Delhi HC's Recent Decision on Taxation of NR's Services to Oil Industry - A Critique

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The taxation in India of income derived by non-resident vendors from providing services to oil and gas companies engaged in prospecting, extraction or production of mineral oils has always been contentious. The resolution of aforesaid conflict involves examination of not one, but multiple provisions of the Income Tax Act, 1961 ('the Act'), i.e., section 9(1)(vi) relating to taxation of 'royalty', section 9(1)(vii) relating to taxation of 'fee for technical services' ('FTS'), section 115A[3] prescribing preferential rate of tax on 'royalty/FTS' earned by non-resident assessee not having a Permanent Establishment ('PE') in India, section 44DA[4] prescribing preferential rate of tax on 'royalty/FTS' earned by non-resident assessee having a PE in India, and section 44BB[5], a presumptive scheme taxing gross receipts of such non-residents @ 10%.

Given the simplified and preferential rate of tax prescribed in section 44BB, the preference of non-resident assessee(s) is to offer and pay tax under the said section, whereas the Revenue seeks to tax such income either on gross basis under section 9(1)(vi)/(vii) read with section 115A or as 'business income' under section 44DA of the Act.

The contentious issue of taxability of income derived by non-resident vendors from providing services to oil and gas companies engaged in prospecting, extraction or production of mineral oil under sections 44DA/115A or section 44BB has been disputed/litigated in various cases before the High Courts and the Supreme Court and was recently the subject matter of dispute before the Delhi High Court in the case of ***Paradigm Geophysical Pty Ltd***.[6]

Before delving on the recent decision of the Delhi High Court in the case of ***Paradigm Geophysical (supra)***, it is imperative to understand the legal background in which the said decision was rendered including the prevalent judicial precedents on the controversy and the amendments which have been brought into the statute.

Legal background

The decision of the Supreme Court in the case of **ONGC Ltd. v. CIT**: brought some clarity on the aforesaid issue. In that case, the issue raised for consideration before the Supreme Court was whether the amounts paid by ONGC Ltd. to the non-resident vendors for rendering various services in connection with prospecting, extraction or production of mineral oil would be chargeable to tax under section 44D (which governed taxation of Royalty/FTS prior to insertion of section 44DA) read with Explanation 2 to section 9(1)(vii) or whether income from such payments would be taxed on presumptive basis under section 44BB of the Act.

The Supreme Court held that consideration received for services rendered by a non-resident in connection with prospecting for or extraction or production of mineral oil was not FTS, in view of the exclusion contained in Explanation 2 to section 9(1)(vii) of the Act, which excludes any payment received for construction, assembly, mining or like project undertaken by the recipient, from the ambit of FTS.

In coming to the aforesaid conclusion, the Court referred to the Mines Act, 1952 and the Oil Fields (Development) and Regulation Act, 1948 to conclude that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation.

The Court further took note of Circular No.1862 dated 22.10.1990 issued by the Central Board of Direct Taxes (CBDT), taking into account the opinion rendered by the then Attorney General of India, clarifying that operations of prospecting for, extraction or production of mineral oil are `mining' operations and even services rendered in relation to operations for exploration or exploitation of oil and natural gas, such as imparting of training for carrying out drilling , would be covered under the expressions 'mining project' or `like project' occurring in Explanation 2 to section 9(1)(vii) and for this reason, such payments received by

non-residents would qualify for taxation under section 44BB and not section 44D of the Act.

Accordingly, the Court held that since Explanation (a) to section 44D provides that FTS as mentioned in that section would have the same meaning as provided in Explanation 2 to section 9(1)(vii), services excluded from the definition of FTS would also be excluded from the ambit of section 44D of the Act.

