IN THE INCOME TAX APPELLATE TRIBUNAL,
'' D'' BENCH, AHMEDABAD

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos. 1881-1882/AHD/2019

Asstt. Years: N.A

Oil and Natural Gas Corporation Limited, Institute of Reservoir Studies, Chandkheda Campus, Ahmedabad-380005. **PAN: AAACO1598A**	Vs.	Income Tax Officer-2, (International Taxation), Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by	:	Shri Mohd. Farid, A.R
Revenue by	:	Shri Mohd. Usman, CIT.D.R with Shri Purushottam Kumar, Sr.D.R

Date of Hearing : 05/05/2022
Date of Pronouncement: 03/08/2022

O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned two appeals have been filed at the instance of the Assessee against the separate orders of the Learned Commissioner of Income Tax (Appeals)-13, Ahmedabad, of even dated 24/10/2019 arising in the matter of assessment order passed under s. 195 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year N.A.

First, we take up ITA No.1881/Ahd/2019, an appeal by the assessee

2. The assessee has raised the following grounds of appeal;

> *1. The Ld.Commissioner of Income Tax (Appeal)-13, Ahmedabad, has erred in law and in the facts and circumstances of the case in rejecting the contention of the appellant regarding non-taxability of the receipts of University of Texas, USA, under India-USA DTAA.*
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> *2. The Ld. Commissioner of Income Tax (Appeal)-13, Ahmedabad, has erred in law and in the facts and circumstances of the case in not adjudicating the appellant's alternate ground regarding taxability of the receipts of University of Texas, USA, under section 44BB of the Income-tax Act, 1961.*
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> *3. The appellant craves permission to add, alter and/or amend any ground(s) of appeal before or at the time of hearing.*

3. The only issue raised by the assessee is that the Ld. CIT-A erred in upholding the order passed by the AO (Int. Tax) u/s 195(2) of the Act with the direction to deduct 10% TDS on gross payments made to University of Texas at Austin, USA (Non-Residents).

4. The facts in brief are that the assessee is Central Public Sector Undertaking. The assessee has entered into an agreement with University of Texas at Austin, USA vide agreement No. UTA 16-000955 dated 18-05-2018. The agreement was entered to carry out research activity in collaboration with the assessee for the development of suitable chemical Enhanced Oil Recovery (EOR) formulations for its 5 reservoirs. The assessee agreed to pay to the University of Texas at Austin for the services to be availed as per the agreement for a sum of USD 0.99 million for each reservoirs which comes to USD 4.95 million in aggregate.

4.1 The assessee in view of the fact that the University of Texas at Austin, USA was a tax resident of USA and did not had permanent establishment in India applied

for an order u/s 195(2) of the Act dated 18-06-2018 to the ITO Int. Tax, to determine the proportion of sums chargeable to tax on which tax is required to be deducted.

5. The ITO Int. Tax observed that the payments to be made to University of Texas at Austin, USA is in the nature of royalties/fees for technical services. Therefore, the AO directed the assessee to deduct the TDS @ 10% (excluding education cess/surcharge) on gross payments to be made to the University of Texas at Austin, USA vide an order dated 19-07-2018.

6. Aggrieved, with the order of the ITO Int. Tax, the assessee filed the appeal before the Ld. CIT-A. The assessee before the Ld. CIT-A submitted that the payments made to the University of Texas at Austin, USA is not subject to TDS under the provisions of section 195 of the Act. It was contended by the assessee that in pursuance to the provisions of section 90(2) of the Act, the provisions specified in the treaty of India-USA DTAA would be applicable so far it is beneficial to it.

6.1 The assessee in terms of the provisions of Article 12 of India-USA DTAA was of the view that the payments made to University of Texas at Austin, USA to carry out the research programme activity for development of suitable chemical Enhanced Oil Recovery (EOR) formulations for its 5 reservoirs was not on account of royalties and fees for included services.

6.2 The assessee without prejudice to the above also submitted that the "fee for technical service" defined as per the explanation 2 to clause (vii) of sub-section (1) of section 9 of the Act, to mean consideration for the rendering of any managerial, technical or consultancy services but not including consideration for mining or like project undertaken by the recipient. Further, CBDT clarified by issuing Instruction No. 1862 dated 22-10-1990, technical services would also include rendering of

services such as drilling operations for exploration and extraction of oil and natural gas and would be charged in accordance to the provisions of section 44BB of the Act.

