Royalty" within the meaning of Clause (iva) of Explanation 2 to Section 9(1)(iv) of the Act, 1961 as the payment was in connection with the use or right to use commercial equipment. Mr. Pardiwalla strenuously submitted that the authorities fell in the aforesaid error as they lost sight of the exception carved out by the latter part of Clause (iva) to the effect that 'such consideration does not include the amounts referred to in Section 44BB of the Act'. Had the authorities

considered the wide amplitude of the special provision for computing profits and gains in connection with the business of exploration etc. of mineral oils, incorporated in Section 44BB, by employing the expression, “in connection with”, the authorities would not have taken such a narrow view that the use of the barges and tugs to carry the BCP-B2 Booster Compressor from the yard to offshore platform was a case of mere transportation of equipment. Mr. Pardiwalla laid emphasis on the end use of the services and facilities. If the service or facility is inextricably linked with the prospecting for, or extraction or production of, mineral oils, the special dispensation provided under Section 44BB of the Act, 1961 must be extended to a non-resident assessee as it was intended to achieve a definite purpose.

12. Mr. Suresh Kumar, the learned Counsel for the Revenue, on the contrary, submitted that no fault can be found with the impugned order. Respondent no.1 has ascribed justifiable reasons in paragraphs 14 and 15 of the impugned order to arrive at the conclusion that the tugs and barges hired by the petitioner were used for transport of equipment from its yard to the offshore site. In the circumstances, the authorities were within their rights in drawing an inference that the payment was in the nature of royalty within the meaning of Clause (iva) of Explanation 2 to Section 9(1)(iv) of the Act, 1961.

13. As the controversy revolves around the question as to whether the payment of charter hire for the tugs and barges by the petitioner falls within the ambit of 'royalty' under Section 9(1)(iv) or is covered by the special provision contained in Section 44BB of the Act, 1961, for a correct appreciation in a proper perspective, it may be advantageous to extract the relevant provisions of the Act, 1961.

The relevant part of Section 9 reads as under:

> **"Section 9:**
>
> **Income deemed to accrue or arise in India :**
>
> **9.** (1) The following incomes shall be deemed to accrue or arise in India :—
>
> ....
>
> (*vi*) income by way of royalty payable by—
>
> (*a*) ....
>
> (*b*) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of 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
>
> ....
>
> *Explanation 2.*—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—
>
> ....
>
> (*iva*) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB."
>
> ....

The relevant part of Section 44BB reads as under:

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

The relevant part of Section 195 reads as under:

> **Section 195:**
>
> **195. [**(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) [or section 194LD] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:
>
> **[Provided** that in the case of interest payable by the Government or a public sector bank within the meaning of clause (*23D*) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.]

14. A conjoint reading of Section 9(1)(iv) with Clause (iva) of Explanation 2 and Section 44BB of the Act, 1961, extracted

above, would indicate that any income by way of royalty, payable by a person, who is a resident, includes consideration for the use or right to use any industrial, commercial or scientific equipment but does not include the amounts referred to in Section 44BB. And such royalty shall be deemed to be the income accruing or arising in India.

15. Evidently, Section 44BB incorporates a special provision for computing profits and gains in connection with business of exploration, extraction or production of mineral oils. It begins with a non-obstanate clause qua Sections, 28 to 41, 43 and 43A, and provides that in 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 10% 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 head, "profits and gains of business and profession." However, the proviso takes the cases, which are governed by Section 42, 44D, 44DA, 115A or 293A from the ambit of sub-section (1) of Section 44BB for the purpose of computing profits and gains or other income referred to in those sections. In other words, if a case is governed by the provisions contained in Section 44, 44D,

44DA, 115A or 293A, the deeming provision of assuming 10% profits and gains of the aggregate amounts from out of such business, shall not come into play.