The Court then examined the nature of services provided by various foreign companies under 44 different contracts entered with ONGC Ltd. which were broadly classified under the following heads:

1) Seismic surveys and drilling for oil and gas;

2) Services for starting / restarting / enhancing production of oil and gas from wells;

3) Services for prospecting for or exploration of oil and / or gas;

4) Planning and supervision of repair of wells;

5) Repair, inspection of equipment used in the exploration, extraction or production of oil & gas;

6) Imparting Training;

7) Consultancy in regard to exploration of oil & gas;

8) Supply, installation, etc. of software used for oil & gas exploration.

On an analysis of the nature of services in each contract, the Court held that since the dominant purpose or pith and substance of the contract was rendering services for prospecting, extraction or production of mineral oils, the income received would be more appropriately assessable under section 44BB as opposed to section 44D of the Act.

In view of the above, the Court held that where the services provided are directly associated or inextricably connected with prospecting, extraction or production of mineral oil, the consideration received therefor shall not be regarded as “fees for technical services” under Explanation 2 to section 9(1)(vii) in view of the exclusionary clause but taxable under section 44BB of the Act, notwithstanding that the non-resident service provider was not itself directly engaged in prospecting, extraction or production of mineral oil.

The aforesaid decision, therefore, settled two issues – (i) meaning of the word ‘mining’ and (ii) that the non-resident service provider need not be directly engaged in mining, to fall within the exception in Explanation 2 to section 9(1)(vii) of the Act.

In view of the above, the said decision of Supreme Court laid down aforesaid important principles, providing resolution of contentious issues relating to taxation of non-resident assessees rendering services to oil and gas companies. Several controversies which did not arise for consideration before the Supreme Court, viz, taxation of royalty earned by non-resident assessees or interplay between applicability of section 44 BB or section 44 DA of the Act still continue to plague the Courts.

Amendment in sections 44BB and 44DA by the Finance Act, 2010

Section 44D applied only in respect to income earned by a taxpayer from agreements entered into on or before 31.03.2003. Vide Finance Act 2003, section 44DA was inserted in the Act, w.e.f., 01.04.2004, providing mechanism for computing income by way of Royalty/FTS earned by non-resident through PE/fixed base in India from agreements entered after 31.03.2003.

A confusion persisted as to whether technical services rendered by non-residents to oil and gas companies would be covered under section 44BB or section 44DA of the Act. Prima facie, it appeared that there was overlap/ conflict between the scope of sections 44BB and 44DA; thus, the assessees argued that between the aforesaid competing provisions, the former being a more specific provision would prevail over the latter.

It was further argued that although proviso to section 44BB excluded income assessable under section 44D/115A from the ambit of section 44BB but no such exclusion was provided for income falling within the ambit of section 44DA of the Act. Thus, in the absence of such an exclusion, there was no compelling reason to assign a narrow and restricted meaning to the expression 'services' appearing in section 44BB and confine / limit the same to services other than services of technical, consultancy or managerial nature.

Accepting the aforesaid arguments of the assessee, the Authority for Advance Ruling held that provisions of section 44BB would prevail over section 44DA and thus, profits derived from the business of providing

services in connection with prospecting for or extraction or production of mineral oils would be exclusively governed by section 44BB of the Act, irrespective of the nature of such services, provided the services were intimately connected to prospecting and exploration of oil.[7]

In order to provide clarity on the scope of section 44BB vis-a-vis section 44DA in relation to income by way of FTS/Royalty arising from services rendered in connection with exploration of mineral oil, the Finance Act, 2010 amended the aforesaid sections, through insertion of following provisos, having effect from 01.04.2011:

- Proviso to section 44BB(1) was amended to provide that the provisions of the aforesaid section shall not apply to income which is separately covered section 44DA of the Act;
- Second proviso was inserted in section 44DA(1) providing that provisions of section 44BB shall not apply in cases where provisions of section 44DA are applicable.

