SEDCO FOREX INTERNATIONAL INC. THROUGH IT'S CONSTITUTED ATTORNEY MR. NAVIN SARDA

v.

COMMISSIONER OF INCOME TAX, MEERUT & ANR.

(Civil Appeal No. 4906 of 2010)

OCTOBER 30, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Income Tax Act, 1961:

s.44BB – Scope and interpretation – s.44BB starts with non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of ss.28 to 41 and ss.43 and 43A of the Act – For assessment under this provision, 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 the head 'profits and gains of the business or profession' – Sub-section (2) mentions two kinds of amounts which shall be deemed as profits and gains of the business chargeable to tax in India – Sub-clause (a) thereof relates to amount paid or payable to the assessee or any person on his behalf on account of 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 – Thus, all amounts pertaining to the said activity which are received on account of provisions of services and facilities in connection with the said facility are treated as profits and gains of the business – This clause clarifies that the amount so paid shall be taxable whether these are received in India or outside India – Clause (b) deals with amount received or deemed to be received in India in connection with such services and facilities as stipulated therein – Thus, whereas clause (a) mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India – In respect of amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India –On the other hand, amount received or deemed to be received have to be in India.

A *s.44BB – Special provision for calculating profits and gains in connection with business of exploration of mineral oils – Assessee-Non-resident company entered into contract with ONGC for hire of their rig for carrying out oil exploration activities in India – Payment of mobilisation fees for mobilisation/movement of rig from foreign soil/country to the off shore side at Mumbai – Whether said amount* B *received is to be included for computation of deemed profits and gains of the business chargeable to tax under s.44BB of the Act – Held: Clause (a) and (b) of sub-section (2) of s.44BB stipulates that the amount paid under the said contracts as mobilisation fee on account of provision of services and facilities in connection with* C *the extraction etc. of mineral oil in India and against the supply of plant and machinery on hire used for such extraction, clause (a) is attracted – Thus, this provision contained in s.44BB has to be read in conjunction with ss.5 and 9 of the Act and ss.5 and 9 of the Act cannot be read in isolation – The said amount paid to the assessees as mobilisation fee is treated as profits and gains of business and,* D *therefore, it would be "income" as per s.5 – This provision also treats this income as earned in India, fictionally, thereby satisfying the test of s.9 of the Act as well – Circular no.495 dated September 22 1987 issued by CBDT.*

E *s.44BB – Assessee-Non-resident company entered into contracts with ONGC for hire of their rig for carrying out oil exploration activities in India – Reimbursement of cost of tools lost in hole by ONGC – Taxability of – Held: Not taxable – This amount is not covered by sub-section (2) of s.44BB of the Act as ONGC had lost certain tools belonging to the assessee, and had compensated* F *for the said loss by paying the amount in question.*

Disposing of the appeals, the Court

HELD: 1.1 Indian Income Tax Act, admittedly, follows a territorial system of taxation. As per this system only that income of a non-resident is taxable in India which is attributable to G **operations within the Indian Territory. Therefore, in the first instance it is to be seen whether a particular income arises or accrues or deem to arise or accrue within India. In order to seek this answer, the principles contained in Section 9 have to be applied. Only when it becomes an income taxable in India as per** H **Section 9, in case of non-resident, the question of computation of**

the said income would arise. Section 4 is the charging section for levying a tax on the income of any person under the Act and provides that income-tax shall be levied at the rates provided by the Finance Act on the 'total income' of the previous year of every person. The scope of the total income of any person, which could be subjected to tax under the provisions of the Act, is defined under Section 5 of the Act and dependent upon the residential status of the persons. Section 5(1) provides the scope of 'total income' in the case of residents, whereas Section 5(2) provides the scope of 'total income' in the case of non-residents. As per Section 5(2) of the Act, subject to the provisions of this Act, the 'total income' of any previous year of non-resident includes: Income which is received or deemed to be received in India in such year or on behalf of such person; or Income which 'accrues or arises' or is deemed to accrue or arise to him in India during such year. [Paras 38, 39][428-B-D, E-F]

1.2 Section 9 enumerates the income which is deemed to accrue or arise in India. There are two broad categories of taxability of income provided under this Section, i.e., Business Income and income from interest or royalty or fees for technical services (FTS). Section 9(1)(i) provides that income is to be deemed to have accrued or arising in India if the income is accruing directly or indirectly through any business connection in India or from any property in India or from any asset or source of income in India or any capital asset situated in India (referred as business income). Explanation 1(a) to Section 9(1)(i) of the Act provides an exclusion in the case of operations which are not carried out in India. The explanation provides that the income of the business deemed under this clause to accrue or arise in India shall be only that part of the income as is reasonably attributable to the operations carried out in India. Thus, business income earned by non-resident is chargeable to tax in India only to the extent reasonably attributable to the operations carried out in India. [Paras 40, 41][428-G-H; 429-A-C]

2. Section 44BB(2) makes certain receipts as "deemed income" for the purposes of taxation in the said provision. Therefore, aid of this provision is to be necessarily taken to determine whether a particular amount will be "income" within

A the meaning of Section 5 of the Act. Likewise, Section 44BB(2) also acts as guide to determine whether a particular income is attributed as income occurred in India. Section 44BB of the Act provides for special provision for computing profits and gains. However, that would not mean that if the income is to be computed under this provision, a go-by to Sections 5 and 9 of the Act is to be given. Sections 4, 5 and 9 of the Act are to be kept in mind even in those cases where assessment is done under Section 44BB of the Act. The argument of the assessees that Section 44BB is only a computation provision, is also not entirely justified. In the first blush, assessees may appear to be correct in their contentions that Section 44BB falls in Chapter IV of the Act. Insofar as computation of income from 'Profits or Gains of Business or Profession' is concerned, it has to be computed as per the provisions of Sections 28 to 43D(2). However, certain provisions are made for providing special mechanism for computing the income on presumptive basis in case of non-resident and it includes Section 44BB as well. [Paras 42, 43, 44][429-C-E; 430-G-H; 431-A]

Union of India & Anr. v. *A. Sanyasi Rao & Ors.* (1996) 3 SCC 465 : [1996] 2 SCR 570 – relied on.

3. Clause 3.2 of the Agreement dated September 3, 1985 pertains to providing the Shallow Dash Water Jack Up Rig against which payment was made to the assessees. This Clause says that the assessees shall be paid 'mobilisation fee' for the mobilisation of drilling unit from its present location in Portugal to the well location designated by ONGC, offshore Mumbai, India. Fixed amount is agreed to be paid which is mentioned in the said Clause. The said mobilisation fee was payable to the assessees after the jacking up of the drilling at the designated location and ready to spud the well. After the said operation, assessees were required to raise invoice and ONGC was supposed to make the payment within 30 days of the receipt of this invoice. Insofar as Clause 4.2 of Agreement dated July 12, 1986 is concerned, it related to mobilisation of drilling unit. Here again, 'mobilisation fee' was payable for the mobilisation of the drilling unit from the place of its origin to the port of entry (Kandla Port, Mumbai).

