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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26th July, 2019
Decided on: 29th July, 2019

\+ **W.P.(C) 7744/2019 and CM APPL. 32145/2019 (stay)**

BENTLY NEVADA LLC ..... Petitioner

Through: Mr.Sachit Jolly with Mr.Rohit Garg, Mr.Siddharth Joshi and Mr.Aarush Bhatia, Advocates.

versus

INCOME TAX OFFICER, WARD-1(1) (2), INTERNATIONAL TAXATION & ANR. ..... Respondents

Through: Mr.Ruchir Bhatia, Sr.Standing Counsel with Mr.U.K.Das, ITO.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% 29.07.2019

Dr. S. Muralidhar, J.:

1. The challenge in this petition is to a 'lower withholding certificate' issued by the Income Tax Officer-Ward-I (1) (2), International Taxation, New Delhi (Respondent No.1) under Section 197 of the Income Tax Act, 1961 ('Act') directing deduction of tax at source (TDS) @ 5% from the payments made to the Petitioner by its Indian customers.

2. The Petitioner is a company incorporated in the United States of America

('USA') and is a subsidiary of Baker Hughes LLC, a General Electric group company. The Petitioner is engaged *inter alia* in the business of supply of goods from outside India.

3. It is stated that for Assessment Year ('AY') 2002-03, the Income Tax Department ('Department') by the assessment order dated 5th October, 2011 under Section 143 (3)/147 read with Section 144-C (13) of the Act computed profits of the Petitioner by adopting 'deemed profitability' @ 10% of the revenues/sales. This was done with reference to Section 44BB of the Act. 35% of such profits were held to be related to marketing activities. 75% of the marketing activities were held attributable to a Permanent Establishment ('PE') of the Petitioner in India. Effectively, 2.625% of the sales revenue was held to be the profit attributable to the PE in India and this was held to be taxable @ 40%. As a result, 1.054% of the gross sales became the effective tax payable in India (40% of 26.25% of 10% of the sales).

4. The Petitioner states that it has been regularly obtaining lower withholding certificates under Section 197 of the Act from the Department whereby the Petitioner was permitted to receive remittances from its customers after deduction of tax @ 1.5% of the sum remitted.

5. The Income Tax Appellate Tribunal ('ITAT') rejected the Petitioner's appeals and upheld the assessment order for the above AYs 2002-03 to 2006-07 confirming the rate of attribution of income to the PE in India @ 2.6%. This was not further questioned by the Revenue. Copy of the order

dated 27th January, 2017 passed by the ITAT in the appeals for the aforementioned AYs have been enclosed with the petition.

6. However, the above decision was further challenged in this Court by the Petitioner's group companies on identical facts. By judgment dated 21st December, 2018 in ITA No.621/2017 and batch, the said appeals were dismissed by this Court. Following the above judgment, the Department passed an assessment order in the Petitioner's case for AY 2015-16 attributing income to the PE in India at the rate of 2.6% and computing tax @ 40% thereon. According to the Petitioner, the effective rate of tax was worked out at 1.04% of the total revenues.

7. For Financial Year (FY) 2019-20, the Petitioner electronically filed an application on 30th April 2019 under Section 197 of the Act seeking NIL withholding tax. In the alternative, the Petitioner sought a lower withholding of tax @ 1.04% in respect of remittances to be received from customers. Along with the said application, a letter dated 31st May 2019 was filed before Respondent No.1 submitting, *inter alia*, that if effect was given to the orders of the ITAT and this Court in the Petitioner's own case for the earlier years, then the entire outstanding demands for the said years would be reduced and the Petitioner would be entitled to a refund amounting to Rs.2,03,70,412/-. The Petitioner thus requested the Department to issue NIL withholding certificates under Section 197 of the Act.

8. A query was placed by the Department on the 'TRACES' portal of the Petitioner on 4th June 2019 asking the Petitioner to furnish the audited copy

of its India specific account for the previous year and projected accounts of the company for the current year. The Petitioner sent a reply dated 6th June 2019 wherein *inter alia* it was pointed out that since the Petitioner did not have any office/PE in India, it was not required to maintain books of accounts in India. Without prejudice to the above contention, the Petitioner pointed out that as per the prevailing laws in the USA, financial statements of a group entity were required to be consolidated with the financial statements of its respective holding company. The Petitioner pointed out that the question of getting the financial statements audited would arise only in respect of the consolidated national statements prepared by the holding company i.e. Baker Hughes LLC which were required to be filed with the United States Securities and Exchange Commission ('USSEC').

