IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 3524/DEL/2016 (A.Y 2012-13)

ONGC as representative assessee of Dewey & LeBoeuf International Company LLC, USA DGM-Head, Oil and Natural Gas Corporation Ltd. Room NO. 244, Old Secretariat, Tel Bhawan Dehradun AAACO1598A **(APPELLANT)**	Vs	DCIT (International Taxation) Circle-II Dehradun **(RESPONDENT)**

ITA No. 3525/DEL/2016 (A.Y 2012-13)

ONGC as representative assessee of University of New South Wales, Australia DGM-Head, Oil and Natural Gas Corporation Ltd. Room NO. 244, Old Secretariat, Tel Bhawan Dehradun AAACO1598A **(APPELLANT)**	Vs	DCIT (International Taxation) Circle-II Dehradun **(RESPONDENT)**

Appellant by	**Sh. Mohd. Farid, CA**
Respondent by	**Sh. S. S. Rana, CIT(DR)**

Date of Hearing	**06.05.2019**
Date of Pronouncement	**12.06.2019**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the respective assessees against the orders dated 19/04/2016 passed by CIT(A)-2, New Delhi for Assessment Year 2012-13.

2. The grounds of appeal are as under:-

ITA No. 3524/DEL/2016 (A.Y. 2012-13)

"1. The Ld. Commissioner of Income Tax ((Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in upholding the order passed by the Assessing Officer wherein it was held that the receipts of Dewey & LeBoeuf International Company LLC, USA, are taxable as "fees for technical services."

2. The Ld. Commissioner of Income Tax ((Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in not holding that the receipts of Dewey & LeBeouf International Company LLC, USA, were not taxable in India as per the India-USA Double Taxation Avoidance Agreement."

ITA No. 3526/DEL/2016 (A.Y. 2012-13)

1. *"The Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in holding that the receipts of University of New South Wales, Australia, from ONGC were taxable u/s. 44DA of the Income-tax Act, 1961, and in not holding that the same were taxable u/s. 44BB of the Income-tax Act, 1961.*

2. *Without prejudice to the preceding ground, the Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and in the facts and circumstances of the case in applying a deemed profit rate of 25% for computing taxable income u/s 44DA of the Income-tax Act, 1961.*

3. *Without prejudice to the preceding grounds, the Ld. Commissioner of Income Tax (Appeals)-2, Noida, has erred in law and*

in the facts and circumstances of the case in upholding the Assessing Officer's action of charging surcharge and education cess on the amount of tax payable computed as per the maximum rate prescribed in India-Australia Double Taxation Avoidance Agreement, both for the purpose of grossing-up receipts and for computing the final tax liability."

3. The facts of ITA No. 3524/Del/2016 are as under:

3.1 Oil and Natural Gas Corporation Limited (ONGC) had vide letter dated 16.06.2008 engaged Dewey and LeBoeuf International Company LLC, USA (non-resident), for representing ONGC before Russian courts in regard to the litigation between ONGC and Amur Shipbuilding Yard. The non-resident is a tax resident of the United States of America (USA). ONGC filed a return of income as representative assessee of the non-resident on 28.09.2012 claiming that the receipts of the non-resident under the aforesaid letter are not taxable in India. Draft assessment order was passed by Assessing Officer u/s 143(3)/144C (1) of the Act on 21/01/2015 at a total income of Rs. 87,78,960/- against income of NIL shown by the assessee in return of income as representative assessee of the nonresident. The Assessing Officer considered gross receipts of the non taxable as "Fee for technical services" and brought to tax the receipts as per provisions of Section 115A of the Act to be taxed on gross basis. Since, the assessee did not file any objection before the Dispute Resolution Panel, the assessment was finalized u/s 143(3)/144C (3) (B) of the Act.