The relevant extract of Memorandum explaining provisions in the Finance Bill, 2010 wherein the legislative intent behind the aforesaid amendment has been stated, is reproduced hereunder:

"……***Combin e d effect of the provisions of sections 44BB, 44DA and 115A is that if the income of a non-resident is in the nature of fee for technical services, it shall be taxable under the provisions of either section 44DA or section 115A irrespective 'of the business to which it relates. Section 44BB applies only in a case where consideration is for services and other facilities relating to exploration activity which are not in the nature of technical services. However, owing to judicial pronouncements, doubts have been raised regarding the scope of section 44BB vis-a-vis section 44DA as to whether fee for technical services relating to the exploration sector would also be covered under the presumptive taxation provisions of section 44BB. In order to remove doubts and clarify the distinct scheme of taxation of income by way of fee for technical services, it is proposed to amend the proviso to section 44BB so as to exclude the applicability of section 44BB to the income which is covered under section 44DA. Similarly, section 44DA is also proposed to be amended to provide that provisions of section 44BB shall not apply to the income covered under section 44DA***. *These amendments are proposed to take effect from 1st April 2011 and will, accordingly, apply in relation to the assessment year 2011-12 and subsequent years."*

(emphasis supplied)

In view of the above, the amendments made by the Finance Act, 2010 delineated the scope of sections 44BB and 44DA and clarified that income in the nature of FTS/Royalty would be taxable under section 44DA and not section 44BB of the Act, notwithstanding that the same related to the activity of prospecting, exploration or production of mineral oil.

Decisions of Delhi High Court explaining the said amendments

Subsequently, the Delhi High Court in the following two decisions, which although were rendered in the context of legal position prior to amendment by Finance Act, 2010, examined effect of the said amendment and made certain pertinent observations on the same:

▪ In the case of **DIT v. OHM Ltd**.: [TS-879-HC-2012(DEL)-O] (Del), the Court held that section 44BB being industry specific provision was a special provision which would override the general provisions of section 44DA of the Act.

As regards the effect of the amendment by Finance Act, 2010, it was observed that the proviso to section 44BB(1) could only mean that the said section would not be applicable where the services rendered did not fall under that section, but were more general in nature so as to fall under section 44DA. Similarly, the second proviso to section 44DA(1) could only be interpreted to mean that where the services were general in nature and fell under that section read with Explanation 2 to section 9(1)(vii), then, an assessee rendering such services could not claim the benefit of being assessed on the basis of the computational mechanism as provided in section 44BB. In other words, the amendment could not have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation or to take away the separate identity of section 44BB of the Act.

▪ In the case of **PGS Exploration (Norway) AS vs. ADIT**: [TS-5106-HC-2016(DELHI)-O] , the Court held that the conflict between section 44BB and 44DA was resolved by the Finance Act, 2010. Thus, post amendment (i.e., after 01.04.2011), income falling within the scope of section 44DA would be excluded from the scope of section 44BB of the Act; prior to the amendment (i.e., during the period from 01.04.2004 to 01.04.2011), however, tax on any income being in the nature of FTS falling within section 44DA, which was not expressly excluded from the scope of section 44BB of the Act ,would be assessable under the latter section. In other

words, the Delhi High Court upheld the argument of section 44BB being special provision to prevail over section 44DA, but for the period prior to amendment in both the sections, through insertion of Provisos.

The aforesaid issue was once again, considered by the Delhi High Court in the case of ***Paradigm Geophysical (supra)*** which threadbare examines all the provisions relating to the said controversy.

Facts of the case

The assessee, an Australian company, was engaged in the business of developing and providing customized software enabled solutions for processing of raw seismic data and other installation/upgradation/annual maintenance services in relation thereto. The solutions provided by the assessee are used by the Indian oil and gas industry in carrying out the excavation, extraction, production activities.

The ownership in the software was not transferred; only licence to use the said software was granted to the purchasers, viz., Oil India ltd. (OIL), ONGC, RIL etc. The said software aided in ascertaining the drilling spots where probability of finding oil would be maximum though the same was not required to be deployed to be used on the drilling site.

It is pertinent to note that in the facts of the case and decision rendered by the Court, there is no categorical averment by the Revenue regarding existence of permanent establishment ('PE') of the non-resident assessee in India.