What follows from the above is that a fixed amount of mobilisation fee was payable under the said contracts as "compensation". Contracts specifically describe the aforesaid amounts as 'fee'. [Paras 46][431-D-G]

4. Section 44BB starts with non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of Sections 28 to 41 and Sections 43 and 43A of the Act. It is not in dispute that assessees were assessed under the said provision which is applicable in the instant case. For assessment under this provision, 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 the head 'profits and gains of the business or profession'. Sub-section (2) mentions two kinds of amounts which shall be deemed as profits and gains of the business chargeable to tax in India. Sub-clause (a) thereof relates to amount paid or payable to the assessee or any person on his behalf on account of 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. Thus, all amounts pertaining to the said activity which are received on account of provisions of services and facilities in connection with the said facility are treated as profits and gains of the business. This clause clarifies that the amount so paid shall be taxable whether these are received in India or outside India. Clause (b) deals with amount received or deemed to be received in India in connection with such services and facilities as stipulated therein. Thus, whereas clause (a) mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received have to be in India. A bare reading of the clauses shows that the amount paid under the said contracts as mobilisation fee on account of provision of services and facilities in connection with the extraction etc. of mineral oil in India and against the supply of plant and machinery on hire used for such

A extraction, clause (a) stands attracted. Thus, this provision contained in Section 44BB has to be read in conjunction with Sections 5 and 9 of the Act and Sections 5 and 9 of the Act cannot be read in isolation. The said amount paid to the assessees as mobilisation fee is treated as profits and gains of business and, B therefore, it would be "income" as per Section 5. This provision also treats this income as earned in India, fictionally, thereby satisfying the test of Section 9 of the Act as well. [Paras 47, 48][432-A-H]

5. The Tribunal has rightly commented that Section 44BB C of the Act is a special provision for computing profits and gains in connection with the business of exploration of mineral oils. Its purpose was explained by the Department vide its Circular No. 495 dated September 22, 1987, namely, to simplify the computation of taxable income as number of complications were involved for those engaged in the business of providing services and facilities D 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 etc. Instead of going into the nitigrities of such computation as per the normal provisions contained in Sections 28 to 41 and Sections 43 and 43A of the Act, the Legislature has simplified the procedure by providing that tax shall be paid @ E 10% of the 'aggregate of the amounts specified in sub-section (2)' and those amounts are 'deemed to be the profits and gains of such business chargeable to tax...'. It is a matter of record that when income is computed under the head 'profits and gains of business or profession', rate of tax payable on the said income is F much higher. However, the Legislature provided a simple formula, namely, treating the amounts paid or payable (whether in or out of India) and amount received or deemed to be received in India as mentioned in sub-section (2) of Section 44BB as the deemed profits and gains. Thereafter, on such deemed profits and gains (treating the same as income), a concessional flat rate G of 10% is charged to tax. In these circumstances, the AO is supposed to apply the provisions of Section 44BB of the Act, in order to find out as to whether a particular amount is deemed income or not. When it is found that the amount paid or payable (whether in or out of India), or amount received or deemed to be

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received in India is covered by sub-section (2) of Section 44BB of the Act, by fiction created under Section 44BB of the Act, it becomes 'income' under Sections 5 and 9 of the Act as well. In the the instant case, the amount which is paid to the assessees is towards mobilisation fee. It does not mention that the same is for reimbursement of expenses. In fact, it is a fixed amount paid which may be less or more than the expenses incurred. Incurring of expenses, therefore, would be immaterial. It is also to be borne in mind that the contract in question was indivisible. [Paras 49, 50][433-A-G]

6. In revenue's appeal preferred by the Director of Income Tax against the judgment of the High Court, the computation of income of the assessee was done under Section 44BB of the Act. However, the amount which was sought to be taxed was reimbursement of cost of tools lost in hole by ONGC. It is, thus, clear that this was not the amount which was covered by sub-section (2) of Section 44BB of the Act as ONGC had lost certain tools belonging to the assessee, and had compensated for the said loss by paying the amount in question. [Para 51][434-B-D]

Saipem S.P.A. v. Deputy Commissioner of Income Tax **88 ITD 213 (Del)**; *Commissioner of Income Tax* v. *F.Y. Khambaty* **(1986) 159 ITR 203**; *Anglo-French Textile Company, Ltd., by Agents M/s Best & Company, Ltd., Madras* v. *Commissioner of Income Tax, Madras* **(1954) 25 ITR 27 (SC)**; *Ishikawajma-Harima Heavy Industries Ltd.* v. *Director of Income Tax, Mumbai* **(2007) 288 ITR 408 (SC) : (2007) 3 SCC 481 : [2007] 1 SCR 112**; *Carborandum & Co.* v. *CIT, Madras* **(1977) 108 ITR 335 (SC)**; *Commissioner of Income Tax, Madras* v. *Best and Company (Private) Ltd., Madras* **(1966) 60 ITR 11 (SC)**; *Commissioner of Income Tax and Anr.* v. *Hyundai Heavy Industries Co. Ltd.* **(2007) 7 SCC 422 : [2007] 7 SCR 288**; *State Bank of Travancore* v. *Commissioner of Income Tax, Kerala* **(1986) 158 ITR 102 (SC)**; *Avasarala Technologies Limited* v. *Joint Commissioner of Income Tax, Special Range 1, Bangalore* **(2015) 14 SCC 732**; *Commissioner of Income Tax Bihar and Orissa, Patna* v. *Ashoka Marketing Co.*

A (1972) 4 SCC 426– referred to.

Case Law Reference

88 ITD 213 (Del)	referred to	Para 11
[1996] 2 SCR 570	relied on	Para 17
B (1986) 159 ITR 203	referred to	Para 18
(1954) 25 ITR 27 (SC)	referred to	Para 18
[2007] 1 SCR 112	referred to	Para 18
(1977) 108 ITR 335 (SC)	referred to	Para18
(1966) 60 ITR 11 (SC)	referred to	Para 18
C [2007] 7 SCR 288	referred to	Para 23
(1986) 158 ITR 102 (SC)	referred to	Para 23
(2015) 14 SCC 732	referred to	Para 28
(1972) 4 SCC 426	referred to	Para 28

D CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4906 of 2010.

From the Judgment and Order dated 28.09.2007 of the High Court of Uttarakhand at Nainital in Income Tax Appeal (ITA) No. 280 of 2001

WITH

E C. A. No. 4908, 4910, 4911, 4907, 4913, 4920, 4919, 4921, 4916, 4918, 4917, 4925, 4924, 4922, 4923, 4909, 5935, 5934, 4914, 4915, 8595 and 4926 of 2010

C. A. Nos. 5154, 5152, 5153 and 5155 of 2011

F C. A. Nos. 2166 and 3695 of 2012

C. A. Nos. 2631, 4543, 8627, 9188, 8665, 267 and 268 of 2013

C. A. Nos. 5005, 6573 and 6651 of 2014

C. A. Nos. 5437, 10294, 10295 and 10296 of 2016

G C. A. No. 17388, 17389, 17390, 17391, 17392, 17393, 435, 10382, 10385, 10383, 10384, 10386, 17394, 12365 and 12366 of 2017.

Porus F Kaka, Ajay Vohra, Sr. Advs. Ms. Kavita Jha, Ms. Shivani Khandekar, Udit Naresh, Manish Kanth, Divesh Kanth, Rustom B. Hathikhanwala, Rohit Jain, Vaibhav Kulkarni, K.K. Mohan, Arijit Prasad,

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D. L. Chidananda, Ritin Rai, Ms. Sadhna Sandhu, Shirin Khajuria, Ms. Anil Katiyar, Ms. Rashmi Malhotra, Rupesh Kumar, Ms. Gargi Khanna, B. V. Balaram Das, Ms. Kavita Jha, Ms. Geetanjali Mohan, Manish Kanth, Divesh Chawla, V. Lakshmikumaran, Jay Savla, Karan Sachdev, Ms. Renuka Sahu, Aditya Bhattacharye, Prabhat Chaurasia, Jasdeep Singh Dhillon, L Badri Narayanan, Advs. with them for the appearing parties.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Leave granted in SLP(C) No. 2955 of 2012, SLP(C) No. 11560 of 2014, SLP(C) No. 20000 of 2015, SLP(C) No. 22343 of 2012, SLP(C) No. 22833 of 2012, SLP(C) No. 39683 of 2013 and SLP(C) No. 21939 of 2017.

2. In all these appeals filed by different appellants (hereinafter referred to as the 'assessees') except Civil Appeal No. 3695 of 2012 which is filed by Director of Income Tax (Revenue), the question of law which arises for consideration is identical and pertains to the scope and interpretation of Section 44BB of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

3. For computation of profits and gains of a business, to make it exigible to tax under the Act, provisions contained in Chapter IV, from Sections 28 to 41, 43 and 43A of the Act apply. However, in those cases where the assessee is a non-resident and specifically engaged in the business of exploration etc. of mineral oil, special mechanism is provided in Section 44BB of the Act for computation of profits and gains, on which the tax is charged. It, however, gives choice to such non-resident assessees to opt for computation formula provided under Section 44BB or to be covered by normal computation mechanism contained in Sections 28 to 41, 43 and 43A of the Act. Section 44BB of the Act stipulates that 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 the head 'profits and gains of business or profession'. Thus, concessional rate of 10% is charged as tax, which is admittedly much less than the normal tax rate payable on profits and gains of business or profession. However, this tax @10% is on the aggregate of the amounts specified in sub-section (2) which are "deemed" profits and gains of such business. Thus, insofar as calculation of profits and gains of the business under Section 44BB of the Act is concerned,

A on which 10% tax is payable, it is worked out on fictional basis by adopting the formula laid down in sub-section (2). Sub-section (2) mentions those amounts aggregate whereof is to be treated as deemed profits and gains of such a business.