3.2 The facts of ITA No. 3526/Del/2016 are as under:

ONGC had vide Agreement dated 11.01.2005 engaged University of New South Wales, Australia (non-resident) for construction, installation and maintenance of High Resolution CT Scanning Facility at Institute of Reservoir Studies,

ONGC, Ahmadabad. The said Agreement was valid for 78 months, 18 months for installation, testing and commissioning of CT Scanning Facility and remaining 60 months for maintenance thereof on annual basis. The CT Scanner is under maintenance contract w.e.f. 11th March 2008. During the relevant previous year, payments were made for annual maintenance of the CT Scanner. The non-resident is a tax resident of Australia. ONGC filed return of income as representative assessee of the non-resident on 31.07.2012 claiming that the receipts of the non-resident against the aforesaid Agreement are not taxable in India. Alternatively, the assessee submitted that the receipts of the non-resident were claimed to be taxable under Section 44BB of the Act. The Assessing Officer issued notices under Sections 142(1) and 143(2) of the Act. The Assessing Officer asked the assessee to explain as to why the income of the non-resident should not be treated as "fees for technical services". In response, ONGC's authorized representatives appeared before the Assessing Officer and filed written submissions furnishing all requisite information and contended that the receipts of the non-resident were not taxable in India and, alternatively, the same could only be taxed u/s 44BB of the Act. The Assessing Officer brought the receipts of the non-resident to tax as "fees for technical services" under Section 115A of the Act and round off the tax thereon @ 15% as per India-Australia Double Taxation Avoidance Agreement. The Assessing Officer further applied surcharge @ 2% and education cess @ 3% both for the purpose of grossing up of the actual receipts and for computing the total tax payable on the grossed-up amount.

4. Being aggrieved by the assessment orders, the respective assessees filed appeals before the CIT(A). The CIT(A) dismissed the appeals of the assessees.

5. The Ld. AR submitted that the Tribunal in both the assessee's own case for Assessment Year 2011-12 has decided the issues contested herein vide

order dated 25th April 2018 (ITA No. 1329/Del/2016) and ITA No. 1335/Del/2016).

6. The Ld. DR relied upon the assessment orders and the orders of the CIT(A), but could not distinguish the decision relied upon by the Ld. AR in assessee's own case for Assessment Year 2011-12.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the facts in the present assessment year i.e. for Assessment Year 2012-13 are identical to the facts emerge from the Assessment Year 2011-12 being ITA No. 1326/Del/2016. The Tribunal held as under:

> *"8. Pursuant to the agreement between the Directorate General of Hydrocarbons ('DGH') and the non-resident ('GX, USA'), GX, USA which was under a program titled "India Span", the US Company was permitted to carry out seismic surveys and acquire, process, interpret seismic gravity and magnetic data and thereafter, assist DGH in preparing data packages for 12,000 km of seismic data acquired from Eastern and Western shore of India. In order to meet part of the funding requirements for the "India Span" Program, GX, USA was entitled to sell the dataset on non-exclusive basis to both national and international exploration & production companies. A Letter of Commitment dated 03.11.2005 was executed between GX, USA and ONGC for participation of ONGC in the non-resident's India Span program. Further an agreement dated 03.11.2005 was entered between ONGC and GX, USA, whereby ONGC was granted a license to use the seismic data subject to terms and conditions specified therein. In the terms of the agreement, ONGC had obtained a license to use the product 'India Span' for a period of 40 years from GX, USA. 'India Span', which is a regional 2D seismic data programme and geological and geophysical study covering all the major prospective basins off-shore east and west India, was providing both, the fundamental basis for evaluation of India's vast off-*

shore margins as well as the regional framework in depth domain. The data/deliverable under the agreement and the payment details thereof are as under:-

a) Licence price for IndiaSpan 8500 kms : USD 31,00,000

(Including seismic and potential filed data)

b) Prestack time migration (PTSM Deliverables): USD 3,00,000

c) Additional 2000 KMS with standard deliverable : USD 7,46,000

Total Price USD 43,68,000

9. As per the terms of the agreement, no title or ownership of data is transferred by GX, USA to ONGC. ONGC was granted a non-exclusive right to use the data for internal purpose only and unless authorized by GX, USA, ONGC had no right to copy or transfer the data. Further on termination of the licence, ONGC had to return or destroy the data. During the relevant year, GX, USA had received USD 39,32,600 (including payment of USD 1,05,000 received towards training) equivalent to Rs. 17,55,57,305 under the said agreement which was claimed as not taxable in India under the provisions of DTAA between India and USA. The AO had brought the same to tax as "Royalties" as per the provisions of section 9(l) (vi) of the Act. The CIT (A), although, did not give any finding as regards to the taxability of the said receipts as 'royalty', however, following the order of the Delhi Tribunal in the case of CGG Veritas Services SA v. ADIT in ITA No.: 4653/Del/2010, held the same is to be treated as "fees for technical services" under section 9(1) (vii) of the Act. The ITAT in the first round, vide order dated 22.02.2013 had restored the matter back to CIT(A) with the direction to examine the taxability of the receipts in light of the provisions of Indo-USA DTAA. Pursuant to the directions of the ITAT, the CIT (A) passed the impugned order dated 05.01.2016, holding that the amount received by GX, USA was

taxable as FTS both under section 9(l)(vii) of the Act and also under Art. 12 of the India-USA DTAA.

10. Ongoing through the relevant facts, we find that the non-resident assessee has carried out seismic data services under the program titled "India Span" and was engaged by ONGC for providing seismic data. The aforesaid services, being in the nature of providing seismic survey data/report by GX, USA were not 'made available' to ONGC inasmuch as ONGC only derived the benefit of the said services and did not obtain any technical knowledge, experience or skill in respect of collection or processing of seismic data which would enable ONGC to undertake such survey independently, without assistance of GX, USA. In that view of the matter, the amount of USD 38,27,600 received by GX in respect of the seismic data (excluding the receipts of USD 1,05,000 relating to training) cannot, be in our opinion brought to tax in India as "Royalties and Fees For Included Services" in terms of Article 12 of India-USA DTAA. The training imparted by the non-resident is purely incidental to analysis of data and does not lead to imparting of know-how relating to services of collection of data. Thus, the impugned payment does not satisfy the test of "make available" within the meaning of Article 12 of Indo-USA DTAA.

11. In any case seismic /geological studies reveal the possibility of presence of hydrocarbons and thus, are vital for prospecting and exploring mineral oil and since services rendered by GX, USA were inextricably connected with extraction and production of mineral oil, therefore, the receipts therefrom would ostensibly fall within the ambit of consideration for mining of like project which is to be excluded from the definition of term 'fee for technical services' as defined in Explanation 2 of Section 9(1)(vii) and

same were taxable u/s.44BB of the Act. Thus, we hold that; firstly, the payment in question does not fall within the scope and ambit of FIS/FTS under Article 12 of India-US DTAA as the same did not satisfy the make available clause; and secondly, in any case in view of the judgment of Hon'ble Supreme Court in the case of ONGC vs. CIT (supra), such payments are in the nature of mining or like project and therefore, it will not fall within the ambit and scope of fee for technical services, as contemplated in Explanation 2 of Section 9(1)(vii). The relevant observations given in the said judgment for the sake of ready reference is reproduced hereunder:-

> *Under section 44BB (1) of the Income-tax Act, 1961, in the case of a non-resident providing services or facilities in connection with or supplying plant and machinery used or to be used in prospecting, extraction or production of mineral oils, the profits and gains from such business chargeable to tax are to be calculated at a sum equal to 10 per cent, of the aggregate of the amounts paid or payable to such non-resident assessee as mentioned in sub-section (2). On the other hand, section 44D contemplates that if the income of a foreign company with which the Government or an Indian concern had an agreement executed before April 1, 1976, or on any date thereafter the computation of income would be made as contemplated under section 44D. Explanation (a) to section 44D specifies that "fees for technical services" as mentioned in section 44D would have the same meaning as in Explanation 2 to clause (vii) of section 9(1). The Explanation defines "fees for technical services" to main consideration for rendering of any managerial, technical or consultancy services. However, the later part of the Explanation excludes from consideration for the purposes of the expression, "fees for technical services, any payment received for construction, assembly, mining or like project undertaken by the recipient or consideration which would be*

chargeable under the head "Salaries". Fees for technical services, therefore, by virtue of the Explanation will not include payments made in connection with a mining project.

The Income-tax Act, 1961, does not define the expression "mines" or "minerals". The expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act, 1948. While construing the somewhat pari materia expressions appearing in the Mines and Minerals (Development and Regulation) Ad, 1957, regard must be had to the provisions of entries 53 and 54 of List I and entry 22 of List 11 of the Seventh Schedule to the Constitution to understand the exclusion of mineral oils from the definition of "minerals " in section 3(a) of the 1957 Act. Regard must also be had to the fact that "mineral oils" is separately defined in section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under entry 53 of List I of the Seventh Schedule and had enacted an earlier legislation, i. e., the Oil Fields (Regulation and Development) Act, 1948. Reading section 2(j) and (jj) of the Mines Act, 1952, which define "mines" and "minerals" and the provisions of the Oil Fields (Regulation and Development) Act, 1948, specifically relating to prospecting and exploration of mineral oils, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. It is the proximity of the works contemplated under an agreement, executed with a non-resident or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company are to be assessed under section 44BB or section 44D of the Act. The test of pith and substance of the agreement is applicable and the Central Board of Direct Taxes had accepted the test and had in fact issued a circular as far back as October 22, 1990, to the effect that mining operations and the

expressions "mining projects" or "like projects" occurring in Explanation 2 to section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident would be chargeable to tax under the provisions of section 44BB and not section 44D of the Act. No other view can be taken if the works or services mentioned under a particular agreement are directly associated or inextricably connected with prospecting, extraction or production of mineral oil.

The appellant, the Oil and Natural Gas Corporation (ONGC), was assessed in a representative capacity on behalf of foreign companies with whom it had executed separate agreements by which the non-resident companies agreed to make available supervisory staff and personnel having experience and expertise for operation and management of drilling rigs for the assessment years 1985-86 and 1986-87. The contract between the parties visualised operation of the oil rigs including drilling operations by personnel made available under the agreements. The contracts involved carrying out seismic surveys and drilling for oil and gas, services of starting, re-starting and enhancing production of oil and gas from wells, services for prospecting for exploration of oil and or gas, planning and supervision of repair of wells, repair, inspection or equipment used in the exploration, extraction or production of oil and gas, imparting training, consultancy in regard to exploration of oil and gas and supply, installation, etc., of software used for oil and gas exploration. The assessing authority took the view that the assessments should be made under section 44D of the Income-tax Act, 1961, and not section 44BB of the Act. The Appellate Commissioner and the Appellate Tribunal disagreed with the views of the assessing authorities. On appeals before the High Court, the High Court held that the contract clearly contemplated the rendering of technical services by personnel of the non-resident company, and specifically, that

the contract did not mention that the personnel of the non-resident were also carrying out the work of drilling of wells and as the company had received fees for rendering service the payments made were liable to be taxed under the provisions of section 44D of the Act.

*The Hon'ble Court allowing the appeals, held that the brief description of the works covered under each of the contracts in question would indicate that the pith and substance of each of the contracts was inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreements was for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, the payments made by the ONGC and received by the non-resident or foreign companies under the contracts for providing various services in connection with prospecting, extraction or production of mineral oils were not chargeable to tax as "fees for technical services" under section 44D read with Explanation 2 to section 9(l)(vii) of the Act but more appro*priately assessable on a *presumptive* basis *under section* 44BB *of the Act.*

12. Accordingly, respectfully following the judgment of Hon'ble Supreme Court we decide this issue in favour of the assessee.

B. ONGC Ltd. as representative assessee of GX Technology Corporation, USA, 2485/Del/2016, A.Y. 2010-11.

13. Here, in this case, also the facts are exactly similar to appeal for the Assessment Year 2007-08 and in this ear the relevant letter of commitment is dated 22.03.2007 which was executed between ONGC and the aforesaid non-resident for participation in non-resident's regional seismic and geological studies for India Span program. ONGC had also placed Purchase Order no. 4050004364 dated 25-05-2007 for procurement of

4088 line kilometres of seismic data acquired by the GX, USA under the India Span program. During the relevant previous year, GX, USA had received payments of USD 5,00,371.20 equivalent to Rs. 2,55,13,928 from ONGC under the aforesaid contract, which were claimed as not taxable in India under the provisions of DTAA between India and USA. The AO had brought to tax as "Royalty" as per the provisions of section 9(1)(vi) of the Act. The CIT (A) had, however, held the same to be "fees for technical services" under section 9(1)(vii) of the Act and also under Article 12 of the India-USA DTAA.