In the return of income filed for AY 2012-13, the assessee had opted for presumptive taxation under section 44BB in connection with income arising from supply of software as well as other services such as installation, maintenance and upgradation rendered in relation thereto. The assessing officer ('AO'), however, held that the services provided by the assessee fell within the purview of Royalty/FTS and were, therefore, liable to be taxed under section 44DA instead of section 44BB of the Act. The AO did not categorically specify whether the receipts or any part thereof fell within the ambit of FTS and/or Royalty; the AO also did not record any finding as to whether the assessee had PE in India and that such receipts were effectively connected with such PE, if any.

The assessee did not file an appeal against the assessment order but chose to exercise the alternate remedy of filing Revision Petition under Section 264 of the Act before the Commissioner of Income Tax ('CIT'), claiming that the assessee was wrongfully denied the benefit of assessment under section 44BB of the Act.

The CIT rejected the revision petition, primarily on the ground of maintainability, without dealing with merits of the case. Considering that no right of appeal against 264 order is available under the statute, the assessee exercised constitutional remedy of assailing the said order by way of writ petition before the High Court, in terms of Article 226 of the Constitution.

Allowing the writ of the assessee, the High court remanded the matter back to the CIT with a direction to examine the case on merits, with liberty to the assessee to challenge the same in case of an adverse outcome.

On remand, the CIT upheld the taxability under section 44DA and rejected the assessee's claim of taxation on presumptive basis under section 44BB, inter alia, on the following grounds:

Ø The CIT gave a restrictive interpretation to the expression 'mining or like project' occurring in Explanation 2 to section 9(1)(vii) and held that since the software was not directly used in drilling, income earned by non-resident assessee from supply of the same, could not be said to be inextricably connected with drilling and prospecting so as to be excluded from the definition of FTS under the aforesaid Explanation;

Ø CIT also observed that grant of license of right to use the computer software would also fall under the definition of royalty under clause (v) of Explanation 2 to section 9(1)(vi) of the Act;

Like the assessment order, the CIT's order was also ambiguous as to the exact nature of receipts, viz. whether Royalty or FTS or partly Royalty and party FTS. Despite the aforesaid ambiguity in the exact nature of receipt(s), the CIT upheld the taxation of entire income under section 44DA of the Act

Aggrieved with the aforesaid order, the assessee filed writ petition before the High Court.

Issue involved

Whether income earned from supply of the software and from providing services such as installation, upgradation and maintenance, would be taxable as FTS/Royalty under section 44DA/115A r.w.s. 9(1)(vi)/(vii) or under section 44BB of the Act, being special provision for taxation of income to non-residents from

business connected with oil exploration?

Arguments of the parties

Ø assessee

- It was argued that the services rendered by the non-resident assessee viz, customized software enabled solutions for processing of raw seismic data and other installation/upgradation/annual maintenance services rendered in relation thereto were inextricably linked with the extraction or production of mineral oil and thus income therefrom would be taxable under section 44BB and not section under 44DA of the Act. For the aforesaid, reliance was placed upon the decision of Supreme Court in the case of ***ONGC Ltd. (supra)***, wherein it was held that services inextricably linked with the extraction or production of mineral oil would be excluded from the definition of FTS, and would be assessable under Section 44BB of the Act.
- The income from grant of licence for use of specialized software was also not in the nature of 'Royalty', since the right to use the copyrighted software fell outside the ambit of said definition under section 9(1)(vi) read with relevant Article of the Treaty, as per the repeated decisions of the Delhi High Court.[8]
- Relying upon the decision of Delhi High Court in the case of ***OHM Ltd. (supra)***, it was argued that the services which were inextricably linked with prospecting and extraction of mineral oil would be covered under the special provisions of section 44BB, as opposed to section 44DA, which was generally applicable to income by way of royalty/FTS for any other industry. It was further argued that amendments made in the aforesaid sections through insertion of Proviso(s) by the Finance Act, 2010 would not obliterate the intent and separate identity of the special provision i.e., section 44BB.

