IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.2373/Del/2022
Assessment Year: 2019-20

Kreuz Challenger Pte Ltd., 2, Venture Drive, #24-01 Vision Exchange, Singapore , 999999	Vs	ACIT, International Taxation Circle 2(1)(2), New Delhi.

PAN : AAHCK3082A

(Appellant)		(Respondent)
Assessee by	:	Shri Salil Kapoor, Advocate Shri Anil Chachra, Advocate & Shri Shivam Yadav, Advocate
Revenue by	:	Ms C. Chandra Kanta, CIT-DR
Date of Hearing	:	07.11.2024
Date of Pronouncement	:	09.12.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 28.07.2022 of the Asstt. Commissioner of Income Tax, Circle International Taxation-2(1)(2), New Delhi (hereinafter referred to as the Ld. AO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2019-20.

2. The assessee filed return of income which was selected for scrutiny and the AO examined the receipts of the assessee from M/s J Ray Mcdermott SA which was on account of the provision of S-89 uniform project time charter party for offshore services vessel. The AO observed that the hire charges earned by the assessee from provision of vessels fall within the definition of royalty as prescribed u/s 9(1)(vi) of the Act or Article 12 of the Tax Treaty and if the assessee wanted to be governed by the provisions of Tax Treaty, the revenue earned by the assessee would be taxable as per Article 12 of the Tax Treaty. On the other hand, taxability of the income earned by the assessee was held to be falling within the ambit of section 115A if the assessee doesn't have a PE in India/section 44DA if the assessee has a PE in India. The AO observed that as the vessel was provided by the assessee company for the purpose of providing services/facilities for extraction or production of mineral oil in India, therefore, such services fall within the provisions of section 44BB of the Act and that this section does not embargo any addition on the assessee to have earned for PE in India. Further, the AO has taken into consideration a letter issued from the assessee for withholding tax certificate u/s 197 of the Act wherein the assessee had claimed applicability of section 44BB. Therefore, the amount of Rs.30,50,33,034/- were held to be received for provision of offshore services vessel and taxable u/s 44BB of the Act. The ld. DRP has sustained this addition for which the assessee is in appeal raising the following grounds:-

"Based on facts and circumstances of the case, Kreuz Challenger Pte Limited (hereinafter referred to as 'the Appellant') respectfully craves leave to prefer an appeal against the assessment order issued by the Assistant Commissioner of Income Tax, (International Taxation) - 2(1)(2), New Delhi (hereinafter referred to as 'the Ld. AO') based on the directions of Hon'ble Dispute Resolution Panel ('DRP') under Section 143(3) read with Section 144C(13) of the Income-tax Act, 1961 ('the Act') on the following grounds:

1. *On the facts and circumstances of the case and in law, the final assessment order ('impugned assessment order') for Assessment Year 2019-20 (relevant AY) is based on incorrect surmises and conjectures and the Ld. AO has erred in assessing total income of the Appellant at Rs.3,05,03,303/- as against the nil returned income. Hence, the order is bad in law and liable to be quashed.*

2. *That Ld. AO and DRP has failed to appreciate that the Appellant being a resident of Singapore, is eligible to avail beneficial treaty provisions as per section 90(2) of the Act. Accordingly, in absence of PE in India in terms of Article 5 read with Article 7 of the India-Singapore tax treaty ('DTAA'), income earned in India is not taxable in India.*

3. *On the facts and circumstances of the case and in law, the Ld. AO and DRP has grossly erred in holding that the income earned by the Appellant for providing diving services through its vessel 'Kreuz Challenger' is to be taxed under the provisions of section 44BB of the Act without considering the beneficial provision of DTAA.*

4. *On the facts and circumstances of the case and in law, the Ld. AO and DRP has grossly erred in holding that the income of the appellant falls in the definition of Royalty under section 9(1)(vii) of the Act as well as under Article 12 of the DTAA.*

5. *That the Ld. AO and DRP has grossly erred in not appreciating substance over form and principally relying on the withholding tax certificate issued u/s 197 to conclude that the income of appellant is chargeable to tax u/s 44BB. That the Ld. AO and DRP has grossly erred in not appreciating that section 197 proceedings are only provisional in nature and cannot be the sole basis for conclusion of assessment proceedings.*

6. *On the facts and circumstances of the case and in law, the Ld. AO has erred in not granting complete credit of TDS amounting to INR*

1,33,23,843 as claimed in the return of income filed for the relevant AY.