4. At this juncture, we reproduce the provisions of Section 44BB
B of the Act, as reading of this provision is necessary before spelling out the nature of dispute which had arisen in these appeals. This section reads as under:

> **"44BB. Special provision for computing profits and gains in connection with the business of exploration, etc., of**
> C **mineral oils.**
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> (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
> D 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":
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> E 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.
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> (2) The amounts referred to in sub-section (1) shall be the
> F following, namely:—
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> (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
> G extraction or production of, mineral oils in India; and
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> (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.
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(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."

5. A bare reading of the aforesaid provision brings out the following salient features thereof:

(a) Sub-section (1) is a non-obstante clause, starting with the expression 'notwithstanding anything to the contrary contained in Sections 28 to 41 and Sections 43 and 43A'. Thus, once we apply this special provision for computation of profits and gains, provisions for computation of such profits as contained in Sections 28 to 41 and Sections 43 and 43A of the Act stand excluded.

(b) In order to attract the provisions of Section 44BB of the Act, two conditions are to be specified, namely, (i) assessee has to be a non-resident; and (ii) assessee should be engaged in the business of exploration etc. in mineral oils of the nature specifically spelled out in the provision.

(c) Choice is given to such an assessee under sub-section (3) of the Act to either claim lower profits and gains than the profits and gains specified in sub-section (2) and covered by normal provisions of computing profits and gains of business or profession, subject to fulfilling the conditions of audit etc. as mentioned therein or to be governed by Section 44BB of the Act.

A (d) In case the twin conditions mentioned above are satisfied, the assessee can take the benefit of paying the tax as per the provisions of Section 44BB on "deemed profits and gains" of its business and such profits and gains are to be calculated as per the formula provided in sub-section (2) thereof. Pertinently, it is a 'deemed' provision for calculating profits and gains of B business or profession, which means that such profits and gains are to be arrived at fictionally, as per provisions contained in sub-section (2).

(e) Sub-section (2) mentions the amounts which are to be added up, and the aggregate of those amounts is deemed to be profits C and gains on which 10% tax is charged as component of income tax.

6. Coming to the *lis* that is involved in these appeals, it may be seen that sub-section (2) mentions two kinds of amounts which are to be treated as profits and gains of the business. In clause (a) of sub-section D (2), the amount referred to are those which are paid or payable to 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 in India. It is immaterial whether the said amount is paid or payable in E India or out of India. Second kind of amounts mentioned in clause (b) of sub-section (2) are those sums which are received or deemed to be received by or on behalf of the assessee on account of 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, extraction or production of mineral oils outside India. Here, however, only those sums which are F paid or payable in India are to be included.

7. The assessees herein had entered into contracts primarily with Oil and Natural Gas Commission (ONGC), a public sector company, for hire of their rig for carrying out oil exploration activities in India. For this purpose, they were paid mobilisation fee as well, for and on account of G mobilisation/movement of rig from foreign soil/country to the off-shore side at Mumbai (India). The issue that has fallen for consideration is as to whether aforesaid amount received is to be included for computation of deemed profits and gains of the business, chargeable to tax under Section 44BB of the Act. Right from the Assessing Officer (AO) till the

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High Court, all the fora have answered this question in affirmative holding that this amount is to be included for computing profits and gains of the businesses of the assessees. A

8. Civil Appeal Nos. 4906 of 2010, 4907 of 2010, 4915 of 2010 filed by Sedco Forex International Inc., M/s Transocean Offshore Inc., M/s Sedco Forex International Drilling Inc. respectively were taken up as lead matters and, therefore, for the sake of brevity, we recapitulate the factual matrix from the said appeals, as it would suffice for answering the question involved. B

9. During the years under consideration, the assessees are engaged in executing the contracts all over the world including India in connection with exploration and production of mineral oil. The assessees are companies incorporated outside India and, therefore, non-resident within the meaning of Section 6 of the Act. The assessees entered into agreements with ONGC, Enron Oil and Gas India Ltd. The aforesaid agreements provided for the scope of work along with separate consideration for the work undertaken. Since the dispute is about mobilisation charges, clauses in respect thereof are as under: C D

> "Operating Rate – Receipts for undertaking drilling operations computed by per day rates provided in the contract. The operating rates shall be payable from the time the drilling unit is jacked-up and ready at the location to spud the first well. E
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> Mobilisation – charges for the transport of the drilling unit from a location outside India to a location in India as may be designated by ONGC."

In addition to the above, assessees also received amounts from the operator towards reimbursement of expenses like catering, boarding/ lodging, fuel, customs duty, the supply of material etc., with which we are not concerned. F

10. The assessees filed their return of income declaring income from charter higher of the rig. The same was offered to tax under Section 44BB of the Act. In the case of Sedco Forex International Inc., the assessee did not include the amount received as mobilisation charges to the gross revenue for the purpose of computation under Section 44BB of the Act. In the case of Transocean Offshore Inc., the assessee included 1% of the mobilisation fees. The mobilisation fees were offered G

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A to tax on a 1% deemed profit basis on the ratio of the CBDT Instruction No. 1767 dated July 1, 1987.

11. The AO included the amounts received for mobilisation/ demobilisation to the gross revenue to arrive at the "profits and gains" for the purpose of computing TAX under Section 44BB of the Act. The B Commissioner of Income Tax (Appeals) {hereinafter referred to as the 'CIT(A)'} confirmed the action of the AO. The Income Tax Appellate Tribunal (hereinafter referred to as the 'ITAT') in the case of Sedco Forex International Inc. dismissed the appeal of the assessee and the action of the AO was upheld insofar as the mobilisation charges were concerned. In the case of Transocean Offshore Inc., the ITAT upheld C the view taken by the assessee and directed the AO to assess the profits on mobilisation charges at 1% of the amount received. This was done following the Circular of CBDT Instruction No. 1767 dated July 1, 1987 and decision of the third Member in the case of ***Saipem S.P.A.*** v. ***Deputy Commissioner of Income Tax***[1]. The High Court has held that the D mobilisation charges reimbursed *inter alia* even for the services rendered outside India were taxable under Section 44BB of the Act as the same is not governed by the charging provisions of Sections 5 and 9 of the Act. Even on the issue of reimbursement in M/s. Sedco Forex International Drilling Inc. (Civil Appeal No. 4915 of 2010), the High Court followed its earlier judgments dated September 20, 2007 and May E 22, 2009 to hold that reimbursement of expenses incurred by the assessee was to be included in the gross receipts, and taxable under Section 44BB of the Act.

12. From the aforesaid brief narration of facts, it may be discerned that following three types of payments were given by the ONGC to the F assessees:

(i) Mobilisation/demobilisation advance.

(ii) Custom duty reimbursement.

(iii) Operational charges reimbursement.

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13. The High Court has held that these payments be also included as amounts received for computation of aggregate of amounts specified in sub-section (2) as deemed to be the profits and gains of the businesses of the assessees, chargeable to tax under the said provision.

[1] 88 ITD 213 (Del)

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14. Mr. Porus F. Kaka, learned senior advocate appearing in some of these appeals submitted that the aforesaid amounts were, in fact, towards reimbursement of expenses actually incurred by the assessees. According to him, the work undertaken was, in fact, the obligation of the ONGC and it was for ONGC to provide such facilities/material under the contract. Still the assessees performed the said task at the request of the ONGC and ONGC simply reimbursed these expenses which did not have any profit element. It was emphasised by Mr. Kaka that insofar as the assessee—Sedco Forex International Inc. is concerned, the expenditure incurred on mobilisation was much higher than the actual payment received. Thus, this assessee had, in fact, suffered loss on this transaction. He also pointed out that the agreement separately provided for consideration/remuneration for mobilisation and demobilisation of drilling unit and reimbursement of cost incurred on behalf of the operator of ONGC. It was submitted that as this was the nature of the amount received, namely, reimbursement of expenses without there being any profit element, it could not be treated as 'amount' within the meaning of sub-section (2) of Section 44BB of the Act.