6.3 The assessee, thus, was of view that the payments made to University of Texas at Austin USA for research activity for development of suitable chemical Enhanced Oil Recovery (EOR) formulations was somewhere directly connected with the extraction and production of mineral oil. The assessee regarding this also relied on the judgment of Hon'ble Apex Court rendered in its own case dated 01-07-2015, reported in 376 ITR 306.

6.4 The assessee, accordingly prayed before the Ld. CIT-A, to tax the receipts of non-residents in accordance to the provisions of section 44BB of the Act.

7. However the Ld. CIT-A disregarded the contention of the assessee and confirmed the order of the AO by observing as under;

> *5. I have carefully considered the order and the written submission filed by the appellant. On careful consideration of the issue as brought out in the order, the grounds of appeal and the submission of appellant, the grounds raised by the appellant is decided hereunder:*
>
> *5.1 The primary ground of appeal is regarding non-taxability of receipts of the non-resident from the appellant under India-USA Double Taxation Avoidance Agreement (DTAA). The authorized representatives of the appellant contended that the receipts of the non-resident from ONGC are not taxable in India under the provisions of India-USA DTAA and, hence, the same were not subject toTDS.*
>
> *5.2 It was further contended that since there is no transfer of any copyright or patent under the aforesaid agreement, the income of the nonresident is not covered within the definition of "royalty" under India-USA DTAA and cannot be charged to tax as such.*
>
> *5.3 As regards the contention that the income of the non-resident is also not taxable as "fees for included services" under Article 12 of India-USA DTAA, the appellant's argument is based on the premise that as a result of rendering services to ONGC there is no transfer of technology from the nonresident to ONGC and, hence, "make available" clause appearing in the definition of "fees for included services" is not satisfied. The extracts of the relevant written submissions are reproduced below-*

"Further, since as a result of carrying out seruices of developing chemical EOR formulations, ONGC has not been enabled to carry out similar services (i.e., developing a suitable chemical EOR formulations) on its own without recourse to the non-resident, no technical knowledge, experience, skill, know-how etc., as envisaged in the definition of "fees for technical service", can be said to have been made available to the appellant".
**
The aforesaid argument is completely misplaced and out of the context. For understanding the meaning and scope of "make available" phrase appearing in the definition of "fees for included services", it is relevant to refer to the Memorandum of Understanding (MoU) dated 15-05-1989 between the Governments of India and USA. The relevant part of the said MoU is as under-

"Paragraph 4(b) of Article 12 refers to technical or consultant services that available to the person acquiring the service, technical knowledge, experience skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person, admiring the service shall be deemed to include an agent nominee, or transferee of such person . This category is narrower than the category described in paragraph 4{a] because it excludes any service that does not make technology available to the person acquired the service. ***Generally speaking, technology will be considered "made available" when the person .acquiring the service AS enabled to apply the technology.*** *The fad that the provision of the survive man, required technical input by the person providing the service does not per se mean that technical knowledge skills, etc., are ma.de available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which, embodies technology shall not per $e be considered to make the technology available (emphasis supplier)*

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5.4 The instant case is a Sponsored Research Agreement, wherein a research project was carried out by the non-resident in collaboration with the appellant. The recitals of the contract specifically mention.

"Sponsor desires to obtain certain rights to parents and technology developed during the course of such research with a view to profitable commercialization of such patents and technology for the Sponsor 's benefit. "

5.5 In the instant case, collaborative research program is to be carried out for development of chemical Enhanced Oil Recovery (EOR) formulations and field tests for ONGC reservoirs. One of the objects of die program as brought out under Scope of Work is to collaborate to advance both new knowledge and understanding of chemical EOR and on the best ways to conduct experiments, designs, field tests of chemical EOR processes. The representatives of the non-resident in collaboration with the appellant's personnel has to carry out laboratory study, simulation and pilot design, pilot monitoring, evaluation and field implementation etc. Further, the deliverables of the program include the results of analysis and evaluation of monitored pilot data and recommendation to ensure success of die pilot apart from other R&D results.