7. *On the facts and circumstances of the case and in law, the Ld. AO has erred in erroneously levying Interest under section 234B and 234D of the Act.*

8 *On the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under Section 270A of the Act without appreciating that the Appellant has neither under-reported nor misreported its income for the relevant AY.*

All the above grounds are without prejudice to each other.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the hon'ble members to decide this appeal according to law."

3. The ld. counsel for the assessee has submitted that the Revenue does not dispute the fact that number of days for which the vessel stayed in India was from 5th January, 2019 to 25th February, 2019 and that makes it 52 days. It was submitted that when there is admittedly no PE of the assessee in India, the receipt in the form of hire charges of the vessel constitutes a business income which is not taxable under the India-Singapore DTAA. It was also submitted that the AO has contradicted himself by holding the receipts as royalty and also considering the same to be business income for taxing u/s 44BB of the Act. Reliance has been placed on the following decisions to contend that in the absence of PE, section 44BB would not be applicable:-

(i) CIT vs. Enron Oil & Gas Expat Services, 29 taxmann.com 419 (UK); and

(ii) Baker Hughes Energy Technologies UK Ltd. vs. ACIT, 151 taxmann.com 78 (Delhi Trib.).

4. The following judgments have then been relied for the contention that time charter of vessels used for providing services for exploration and exploitation of the oil and natural gas do not lead to royalty income:-

(i) Smit Singapore Pte Ltd. vs. DCIT, 125 taxmann.com 349 (Mum Trib.); and

(ii) Smit Singapore Pte Ltd. vs. DCIT, 151 taxmann.com 197 (Mum Trib.).

5. On the other hand, the ld. DR has stressed on the fact that there is no conclusive finding of the AO that there was no PE. It was submitted that the assessee himself admits on the basis of invoices that the services are provided throughout the year. The ld. DR contended that the provisions of section 44BB are squarely applicable on assessee's own acknowledgement of the facts when application u/s 197 of the Act was moved.

6. We have given thoughtful consideration to the matter before us and the submissions. Quite apparently, the tax authorities below have concluded that the provision of offshore service vessel is to be taxed as per the provisions of section 44BB of the Act irrespective of whether the assessee has a PE in India or not. After going through the impugned orders of the ld. tax authorities below, we find that although at the stage of assessment when notices were issued to the

assessee, a query was raised from the assessee as to if assessee has a PE in India for which the assessee had responded in negative submitting that the assessee does not have any office, branch, a project office or a liaison office in India. This aspect seems to have been not at all disturbed by any finding to the contrary. At the same time, we find that the claim of the assessee is that the vessel which was given on hire to the charterer stayed in India for the period 5th January, 2019 till 25th February, 2019 which works out to 52 days. This is supported by the customs clearance certificate which was filed before the ld. tax authorities below.

7. We then find that the nature of contract between the assessee and the charterer was a project time charter party for offshore services vessel and, as appearing from the agreement, copy of which is available at page No.12 to 46 of the paper book, the period of hire was 30 running days (firm period) inclusive of the dates of delivery and re-delivery and of 'off service' time. It further comes up from the agreement that the schedule of price and rates was by way of Annexure-E and copy of which is available at page No.43 of the paper book. The vessel spread day rates were USD 41,560 per day apart from other payments for these the tax invoice was raised by the assessee and the copy of which have been made available at page 118 and 119 of the paper book. We find that as for the charter for the following period which comes to 35 days, the payments were made from 07.01.2019 to 10.02.2019. Thus, it is established

that for the purpose of Article 5of Indo-Singapore DTAA, the assessee does not have a PE in India.

