

Sharayu Khot & S.R. Joshi.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2701 OF 2017

**M/s Tata Teleservices (Maharashtra)
Limited**

...Petitioner

Versus

- 1. The Deputy Commissioner of Income
Tax (TDS)-2(3)**
- 2. The Commissioner of Income Tax
(2) TDS**
- 3. The Commissioner of Income Tax
(Appeals)**
- 4. The Union of India**

...Respondents

Mr. Tarun Gulati, a/w Ms. Ishita Farsaiya a/w Mr. Jas Sanghavi,
i/by PDS Legal, for the Petitioner.

Mr. Suresh Kumar, a/w Ms. Samiksha Kanani, for the
Respondents.

**CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.**

DATE : 16 & 25 January 2018

ORAL JUDGMENT : [Per M.S. Sanklecha, J]

1. At the request of the parties, this Petition is being

disposed of finally at the stage of admission.

2. This Petition under Article 226 of the Constitution of India seeks the following reliefs :-

(a) The order dated 23 October 2017 issued by the Deputy Commissioner of Income Tax (TDS), Respondent No. 1, canceling the certificate dated 4 May 2017 of nil deduction of tax for the period 4 May 2017 upto 31 March 2018 (A.Y. 2018-19) issued under Section 197 of the Income Tax Act, 1961 ("**the Act**" for short), be quashed and set aside; and

(b) The Commissioner of Income Tax (Appeals) ("**CIT[A]**")- Respondent No. 3 be directed to decide the Petitioner's pending Appeal for the assessment year 2012-13 in respect of a demand of Rs. 6.68 Crores. The hearing of which had taken

on 15 February 2017, when detailed written submissions were filed, within a time frame;

3. So far as relief (b) above is concerned, Mr. Suresh Kumar, learned Counsel for the Revenue, on instructions of CIT(A)-Respondent No. 3 states that the pending Appeal in respect of assessment year 2012-13 would be disposed of on or before 1 March 2018. Statement accepted. In view of the above statement, this relief is not being pressed by the Petitioner.

4. The relevant facts leading to the filing of this Petition are that the Petitioner is engaged in providing telecommunication services. In the course of its business, Petitioner earns its revenue from sale of post and prepaid cards, sale/ lease of equipments and providing various value added services. Petitioner has huge accumulated losses. Its return of income for the Assessment Years 2014-15 to 2016-17, are loss returns aggregating to Rs. 1330.00 Crores and in which an aggregate claim to a refund of Rs. 121.00 Crores has been made.

5. In the course of its business, Petitioner receives various payments for services rendered which are subject to tax deduction at source under Chapter XVII of the Act. However, according to the Petitioner it would not be liable to pay corporate tax in the immediate future in view of the likely loss for the assessment year 2018-19 and the huge carried forward losses.

6. Therefore, on 27 February 2017, Petitioners applied to the Respondent No. 1 seeking an issuance of nil/lower withholding taxes under Section 197 of the Act. This was to enable the Petitioner to receive its payments from various parties which are subject to tax deduction at source, without deduction at source. In support of the above, the application pointed out that their accumulated losses carried forward as on 1 April 2014 is over Rs. 4000.00 Crores – both as per MAT provisions and under the normal provisions. Further, the Petitioner had filed loss returns for Assessment Years 2015-16 and 2016-17. It was also submitted that the estimated loss for

Assessment Year 2017-18 is approx. Rs. 1000.00 Crores. Thus, there will be no assessable profit under the Act for the assessment year in 2018-19 in view of huge carry forward losses. Besides, the application points out that there was an amount of Rs. 101.53 Crores up to 10 February 2017 receivable as refund from the Revenue. It was also pointed out that the financial health of the Petitioner is such that it has taken long term debts, at huge interest payments. Therefore, the amounts which are blocked on account of tax deduction at source aggravates its financial hardship including cash crunch. Lastly, it was pointed out that the amount of Rs. 6.68 Crores which is the outstanding tax demand for the assessment year 2012-13 was on account of an issue which already stands concluded in its favour by an order of the Tribunal dated 27 May 2016, on identical issues for assessment years 2009-10 to 2012-13 (upto July 2011). This demand of Rs. 6.68 Crores is thus, likely to be set aside by the CIT(A) as he would be bound by the order of the Tribunal. It was pointed out so far as the demand for the balance amount of Rs. 28.00 Lakhs is concerned

it is on account of wrong/unsustainable demand arising from an incorrect processing of TDS statement on application of TRACES System.

7. Thereafter, Respondent No. 1 called for various details from the Petitioner. On the same being submitted, they were examined by Respondent No. 1. Thereafter, on 4 May 2017, Respondent No. 1 issued a certificate under Section 197 of the Act, directing the deduction of tax at nil rate by the various persons listed in the certificate while making payments to the Petitioner under Sections 194, 194A, 194C, 194I, 194H and 194J of the Act. This would result in a relief of Rs. 238.90 Crores as the same would not be deducted as tax at source. Thus, obviating the need for filing of refund claim with the Revenue for the assessment year 2018-19.

8. Thereafter, on 16 August 2017, Respondent No. 1 informed the Petitioner that he is reviewing cases where certificate under Section 197 of the Act has been issued in cases

where huge outstanding tax demand is pending. Consequently, the above communication requested the Petitioner to furnish the details of outstanding tax demands. The Petitioner responded to the same by its letter dated 20 August 2017, giving the details of the tax outstanding. It reiterated its submissions made in the application made on 27 February 2017. Besides pointing out that a further refund of Rs. 34.37 Crores was due to them from the Revenue for tax deducted at source in the subject assessment year, for the period prior to the issue of certificate.

9. Thereafter, on 30 August 2017, Respondent No. 1 issued a Show Cause Notice to the Petitioner, calling upon it to show cause as to why the certificate dated 4 May 2017 should not be reviewed/ canceled. This was on account of outstanding demand of taxes payable. Besides, relying upon the extract of Central Action Plan 2017-18 issued by CBDT which directs the Officers to follow the instructions/certificate issued by the CBDT and also mentions of Certificates being issued where large demands are pending. The Petitioner responded by letter dated

7 September 2017 to the notice dated 30 August 2017 while reiterating its reply dated 20 August 2017 and called for withdrawal of the notice.

10. Thereafter, on 7 September 2017, a personal hearing was granted and on 23 October 2017, the impugned order was issued. By the impugned order, the certificate dated 4 May 2017 issued under Section 197 of the Act, was canceled. The impugned order holds that while issuing the certificate dated 4 May 2017 the existing demand of Rs. 6.90 Crores was as recorded in the impugned order *“Apparently, the demand was not considered on the basis that this demand was under a covered issue”*. This i.e “covered issue” in terms of Rule 28AA(2) of the Income Tax Rules 1961 (Rules), cannot be a subject of consideration while granting the certificate. Further, it holds that in view of the current financial status, the future liability, if any, which may arise on assessment or otherwise against the company, would be impossible to recover.

11. Before considering the rival submissions urged on behalf of the respective parties, it would be useful to reproduce Section 197 of the Act and Rule 28AA of the Rules, which arises for our consideration:-

“Section 197 of the Act :-

- (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA and 195, the Assessing Officer is satisfied] that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.*
 - (2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.*
- (2A) The Board may, having regard to the*

convenience of assesseees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

Rule 28AA- Certificate for deduction at lower rates or no deduction of tax from income other than dividends.-

- (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 income, as the case may be, of the last three previous years;*
- (iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;*
- (iv) advance tax payment for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;*
- (v) tax deducted at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;*

and

- (vi) 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.*
-
- (3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.*
 - (4) The certificate for no deduction of tax shall be valid only with regard to the person responsible for deducting the tax and named therein.*
 - (5) The certificate referred to in sub-rule (4) shall be issued direct to the person responsible for deducting the tax under advice to the person who made an*

application for issue of such certificate.”

12. Mr. Tarun Gulati, learned Counsel, in support of the Petition, submits as under:-

- (a) The impugned order dated 23 October 2017 cancelling the certificate dated 4 May 2017, is without jurisdiction as Rule 28AA(3) of the Rules could not be invoked in the present facts;
- (b) The impugned order is arbitrary as it cancels a valid certificate under Section 197 of the Act, ignoring the fact that the existing liability of the Petitioner would continue to be nil on consideration of the factors as provided under Rule 28AA(2) of the Rules;
- (c) The impugned order completely ignores the test of proportionality. At the highest, according to the Revenue, the unpaid tax demand is Rs. 6.90

Crores. While undisputedly, Petitioner is entitled to refund of Rs. 7.30 Crores (being the deposit made), consequent to the order dated 27 May 2016 passed by the Tribunal in respect of Assessment Years 2009-10 to 2012-13. The aforesaid amount continues to be retained by the Revenue and it could be easily adjusted against the demand of Rs. 6.90 Crores. In any event, the relatively meagre amount of Rs. 6.90 Crores of tax demand as against a refund of over Rs. 121.00 Crores would not justify denial of the benefit of about Rs. 238.00 Crores as available under Section 197 of the Act. ;

- (d) Lastly, it is submitted that the amount of Rs. 6.68 Crores is on account of an order for Assessment Year 2012-13 which is pending before the CIT(A). This issue to the knowledge of all concerned is concluded in favour of the Petitioner and kept

pending deliberately. This, even after the hearing was completed, so far back as in February 2017.

13. On the other hand, Mr. Suresh Kumar, learned Counsel for the Revenue supports the impugned order dated 23 October 2017 and submits as under:-

(a) An equally efficacious alternative remedy under Section 264 of the Act as an by way of a Revision to be Commissioner of Income Tax (CIT), against the impugned order dated 23 October 2017, cancelling the certificate dated 4 May 2017 is available to the Petitioner. Therefore, this Court should not entertain the Petition to exercise its extraordinary jurisdiction;

(b) Cancellation of the certificate dated 4 May 2017 became necessary in view of the fact that the financial condition of the Petitioner-company has

further deteriorated. Thus, putting in jeopardy the recovery of any liability, which may arise against the Petitioner-company on account of future assessment or otherwise. Therefore, necessitating the cancellation of the nil withholding tax certificate dated 4 May 2017;

(c) The existing demand of Rs. 6.90 Crores which continued to be pending. This cannot be ignored merely because, according to the Petitioner, the demand is unsustainable and would be set aside in appeal due to the issue being considered in its favour;

(d) No prejudice would be caused to the Petitioner in case the nil withholding certificate dated 4 May 2017 is withdrawn. This, for the reason that the amounts so received by the Revenue on account of withholding tax would be refunded if no tax

demand is payable in future by the Petitioner.

14 . Before dealing with the rival submissions on merits, we shall first deal with the preliminary objection of the Respondent to entertain this Petition. The objection is that an effective efficacious alternative remedy to challenge the impugned order under Section 264 of the Act, is available. Therefore, this Petition should not be entertained. It is submitted that a Revision under Section 264 of the Act would lie to the Commissioner of Income Tax (CIT). This is so for the reason that under Section 264 of the Act, Revision lies from any order passed by any authority – subordinate to CIT other than an order which is appealable and from which an appeal has been filed or an order to which Section 263 of the Act is applicable. In fact, this Court in ***Larsen & Toubro Ltd. & Another v/s. CIT 326 ITR 514*** has held that an order passed under Section 197 of the Act, is amenable to Revision under Section 264 of the Act.

15. However, as correctly pointed out by the Petitioner in this case, the impugned order dated 23 October 2017 as recorded therein, has been issued/ decided with the concurrence of the CIT (TDS). This was not so in the case of Larsen & Toubro (supra). It is also not disputed before us that in this case, the Revision would be before the same authority who gave the concurrence or to an authority of equal rank/designation.

16. In the above view, the decision of this Court in Larsen & Toubro Ltd., (supra) would not apply to the present facts. As in this case, the Revision i.e. alternative remedy would in facts be from “Caesar to Caesar.” Therefore, in such a case an alternative remedy would be a futile/empty formality and not an efficacious remedy. (Please see ***Ram & Shyam Co. v/s. State of Haryana 1985 (3) SCC 267***).

17. In the above circumstances and in the present facts, there is no merit in preliminary objection taken by the

Revenue. Therefore, we proceed to examine the issue arising herein and decide the same.

18. 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. The Assessing Officer is also in terms of Section 197(2) of the Act read with Rule 28AA (3) of the Rules empowered to cancel a certificate already granted under Section 197(1) of the

Act. This power of cancellation which in effect withdraws the earlier certificate to the prejudice of the Assessee would be required to stand the tests applicable to a rejection of an application made under Section 197 of the Act. It is undisputed that the cancellation of the earlier certificate will be effective only from the date, the order of cancellation is passed.

19. The Petitioner's primary grievance is that the impugned order dated 23 October 2017, canceling the certificate dated 4 May 2017 is completely without jurisdiction. It is not open to the Assessing Officer to even initiate review proceedings in the absence of any change in circumstances which existed while granting certificate dated 4 May 2017. It is not disputed that Section 197(2) of the Act empowers the Assessing Officer to cancel the certificate issued under Section 197(1) of the Act with regard to lower and/or nil withholding tax issued under Section 197(1) of the Act. However, it is submitted that there is no change in the financial and other circumstances as existing when the certificate dated 4 May 2017

was issued and when the impugned order canceling the above certificate was passed. Therefore, the impugned order is without jurisdiction.

20. In the present facts, we note that impugned order dated 23 October 2017 cancels the certificate dated 4 May 2017 on the ground that it was issued by mistake i.e. not having considered Rule 28AA (2) of the Rules in the context of the pending demands. The Revenue has filed an affidavit in reply dated 11 January 2018 of Respondent No. 1- Mr. M. Ashok Babu, Joint Commissioner of Income Tax, opposing the admission and also relies upon it at the final hearing. We find that the order preceding the grant of the certificate has not been annexed to the affidavit filed by the Revenue. This Court in *Larsen & Toubro Ltd.*, (supra) has held that an issue of certificate must necessarily be preceded by an order under Section 197(1) of the Act. In fact the issue of certificate is the result of an order holding that the applicant is entitled to a certificate under Section 197 of the Act. It must of necessity be so, as in the absence of the reasons being recorded, the

Certificate under Section 197 of the Act, would not be open to challenge by the Revenue, as it would be impossible to state that it is erroneous and prejudicial to the Revenue. The Revenue would be helpless. Therefore, the recording of reasons is necessary as only then it could be subject to Revision by the Commissioner of Income Tax under Section 263 of the Act.

21. Therefore, it appeared to us while correcting the order which was dictated in Court on 16 January 2017 that the order prior to issuing the certificate dated 4 May 2017 ought to have been communicated to the Petitioner along with the notice, seeking to review the earlier certificate on account of mistake. In the above circumstances we kept the petition on board for directions on 23 January 2018 as this issue was not addressed by the Revenue at the hearing. In fact the petitioner had contended before us that the Respondent No. 1 had no jurisdiction to cancel the certificate dated 4 May 2017 in the absence of any change in the circumstances. However, we wanted to hear and consider the Revenue's response on the above aspect of jurisdiction. Therefore, on 23 January 2018 we

expressed our prima faice view on the issue to the parties, particularly that the absence of the order leading to the grant of the certificate being given to the Petitioner, leads to an adverse inference against the Revenue i.e. all issues including Rule 28AA (2) of the Rules were considered in the order passed leading to the issuing of Certificated dated 4 May 2017. We specifically invited the attention of the Revenue to the specific observation found in para 7 of the decision of this Court in **Larsen & Toubro Ltd.** (supra) and also to the decision of the Apex Court in **Liberty Oil Mills Vs. U.O.I. 1984(3) SCC 465** which while construing the words “without assigning any reasons” held that it does not do away with the requirement of reasons existing for the decision, it only does away with communicating the same. In fact in this case the Section does not do away with requirement of issuing a reasoned order while issuing a Certificate under Section 197 of the Act.

22. At the request of the Revenue the petition was posted for directions on 25 January 2018 to enable the

Respondent to respond on the above issue. On 25 January 2018, the Revenue did not make any submission to counter our *prima facie* view including our drawing an adverse inference on account of non furnishing of the order/reasons leading to the issue of the certificate dated 4 May 2017. Therefore, we conclude that there would have been reasons recorded in the file before issuing a certificate dated 4 May 2017 and this ought to have been furnished to the party before resting its case in the impugned order on the ground that the aspect of Rule 28 AA of the Rules was not considered at the time of granting the Certificate. Further if the Revenue seeks to cancel the same on the ground that a particular aspect has not been considered then before taking a decision to cancel the certificate already granted, it must satisfy the requirement of Natural Justice by giving a copy of the same to the parties and hear them on it before taking decision to cancel the certificate. This is particularly so as in the present facts the show cause notices dated 16 August 2017 and 30 August 2017 seeking to review the Certificate dated 4 May 2017 did not indicate that the review is being done

as the Certificate dated 4 May 2017 was granted without considering the applicability of Rule 28 AA of the Rules in the context of the petitioner's facts. Therefore, there was no opportunity/occasion for the petitioner to seek a copy of the reasons recorded while issuing a certificate dated 4 May 2017. Moreover, this becomes all the more important as we have found on examination of facts that there is no change in facts as existing on 4 May 2017 and as existing when the impugned order dated 23 October 2017 was passed. Thus, in the present facts, according to us, there is a flaw in the decision making process which vitiates the impugned order dated 23 October 2017.

23. Apart from the above, we shall examine the issue of cancellation of certificate dated 4 May 2017 by the impugned order dated 23 October 2017 and examine whether the same can be sustained on grounds specified therein, de hors the issue of breach of natural justice. However, before examining the other issues we must make it clear that we are

mindful of the fact that the Revenue Officers are best equipped to protect the interest of the Revenue. Therefore, at the time of disposing of an application for grant of nil or lower rate of withholding tax certificate, they must ensure that Revenue's interest are protected. However, this protection of Revenue's interest has as to be examined/weighed against the assessee's right to nil or lower rate of withholding tax as provided by Parliament in Section 197 of the Act. Therefore, the grant or refusal to grant the certificate under Section 197 of the Act has to be determined by the parameters laid down therein and Rule 28 AA of the Rules. It cannot go beyond the said provisions to decide an application. This alone would ensure uniformity of treatment of all applicants seeking the benefit of Section 197 of the Act.

24. Mr. Suresh Kumar, learned Counsel for the Revenue, states that the impugned order need not be examined at all as the cancellation of a certificate in the present case would not cause any prejudice to the Petitioner. In case, more

taxes are paid then it is liable to, by virtue of tax deducted at source, then consequent to final assessment the Petitioner would be entitled to refund of excess tax paid. In support he places reliance upon the decision of the Madras High Court in ***Ansaldo Energia SpA. Vs. ITO 2003(133) Taxmann 795***. The above submission completely ignores the provisions of Section 197 of the Act which provides a facility to an assessee who may not be liable to tax, to have the benefit of not having tax deducted at source on his behalf being made completely nugatory. This is so, as in all cases an assessee would be entitled to refund after assessment and no occasion to apply Section 197 of the Act can ever arise. Further the decision of the Madras High Court in ***Ansaldo Energia SpA.*** (supra) has no application to the present facts. In the case before Madras High Court, the contention of the Petitioner was that no tax liability would arise as it stood exempted by virtue of Section 49BBB of the Act. It was in the above facts that the Madras High Court upheld the cancellation of a certificate by holding that whether or not the assessee is entitled to the benefit of Section 49BBB of the Act, is a matter of

determination during the assessment proceedings. Therefore, at this stage, before the assessment is completed, it is not open to the Assessee therein to contend that it is not liable to tax till its claim to exemption is determined during assessment proceedings. In the present facts, the carry forward loss of the Petitioner are so huge that even if the Petitioner makes any profits in the subject assessment year, there would be no taxable income for the subject Assessment Year. Thus, the aforesaid decision of the Madras High Court in *Ansaldo Energia SpA*. (supra) would have no application to the present facts.

25. The impugned order dated 23 October 2017 cancels the certificate dated 4 May 2017 on the following two grounds:-

- (a) the financial condition of the Petitioner is such that any future tax payable may not be recoverable from the Petitioner; and

(b) there is outstanding tax demand of Rs. 6.90 Crores payable by the Petitioner.

26. So far as ground (a) above viz: the earlier certificate is cancelled because of the current financial health/condition of the Petitioner is such that it would be difficult to recover any future liability raised against the Petitioner-Company. A mere averment is made to above effect without indicating any basis for the conclusion.

27. Mr. Suresh Kumar, learned Counsel for the Revenue places reliance upon the affidavit in reply of Respondent No. 1 Mr. N. Ashok Babu, Joint Commissioner of Income Tax, dated 11 January 2018 – wherein reference is made to a meeting with the group CFO that the financial health of the Company is very weak and also newspaper reports. It is now well settled that the impugned order would stand or fall by the reasons mentioned therein and the same cannot be improved by an affidavit. In any case, in the present case, the

affidavit relied upon newspaper items and discussion with the group CFO that the financial health of the company is very weak. This is without giving any particulars. In any case this also supports the stand of the petitioner that its financial condition was very weak both when it made the application on 27 February 2017 for a certificate under Section 197 of the Act – wherein the Petitioner points out that it had carried forward loss of over Rs. 4900.00 Crores as per the return of income filed for the year ending 31 March 2016 and now at the time when the impugned order was passed. The impugned order dated 23 October 2017 does not indicate, even remotely, what the profits are likely to be in the near future, which the revenue may not be able to recover as it would be more than the carry forward losses. In fact the affidavit if anything supports the case of the petitioner that they have huge carried forward losses and there is no likelihood of any tax becoming payable in the subject assessment year.

28. Moreover, it was urged by the petitioner that

the aforesaid further huge financial loss was one of the considerations which weighed with the Respondent No. 1 while granting certificate dated 4 May 2017 as even if the Company were to turn the corner, the accumulated losses were so huge that it was unlikely that any taxable income would be a subject matter of tax for the subject Assessment year. In fact, this Court had occasion in *Mckinsey and Company Inc. Vs. U.O.I.* 324 *ITR* 367 to consider the exercise of powers under Section 197(2) of the Act by the Assessing Officer i.e. to cancel the certificate granted earlier. This Court had observed that the Assessing Officer can exercise power under Section 197(2) of the Act for canceling the certificate which has been earlier issued/ granted. However, such a cancellation/ departure from the earlier view has to be made on valid and cogent reasons, i.e. when there is material on record to justify the departure. The impugned order does not indicate any such material, nor Revenue is able to show us any such change in circumstances which would warrant canceling certificate dated 4 May 2017. Therefore, the basis/ ground (a) of the impugned order is not

sustainable in the facts and renders the order bad.

29. So far as ground (b) above viz. outstanding tax demand of Rs. 6.90 Crores is payable to the revenue by the petitioner. Therefore, the certificate dated 4 May 2017 cannot be sustained, resulting in its cancellation. We note that neither Section 197 of the Act nor Rule 28AA of the Rules provide that no certificate of nil/lower rate of withholding tax can be granted if any demand, howsoever minuscule, is outstanding. In fact Rule 28 AA(2) of the Rules requires the authority to determine the existing/estimated liability taking into consideration various aspects including the estimated tax payable for the subject assessment year and also the existing liability. The existing and estimated liability would also require taking into account the demands likely to be upheld by the appellate authorities.

30. In a case like this one where the petitioner states that the issue is concluded by a decision dated 27 May

2016 of the Tribunal in its own case, then the assessing officer has to consider the same and give some modicum of reason why it is *prima facie* not covered by the decision of the Tribunal. This is particularly so in the back ground of the petitioner's Appeal with respect to the demand of Rs. 6.68 Crores being heard by the CIT(A) as far back as in February 2017 and no order being passed thereon till date. Further, in the present case the impugned order does not deal with the petitioner's contention that the demand of Rs. 28.00 Lakhs is on account of mistake in application of TRACE system nor does it deal with the Petitioner's contention that the entire demand of Rs. 6.90Crores can be adjusted against the refundable deposit of Rs. 7.30 Crores, consequent to the order dated 27 May 2016 of the Tribunal in its favour.

31. Therefore, the impugned order dated 23 October 2017 seeking to cancel the certificate dated 5 May 2017 is a non speaking order as it does not consider the petitioner's submissions. Therefore, the basis/ ground (b) of the impugned

order is not sustainable in the above facts and renders the order bad.

32. In the above view the impugned order dated 23 October 2017 is quashed and set aside.

33. Writ Petition disposed of in the above terms.

[RIYAZ I. CHAGLA J.]

[M.S. SANKLECHA, J.]