5.6 Thus, it is evident that the instant case is a clear case of transfer of technical design whereby the appellant is being enabled to apply such technology as well as transfer of certain rights to patents & technology for commercialization of such patents and technology for benefits of ONGC. Therefore, the income of the non-residents is covered within the definition of "Royalty" under India-USA Treaty. Also as per the MOU to India - USA tax treaty "transfer of technical plants or technical designs is "Make Technology Available" for the purpose of Article 12 paragraph 4(b).

5.7 Further, it is seen from the plain reading of the May 15, 1989 U.S. - INDIA TAX TREATY Memorandum of understanding concerning fees for included services in Article 12 Paragraph is as follows:

"Typical categories of services that generally involve either the development and transfer of technical plants or technical designs, or making technology available as described in paragraph 4(b), include :

1. Engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering) ;
2. Architectural services ; and
3. Computer software development.

Under paragraph 4{b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for examples, relate to any of the following areas :

1. Bio-technical services ;
2. Food processing ;
3. Environmental and ecological services ;
4. Communication through satellite or otherwise ;
5. Energy conservation ;
6. Exploration or exploitation of mineral oil or natural gas ;
7. Geological surveys ;
8. Scientific services ; and
9. Technical training."

Thus, the Memorandum of understanding (MOU) concerning fees Tor included services in Article 12 between India and USA Tax treaty clearly illustrates that ***Exploration or exploitation of mineral oil or natural gas or transfer of technical design*** *is make technology available under paragraph 4(b), and is included in fees for included services. If the issue is covered directly under a specific clause of the DTAA and if the income of the non-resident is taxable from the plain reading of. the treaty and there is no ambiguity in the language of the treaty then there is no scope of interpretation of the language used. Here, in the given case, general interpretation of make technology available shall not be applicable as the issue is specifically covered under MOD of the DTAA wherein it is mentioned in unambiguous terra that* ***'Exploration or exploitation of mineral oil or natural gas or transfer of technical design*** *is Make technology available' . The general principle of 'specific overriding the general' needs to be followed here. It is not disputed that the services rendered by the non-resident in collaboration with the appellant's personnel was to carry out laboratory study, simulation and pilot design, pilot monitoring, evaluation and field implementation therefore due to unambiguous provisions of the MOU the said transfer of technology is Make technology available and covered under fees for included services. It is also covered under the definition of 'Royalty' as held supra.*

5.8 In support of the contention regarding non-taxability of receipts of the non-resident, the appellant has relied upon Hon'ble Karnataka High Court judgment in the case of De Beers India Minerals (P.) Ltd., 346 ITR 467 and other pronouncements. The rationale of the aforesaid judicial pronouncements is not

applicable in the instant matter as the same are distinguishable on the facts of the matter. Accordingly, this ground is dismissed.

6. In the result, appeal of the Appellant is ***Dismissed.***

8. Being aggrieved by the order of the Ld. CIT-A, the assessee is in appeal before us.

9. The Ld. AR for the assessee filed a paper book running from pages 1 to 102 and contended that the payment made by the assessee neither represents against the royalty nor acquisition of any technical knowledge/know-how. Thus the assessee is not liable for the TDS under Article 12 of India-USA DTAA.

10. On the other hand, the Ld. DR strongly relied on the order of authorities below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. The important issue before us relates whether the services rendered by non-resident University of Texas at Austin, USA to carry out research programme for development of suitable chemical Enhanced Oil Recovery (EOR) formulations in collaboration with the assessee is covered under "royalties/fees for technical services" or not.

11.1 Admittedly, the assesse is engaged in the extraction and production of mineral oil and natural gas. The assessee has entered into an agreement with the non-resident University of Texas at Austin, USA dated 18-05-2018 to carry out the research programme at its 5 reservoirs (4 onshore sandstone and 1 offshore carbonate) with the objective and scope of work as detailed in the agreement running from pages 13 to 15 placed in the paper book.

11.2 The assessee has made payment to avail the technical services of USD 4.95 million to University of Texas at Austin, USA. It is also pertinent to note that, the

services rendered by University of Texas at Austin, USA is tax resident of USA, therefore India-USA DTAA has also to be applied in the case on hand.

11.3 From the statutory provisions of section 9 of the Act and the relevant clauses of article 12 in the DTAA, it is clear that there is marked distinction between royalty and fees for technical services. Explanation (2) to clause (vi) of sub-section (1) of section 9 defines royalty for the purpose of the said clause. It amounts to consideration for transfer of or any rights or imparting of information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property. It also includes imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill. Further, the use or right to use any industrial, commercial or scientific equipment and transfer of all or any other rights and the intellectual properties mentioned therein or rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv) (iva) and (v). Therefore fees paid for transfer of rights and services rendered in that regard constitutes royalty.

11.4 Likewise, the explanation 2 to clause (vii) of sub-section (1) of section 9 defines the phrase fees for technical services for the purpose of clause (vii). It is the consideration for the rendering of any managerial, technical or consultancy services. Here there is no question of any right. It is purely for the services rendered. So under the Indian law whether the consideration paid is for the transfer of a right in any Intellectual Property or for rendering of any services which are managerial, technical or consultancy services, the liability to tax is attracted. In the case on hand it is not in dispute that the nature of services rendered are technical in nature. Therefore, it is liable to tax. But this liability arises under the Double Taxation Avoidance Agreement. Section 90 which deals with the Double Taxation relief provides that the provisions of the DTAA override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to Income-tax and ascertainment of total Income-tax.

11.5 Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, Article 12 of the India USA Treaty defines fees for technical services. As per Article 12 of DTAA also fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to clause (vii) of sub-section (1) of section 9. In view of section 90 of the Act, the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the service to apply technology contained therein.

11.6 Therefore the clause in Singapore agreement which explicitly makes clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax

liability, that technical knowledge, experience, skill, know-how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilizes for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA, the liability to tax is not attracted.

11.7 From the aforesaid discussion it is clear that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

11.8 It is in this background one has to look at the facts of this case, in order to find out whether the service provider has made available the technical knowledge to the assessee so as to fasten the liability of payment of tax. In this connection, we have referred the agreement between the assessee and University of Texas at Austin, USA, defining the scope of work which is placed on pages 13 to 15 of the

paper book and note that there was neither any patent/copyright used by the assessee against which the royalty was paid nor there was any technical know-how which was made available to the assessee. Thus in such facts and circumstances there is no liability on the assessee to deduct the TDS in pursuance to the Article 12 of India-USA DTAA. As such the agreement was entered between the assessee and Texas for the following purposes:

> *The broad objectives of the proposed research collaboration between ONGC and the University of Texas at Austin (UT) are as follows:*
>
> *Improve the chemical EOR research program at ONGC*
>
> *Develop chemical EOR formulations and field tests for ONGC reservoirs*
>
> *Facilitate exchange of faculty and researchers, pursuant to Institutional policies via separate agreements*
>
> *Collaborate to advance both new knowledge and understanding of chemical EOR and on the best ways to conduct experiments, design field tests of chemical EOR processes.*

11.9 From the above, there remains no ambiguity to the fact that there was any royalty payment made by the assessee or any technical know-how was received by the assessee. Accordingly, we set aside the finding of the Ld. CIT-A and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

In the result the appeal filed by the assessee is allowed.

Coming to ITA number 1882/AHD/2019, an appeal by the assessee

12. At the outset we note that the issues raised by the assessee in its grounds of appeal for the AY 2019-20 are identical to the issues raised by the Assessee in ITA No. 1881/Ahd/2019 for the assessment year 2018-19. Therefore, the findings

given in ITA No. 1881/AHD/2019 shall also be applicable for the year under consideration i.e. AY 2019-20. The appeal of the assessee for the assessment 2018-19 has been decided by us vide paragraph No. 11 of this order in favour the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2018-19 shall also be applied for the year under consideration i.e. AY 2019-20. Hence, the grounds of appeal filed by the assessee is hereby allowed.

In the result the appeal filed by the assessee is allowed

13. In the combined results, both the appeals of the assessee are allowed.

Order pronounced in the Court on 03/08/2022 at Ahmedabad.

Sd/-	**Sd/-**
(MAHAVIR PRASAD)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 03/08/2022

Manish