Ø Revenue

- The Revenue contended that since the software was not deployed at the drilling-site, thus, income from supply of software and services provided in relation thereto by the assessee could not be said to be wholly and inextricably connected with drilling and prospecting for being excluded from the definition of FTS as per Explanation 2 to section 9(1)(vii) of the Act so as to fall within the ambit of section 44BB of the Act.
- Supply of software by the assessee fell under the ambit of Royalty as defined under clause (vi) of Explanation 2 to section 9(1) in view of the decision of Karnataka High Court in the case of **CIT v. Synopsis International Old Ltd. (2012)** [TS-5554-HC-2010(KARNATAKA)-O] (Kar).
- The decision of Supreme Court in the case of ***ONGC Ltd. (supra)*** was not applicable since in that case, the services provided to ONGC by the contractors did not qualify as FTS in view of exclusionary part of Explanation 2 to Section 9(1)(vii) and thus, income relating thereto was held to be outside the purview of section 44DA and rightly assessable under section 44BB of the Act. The applicability of section 44BB to services falling in the nature of royalty was not examined by the Supreme Court.
- Further, the said decision was rendered in context of pre-amendment period and the amendment had curtailed the applicability of section 44BB by providing that income falling within the ambit of section 44DA of the Act (Royalty/FTS) would not be taxable under the former section.
- In view of the above, it was argued that since the receipts by non-resident assessee were either royalty or FTS, the same were ousted from section 44BB by virtue of the proviso thereto, and would be taxable under section 44DA of the Act.

Decision of the Delhi High Court

Re: Scope of sections 44BB and 44DA post amendment

- The Court held that after amendment in sections 44BB and 44DA made by Finance Act, 2010, section 44BB has been made inapplicable qua income falling within the ambit of section 44DA of the Act. Accordingly, the Court held that after the amendment, the overall scheme of sections 44BB and 44DA made it apparent that section 44BB applied to assessees engaged in rendering services or facilities in connection with prospecting or extraction or production of mineral oil; however, if income earned by such assessee takes the color of royalty or FTS, then, provisions of section 44DA of the Act would be applicable, even if the non-resident had provided such services in relation to mineral oil exploration.
- Further, the Court relying upon the decision in case of PGS Exploration (supra) rejected the assessee's contention that income falling within the ambit of section 44DA of the Act would be liable to be taxed under section 44BB, if it was in connection with extraction or production of mineral oils, since the latter provision is a special provision, holding that post amendment such income would be taxable under section 44DA of the Act.
- The decision of Supreme Court in the case of ONGC Ltd. (supra) was held to be not fully applicable to the aforesaid case, since the said decision dealt with periods prior to insertion of section 44DA and that, too, for period prior to insertion of provisos by the Finance Act, 2010.

Re: FTS

- The Court, however, held that despite the amendment in sections 44BB and 444DA, there had been no amendment in the definition of FTS and accordingly Circular No.1862 dated 22.10.1990 was still in force. Thus, the High Court held that the decision of Supreme Court in the case of ONGC (supra), applying the doctrine of pith and substance and holding that services inextricably connected with mining activity but not necessarily directly related to drilling, would be excluded from the ambit of FTS under section 9(1)(vii) and consequently from purview of section 44DA of the Act, still held the field.
- The Court, therefore, concluded that if the income was in the nature of FTS but excluded from the scope of Explanation 2 to section 9(1)(vii), the same would be chargeable to tax under section 44BB of the Act.