8. Now, once that is established that assessee has no PE in India, the only question required to be examined is if even in the absence of permanent establishment, assessee would still be covered by the provisions of section 44BB, and not entitled to benefit of DTAA. In this regard, it is important to examine the basic document, where in assessee has agreed to provide the following services to its Indian counterpart, the Charterer.

> *"To provide a Diving Support Vessel (DSV) complete with marine crew, IMCA compliant saturation and air diving spread with maintenance technicians, ROV systems and personnel for diving support activities for Project at the Reliance KGD6 platform as per direction of Charterer within the Vessel safe and natural capabilities. Responsibilities for each Parties are summarized in the Responsibility Matrix as per Annex.D"*
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> *We further find that the various clauses of the agreement indicate that the vessel is on hire and the responsibility of the owners (assessee) and charterers included the following:-*

8.1 Further the respective responsibility are defined as follows;

> ***Owners to Provide***
>
> *(a) The Owners shall provide and pay for all provisions, wages and all other expenses of the Master, Officers and Crew, all maintenance and repair of the Vessel's hull machinery and equipment as specified in ANNEX 'A'; also, except as otherwise provided in this Charter Party, for all insurance on the Vessel, all dues and charges directly related to the Vessel's flag and/or registration, all deck, cabin and engine room stores, cordage required for ordinary ship's purposes mooring alongside in harbour, and all fumigation expenses and de-ratisation certificates. The Owners obligations under this Clause extend to cover all liabilities for consular charges appertaining to the Master, Officers and Crew, customs or import duties arising at any time during the performance of this Charter Party in relation to the personal effects of the Master, Officers and Crew, and in relation to the stores, provisions and other matters as aforesaid*

which the Owners are to provide and/or pay for and the Owners shall refund to the Charterers any sums they or their agents may have paid or been compelled to pay in respect of such liability

(b) On delivery the Vessel shall be equipped, if appropriate, at the Owners' expense with any towing and anchor handling equipment specified in Section 5(b) of ANNEX "A". If during the Charter Period any such equipment becomes lost, damaged or unserviceable, other than as a result of the Owners negligence, the Charterers shall either provide, or direct the Owners to provide, an equivalent replacement at the Charterers' expense

Charterers to Provide

(a) While the Vessel is on hire the Charterers shall provide and pay for all fuel, lubricants, water, dispersants, fire fighting loam and transport thereof, port charges, pilotage and boatmen and canal steersmen (whether compulsory or not), launch hire (unless incurred in connection with the Owners business), light dues, tug assistance, canal, dock, harbour, tonnage and other dues and charges, agencies and commissions incurred on the Charterers' business, costs for security or other watchmen, and of quarantine (if occasioned by the nature of the cargo carried or the ports visited whilst employed under this Charter Party but not otherwise)

(b) At all times the Charterers shall provide and pay for the loading and unloading of cargoes so far as not done by the Vessels crew, cleaning of cargo tanks, all necessary dunnage, uprights and shoring equipment for securing deck cargo, all cordage except as to be provided by the Owners, all ropes slings and special runners (including bulk cargo discharge hoses) actually used for loading and discharging, inert gas required for the protection of cargo, and electrodes used for offshore works, and shall reimburse the Owners for the actual cost of replacement of special mooring lines to offshore units, wires, nylon spring lines etc. used for offshore works, all hose connections and adaptors, and further, shall refill oxygen/acetylene bottles used for offshore works.

(c) The Charterers shall pay for customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, both for the Vessel and/or equipment, required for or arising out of this Charter Party"

9. It appears that the ld. tax authorities have heavily relied the Hon'ble Supreme Court judgement in the case of ONGC Ltd. After considering the said judgement in the case of **ONGC (2015) 59 taxmann.com 1/233** it comes up

that was a case involving the question "Whether the amounts paid by the ONGC to the non-resident assessees /foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as "fees for technical services" under Section 44D read with Explanation 2 to Section 9(1)(vii) of the Income Tax Act or will such payments be taxable on a presumptive basis under Section 44BB of the Act"? Thus Hob'ble Supreme Court examined the question that the assessments should be made under Section 44D of the Act or Section 44BB of the Act.