15. Explaining the taxation of income scheme enumerated under Sections 4, 5 and 9 of the Act, Mr. Kaka submitted that globally the tax systems can be classified broadly into two models; Worldwide and Territorial system. India follows a territorial system of taxation specially *qua* business income of non-residents, which is taxed only as it is attributable to operations within the Indian territory. This, according to him, was clear from the conjoint reading of Sections 4, 5 and 9 of the Act. Section 4 is the charging section for levying a tax on income of any person under the Act which provides that income tax shall be levied at the rates provided by the Finance Act on the 'total income' of the previous year. Scope of total income is provided under Section 5 of the Act which deals with total income of residents as well as non-residents. The learned senior counsel pointed out that insofar as non-residents are concerned, total income as per Section 5(2) of the Act is the income which is received or deemed to be received in India in such year or on behalf of such person; or income which accrues or arises or is deemed to accrue or arise in India during such year. He, thus, argued that in respect of non-residents only that income which is received or deemed to be received in India or which accrues or arises or deemed to accrue or arise in India is taxable. In order to locate the income which is deemed

A to accrue or arise in India, Section 9 is the concerned provision. Section 9 acknowledges principle of attribution of income under the Act. Section 9 lays down two broad categories of taxable of income i.e. (a) business income; and (b) income from interest or royalty or fees for technical services. Insofar as business income is concerned, it becomes taxable and only that income becomes chargeable to tax in India which is B attributable to operations carried out in India. Insofar as second category, namely, income in the nature of interest, royalty or fees for technical services is concerned, such income would be deemed to accrue or arise in India, irrespective of situs of the services. The learned senior counsel argued that insofar as payment for mobilisation which was received by C the assessee is concerned, it is neither income receipt nor deemed to be received in India. It is in respect of services outside India and, therefore, does not accrue or arise or deemed to accrue or arise under Section 5 read with Section 9 of the Act.

16. Proceeding further on the aforesaid line of argument, he D submitted that, in the first instance, it has to be determined that income accrues or arises or is deemed to accrue or arise in India. Only when that is established, the next step is to compute the total income based on other provisions of the Act and here Chapter IV of the Act which deals with computation of income from 'Profits and Gains of Business or Profession' gets triggered. It was submitted that, no doubt, Sections E 44B, 44BB, 44BBB etc. provide for special mechanism for computing the income in the case of non-residents on presumptive basis. However, even when the income is to be computed under any of these provisions, first pre-requisite is to find out as to whether a particular income has accrued or arisen or deemed to accrue or arise in India. If that threshold F is not met, the question of treating such payments as 'income', merely because the income is to be computed under special provision, is of no consequence. Mr. Kaka also referred to Circular No. 495 dated September 22, 1987 issued by the Central Board of Direct Taxes (CBDT) which, according to him, explains the Legislature intent behind inserting Section 44BB in the Act. According to the circular, the computation of G taxable income of a non-resident assessee engaged in the business of exploration etc. of mineral oils in accordance with the general mode of computation under Sections 28 to 43A involved a number of complications. As a measure of simplification, Section 44BB was inserted by the Finance Act, 1987 with retrospective effect from April 1, 1983

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for determination of income of such tax payers on a presumptive basis, at 10% of the amounts mentioned in sub-section (2) thereof. Relevant portion of that circular is as under:

> "21.1 A number of complications are involved in the computation of taxable income of a taxpayer 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 exploration for and exploitation of mineral oils. With a view to simplifying the provisions, the Amending Act has inserted a new Section 44BB which provides for determining of the income of such taxpayers at 10 percent of the aggregate of certain amounts which have been specified. This amount will include the amounts received or due to be received in India on account of such services or facilities or supply of plant and machinery."

17. After arguing that the provisions have to be read in the aforesaid manner, proposition advanced by the learned senior counsel is that Section 44BB of the Act is only a computation provision and does not override Sections 4 and 5 of the Act. For this purpose, he referred to the judgment of this Court in ***Union of India & Anr.*** v. ***A. Sanyasi Rao & Ors.***[2] wherein Section 44AC of the Act has been interpreted in a similar manner holding that Section 44AC read with Section 206C is the only machinery provision and not charging Section.

18. Towing the aforesaid line of argument, another submission of Mr. Kaka was that since Section 44BB is a computation provision under the head 'income', it cannot override the charging section. For this purpose, he relied upon the judgment of Bombay High Court in ***Commissioner of Income Tax*** v. ***F.Y. Khambaty***[3]. Mr. Kaka also relief upon the following judgments:

(a) ***Anglo-French Textile Company, Ltd., by Agents M/s Best & Company, Ltd., Madras*** v. ***Commissioner of Income Tax, Madras***[4]

(b) ***Ishikawajma-Harima Heavy Industries Ltd.*** v. ***Director of Income Tax, Mumbai***[5]

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[2] (1996) 3 SCC 465
[3] (1986) 159 ITR 203
[4] (1954) 25 ITR 27 (SC)
[5] (2007) 288 ITR 408 (SC) = (2007) 3 SCC 481

A (c) ***Carborandum & Co.*** v. ***CIT, Madras***[6]

(d) ***Commissioner of Income Tax, Madras*** v. ***Best and Company (Private) Ltd., Madras***[7]

19. He also cited judgments on the proposition that CBDT Circulars are binding on tax authorities; reimbursement of actual expenses does B not represent income and, therefore, cannot be taxed; and normal concept of income cannot be taken away by presumption provisions.

20. In nutshell, as can be seen from the aforesaid arguments, the proposition advanced by learned senior counsel are as follows:

(a) Principle of apportionment between India and outside India is C a basic principle of income tax law. Where payments are made to a non-resident outside India, for services rendered outside India, namely mobilization charges for drilling rigs from a foreign location to a location in India, the same is not chargeable to tax in India under Sections 5 and 9 of the Act and the same cannot be made chargeable to tax under Section D 44BB of the Act.

(b) A computation provision like Section 44BB cannot override the charging provisions of Sections 4 and 5. It is so stated in the instruction No. 1767 dated July 1, 1987 issued by the CBDT. The understanding of the CBDT is binding on the E Revenue.

(c) The charges were reimbursed for services rendered outside India. Services rendered outside India cannot be chargeable to tax under the Act. There should be sufficient territorial nexus between the rendering of services and the territorial limits of F the Act to make the income taxable.

(d) Where the actual expenditure incurred by the assessee for the mobilization of the rigs was higher than the amount reimbursed, there cannot be any income chargeable to tax under the Act.

(e) Reimbursement of actual expenditure, which was the obligation G of the operator/company cannot be included in receipts under Section 44BB of the Act as the income tax is levied on income. Further, the fact of such reimbursements being devoid of any profit element has not been disputed by the Revenue.

[6] (1977) 108 ITR 335 (SC)

H [7] (1966) 60 ITR 11 (SC)

21. Mr. Vohra, learned senior counsel appearing for the appellant Pride Foramer S.A. (Civil Appeal No. 4543 of 2013) stated that the appellant in the said case is a non-resident company incorporated in the Republic of France. It also entered into contract with ONGC for hire of its rig for carrying out oil exploration activities by ONGC in India. The rig was located in Singapore and accordingly, under the contract, mobilization fees of US$1 million (equivalent to Rs.4,31,10,000/-) was payable by ONGC to the appellant for and on account of mobilization/ movement of rig from Singapore to the offshore site at Mumbai. In case of delay, liquidated damages @0.5% of operating day rate subject to a maximum of 5% of the annual operating charges was payable by the appellant to ONGC. In Assessment Year 2000-01, during the year under consideration, the appellant received outside India, net mobilization charges of US$ 6,42,300 (equivalent to Rs.2,76,89,533/-) after deduction of liquidated damages for delay, for mobilization from Singapore to the offshore site (in India).

22. On the aforesaid facts, he submitted that net mobilization charges received outside India could not be taxed in India, more so, when these were in the nature of reimbursement of expenses on account of mobilization/movement of rig from Singapore to the offshore site at Mumbai. His primary contention was that before this payment could be included while making computation under Section 44BB of the Act, it had to be 'income' which is taxable in India in the first instance. His submissions on the scheme of Sections 4, 5 and 9 of the Act were the same as that of Mr. Kaka, already noted above. Additionally, he submitted that insofar as Section 44BB of the Act is concerned, it only provides a simplified computation mechanism for computing profits and gains in case of non-resident assessee engaged in activities relating to business of exploration of mineral oil etc. Thereby, overriding the normal computation mechanism contained in Sections 28 to 41, 43 and 43A of the Act. His emphasis was that this provision does not override charging provisions as contained in Section 4 read with Sections 5 and 9 of the Act, thereby bringing to tax an amount which is not at all taxable under the provisions of the Act. In addition to Circular No. 495 dated September 22, 1987 (already noted above), he also relied upon Instruction No. 1767 dated July 1, 1987 issued by CBDT explaining the computation of business income in case of a contractor engaged in business of exploration of oil where part of the activities are carried out in India and part of the activities are carried on outside India. It has been stated as under:

A "3. On these facts, it is clear that income accruing or arising to the non-resident contractor should be apportioned between the various activities carried on by it, some of which would be within India and some outside. Where the ownership in the platform, terminal, treatment plant or other facilities passed outside India, the non-resident will be taxable only in respect of the activities B performed in India by way of installation, hook-up and commissioning etc., of the facilities acquired by the Indian enterprises engaged in oil exploration or production..."

23. In support of the aforesaid submissions, Mr. Vohra relied upon the following judgments:

C (i) ***Commissioner of Income Tax and Anr.*** v. ***Hyundai Heavy Industries Co. Ltd.***[8]

(ii) State Bank of Travancore v. ***Commissioner of Income Tax, Kerala***[9]

24. To summarise, proposition advanced by Mr. Vohra are as under:

D (i) Mobilization fee was in respect of activities carried outside India prior to coming into existence of the PE in India and, therefore, this mobilization fee was not taxable at all, in view of Article 7 of Double Taxation Avoidance Agreement (DTAA) between India and France, the relevant portion whereof is as E under:

"1. The profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the F enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is attributable to that permanent establishment...."

(ii) In case the payment is held liable to tax in India, then the same G has to be computed in terms of Sections 4, 5 and 9 read with Section 44BB of the Act. In that situation, only the mobilization fee pertaining to voyage within the territorial waters of India can be subjected to tax.

[8] (2007) 7 SCC 422

H [9] (1986) 158 ITR 102 (SC)

(iii) Without prejudice to the aforesaid, it is alternatively submitted that since the appellant only received mobilization fee amounting to Rs.2,76,89,533/- (equivalent to US$ 6,42,300), after deduction of liquidated damages, the AO erred in bringing to tax the gross amount of US$1 million under Section 44BB of the Act.

25. Mr. Lakshmikumaran and Mr. Jay Savla, learned advocates appearing for some other assessees treaded the same path by adopting same line of arguments.

26. M/s. Chidananda and Arijit Prasad, learned advocates appearing for the Revenue put up an emphatic defence to the judgment of the High Court which has accepted the position taken by the Revenue. It was argued that assessee Sedco, which is a non-resident company, had entered into a composite/indivisible contract with ONGC to provide a drilling unit to carry out drilling operations. A finding of fact to this effect i.e. a composite/indivisible contract was entered into, was arrived at by the ITAT and, therefore, matter had to be proceeded on that basis. Submission was that, as per this contract, it was the obligation of the assessee to mobilise its resources for the purpose of drilling operations. According to them, since the payments were made by ONGC to the assessee in terms of indivisible contract for the purposes of drilling operations, it was not open to the assessee to claim that mobilisation fee/ charges and it should not be included in the aggregate receipts for the purposes of Section 44BB of the Act and their plea that they are not actual charges but expenses in the nature of reimbursement by ONGC was not permissible. It was submitted that though, mobilisation fee/ charges have been separately indicated in the said contract, the payments have been made by ONGC for supply of drilling unit including the rigs, for operating these rigs and for providing experts and other personnel for operating the rigs etc. Therefore, it is a misnomer to term payment of mobilisation fee/charge as 'reimbursement'. They are payments made pursuant to an indivisible contract. Assuming, for the purposes of argument that it amounts to reimbursement, the same will not make any difference for the reason that parties may agree to divide the total amount as a direct payment by way of fees and some part of the consideration by way of expenses, but this arrangement between the parties would not alter the character of receipts. A receipt will remain as such and will not partake the character of an expenditure. According to the learned counsel, the mobilisation fee/charges paid by ONGC to assessee amounts to income chargeable to tax.

A 27. For this purpose, reliance was placed on the definition of "income" as contained in Section 2(24) of the Act which defines the said expression in an inclusive manner. Attention was also drawn to Section 2(45) of the Act which defines "total income" to mean total income referred to in Section 5, computed in the manner laid down in the Act. It was, thus, argued that income had to be computed as per the B provisions of the Act. Even Section 4 of the Act, which is a charging section, clearly points out that income tax is to be paid 'in respect of the total income of the previous year'. Likewise, Section 5 of the Act which deals with 'scope of total income' includes all income from whatever the source derived. It was submitted that, in this hue, Section 9 which C deals with income deemed to accrue or arise in India, had to be looked into. According to the learned counsel, the assessee had business connection in India through the equipment owned by it, operating in India and its employees, experts etc. working in India. Its assets are employed/ used in India and the source of income is in India. Therefore, the ingredients of Section 9(1)(i) are fulfilled. Thus, assessee has territorial D nexus in India. Further, in a given case, if the assessee fulfils these requirements and a DTAA applies, this will also constitute a Permanent Establishment (PE) through which an assessee operates its business in India. Further, the rigs/equipment are mobilised for its business operations in India and that source of income is in India, therefore, the question of E apportionment. Thus, the mobilisation fee/charges paid by ONGC to assessee is an income chargeable to tax from a conjoint reading of Sections 4, 5 and 9. Therefore, the submission of the assessee that Section 44BB seeks to tax an event which the charging sections does not seek to tax is incorrect.

F 28. Adverting to the provisions of Section 44BB of the Act which finds place in Chapter IV dealing with 'computation of income' in respect of business or profession, it was submitted that the scope and effect of Section 44BB has been explained in Departmental Circular No. 495 dated September 22, 1987. It has been mentioned in the said circular that a number of complications were involved in the computation of G taxable income of a taxpayer 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 exploration for and exploitation of mineral oils. Section 44BB was introduced with a view to simplifying the relevant provisions which provide for determining the income of such taxpayers

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at 10 per cent of the aggregate of certain amounts, which have been specified in the said section. It was submitted that Section 44BB provides for "presumptive income determination". It is a complete code in itself for determining the taxable income 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. It replaces Sections 28 to 41 and Sections 43 and 43A (which otherwise mandates assessee to maintain accounts, claim and prove expenses). Only the receipts are taken into account. Even if the actual profits and gains of the assessee are more than 10%, only 10% is presumed to be its income. Thus, 10% is the income and the rest 90% is allowed as expenditure/allowable claims of the assessee. Assuming that Section 44BB was not on the statute book, assessee would have shown mobilisation fee as receipt and claimed the actual expenditure and arrived at the net taxable income. Now, Section 44BB presumes that only 10% of the aggregate receipts is income and the remaining 90% is expenditure. It was also argued that in the case of presumptive income determination like Section 44BB, items of expenditure cannot be claimed separately, otherwise it would lead to double deduction as Section 44BB presumes that only 10% of the aggregate receipts is income and the remaining 90% is expenditure. It was pleaded that when all the authorities including the final fact finding authority as well as the High Court have recorded their concurrent findings on consideration of relevant material, this Court may not disturb those findings. Reliance was placed on ***Avasarala Technologies Limited*** v. ***Joint Commissioner of Income Tax, Special Range 1, Bangalore***[10] and ***Commissioner of Income Tax Bihar and Orissa, Patna*** v. ***Ashoka Marketing Co.***[11]

A B C D E F

29. Before we appreciate the rival submissions made by counsel for the parties on both sides, it would be apposite to go into the *raison d'etre* behind the orders of the ITAT as well as the High Court.