Re: Royalty

- The Court noted that the Supreme Court in the case of ***ONGC Ltd. (supra)*** did not have an occasion to examine the issue of taxation of Royalty under section 44BB of the Act. In the present case, the Revenue specifically contended that the said receipts could qualify as Royalty. The Court, therefore, held that, if the receipts fell within the meaning of 'Royalty', then, by virtue of the Proviso to section 44BB(1), such receipts would fall outside the ambit of that section and could be taxed under section 44DA or section 115A of the Act.
- As regards the finding as to whether the receipts qualified as Royalty or not, the Court noted that income earned by the assessee involved two components, i.e., (i) from supply of software and (ii) from other services in relation to the aforesaid supply, i.e., maintenance of software/upgradation of software etc. In the absence of complete facts on record, the High Court set aside the matter to the Revenue to ascertain if the income or any portion thereof was in the nature of Royalty or FTS. The Court held that if such other services are

(i) ancillary/incidental to supply of software, then, the same would qualify as Royalty and would be taxable under section 44DA,

(ii) if not ancillary/incidental in nature, then, the same would qualify as FTS and income to that extent would be taxable under section 44BB of the Act.

▪ The assessee was also given liberty to take the benefit of the definition of 'royalty', if any, contained under Article 12 of applicable Indo-Australia Treaty.

Analysis of the decision

The decision in the case of ***Paradigm Geophysical (supra)*** assumes vital importance since the same being the first decision rendered post the amendments which were introduced by Finance Act, 2010, dilates on the vexed issue of interplay of sections 44BB and sections 44DA/115A of the Act.

In the said case, the Court after going through the legislative intent of the amendment, categorically held that there is no dichotomy between sections 44BB and 44DA/115A and the said sections operate in separate fields. The Court further held that the amendment had, in fact, resolved the controversy and clarified the legal position by providing that income in the nature of FTS/royalty would be excluded from the ambit of section 44BB and the same would be assessable under section 44DA or section 115A, as may be applicable.

While holding the aforesaid, the Court negated the argument of the assessee that section 44BB being a special provision would prevail over section 44DA of the Act and held that the said argument would not hold good post amendment.

Another important take away from this decision is that the doctrine of pith and substance laid down by the Supreme Court in the case of ONGC Ltd (supra) was reaffirmed by the Court, to interpret the scope of FTS in the context of section 44DA of the Act. The Court rejected the argument of the Revenue that only services which are rendered on-site i.e., at the drilling site could be said to be covered in the expression 'mining or like project' and accordingly, excluded from the ambit of FTS under Explanation 2 to section 9(1)(vii) of the Act. The said argument was clearly in teeth of the decision of the Supreme Court which held that services having proximate nexus with extraction of mineral oil would be outside the ambit of FTS.

It is pertinent to note that in the present case, the AO/CIT had not given a categorical finding as to the categorization of income as Royalty/FTS. Such characterization becomes imperative when dealing with interplay between sections 44BB and 44DA/115A, in view of the exclusion relating to 'mining and like projects' contained in the definition of FTS and no such corresponding exclusion being present in the definition of Royalty[9].

Further, the Court being aware that the receipts could be partly in nature of FTS and partly in nature of royalty, gave specific directions to the Revenue to decide on exact characterization of receipts.

Section 44DA, as discussed supra, is, however, applicable only where receipts in the nature of royalty/FTS, are effectively connected with PE. Two points, therefore, emerge for applicability of section 44DA, i.e., (i) the non-resident assessee must have pre-existing PE in India, and (ii) such royalty/FTS must be effectively connected with such PE. In other words, the royalty/FTS must not be the cause for creation of PE. [Refer, CIT v. Hyundai Heavy Industries Co. Ltd.: [TS-29-SC-2007-O] (SC) and DCIT vs. Guardian International Corporation Ltd: ITA No. 110/Del/1997(Del Trib.) -affirmed by the Delhi High Court in ITA No. 147/2003]

The essential conditions precedent that need to be cumulatively satisfied for section 44DA to apply are that-

(i) the income must be in the nature of Royalty/FTS as defined in sections 9(1)(vi) and 9(1)(vii) of the Act respectively; and

(ii) such Royalty/FTS must be received from an Indian resident (and not a non-resident); and

(iii) the non-resident recipient assessee must have a pre-existing PE in India; and

(iv) the Royalty/FTS must be effectively connected with such pre-existing PE in India.