10. A Circular No. 1862 dated 22.10.1990, having a bearing on the subject was placed for consideration by the appellant-assessee, in that case and where in as for the definition of "fees for technical services" in Explanation to Section 9(1) (vii) of the Income Tax Act, 1961, prospecting for or extraction of production of mineral oil are "mining" operations are covered was exmamined and on the question whether prospecting for, or extraction or production of, mineral oil can be termed as 'mining operations, was referred to the Attorney General of India for his opinion. The Attorney General has opined that such operations are mining operations and the expressions 'mining project' or 'like projects' occurring in Explanation 2 to Section 9(1) (ii) of the Income Tax Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration or exploitation of oil and natural gas. Thereafter, hon'ble supreme court had held as follows;

"The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act."

11. However, no issue about taxability of receipt by a foreign resident, not having PE in India, from hire of vessel on time charter basis was examined in any form. So the reliance on the ONGC Case (supra) by the ld. Tax authorities was not justified.

12. This issue has been examined by the Mumbai Bench in the case **Smit Singapore Pte Ltd. Vs. DCIT [2021] 125 taxmann.com 349 (Mumbai-Trib.)** wherein the issue was examined to some extent in the context of payment of royalty and it was held in para 18 that the hire charges were not royalty within the meaning of Article 12(3)(b) of India-Singapore Tax Treaty and the relevant part is reproduced below:-

"As such, we herein not being able to subscribe to the view taken by the lower authorities, to the extent they had concluded that the amounts received by the assessee for time charter of its vessel viz. Smit Borneo' was to be treated as royalty under Article 12(3)(b) of the India-Singapore tax treaty, therein vacate the same. As we have vacated the view taken by the A.O/DRP that the consideration received by the assessee from time charter of its vessel viz. Smit Borneo' was to be treated as royalty' as per Article 12 of the India-Singapore Tax Treaty, therefore, we refrain from adverting to the other contentions advanced by the ld. A.R to support its claim, which thus are left open. The Grounds of appeal No. 2 to 4 are allowed in terms of our aforesaid observations."

13. Then, in the case of **Sedco Forex International Inc. vs. CIT, [2017] 87 taxmann.com 29 (SC),** the Hon'ble Supreme Court was examining the question of taxability of mobilization fee in the context of provisions of section 44BB of the Act. The Hon'ble Supreme Court observed that sections 4, 5 and 9 of the Act are still applicable where an assessee had opted application of provisions of section 44BB of the Act and we consider it appropriate to reproduce relevant paras 38 to 43 as follows:-

> *"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 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 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 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) of the Act to mean the total amount of income referred to in Section 5 computed in the manner laid down under the Act.*
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> *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. 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.

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 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.

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.

"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.

xxx xxx xxx

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 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 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…

xxx xxx xxx

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 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 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. 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 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."

14. Now, this aspect has been taken note of by the coordinate bench of Delhi in the case **Baker Hughes Energy Technologies UK Ltd. vs. ACIT, [2023] 151 taxmann.com 78 (Delhi-Trib.)** and, dealing with the case of the assessee in that case that income of the assessee which is a tax resident of UK is not taxable in India since neither it had a permanent establishment in India nor the provisions of section 44B be applied and thereby it concluded in para 8 as follows:-