14. In view of our finding given for the Assessment Year 2007-08, we hold that the same payment cannot be brought in India as 'Fees for included Services' in terms of Article 12 of India-USA DTAA. In any case, as held above, it is squarely covered by the judgment of Hon'ble Supreme Court in the case of ONGC Ltd. (supra).

C. ONGC Ltd. as representative assessee of Boots & Coots International Well Control Inc., USA.

15. Boots & Coots were engaged to provide the various services under the following contracts:-

- *Contract dated 12.12.2008 for; (i) Deployment of well control specialists for blowout control operations; (ii) training of CMT (Crisis Management Team) and other ONGC personnel; (iii) inspection and testing of blowout control equipment; and (iv) services for development of procedures and practices for blow out control operations.*
- *Contract dated 07.04.2010 for securing of well G-4-AF and salvaging of sub-sea blow out preventer (BOP).*
- *Settlement Agreement dated 23.07.2010 and Purchase Order No.5060034002 dated 22.01.2008 for securing and salvaging of well G-1*

DB.

In accordance with the aforesaid agreements and contracts, Boots and Coots received a payment of USD 2,22,34,382 equivalent to Rs.103,10,32,956 from ONGC which was offered to tax under section 44BB of the Act, while filing return of income for the relevant assessment year.

16. The Assessing Officer has brought to tax the aforesaid receipts as FTS under Explanation 2 to Section 9(1)(vii) r.w.s. 115A and also under India-US DTAA, which has been upheld by the ld. CIT(A) also.

17. From the perusal of the terms of agreements and the services provided by Boots and Coots, it is seen that it was for controlling the situation of uncontrolled flow of crude oil/natural gas from oil or gas well after pressure control system failed, which is a serious threat to oil production operations. It was also engaged in training CMT (Crisis Management Team) personnel, inspection and testing of blowout control equipment utilized by the assessee and to provide services for development of standardized procedures and practices for blowout control operations. Since the services rendered by the non-resident entity was directly associated and inextricably connected with the extraction and production of mineral oil, therefore, the receipts therefrom ostensibly would falls within the ambit of consideration for 'any mining or like project' which is to excluded from the definition of FTS as defined under Explanation 2 to Section 9(1)(vii) and same would be taxable u/s.44BB. It has been pointed out by the learned counsel that this Tribunal in assessee's own case for the Assessment Years 2010-11 and 2009-10 in ITA No.4469/Del/2013 order dated 03.12.2015 and ITA No.4269/Del/2012, vide order dated

16.11.2016, on identical facts and similar receipts has held that the receipts is taxable u/s.44BB following the Hon'ble Supreme Court's judgment of ONGC Ltd. (supra). Thus, in view of the precedence in assessee's own case, we hold that the said receipts cannot be taxed as FTS under 9(1) (vii), albeit would be taxable u/s.44BB.

D. ONGC Ltd. as representative assessee of Dewey & LeBoeuf International Company L.L.C., USA, ITA No.1329/Del/2016 Assessment Year 2011-12.

18. The aforesaid non-resident entity was engaged for representing ONGC before Russian courts with regard to the litigation between ONGC and Amur Shipbuilding Yard. The services were rendered and utilized in Russia and payment was also received outside India. During the relevant year, Dewey & LeBoeuf, USA received an amount of USD 1,20,275 equivalent to Rs.54,51,535/- from ONGC under the said agreement. In the return of income filed for the said Assessment Year, the assessee claimed exemption of the aforesaid receipts from tax in India, thereby declaring 'nil' income. However, the Assessing Officer, brought the aforesaid receipts to tax as 'Fees for technical services' as per Explanation 2 to section 9(1)(vii) read with section 115A of the Act. The CIT (A) held that the receipts were taxable not only under section 9(1)(vii) of the Act but also Article 12 of India-USA Treaty.