30. The ITAT in its order has taken note of the relevant clauses of the agreements entered into between ONGC and assessee (Sedco) pertaining to mobilisation and mobilisation fee. Clause 3.2 of the Agreement dated September 3, 1985 relating to providing the Shallow Dash Water Jack Up Rig covering this aspect reads as under:

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[10] (2015) 14 SCC 732
[11] (1972) 4 SCC 426

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A "Mobilisation

Operator shall pay to Contractor a mobilisation fee of eight hundred thousand United States Dollars (US $ 800,000) ("Mobilisation Fee") for the mobilisation of the Drilling Unit from its present location in Setubal, Portugal to the first well location designated
B by Operator, Offshore Bombay, India. Operator will notify Contractor no later than fifteen (15) days from the execution of this Agreement if it desires to mobilize the Drilling Unit to another location offshore India and no additional costs shall be charged to Operator for mobilisation to such other location. In the event that Operator desires to mobilize the Drilling Unit to another location
C offshore India and it fails to notify Contractor by such date, any additional costs incurred by Contractor for such mobilisation in excess of the Mobilisation Fee shall be borne by the Operator. Contractor shall invoice Operator for payment of the Mobilization Fee after the Drilling Unit is jacked-up on the first well location
D and ready to spud the well. Operator shall make payment to Contractor no later than thirty (30) days after receipt of the invoice."

31. Clause 4.2 of the Agreement dated July 12, 1986 relating to Mobilisation of the Drilling Unit (including Rig 21) is also reproduced
E hereunder:

"Mobilisation and Mobilisation Fee

Contractor shall notify Operator when it is prepared to commence mobilisation of the Drilling Unit from Muscat, Oman. Within thirty days of receipt of Contractor's notice of readiness, Operator shall
F instruct Contractor to commence mobilisation, and Contractor shall forthwith ship the Drilling Unit to the port of entry (Kandla or Bombay).

Contractor shall be compensated for the mobilisation of the Drilling Unit from its place of origin by a mobilisation fee payable within
G thirty days following the commencement date."

32. It also noted that apart from the aforesaid mobilisation fee stipulated in the aforesaid two contracts, the ONGC had undertaken to pay compensation based on operating rate of US $ 24,550 per 24 hours a day for all operating time and US $ 24,060 as non operating rate per

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day relating to Sedco 252 Rig. Similarly operating rate – R1 and stand by rate – R2 was also separately stipulated in the other contract dated July 12, 1986 relating to Rig-21 etc. A

33. Thereafter, the ITAT pointed out that even as per the assessee, there was no dispute about the applicability of Section 44BB of the Act in relation to payments made by the ONGC under the aforesaid agreements by way of operating charges and other payments made by ONGC to the assessee except in relation to mobilisation fee and reimbursement of certain other expenses as according to the assessee, these payments were not in the nature of fee (income) but reimbursement of expenses only. This argument is dealt with by the ITAT, taking note of the provisions of Section 44BB of the Act. The ITAT concluded that it was a special provision for computing profits and gains in connection with the business of exploration of mineral oils, effect whereof was explained in Departmental Circular No. 495 dated September 22, 1987. It further noted that agreements between ONGC and the assessee were indivisible in nature as per which entire payments had been agreed to be made by ONGC for supply of drilling unit including the rigs, for operating those rigs, and for providing experts and other personnel for operating those rigs. Therefore, all these payments were deemed to be the profits and gains of business for the purposes of Section 44BB of the Act and 10% thereof was to be treated as income chargeable to tax. Section 44BB of the Act does not provide that separate consideration mentioned in the Agreement for transportation of the drilling units/rigs from their present location to the designated location in India would be excluded from the correct amount of gross receipts on which 10% profit rate is required to be applied. The ITAT held that the mobilisation fee paid by ONGC to the assessee had no nexus with the actual amount incurred by the assessee for transportation of drilling units/rigs and, therefore, it could not be said that this payment was made for reimbursement of actual expenditure. B C D E F

34. This is the summary of the rationale given by the ITAT in support of its conclusion, as can be seen from the following detailed discussion: G

> "2.14 The aforesaid Sec. 44BB making a special provision for computing profits and gains in connection with the business of exploration of mineral oils has been inserted by the Finance Act,

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A 1987 with retrospective effect from 1st April, 1983. The scope and effect of new Sec. 44BB was explained in Departmental Circular No. 495 dated 22nd September, 1987. It has been mentioned in the said Circular that a number of complications were involved in the computation of taxable income of a taxpayer engaged in the business of providing services and facilities in B connection with or supply of Plant & Machinery on hire, used or to be used in the exploration for and exploitation of mineral oils. Section 44BB was introduced with a view to simplifying the relevant provisions which provide for determining the income of such tax-payers at 10% of the aggregate of certain amounts, which C have been specified in the said Section. The provisions of Section 44BB were amended by the Finance Act, 1988 with retrospective effect w.e.f. 1st April, 1983 which clarifies that applicability of Section 44BB will be restricted to the cases of only non-resident tax-payers. It is clear from the language used in Section 44BB(2)(a) that the amount referred to in Section 44BB(1) on D which profits have to be calculated @10% will be the aggregate of amounts paid or payable to the taxpayer or to any person on his behalf whether in or out of India on account of the provisions of such services or facilities.

E 2.15 A perusal of the relevant Agreements executed between the appellant company and ONGC clearly reveals that both the Agreements are indivisible contracts. It is true that mobilisation fee and operating charges have been separately indicated in the said Agreements but the entire payments have been agreed to be made by ONGC for supply of the Drilling Unit including the Rigs, F for operating these Rigs, and for providing experts and other personnel for operating those rigs etc. Section 44BB specifically provides that the aggregate of the amounts referred to in sub-section (2) of Section 44BB will be adopted as the basis for calculating profits @10%, which shall be deemed to be the profits and gains of such business chargeable to tax under the head G "Profits & Gains of Business or Profession". It does not provide that separate consideration mentioned in the Agreement for transportation of the Drilling Unit/Rig from their present location to the designated location in India will be excluded from the aggregate amount of gross receipts on which 10% profit rate is

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required to be applied. ONGC has made the entire payment including the mobilisation fee, operating charges, daily hire on non operating days etc. for availing the services and facilities and the supply of Plant & Machinery on hire agreed to be provided by the appellant company to ONGC. The mobilisation fee paid by ONGC to the appellant company has no nexus with the actual amount incurred by the appellant company for transportation of the Drilling Unit/Rigs to the specified drilling location in India. Even if the actual expenditure incurred by the appellant company would have been substantially less, ONGC was liable to pay the fixed amount of mobilisation fee stipulated in the respective Agreements."

35. Before the High Court, argument of the assessee was that amount of mobilisation charges cannot be included in the amount referred to under sub-section (2) of Section 44BB of the Act as the mobilisation charges represent reimbursement of expenses incurred for transportation of drilling units of rigs from outside India to designated drilling places in India and the payment has also not been made in India. In support of his submission, apart from other judgments, heavy reliance was placed on the decision of this Court in ***Ishikawajima-Harima Heavy Industries Ltd.*** case. The High Court noted that in the said case, the assessee was a Japanese company, inter alia, engaged in the business of construction of storage tanks as also engineering etc. It formed consortium along with few other Japanese companies and one subsidiary company of the Japanese company. This consortium had entered into an agreement with an Indian company on January 19, 2001 for setting up a Liquefied Natural Gas (LNG) receiving, storage and degasification facility at Dahej in the State of Gujarat. A supplementary agreement was also entered by the parties on March 19, 2001. It was a turnkey project. At the same time, role and responsibility of each member of the consortium was separately specified and each of the members of the consortium was to receive separate payments. Insofar as appellant-assessee is concerned, it was to develop, design, engineer and procure equipment, materials and supplies to reject and construct storage tanks of 5 MMTPA capacity, with potential expansion of 10MMTPA capacity at the specified temperature, i.e., 200 degree celsius. The arrangement also included marine facilities (jetty and island breakwater) for transmission and supply of LNG to purchaser; to test and commission facilities relating to receipt and unloading, storage and regasification of LNG and to send out

A regasified LNG by means of a turnkey fixed lump sum price time certain engineering procurement, construction and commission contract. The contract indisputably involved: (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv) onshore services and (v) construction and erection. The price was payable for offshore supply and offshore services in US dollars, whereas that of onshore supply as also onshore B services and construction and erection partly in US dollars and partly in Indian rupees.