> *"8. Thus, a reading of the above section shows that the section provides that notwithstanding anything contained in sections 28 to 41 and section 43 & 43A, 10% of the gross receipt of a non-resident engaged in the business of providing services or facilities or supplying plant & machinery on hire which is used in prospecting for or extraction of mineral oils shall be deemed to be the profits & gains of business. Thus, this section has rightly been contended by ld. Counsel of the assessee that it is a computation provision. Thus, this section provides a presumptive taxation rate for computation of profits but does not override provision of sections 5, 9 or section 90 of the Income-tax Act, 1961. Case law referred by the ld. Counsel for the assessee in this regard i.e. Sedco Forex International vs. CIT 399 ITR 1 (SC) fully supports this proposition. In this regard, Hon'ble Supreme Court had expounded that sections 4, 5 & 9 are to be kept in mind, where assessment is done u/s 44BB. It is settled proposition that unless Revenue is able to prove that the assessee has a PE in India, its business profits cannot be subject to tax in India. This view is supported by ITAT decision in the case of R&B Falcon Offshore Ltd. In this case, ITAT clearly held that in absence of a PE, section 44BB has no application. We may refer to this ITAT order para 11 wherein it has been held as under :-*
>
> > *"11. Ground nos.3, 4, 5 7 6 are in regard to computation of income and the application of presumptive scheme of taxation/s 44BB of the Act. This section provides for computation of business income on a presumptive basis at 10% of the aggregate amount paid or payable to the assessee. This machinery provision will admittedly come into operation only when the income is liable to be computed under the Act. That can be done only if the assessee has a PE in India. We have already decided the matter of PE against the revenue and in favour of the assessee. Therefore, there is no question of computation of business income in this case."*

As to when does the specific PE come into existence or how the offshore supply of equipment is attributable to the PE has not been identified by the AO. Assessee's counsel has specifically mentioned that there is no finding in the assessment order as to which consortium member and which office of such consortium member constitutes PE of the assessee in India. Assessee has challenged the aforesaid finding before the DRP. DRP did not address the issue but held that the issue of PE is academic, therefore, need not be answered. This view is quite contradictory to the above decision. As referred in Hon'ble Supreme Court decision in the case of ADIT vs. E-Funds (2018) 13 SCC 294, burden of proving the existence of PE lies on the Revenue which has not been discharged. In this view of the matter, assessee succeeds that there is no finding of PE in this case, hence section 44BB will not apply. Since the assessee succeeds on this plank, other limb of arguments is not being adjudicated as they are now of academic interest"

15. In the aforesaid context, we can also consider the judgement of the Hon'ble Uttarakhand High Court in the case of **CIT vs. Enron Oil & Gas Expat Services Inc. [2013] 29 taxmann.com 419 (Uttarakhand)** wherein with regard to applicability of section 44BB of the Act in the context of DTAA provisions, the Hon'ble High Court has held as follows:-

"3. We hold that Article 7 of DTAA requires a nonresident US enterprise to have a permanent establishment in India for being taxed in India, otherwise it is not taxable in any view of the said treaty, even it received any remuneration in connection with any matter provided in Section 44BB of the Act. In the judgment referred to above, the Division Bench stated in so many words that the assessee was not having any permanent establishment in India during the relevant years. The said fact was culled out with certainty from the facts determined by the fact finding authorities, namely, the Assessing Officer and the Appellate Commissioner. In the instant case, there is no such finding for the relevant year. However, from the judgment of this Court, referred to above, it appears that in Income Tax Appeal No. 7 of 2009 for the assessment year 2000-2001, the assessee was M/s Enron Oil & Gas Expat Services Inc., Dehradun, and that, in the said appeal, the Division Bench of this Court granted relief to the assessee on the basis of the fact recorded that the assessee had no permanent establishment in India."

16. So, the payments received by the assessee are business receipts and the assessee does not have a PE in India. Therefore, the assessee is entitled to be benefitted of the DTAA provisions. Now, merely because of the fact that the assessee had applied for lower deduction certificate u/s 197 of the Act, that in itself cannot be a basis for imposing a tax liability as no admission against the interest of person is conclusive as far as it can be explained. To be more precise, determination of income and tax liability of a person cannot be decided based on concession given by any party at any stage of proceedings. If the assessee, in order to be cautious has sought this certificate u/s 197 of the Act, that cannot act as an estoppel. Thus, on that basis alone any adverse inference by the ld. tax authorities below was not justified.

17. In the light of the aforesaid, the grounds are sustained. The appeal of the assessee is allowed.

Order pronounced in the open court on 09.12.2024.

Sd/-	Sd/-
(M. BALAGANESH) ACCOUNTANT MEMBER	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 09th December, 2024.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi