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

+ **W.P.(C) 2117/2017 & CM No.9268/2017**

NATIONAL PETROLEUM CONSTRUCTION COMPANY

..... Petitioner

Through: Mr. Balbir Singh, Senior Advocate
with Mr. Prakash Kumar, Ms. Rubal
Maini & Ms. Rashmi Singh,
Advocates

versus

**DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE -2(2)(2),
INTERNATIONAL TAXATION, NEW DELHI & ANR.**

..... Respondents

Through: Mr. Ruchir Bhatia, Advocate

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR**

ORDER

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09.05.2017

1. This is a writ petition by the National Petroleum Construction Company ('NPCC') seeking quashing of the impugned certificate dated 31st January, 2017 issued by the Deputy Commissioner of Income Tax, Circle-2(2), International Taxation, New Delhi rejecting the plea of the Petitioner for being granted a certificate under Sections 197(1)/195 of the Income Tax Act, 1961 ('Act') for Nil deduction of tax at source on the payments received by it from the Oil and Natural Gas Corporation ('ONGC') in respect of a contract dated 30th September, 2016.

2. The facts are that NPCC, is a company incorporated in the United Arab Emirates and based in Abu Dhabi. Its principal activities include fabrication and installation of onshore and offshore oil facilities and submarine pipelines and pipelines coating. It is stated that the provisions of the Agreement for Avoidance of Double Taxation between India and the UAE ('the Treaty') will apply in determining the taxable income of NPCC. It is stated that the Petitioner has been filing its Corporate Tax Returns till Assessment Year ('AY') 2016-2017 and its assessments have been completed till AY 2013-2014.

3. NPCC entered into the aforementioned contract with the ONGC for a number of activities, including survey, design, engineering, fabrication removal/replacement of existing topside decks, hookup, testing and commissioning of 10 oil well platforms. It is stated that the contract in question is similar to earlier contracts entered into between NPCC and ONGC and in respect of which NPCC had obtained a lower withholding of tax order under Section 197 (1) of the Act @ 4% + applicable surcharge and education cess.

4. The revenue earned by NPCC comprises revenues received earned from (a) outside India activities and (b) inside India activities. NPCC submits that under the Treaty, its business profits would be taxable in India only if it has a Permanent Establishment (PE) in India as per Article 5 of the Treaty. It is the consistent stand of NPCC that it has no PE in India. It is pointed out that the activities of fabrication and construction of platforms take place in Abu Dhabi. They are outside India activities that do not contribute to

establishment of a PE in India. The activities of decommissioning and installation of platforms would be 'inside India activities' but the time period of these activities do not exceed nine months as envisaged under Article 5(2)(h) of the Treaty. It is submitted that even if a PE is assumed in India NPCC is not liable to pay tax in respect of the revenues from the outside India activities. In other words, no TDS could be deducted from the payments received by it for such activities.

5. NPCC filed an application on 8th December 2016 with Respondent No.2 seeking a certificate under Section 197 of the Act for nil deduction of tax on the payments received by it from ONGC under the above contract. An alternative prayer was made that in respect of the revenues earned from the inside India activities, Respondent No.1 may direct the ONGC to withhold taxes @ 4% + applicable surcharge and education cess.

6. By the impugned certificate dated 31st January, 2017 Respondent No.1 directed ONGC to deduct tax at 4% on the amounts paid to NPCC both in respect of the outside India and inside India activities. As such, Respondent No.1 rejected NPCC's request for grant of a certificate under Section 197 of the Act for deduction at nil rate of tax.

7. On the previous date, this Court recorded the statement of Mr. Ruchir Bhatia, learned counsel for the Respondents that he would seek instructions from the Assessing Officer on revising the certificate in question to confine the deduction of TDS to amounts paid by ONGC to NPCC for the inside

India activities. Today Mr Bhatia informed the Court that he had no instructions and that the Court may proceed with the matter on merits.

8. It may be noticed at this stage that by its judgment in *National Petroleum Construction Co. v. Director of Income Tax (International Taxation)*, (2016) 383 ITR 648(Del), for AYs 2007-2008 and 2008-2009, this Court held, in respect of similar contracts between NPCC and ONGC, that the project office of NPCC did not constitute a fixed place PE under Article 5(3)(e) read with Article 5(2)(c) and 5(1) of the Treaty. It was further held that since the site or the installation activity in India was less than the threshold of 9 months, such installation activity did not constitute an Installation PE under Article 5(2)(h) of the Treaty. It was further held that in the absence of a PE, the splitting of profits arising from the contract into profits attributable to the India activities and the profits attributable to the activities overseas did not arise. It is pointed out by Mr Bhatia that while leave to appeal against the said judgment has been granted to the Respondents by the Supreme Court, there is no stay of said judgment.

9. Meanwhile this Court has followed its decision dated 29th January 2016 for AYs 2007-08 and 2008-09 and dismissed the Revenue's appeal for AY 2009-10. There is no distinguishing feature as far as the previous contracts that were subject-matter of the above decision and the contract at hand. *Prima facie*, it appears to the Court that there is no justification for Respondent No.1 not to accept the alternative and 'without prejudice' plea of the Petitioner that in respect of only the inside India activities there may be a deduction of TDS @ 4%.

10. Accordingly, the Court sets aside the certificate issued by Respondent No.1 dated 31st January, 2017 insofar as it requires deduction of TDS @ 4% on the entire payments made by the ONGC to the Petitioner, both on the outside India and the inside India activities. Respondent No.1 is now directed to consider the matter afresh, and within a period of four weeks from today, issue a fresh certificate under Section 197(1) of the Act, accepting the alternative plea of the Petitioner, without prejudice to its right to contest the said deduction in accordance with law, that the ONGC would deduct tax @ 4% + surcharge+ education cess on the revenues in respect of only the inside India activities of the Petitioner.

11. The petition is disposed of in the above terms. The pending application is also disposed of.

12. It is clarified that this order is in the context of the issuance of the certificate under Section 197(1) of the Act and should not be construed as an expression of any opinion by the Court on the merits of the contentions of either of the parties.

13. *Dasti.*

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 09, 2017/tp