9. The Petitioner in its letter dated 6th June 2019 then referred to the assessment proceedings undertaken by the Department from AY 2002-03 till 2015-16 where the profit percentage of 10% had been regularly determined by the AO as per Rule 10 of the Income Tax Rules, 1962 ('Rules'). A reference was made to the order of the ITAT which *inter alia* had stated that the approach of the AO in estimating income @ 10% in the sales made in India in respect of the Assessee "is perfectly in order and does not require any interference." An extract was also given from the judgment of this Court concurring with the above view. It was pointed out that since profitability of 10% had been accepted in the above assessment proceedings by the ITAT, there was no reason for Respondent Nos.1 and 2 to take a different stand in the absence of any change in facts of the applicable law.

10. With its reply dated 6th June 2019, the Petitioner enclosed the withholding certificate issued by Respondent No.1 under Section 197 of the Act for FY 2018-19 @ 1.5%. The Form 10K filed by Baker Hughes before the USSEC for the year ended 31st December 2017 was also enclosed. This indicated figures pertaining to global revenues. It showed that the holding company had earned profit/loss margin of 3.06% and 1.65% of global revenue in 2018 and 2017 respectively. It was pointed out that even if the Department decided to continue with the determination of profitability of the Petitioner, it could not be more than the global profit margin of the holding company.

11. Respondent No.1 issued the impugned certificate on 11th June 2019 authorising deduction of tax from the payments made to the Petitioner by different entities which purchased its goods @ 5%. This withholding certificate has been challenged in the present petition by the Petitioner on the following grounds:

(i) No reasons have been given for arriving at the withholding rate of 5%. An order under Section 197 of the Act was quasi-judicial in nature. It must be supported by valid and cogent reasoning. Reference is made to the decisions in ***McKinsey and Company Inc. v. Union of India (2010) 324 ITR 367 (Bom)*** and ***Tata Teleservices (Maharashtra) Ltd v. Deputy Commissioner of Income-Tax (TDS) (2018) 402 ITR 384 (Bom)***.

(ii) The Respondent No.1 did not consider the undisputed fact that in terms of the order passed by the ITAT and this Court, there would be no

outstanding demand as on date and on the contrary, the Petitioner would be entitled for a refund of Rs.2,03,70,412/-. This justified the Petitioner's prayer for a NIL withholding certificate under Section 197 of the Act.

(iii) Without prejudice to the above contention, it is submitted that with the attribution rate @ 2.6% to the PE of the Petitioner having been accepted by the Department while passing the assessment order for AY 2015-16, the effective tax rate worked out only to 1.04% and, therefore, Respondent No.1 erred in not issuing a lower withholding certificate under Section 197 of the Act at 1.04%. Withholding tax rate of 5% meant that the attribution of the alleged PE was assumed to be higher than 2.6% of the total revenue which was totally contrary to the order of the ITAT and this Court.

(iv) In any event, there was no occasion to increase the withholding rate beyond 1.5% which was the rate which had been consistently adopted by the Department while issuing such certificates under Section 197 of the Act for the earlier years.

(v) For the rule of consistency, reliance is placed on the decision in ***Radha Saomi Satsang v. CIT (1992) 193 ITR 321 (SC)***. In view of the global profitability of the holding company of the Petitioner being 3.06%, the impugned order directing deduction of tax @ 5% defeated the purpose of Section 197 of the Act and denied the Petitioner much needed working capital thereby crippling its business.

(vi) No appeal was preferable under the Act in respect of an order passed

under Section 197 of the Act. Since the impugned certificate, which has been issued with the prior approval of the Commissioner of Income Tax (International Transaction) (Respondent No.2), even the revisionary jurisdiction under Section 264 of the Act is unavailable.

12. This petition was listed first on 19th July 2019 when notice was issued. Mr. Sachit Jolly, learned counsel for the Petitioner pressed for an urgent interim relief since the amount involved since the beginning of FY 2019-20 was already substantial. However, given the nature of the matter, it was felt that the interim relief would be no different from the final relief. At the request of Mr. Ruchir Bhatia, learned counsel for the Revenue, who was present in Court on that day, the case was adjourned to 26th July 2019 to enable him to take instructions.

13. On the adjourned date, Mr. Bhatia informed the Court that he had with him, the relevant files of the Department. When asked about the reasons for the impugned certificate under Section 197 of the Act specifying the rate of TDS at 5%, Mr. Bhatia volunteered that it was only the certificate which was posted online on the portal of the Petitioner and no separate order as such giving reasons for the same was posted. He, however, stated that the original file brought to the Court would contain the reasons.