In view of the above, considering that in the facts of the aforesaid case, there was no averment by either parties regarding existence of PE, leave alone the question whether the impugned receipts were effectively connected with such PE, the Court ought to have left open the question of applicability of section 44DA of the Act, basis satisfaction of the aforementioned conditions precedent.

Thus, in a nutshell, the conditions precedent for applicability of sections 44BB and 44DA of the Act could be summarized as under:

Particulars	**Section 44BB**	**Section 44DA**
Scope/Applicability of the section	Income in the nature of profits and gains from supply of plant and machinery on hire or rendering of services or facilities in connection with or for use in the business of prospecting or extraction or production of mineral oils including petroleum and natural gas in India, other than royalty or FTS.	Income by way of royalty or fees for technical services as defined in sections 9(1)(vi) and 9(1)(vii) of the Act respectively.
Requirement of existence of PE of non-resident in India	No such condition of existence or non-existence of PE of non-resident in India has been prescribed in the section	The non-resident assessee must have a pre-existing PE in India
Connection of receipt with the PE of non-resident in India	Not Relevant	Royalty/FTS must be effectively connected with such pre-existing PE in India
Residential status of person making the payment	Receipts specified under this section could be received from either an Indian Resident or non-resident.	Royalty/FTS must be received from an Indian resident (and not a non-resident)

Conclusion

The said decision lays down and clarifies certain important principles relating to interplay of various provisions of the statute relating to taxation in India of income earned by non-residents from services provided to oil and gas companies, which would need to be kept in mind while determining tax liability of such assessees. The same cannot, however, be regarded as a complete answer to this conundrum, which is likely to weave its way again, to haunt the Courts.

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[3] Section 115A provides for special provision for computing income by way of Royalty/FTS earned by non-resident in absence of a PE/fixed base in India. Under this section, income is taxable on gross basis at the rates specified therein. Royalty and FTS have been given the same meaning as envisaged under sections 9(1)(vi) and (vii) of the Act respectively.

[4] Section 44DA (inserted by FA 2003, w.e.f. 01.04.2004, prior to its insertion section 44D was applicable) is a special provision for computing income by way of Royalty/FTS earned by non-resident through a PE/fixed base in India. Under this section, taxable income is to computed on net-income basis with certain expenditure being allowed. Royalty and FTS have been given the same meaning as envisaged under sections 9(1)(vi) and (vii) of the Act respectively.

[5] Section 44BB provides for presumptive scheme of taxation of income of non-resident assessee engaged in the business of providing 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. Under this section, 10 per cent of the gross amount/receipts is deemed income of the business income of the assessee. Further, in order to be assessable under this section, there is no requirement of existence of a PE in India.

[6] Paradigm Geophysical Pty Ltd. v. CIT: W.P.(C) 1370/2019 (Del. HC) decided on 13.03.2020 / [TS-161-HC-2020(DEL)]

[7] Refer, Geofizyka Torun Sp.zo.o, In re [2010] [TS-43-AAR-2009-O] (AAR) followed in Wavefield Inseis ASA, In re [2010] [TS-46-AAR-2009-O] (AAR) and In re Seabird Exploration FZ LLC, In re [2010][TS-5027-AAR-2009-O] (AAR)

[8] Refer, CIT v. Alcatel Lucent Canada (2015 [TS-5168-HC-2015(DELHI)-O] (Del); CIT v. ZTE Corporation (2017) [TS-5741-HC-2017(DELHI)-O] (Del); Income Tax v. Ericsson A.B. [TS-769-HC-2011(DELHI)-O] (Del) and Director of Income Tax v. Infrasoft Ltd. (2014) [TS-592-HC-2013(DEL)-O] (Del).

[9] Clause (iva) of Explanation 2 to section 9(1)(vi) of the Act provides for exclusion of amounts referred to in section 44BB from the ambit of royalty under this clause.