16. The phraseology of Section 44BB(1), extracted above, indicates that for its applicability the following conditions must be satisfied:

(i) The assessee ought to be a non-resident, and

(ii) Such non-resident assessee should be engaged in the business of providing services or facilities or supplying plant and machinery on hire, and

(iii) The services or facilities so provided shall have connection with prospecting for, or extraction or production of, mineral oil, or;

(iv) the plant and machinery so supplied on hire should be used in the prospecting for, or extraction or production of, mineral oils.

(v) If the aforesaid conditions are satisfied, then a sum equal to 10% of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains chargeable to tax.

17. It would be contextually relevant to note that under

Explanation 2 to Section 9(1)(iv), which defines “royalty” for the purpose of the said clause to mean consideration, *inter alia,* for the use or right to use any industrial, commercial or scientific equipment, the amounts referred to in Section 44BB stand excluded (Clause (iva)).

18. In the light of the aforesaid, the pivotal question which wrenches to the fore is, whether, in the facts of the case at hand, the payment made by the petitioner towards charter hire of the tugs and barges for executing the contract entered into with ONGC falls within the purview of Section 44BB of the Act, 1961 and thus entitled to special dispensation thereunder.

19. At the threshold, we may note that the view of the Assessing Officer that the benefit of Section 44BB would be admissible only to the person directly using the services/plants and machinery for exploring, extracting or producing mineral oils and not to the entity which executes the contract for such person is not borne out by the text of Section 44BB. It is imperative to note that the service provider in this case being a non-resident assessee, under Section 195 of the Act, the petitioner – assessee was enjoined to deduct income tax thereon at source at the applicable rates. Moreover, there is material to indicate that in the case at hand, the petitioner had grossed up

the profits by 10% and thereafter paid the taxes.

20. This propels us to the core question as to whether the hire of the tugs and barges by the petitioner had any connection with the exploration, extraction or production of mineral oils. On the factual score, there does not appear much controversy as regards the nature of the contract between ONGC and the petitioner. The observations of Director of Income Tax – respondent no.1, in paragraph 14, on which reliance was placed by Mr. Suresh Kumar, make this position absolutely clear. It reads as under:

> "**14.** In this backdrop, it may be seen that ONGC has given contract to L&T, the contractor to design, engineering, procurement, fabrication, load-out, tie-down/sea fastening, tow-out/sail-out, transportation/installation of platform, modifications at existing facilities, hook-up, testing, pre- commissioning, start-up and commissioning of entire facilities. The platform was to be commissioned on turnkey basis at Bassein field offshore site and this platform was to be used in maintaining and enhancing the production/extraction rate of mineral oil. The tug, which has been hired by L&T was used for towing the compression module of platform from their yard to offshore platform by TPL."

21. From the aforesaid observations an inference becomes inescapable that the scope of work under the contract was comprehensive from survey to the commissioning of entire facilities on turn key basis at Bassein field offshore site. The said platform was to be used in maintaining and enhancing the production/extraction capacity of mineral oil. The tugs hired by

the petitioner were used for towing the compression module of platform, from petitioner's yard to offshore platform. At this juncture, it would be contextually relevant to note that in connection with the execution of the said contract, the Director General of Hydro Carbons had issued Essentiality Certificate to import the cargo (barge) for the petroleum operations.

22. Can the transportation of the Compression Module be said to be a mere transportation of equipment/material? In our view, answer to this question is required to be explored in the context of the utility of the equipment to the exploration, extraction and production of the mineral oils. Whether the said equipment used was indispensable for, or is inextricably connected with, exploration, extraction and production of mineral oils bears upon the controversy at hand.

23. From the text of Section 44BB extracted above, it becomes evident that the emphasis is not on the service, facility or plant and machinery. What is the linchpin of the provision is the connection of the service or facility with, or the use of the plant and machinery on hire for, exploration, extraction or production of mineral oils. The Explanation 2 to Section 44BB provides that for the purpose of the said section, "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and

equipment, used for the purposes of the said business. The definition of "plant" is thus inclusive and subsumes within its fold means of transport, equipment and machinery, which can be utilised for the purpose of exploration, extraction and production of mineral oils.