14. The Court has perused the Department's file. It contains just 8 pages of notings. The first noting is of 21st May 2019 by Respondent No.1. The said note acknowledges that the Petitioner had filed an online application on 30th April 2019 for issuance of a certificate at "nil/lower of TDS" with a list of

parties from whose payments tax had to be deducted. The list is of 29 such Indian entities. It is noted that the nature of the business of the Petitioner i.e. "supplying of goods from outside India"; that the Petitioner was expected to receive orders during the FY 2019-20 from various customers in India worth USD 3,109,169/- equivalent to Indian Rs.21,76,41,830/-. The note then states that in the latest assessment order for AY 2014-15, the Assessing Officer (AO) had established the PE in India and attributed income to the marketing activities carried out in India in respect of offshore supplies. The tax payable in India was shown as 1.05%. In para 4 of the note dated 21st May 2019, Respondent No.1 stated as under:

> "4. The assessee has sought the Certificate of TDS deduction at "NIL". However, considering the latest assessment order on offshore supply of goods and keeping in line with the order u/s 197 for last financial year, where the application was allowed **@ 1.5%**, we may, if approved, issue the Certificate at the same rate as applicable for the last financial year i.e. **@ 1.5%.**" (emphasis in original)

15. When this note was placed before the CIT (IT) (Respondent No.2), he made an endorsement dated 24th May 2019: "please discuss". On the same date, another noting was made by the Addl. CIT, Range-1 (1), Delhi which reads: "Discussed with CIT. He desires that file may be put up again with 2% TDS rate." The file was then sent back to Respondent No.1 who stated "as directed, fresh note sheet has been put-up on next page for kind perusal and further direction please." This was dated 27th May 2019. The fresh note virtually repeated the entire earlier note dated 21st May 2019 except that para 4 of this fresh note reads as under:

> "4. The assessee has sought the Certificate of TDS deduction at

> "NIL." However, considering the facts and circumstances of the case, we may, if approved, issue the Certificates **@ 2.0%.**" (emphasis in original)

16. Thus, it would be seen that Respondent No.1 who is supposed to exercise a quasi-judicial function acted under the dictation of his superior i.e. Respondent No.2, who simply asked him to increase the TDS percentage from 1.5% to 2% without any reason whatsoever. Consequently, in the fresh note dated 27th May 2019 of Respondent No.1, no reasons were given as to why the TDS rate should not be NIL as requested for by the Assessee and instead why it should be increased from 1.5% to 2%. Interestingly, in this entire note and in the further notes of the superior officers, no reference is made to what is stated by the Petitioner in its application dated 30th April 2019.

17. The fresh note dated 27th May 2019 was placed again before the Addl. CIT and then before the CIT (IT) i.e. Respondent No.2. On 28th May 2019 the noting made by Respondent No.2 reads as under:

> "PE has been held to be there in India. Accounts have not been given. Issue @ 5%."

18. This is a crucial noting. Two factors require to be noted here. One that without any change in the circumstances, between 24th May 2019 when he first saw the file and 28th May 2019 when he next saw it, the CIT reviewed his earlier decision instructing his subordinate to put up the file again proposing a 2% TDS. Secondly, his comments were cryptic. That there was a PE of the Petitioner in India was not a new development. The second, that

accounts have not been given, he failed to acknowledge that till that date accounts were not even called for from the Petitioner. Yet the decision was given: "Issue at 5%'. The arbitrary nature of such decision is thus self-evident.

19. The matter was then placed again before the Addl. CIT who made the following note:

> "See the pre-page. Approved @ 5% TDS by CIT. Please issue certificate accordingly."

20. When the file was again sent to the Respondent No.1, he made an endorsement on 3rd June 2010: "Please check demand position" and sent the file to the Addl. CIT who stated "As per the dossier, demand of Rs.42,81,61,593/- is pending which has been stayed." This note is also dated 3rd June 2019. The file was then marked to the CIT (IT) who simply put his initials thereon on 10th June 2019. There is no further note on the file.

21. Thus it will be seen that the direction given by the CIT (IT) for issuing the TDS at 5% was only for two ostensible reasons, the first being that the PE had been held to be there in India. This cannot be *per se* the reason for increasing the TDS from 1.5% to 5%. The second reason is that "accounts have not been given." If indeed accounts had not been given, it should have not been difficult for the Respondents to ask the Petitioner to furnish the relevant accounts.

22. From the file it appears that on 3rd June 2019, a reminder had been sent

by the Petitioner for issuance of the TDS certificate. Although on the file it appears that the decision to charge TDS at 5% had already been taken by that date (it was taken by the CIT on 28th May 2019), it is only on 4th June 2019 that a query was addressed to the Petitioner on the TRACES asking it for the accounts. The reply thereto by the Petitioner on 6th June 2019 has already been referred to earlier in this order. However, without referring to the said reply dated 6th June 2019 of the Petitioner (copy of which along with its enclosures is available on the Department's file) the CIT (IT) initialled the note on the file on 10th June 2019 and on that basis the impugned certificate dated 11th June 2019, under challenge in the present petition, was issued.

23. The Court finds that there is both arbitrariness and non-application of mind at various levels which vitiates the impugned certificate. Some of them, at the cost of repetition, may be recapitulated. The first is Respondent No.1 changing his initial decision as contained in the note dated 21st May 2019 directing TDS at 1.5% to 5% by his subsequent note dated 27th May 2019 without any reasons and only because his superior, the CIT (IT) asked him to do so. At that stage, no reasons whatsoever appeared to have been indicated as to why the CIT felt that the TDS rate should be 2% instead of 1%. Respondent No.1 mechanically followed the advice and prepared a fresh note on 27th May 2019 simply stating that "considering the facts and circumstances of the case" the TDS certificate should be at 2%.

24. Secondly, when this note went back to the CIT, he simply said 'issue @ 5%' after noting that there was a PE in India and 'accounts have not been

given.' This was, therefore, done even without asking the Petitioner for the accounts at that stage. It may be noted that this noting was made on 28th May 2019 and on 29th May 2019 it was already decided to issue the certificate 'accordingly.' For the second time, therefore, Respondent No.1 acted on dictation. This was not a case of a superior officer 'concurring' with the decision of the subordinate. This was a textbook example of a superior officer dictating to his subordinate what the decision should be.

25. The settled legal position in administrative law is that orders passed by a statutory authority under 'dictation' of a superior officer or anyone else is bad in law. Illustratively, reference may be made to the decision in ***Anirudhsinhji Karsansinhji Jadeja v. State of Gujarat AIR 1995 SC 2390*** where the Supreme Court held that the decision to book the Appellants before them for offences punishable under Sections 3 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1985 was bad in law. The following discussion in the said decision is relevant for the case on hand, because the principle enunciated will apply here on all fours:

> "11. The case against the appellants originally was registered on 19th March, 1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20A (1)? This is a case of power conferred upon one authority being really exercised by another. **If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then**

it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20A (1) was not exercised by the DSP at all.

12. Reference may be made in this connection to *Commissioner of Police vs. Gordhandas Bhanji 1952 SCR 135*, in which the action of Commissioner of Police in cancelling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the concerned rules had conferred this power on the Commissioner, because of which it was stated that the Commissioner **was bound to bear his own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass**.

13. It has been stated by Wade and Forsyth in 'Administrative Law', 7th Edition at pages 358 and 359 under the heading 'Surrender, Abdication, Dictation' and sub-heading "Power in the wrong hands" as below:

> "Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them.....".
>
> "Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise...."

> 14. The present was thus a clear case of exercise of power on the basis of external dictation. That the dictation came on the prayer of the DSP will not make any difference to the principle. The DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion." (emphasis supplied)

26. Thirdly, the decision was taken without valid basis and ignoring the relevant material that was called for and available on record. On 3rd June 2019, the demand position was asked to be checked and it was stated that the demand had been stayed. It is only thereafter on 4th June 2019 that the Petitioner was asked for the accounts. It sent its reply on 6th June 2019 but on 11th June 2019 the impugned certificate was issued without adverting to any of the contentions raised by the Petitioner or the documents enclosed with the said reply.

27. Rule 28AA of the Rules prescribes the procedure to be followed by the AO who is approached with an application under Section 197 (1) of the Act. How the AO is to estimate the 'existing and estimated liability' is indicated in Rule 28 AA (2). The relevant portion of Rule 28 AA reads thus:

> "Certificate for deduction at lower rates or no deduction of tax from income other than dividends.
>
> 28AA (1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of

sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax.

(2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:—

(*i*) tax payable on estimated income of the previous year relevant to the assessment year;

(*ii*) tax payable on the assessed or returned [2]or estimated income, as the case may be, of last four previous years;

(*iii*) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;

(*iv*) advance tax payment tax deducted at source and tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28."

28. The file produced before this Court by the Department shows that the above factors were not kept in view and no reference in fact was made to Rule 28AA of the Rules. The impugned certificate simply states that the rate of TDS should be 5%, which obviously does not satisfy the requirements of the law.

29. Even if one were to accept the explanation offered by Mr. Bhatia that on the online portal only a certificate is posted and not the reasons for the decision, then surely there should be a separate written order communicated to the Petitioner giving the reasons for fixing the TDS rate under Section 197(1) since this is mandated by law. To reiterate, that decision which is quasi-judicial in nature, has to be taken by the AO under Section 197(1) of the Act on objective criteria and be based on relevant material provided by the applicant and available with the Department. It must be supported by

reasons available on the file which conform to the requirement of Section 197 of the Act read with Rule 28 AA of the Rules. Those reasons must be communicated to the applicant. It cannot be taken, as in the instant case, on the dictation of an officer superior to the AO.

30. In ***Tata Teleservices (Maharashtra) Ltd v. Deputy Commissioner of Income-Tax (TDS)*** (*supra*) the Bombay High Court held as under:

> "Section 197 of the Act permits/allows an assessee to make an application to the Assessing Officer, that in its case, the deduction of tax under the sections specified therein should be at lower rates or at nil rates instead of the normal rate prescribed under the Act. The Assessing Officer, if satisfied, with the application made, bearing in mind the provisions of the Act and the Rules, is obliged to grant the certificate. Therefore, there is a right given to an assessee to apply for nil/lower rate of withholding tax under section 197 of the Act and an obligation upon the Assessing Officer to grant the same, if the conditions specified therein are satisfied. Thus, it is clear that the order passed under section 197 of the Act is an order which is a quasi-judicial order and must be supported by reasons."

31. That there have to be proper reasons for the order under Section 197 of the Act has also been emphasized in ***McKinsey and Company Inc. v. Union of India*** (*supra*). In that case the AO determined the withholding % of TDS @ 15% for FY 2009-10 which was much higher than the rate determined by the CIT for the earlier AYs 2007-08 to 2009-10 at 1.5% and 1.3%. While setting aside the order of the AO it was observed by the Bombay High Court as under:

> "In disposing of an application filed by the assessee under Section 197(1) for the grant of a certificate, the Assessing Officer has to make a determination which would constitute an

> order for the purposes of Section 264. That a petitioner should exhaust the alternate remedies available is a self-imposed restraint which does not bar the exercise of the writ jurisdiction under Article 226. In a case such as the present where the Assessing officer has chosen to act in complete departure from a duly considered determination made by a superior officer, it is necessary for this court to step in to ensure that the discipline of the hierarchy imposed by fiscal legislation is duly observed. Unless a sense of hierarchical discipline is observed, while implementing fiscal legislation, the exercise of powers would be rendered arbitrary and subject to the whim and caprice of Assessing officers. This would be impermissible and contrary to the norm of fairness which article 14 of the Constitution embodies. The prescriptions of Article 14 must at all times infuse statutory interpretation and must rigorously apply to the exercise of statutory discretion. It is in these circumstances, that this court has been constrained to exercise its writ jurisdiction under article 226 to correct a manifest failure of justice. The Assessing Officer is correct in adopting the position that section 197(2) will not preclude a departure or a contrary view being taken in assessment proceedings, in view of the judgments of this court in *CIT v. Tata Engineering and Locomotive Company Limited (2000) 245 ITR 823 and CIT v. Elbee Services (P) Limited (2001) 247 ITR 109*. But the Assessing officer must also bear in mind that a departure has to be made on the basis of valid and cogent reasons where there is material on record which would justify such a departure. There is an absence of material on record which would have justified a departure in the facts of the present case."

32. The Court accordingly finds that in the present case the impugned withholding certificate which directs TDS to be deducted at 5% on the payments made by the Indian entities to the Petitioner is unsustainable in law, inasmuch as it is not based on valid reasons and is contrary to the legal requirement spelt out in Section 197(1) of the Act read with Rule 28AA of

the Rules. The impugned certificate is hereby quashed.

33. The Court directs Respondent No.1 to once again consider the application made by the Petitioner on 30th April 2019 for issuance of a lower withholding certificate under Section 197(1) of the Act afresh in accordance with law. Needless to state that Respondent No.1 should deal with the issues raised by the Petitioner in the application and in the subsequent correspondence which already forms part of the record of the Department and take a fresh decision not later than 4 weeks from today. Apart from the certificate being posted online, the decision itself, containing the reasons, must be separately communicated to the Petitioner not later than 1 week thereafter. Till such time the fresh decision is communicated to the Petitioner, the decision in respect of TDS for the immediate earlier AY @ 1.5% will continue to apply.

34. Needless to state, if the Petitioner is aggrieved by the fresh decision it will be open to the Petitioner to seek appropriate remedies in accordance with law.

35. The writ petition is allowed in the above terms. The pending application is disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 29, 2019
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