36. The High Court noted that while determining the tax liability of the said foreign company, this Court had taken into consideration Section 5(2), Section 9(1)(i) and Section 9(1)(vii) of the Act and C considered the question of imposition of tax on income arising from a business connection of the assessee. Holding that income is not taxable in India, the Court premised the conclusion, inter alia, on the ground that as per clause (a) of Explanation 1 to Section 9(1)(i) of the Act, only such part of income as is attributable to the operations carried out in India, is D taxable in India and further that sufficient territorial nexus between the rendition of services and territorial limits of India is necessary to make the income taxable. As far as offshore supply and offshore services in US$ are concerned, it was done outside the territory of India and the payment was also made to the assessee (a foreign company) in US$ outside India, said payment was not taxable as it was not "income" E arising from a business connection of the said assessee.

37. The High Court, after taking note of the aforesaid judgment, has held that it is not applicable in the instant case. Reason given is that in ***Ishikawajima-Harima Heavy Industries Ltd.***, the Court had dealt with the assessment of a non-resident company on its income as per the F provisions of Sections 5 and 9 of the Act and these sections are not attracted in the instant case, as the same is governed by Section 44BB of the Act. This is the material distinction, in the opinion of the High Court, the manner in which the same is discussed needs to be reproduced. Thus, we hereby quote the relevant portion of the said discussion:

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> ".....Therefore, section 5 and section 9 both are aimed a the income for the taxability under section 4 of the Act, while section 44BB does not take into Account the income for calculating the aggregate amount t calculate 10 percent profit and gains. Profit and gains is a type of income to be taxed under a legal fiction, i.e., @10 percent

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of the amount specified in sub-section (2) of section 44BB. Section 44BB is a special provision relating to non-resident assessee who is 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 in or outside India. The section is a complete code in itself. Thus, the reliance placed by Sri Porus Kaka, learned Counsel for the assessee, is misplaced as we have observed that the amount referred in sub-section (2) of Section 44BB are four types of amounts and all the four types of amounts are mutually inclusive and has to be taken into account either all of them or any of them and its clauses themselves provide that whether the payment is made inside India or outside India.

17.In the present case, a finding has been recorded by the ITAT that it was not in dispute before the Tribunal that the payment was made to the appellant company outside India and the mobilization fee as claimed by the assessee was paid to the appellant by ONGC has no nexus with the actual amount incurred by the appellant company for transportation of drilling units of rigs to the specified drilling locations in India. Hence, the mobilization fee is not the reimbursement of expenditure. ONGC was liable to pay a fixed sum as stipulated in the contract regardless of actual expenditure which may be incurred by the assessee company for the purpose. In view of the fictional taxing provision contained under Section 44BB, the Assessing Officer was right in adding the amount of Rs. 99,04,000/- for the Assessment Year 1986-87 and amount worth Rs. 64,64,530/- for the Assessment Year 1987-88 received by the assessee towards mobilization charges for the purpose of imposing income tax and CIT (Appeals) and ITAT were also right in upholding the order of the Assessing Officer."

38. We feel that High Court may not be entirely correct in law in excluding the provisions of Sections 5 and 9 in those cases where the assessment is opted by the assessee under Section 44BB of the Act. Submissions of learned counsel for the assessees are justified to the extent that Section 44BB of the Act is a special provision providing computation mechanism for computing profits and gains in case of non-resident assessee engaged in activities relating to business of exploration of mineral oil etc. At the same time Sections 4,5 and 9 of the Act which deal with charging section, total income and income of non-resident which

A arises or deem to arise in India cannot be sidetracked. These are the provisions which bring a particular income within the net of income tax. Therefore, it is imperative that a particular income is covered by the charging provisions contained in Section 5 of the Act. Indian Income Tax Act, admittedly, follows a territorial system of taxation. As per this system only that income of a non-resident is taxable in India which is B attributable to operations within the Indian Territory. Therefore, in the first instance it is to be seen whether a particular income arises or accrues or deem to arise or accrue within India. In order to seek this answer, the principles contained in Section 9 have to be applied only when it becomes an income taxable in India as per Section 9, in case of non-resident, the C question of computation of the said income would arise. To recapitulate the scheme of the Act in this behalf, it may be stated that Section 4 is the charging section for levying a tax on the income of any person under the Act and provides that income-tax shall be levied at the rates provided by the Finance Act on the 'total income' of the previous year of every person. The expression 'total income' has been defined in Section 2(45) D of the Act to mean the total amount of income referred to in Section 5 computed in the manner laid down under the Act.

39. The scope of the total income of any person, which could be subjected to tax under the provisions of the Act, is defined under Section 5 of the Act and dependent upon the residential status of the persons. E Section 5(1) provides the scope of 'total income' in the case of residents, whereas Section 5(2) provides the scope of 'total income' in the case of non-residents. As per Section 5(2) of the Act, subject to the provisions of this Act, the 'total income' of any previous year of non-resident includes:

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- Income which is received or deemed to be received in India in such year or on behalf of such person; or
- Income which 'accrues or arises' or is deemed to accrue or arise to him in India during such year.

G 40. Section 9 enumerates the income which is deemed to accrue or arise in India. There are two broad categories of taxability of income provided under this Section, i.e., Business Income and income from interest or royalty or fees for technical services (FTS).

41. Section 9(1)(i) provides that income is to be deemed to have H accrued or arising in India if the income is accruing directly or indirectly

through any business connection in India or from any property in India or from any asset or source of income in India or any capital asset situated in India (referred as business income). A

Explanation 1(a) to Section 9(1)(i) of the Act provides an exclusion in the case of operations which are not carried out in India. The explanation provides that the income of the business deemed under this clause to accrue or arise in India shall be only that part of the income as is reasonably attributable to the operations carried out in India. Thus, business income earned by non-resident is chargeable to tax in India only to the extent reasonably attributable to the operations carried out in India. B C

42. It is, however, pertinent to point out that Section 44BB(2) makes certain receipts as "deemed income" for the purposes of taxation in the said provision. Therefore, aid of this provision is to be necessarily taken to determine whether a particular amount will be "income" within the meaning of Section 5 of the Act. Likewise, Section 44BB(2) also acts as guide to determine whether a particular income is attributed as income occurred in India. Section 44BB of the Act provides for special provision for computing profits and gains. However, that would not mean that if the income is to be computed under this provision, we have to give a go-by to Sections 5 and 9 of the Act. To this extent, remarks of the High Court may not be correct. Law in this behalf is settled by the judgment of this Court in ***A. Sanyasi Rao*** case as can be discerned from the following discussion in the said judgment. D E

> "We are further of the view that the basis of a charge relating to income tax is laid down in Sections 4 to 9 of the Act. Section 4 is the charging section. Income-tax is levied in respect of the total income of the previous year of every person. Section 5 deals with the scope of total income. Section 6 deals with the residence in India. Section 7 deals with the income deemed to be received. Section 8 deals with dividend income. Section 9 deals with the income deemed to accrue or arise in India. F G
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> The crucial words in Section 9(1) to the effect that "all income accruing or arising, *whether directly or indirectly, through or from any business connection*" occurred in Section 42 of the Income Tax Act, 1922 as well. The said section came up for H

A consideration before this Court in *Anglo-French Textile Co. Ltd.* v. *CIT* [(1953) 23 ITR 101...

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The counsel for the revenue Dr. Gaurishankar vehemently contended before us that Section 44AC read with Section 206C
B are only machinery provisions and not charging sections. We see force in this plea. The charge for the levy of the income that accrued or arose is laid by the charging sections, viz., Sections 5 to 9 and not by virtue of Section 44AC or section 206C...