19. Before us the learned counsel for the assessee submitted that the legal representation services rendered by Dewey & LeBoeuf International Company LLC, USA was in connection with a dispute which arose outside India in relation to work carried on by a non resident outside India which was being litigated before the court of law in Russia. In any case, the said

receipt cannot be brought to tax as 'fee for included services' under Article 12 of India-US DTAA, since in the course of rendering services of ONGC by way of representing before Russian courts, ONGC has not been able to apply the knowledge, skill, etc. to litigate the matter before courts, in future on its own without recourse to the non-resident. Thus, the said services rendered by this non-resident entity cannot be taxed under Article 12 of India-US DTAA. Otherwise, also under the domestic law such legal services being in the nature of professional services fall outside the ambit of FTS as defined in Section 9(1)(vii).

20. We agree with the contention raised by the learned counsel that so far as providing of professional legal services before a foreign court, cannot be brought to tax as FIS under Article 12, because there is no make available of any kind of knowledge or skill to ONGC before the courts which can enable ONGC to represent its case in future. Under India-US DTAA, for applicability of Article 12 its imperative that FTS/FIS should be in such a nature that it makes available the knowledge and skill and knowledge to the other person. Even otherwise also under Section 9(1)(vii) legal services cannot be reckoned as FTS albeit it is professional services outside the scope of Section 9(1)(vii). It has also been brought on record that in assessee's own case for the Assessment Year 2009-10, the Tribunal in the context of legal services rendered by the same party with regard to litigation between ONGC and Amur Shipbuilding Yard was held not taxable as FTS u/s.9(1)(vii). Accordingly, we hold that such payment cannot be brought to tax u/s. 9(1)(vii). Hence, the appeal of the assessee is allowed.

E. ONGC Ltd. as representative assessee of University of New South

Wales, Australia, ITA No.1335/Del;/2016, Assessment Year 2011-12.

21. The non-resident assessee ('UNSW, Australia') had entered into a contract dated 11.01.2005 with ONGC for construction, installation and maintenance of High Resolution CT Scanning Facility at the in-house R&D facility of ONGC viz., Institute of Reservoir Studies ('IRS'), Ahmedabad, which was primarily engaged in carrying out R&D work related to enhancement of recovery of oil/hydrocarbons through improved/enhanced recovery studies. The services covered under the said contract are as under:-

- *Supply of hardware (High Resolution CT Scanner) including commissioning and testing;*
- *Supply of software including installation and testing;*
- *Software maintenance and assistance with hardware maintenance;*
- *Training of ONGC personnel.*

22. In terms of the contract, the installation, testing and commissioning of CT Scanning Facility was to be completed within 18 months from initiation of project, the maintenance of hardware, software was to continue for 5 years from the date of commissioning thereof on annual basis. The CT Scanner Facility was under maintenance contract w.e.f. 11th March 2008. During the relevant previous year, UNSW, Australia received USD 1,00,000 equivalent to INR 44,81,095 on account of annual maintenance of the CT Scanner Facility. In the return of income filed for the said assessment year, the non-resident assessee claimed exemption of the aforesaid receipts from tax in India under the provisions of the India-Australia DTAA, thereby declaring 'nil' income. Alternatively and without prejudice to the aforesaid, the receipts were claimed to be taxable under section 44BB of the Act in the computation of income and notes appended thereto, filed along with the return of income. The AO, however, brought

the same to tax as "fees for technical services" under section 9(l)(vii) read with section 115A of the Act and also under Article 12 of the India-Australia DTAA. The CIT (A), also upheld the said receipts as taxable under section 9(1)(vii) read with section 44DA after relying on the order of CIT(A) in preceding AY viz., 2010-11, wherein it was held that there was a deemed PE of UNSW which came into existence on account of activity of installation of equipment in India in terms of Article 5(3) of the India-Australia DTAA. Accordingly, ld. CIT (A) directed that taxable income to be computed by bringing to tax 25% of gross receipts deeming the same to be income attributable to PE of non-resident in India on adhoc basis on the ground that books of account as required u/s.44DA were not produced/maintained by non-resident entity.