24. From this standpoint, we find substance in the submission of Mr. Pardiwalla that the use of the expression 'in connection with' in Section 44BB is of significance. The said expression, expands the horizon of the services or facilities, provided by a non-resident assessee, which fall within the ambit of the said provision, provided they have connection with the exploration, extraction or production of mineral oils. The emphasis is not as much on the service, facility as plant as on the purpose to which it is put to. It is the proximity or connection of the service, facility, plant or machinery with the process of exploration, extraction and production of mineral oils, that is of determinative significance.

25. The reliance placed by Mr. Pardiwalla on the judgment of the Supreme Court in the case of ***Oil and Natural Gas Corporation Limited vs. Commissioner of Income Tax and another***[2] appears to be well placed. In the said case, the Supreme Court considered the following question:

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2 (2015) 7 Supreme Court Cases 649.

> "Whether the amounts paid by 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 44-D 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 44-BB of the Income Tax Act?"

26. After adverting to the provisions contained in Sections 44BB and 44D, the Supreme Court enunciated that it is the proximity of the work, contemplated under an agreement executed with a non-resident of 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 following observations of the Supreme Court in paragraphs 13 and 14 are instructive and hence extracted below:

> "**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 44-BB or Section 44-D 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)(vii) 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 44-BB and not Section 44-D of the Act.
>
> **14.** 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……………"
>
> (emphasis supplied)

27. Applying the aforesaid test of pith and substance to the facts of the said case, the Supreme Court concluded that the pith and substance of each of the contract and agreement in the said case was inextricably connected with prospecting, extraction and production of mineral oil. The dominant purpose of each of such agreements was for prospecting, extraction or production of mineral oils though there might be certain ancillary works contemplated thereunder, and, therefore, the

Supreme Court held that the payments made by the ONGC and received by the non-resident assessees or foreign companies under the said contracts were more properly assessable under the provisions of Section 44BB and not under Section 44D of the Act.

28. Applying the aforesaid ratio to the facts of the case at hand, where there is no qualm over the fact that the petitioner had entered into a contract with ONGC on turn-key basis for enhancing the exploration/production capacity of the platform at Bassein field offshore site and, for the said purpose, the petitioner had hired the tugs and barges from non-resident assessees, we are of the view that the authorities were not justified in arriving at the conclusion that the use of the tugs and barges was in the nature of a mere transportation facility. On facts, respondent no.1, in terms, recorded that tugs were hired by the petitioner to transport the Compressor module from the yard to the offshore platform. The said compressor module, as it emerges from the record, was an integral part of the execution of the contract by the petitioner.

29. In the aforesaid factual backdrop, if we consider the object of special dispensation and the proximate use, to which the facility / service or plant and machinery was put to, an inference

becomes irresistible that the hire of the tugs and barges, to transport an integral part of the equipment to enhance the exploration / production capacity, was inextricably connected with the extraction and production of mineral oil.

30. For the foregoing reasons, we are persuaded to hold that the payments made by the petitioner to the non-resident assessess in the execution of the contract with ONGC is properly assessable under the provisions on Section 44BB of the Act, 1961. Thus, the impugned order deserves to be quashed and set aside.

31. Hence, the following order:

: O R D E R :

(i) The order dated 18th July, 2008 passed by the Assessing Officer - Director of Income-tax (International Taxation), Mumbai, under Section 264 of the Act, 1961 and the order dated 15th February, 2008 passed by the Deputy Director of Income-tax (International Taxation) 4(1), Mumbai, under Section 195 of the Act, 1961, stand quashed and set aside.

(ii) It is declared that the payments made by the petitioner to the non-resident assessee are

assessable under Section 44BB of the Act, 1961 and the petitioner shall be entitled to all the consequential benefits in accordance with law.

(iii) Rule made absolute in the aforesaid terms.

No costs.

[N. J. JAMADAR, J.] **[K. R. SHRIRAM, J.]**