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However, the denial of relief provided by sections 28 to 43C to the particular businesses or trades dealt with in Section 44AC calls for a different consideration. Even, according to the revenue, the provisions (sections 44AC and 206C) are only 'machinery provisions'. If so, why should the normal reliefs afforded to all
D assessees be denied to such traders? *Prima facie*, all assessees similarly placed under the Income Tax Act are entitled to equal treatment. In the matter of granting various reliefs provided under sections 28 to 43C, the assessees carrying on business are similarly placed and should there be a law, negativing such valuable reliefs
E to a particular trade or business, it should be shown to have some basis and fair and rational. It has not been shown as to why the persons carrying on business in the particular goods specified in section 44AC are denied the reliefs available to others. No plea is put forward by the revenue that these trades are distinct and different even for the grant of reliefs under Sections 28 to 43C.
F The denial of such reliefs to trades specified in section 44AC, available to other assessees, has no nexus to the object sought to be achieved by the Legislature. (emphasis supplied)"

43. Having corrected the position in law, by emphasising that Sections 4, 5 and 9 of the Act are to be kept in mind even in those cases
G where assessment is done under Section 44BB of the Act, we are of the opinion that the argument of the assessees that Section 44BB is only a computation provision, is also not entirely justified.

44. In the first blush, assessees may appear to be correct in their contentions that Section 44BB falls in Chapter IV of the Act. Insofar as

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computation of income from 'Profits or Gains of Business or Profession' is concerned, it has to be computed as per the provisions of Sections 28 to 43D(2). However, certain provisions are made for providing special mechanism for computing the income on presumptive basis in case of non-resident and it includes Section 44BB as well.

45. Having put the law in prospective, we need to examine as to whether mobilisation charges received by the assessees can be treated as 'income' under Section 5 of the Act and would fall within the four corners of Section 9, namely, whether it can be attributed as having arisen or deemed to arise in India. Argument of the learned counsel appearing for the assessees is that the amount was received by way of reimbursement of expenses for the operation carried outside India and the payment was also received outside India. It is on this premise, entire edifice is built to argue that it is not an "income" and, in any case, not taxable in India at the hands of the assessees which are foreign entities.

46. We have already reproduced above Clause 3.2 of the Agreement dated September 3, 1985 and Clause 4.2 of the Agreement dated July 12, 1986. Clause 3.2 of the Agreement dated September 3, 1985 pertains to providing the Shallow Dash Water Jack Up Rig against which payment was made to the assessees. This Clause says that the assessees shall be paid 'mobilisation fee' for the mobilisation of drilling unit from its present location in Portugal to the well location designated by ONGC, offshore Mumbai, India. Fixed amount is agreed to be paid which is mentioned in the said Clause. The aforesaid mobilisation fee was payable to the assessees after the jacking up of the drilling at the designated location and ready to spud the well. After the aforesaid operation, assessees were required to raise invoice and ONGC was supposed to make the payment within 30 days of the receipt of this invoice. Insofar as Clause 4.2 of Agreement dated July 12, 1986 is concerned, it related to mobilisation of drilling unit. Here again, 'mobilisation fee' was payable for the mobilisation of the drilling unit from the place of its origin to the port of entry (Kandla Port, Mumbai). What follows from the above is that a fixed amount of mobilisation fee was payable under the aforesaid contracts as "compensation". Contracts specifically describe the aforesaid amounts as 'fee'. In this hue, we have to consider as to whether it would be treated as "income" under Section 5 of the Act and can be attributed as income earned in India as per Section 9 of the Act. For this purpose, Section 44BB(2) has to be invoked.

A 47. Section 44BB starts with non-obstante clause, and the formula contained therein for computation of income is to be applied irrespective of the provisions of Sections 28 to 41 and Sections 43 and 43A of the Act. It is not in dispute that assessees were assessed under the said provision which is applicable in the instant case. For assessment under this provision, 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 the head 'profits and gains of the business or profession'. Sub-section (2) mentions two kinds of amounts which shall be deemed as profits and gains of the business chargeable to tax in India. Sub-clause (a) thereof relates to amount paid or payable to the assessee or any person on his behalf on account of 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. Thus, all amounts pertaining to the aforesaid activity which are received on account of provisions of services and facilities in connection with the said facility are treated as profits and gains of the business. This clause clarifies that the amount so paid shall be taxable whether these are received in India or outside India. Clause (b) deals with amount received or deemed to be received in India in connection with such services and facilities as stipulated therein. Thus, whereas clause (a) mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received have to be in India.

48. From the bare reading of the clauses, amount paid under the aforesaid contracts as mobilisation fee on account of provision of services and facilities in connection with the extraction etc. of mineral oil in India and against the supply of plant and machinery on hire used for such extraction, clause (a) stands attracted. Thus, this provision contained in Section 44BB has to be read in conjunction with Sections 5 and 9 of the Act and Sections 5 and 9 of the Act cannot be read in isolation. The aforesaid amount paid to the assessees as mobilisation fee is treated as profits and gains of business and, therefore, it would be "income" as per Section 5. This provision also treats this income as earned in India, fictionally, thereby satisfying the test of Section 9 of the Act as well.

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49. The Tribunal has rightly commented that Section 44BB of the Act is a special provision for computing profits and gains in connection with the business of exploration of mineral oils. Its purpose was explained by the Department vide its Circular No. 495 dated September 22, 1987, namely, to simplify the computation of taxable income as number of complications were involved for those 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 etc. Instead of going into the nitigrities of such computation as per the normal provisions contained in Sections 28 to 41 and Sections 43 and 43A of the Act, the Legislature has simplified the procedure by providing that tax shall be paid @10% of the 'aggregate of the amounts specified in sub-section (2)' and those amounts are 'deemed to be the profits and gains of such business chargeable to tax...'. It is a matter of record that when income is computed under the head 'profits and gains of business or profession', rate of tax payable on the said income is much higher. However, the Legislature provided a simple formula, namely, treating the amounts paid or payable (whether in or out of India) and amount received or deemed to be received in India as mentioned in sub-section (2) of Section 44BB as the deemed profits and gains. Thereafter, on such deemed profits and gains (treating the same as income), a concessional flat rate of 10% is charged to tax. In these circumstances, the AO is supposed to apply the provisions of Section 44BB of the Act, in order to find out as to whether a particular amount is deemed income or not. When it is found that the amount paid or payable (whether in or out of India), or amount received or deemed to be received in India is covered by sub-section (2) of Section 44BB of the Act, by fiction created under Section 44BB of the Act, it becomes 'income' under Sections 5 and 9 of the Act as well.

50. It is stated at the cost of repetition that, in the instant case, the amount which is paid to the assessees is towards mobilisation fee. It does not mention that the same is for reimbursement of expenses. In fact, it is a fixed amount paid which may be less or more than the expenses incurred. Incurring of expenses, therefore, would be immaterial. It is also to be borne in mind that the contract in question was indivisible. Having regard to these facts in the present case as per which the case of the assessees get covered under the aforesaid provisions, we do not find any merit in any of the contentions raised by the assessees.

A Therefore, the ultimate conclusion drawn by the AO, which is upheld by all other Authorities is correct, though some of the observations of the High Court may not be entirely correct which have been straightened by us in the above discussion. For our aforesaid reasons, we uphold the conclusion. Resultantly, all the appeals of the assessees are dismissed.

B 51. In this batch of appeals, Civil Appeal No. 3695 of 2012 is the solitary appeal which is preferred by the Director of Income Tax, New Delhi (Revenue) against the judgment of the High Court of Uttarakhand. The computation of income of the assessee was done under Section 44BB of the Act. However, the amount which was sought to be taxed was reimbursement of cost of tools lost in hole by ONGC. It is, thus, C clear that this was not the amount which was covered by sub-section (2) of Section 44BB of the Act as ONGC had lost certain tools belonging to the assessee, and had compensated for the said loss by paying the amount in question. On these facts, conclusion of the High Court is correct. Even otherwise, the tax effect is Rs.15,12,344/-. Therefore, D Civil Appeal No. 3695 of 2012 filed by the Revenue is dismissed.

Devika Gujral Appeals disposed of.