23. On the perusal of the relevant findings and material referred to before us, we find that the UNSW, Australia had entered into a contract with ONGC for construction, installation and maintenance of High Resolution CT Scanner at ONGC premises in Ahmedabad. The High Resolution CT Scanner is used to study the relationship between petrophysical and transport properties computed on micro CT images and those are measured using conventional laboratory techniques and actual log responses. It is pertinent to point out that the payments received by UNSW, Australia during the relevant previous year were that annual maintenance charges for maintenances of the High Resolution CT Scanner. Since high resolution CT-scanner is used for conduction petrography studies in reservoir rock description which contributes in prospecting / enhancing the recovery of oil, therefore, such services relating to maintenance of high resolution CT-Scanner can be said to be directly associate and inextricably connected with the extraction and production of mineral oil. The receipts therefrom would fall within the ambit of consideration for any mining or like project which is excluded from the definition of term FTS as defined in Explanation 2 to Section 9(1)(vii) and

same would be taxable u/s.44BB. The judgment of Hon'ble Supreme Court in the case of ONGC relating to repairing of various equipment used directly and indirectly in connection with exploration or production of mineral oils will squarely apply. The other allegations of the authorities below that the agreement envisages a long term collaboration, participation, training, maintenance and service of High Resolution CT Scanner and UNSW, Australia would provide hands on training to ONGC personnel on operation of the facility and analysis of data generated during the deputation of UNSE experts, we are of the opinion that training is incidental to operational of the machine and it will still fall within the ambit of Section 44BB of the Act and ONGC's case would also apply in such case. Accordingly, we hold that the receipts by the said non-resident would fall within the ambit of Section 44BB. Accordingly, the appeal of the assessee is allowed.

24. In view of the finding given above qua each assessee, we hold that all the appeals of the assessees are allowed.

25. In the result, all the appeals of the assessees are allowed."

In the present assessees' cases also these issues are identical. As regards ITA No. 3524/Del/2016, the assessee provided of professional legal services before a foreign court, which cannot be brought to tax as FIS under Article 12 of the India-USA DTAA, because there is no make available of any particular knowledge or skill to ONGC before the courts which can enable ONGC to represent its case in future. Under Section 9(1)(vii) legal services cannot be treated as FTS as it is a professional services which is outside the scope of Section 9(1)(vii) of the Act. In A.Y. 2009-10, the Tribunal held that the said legal services is not taxable as FTS u/s 9(1)(vii) of the Act. Therefore, appeal of the assessee being ITA No. 3524/Del/2016 is allowed.

As regards to ITA No. 3526/Del/2016, University of New South Wales, Australia had entered into a contract with ONGC for construction, installation and maintenance of High Resolution CT Scanner at ONGC premises in Ahmedabad. In this year also the payments received by University of New South Wales, Australia during the relevant previous year were that annual maintenance charges for maintenances of the High Resolution CT Scanner. Since High Resolution CT Scanner is directly associate and inextricably connected with the extraction and production of mineral oil, the receipts would fall within the ambit of consideration for any mining or like project which is excluded from the definition of term FTS as defined in Explanation 2 to Section 9(1)(vii) of the Act and same would be taxable u/s 44BB of the Act. Thus the receipts by the said non-resident would fall within the ambit of Section 44BB of the Act as held in the earlier Assessment Years as well. Therefore, appeal of the assessee being ITA No. 3526/Del/2016 is allowed. Thus, the CIT(A) was not correct in holding that these services are taxable in India. Hence both the appeal of the respective assessees are allowed.

8. In result, both the appeals of the respective assessees are allowed.

Order pronounced in the Open Court on 12th June, 2019.

Sd/-	**Sd/-**
(R. K. PANDA)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 12/06/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	06.05.2019
Date on which the typed draft is placed before the dictating Member	07.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	12.6.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	12.6.2019
Date on which the fair order comes back to the Sr. PS/PS	12.6.2019
Date on which the final order is uploaded on the website of ITAT	12.6.2019
Date on which the file goes to the Bench Clerk	12.6.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	