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

+ **W.P.(C) 9136/2019 & CM APPL. 37760/2019**

LUFTHANSA CARGO AG

..... Petitioner

Through: Mr. Sujit Ghosh, Advocate with Mr.
Anand Chaudhuri, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX AND ANR....

Respondents

Through: Mr. Zoheb Hossain, Senior Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **06.11.2019**

1. The Petitioner has preferred the present writ petition to assail the orders/directions issued by Respondent No. 1 under Section 197 of the Income Tax Act, vide certificate dated 29.05.2019, directing withholding of TDS at the rate of 0.5% for the Financial Year 2019-20 and Assessment Year 2020-21.

2. The case of the Petitioner is that, it is a Company incorporated under the laws of Germany and is engaged in the business of transportation of mail, livestock and goods by air through its fleet of aircrafts in international traffic. It is a tax resident of Germany, which is also the Petitioner's place of

effective management for the purposes of the Act and the India- Germany Double Taxation Avoidance Agreement (hereinafter referred to as the "DTAA"), as evidenced by the required tax residency certificate issued by the German tax authorities.

3. In terms of the Article 8 of the said DTAA, the profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. The Petitioner states that in compliance with the provisions of Section 195 of the Act, the Petitioner filed an electronic Form 13 application with the Respondent No. 1 requesting a certificate to be issued under Section 197(1) of the Act allowing a NIL rate of tax withholding to the deductors, as cargo agents on payments to be made to the Petitioner during Financial Year 2019-20.

5. Petitioner states that it has consistently been receiving withholding tax certificates in the past years under Section 197(1) of the Act allowing a NIL rate of tax withholding on identical payments made to the Petitioner and there has been no change in its business pattern in the current financial year relative to the past years. The Petitioner has placed on record the withholding tax certificates issued under Section 197 of the Act for the Financial Years 2009-10 to 2018-19 which described NIL rate of tax withholding in respect of payments made to the Petitioner.

6. The grievance of the Petitioner is that the impugned certificate dated 29.05.2019 has arbitrarily fixed the rate of deduction of tax at source at 0.5% even though under the DTAA, the Petitioner's income is not liable to be taxed in India.

7. On issuance of notice, Respondents have filed their counter affidavit and also placed on record the note sheet from the official records, processing Petitioner's aforesaid application for the current Financial Year i.e. 2019-20.

8. We consider it appropriate to reproduce the said file notice which reads as under:-

F.Y. 2019-20

M/s. Lufthansa Cargo AG (PAN; AABCL6458R)

The applicant M/s. Lufthansa Cargo AG is an international airline company incorporated under the laws of Germany and having its Head Office at Flughafen, Bereich West, D-60546. Frankfurt/ Main, Germany and controlling branch office in India for India operations at Room. no. 202-204, Cargo Complex, IGI Airport, New Delhi-110037. The applicant has filed an application dated 02.05.2019 for issuance of withholding tax certificate u/s 197 of the Act, for lower deduction of tax at source for payment received from various customers, agents and distributors on account of air transportation business in India during the financial year 2019-20.

The applicant company is in the business of transportation of mail, livestock or goods by air through an aircraft in international traffic and these activities are carried out at Delhi, Chennai, Mumbai, Hyderabad and Bagalore. The Company has been receiving payments from various customers, agents and distributors on account of air transportation business in India.

The applicant has stated that as per Article 8 of DTAA between India and Germany, the profits derived by an enterprise

of a contracting state from operation of ships and aircrafts in international traffic is taxable only in that state. For the purpose of taxation, the contracting state of Lufthansa Cargo AG is Germany {Copy of tax residency certificate is placed contra}. Lufthansa Cargo AG has been filing its return of Income in India at NIL as per the provision of DTAA between India and Germany.

In view of the above, if approval, a certificate u/s 197 for the financial year 2019-20 may be issued directing the payers to deduct tax at NIL for payments made to M/s Lufthansa Cargo (excluding surcharge and education cess). Such certificate would be provisional in nature and subject to final assessment.

Submitted for your kind perusal and direction please.

DCIT(IT). Cir-2(2)(1), Delhi

ITI

Plz. ask A following -

(i) Submit the reason for claiming Article -8 DTAA applicability along with supporting documents.

Sd/-
20.05.19

ITI

PVC is LDC A has asked for Nil LDC on the basis of Article & applicability put, up for kind perusal & dir.

Pls

Sd/-
20.05.19

Addl. GIT- 17 Range 2(2)

Pl check the earlier years assessment statems & additions made therein.

Sd/-
21.05.19

DCIT

Put up for perusal. No assessment & addition.

SD/-
24.05.19

Addl. IT Pay 2(2)

To protect the interest of revenue, it is proposed that certificate may be issued @ 0.05%.

SD/-
24.05.19

CIT(IT)-2

Approved @ 0.5% as proposed.

SD/-
24.05.19

Addl.CIT IT 2(2)

SD/-
24.05.19

9. In the light of the aforesaid, the submission of learned counsel for the Petitioner is that the present case is squarely covered by the decision of this Court in the case of ***Bentley Nevada LLC v. Income Tax Officer, Ward-1(1)(2), International Taxation & Anr***, in WP(C) No. 7744/2019 decided on 29.07.2019 by this Court.

10. Mr. Hossain, learned counsel for the Respondent points out that in ***Bentley*** (supra), the effective rate of tax was worked out at 1.04% of the total revenues.

11. In this light, the Court quashed the order under Section 197 of the Act

allowing deduction of the tax at source @ of 5% from the payments made to the Petitioner by its Indian Customers.

12. We may note that the situation in the present case is, in fact, even better for the Petitioner inasmuch as the total income of the Petitioner has been assessed in the return filed by the Petitioner Assessee as NIL. In this regard, the Petitioner has placed on record the assessment orders for the Assessment Years 2013-14 to 2015-16.

13. A perusal of the file notings as extracted hereinabove, demonstrates the position beyond doubt that there has been complete non-application of mind to the germane and relevant considerations by the Respondents while dealing with the Petitioner's application under Section 197 of the Act.

14. The Assessing Officer had proposed issuance of the certificate under Section 197 of the Act directing the payers to deduct tax at NIL rate in respect of payments made to the Petitioner. The DCIT (IT) had sought information/reasons for claiming applicability of Article 8 of the Indo-German DTAA along with supporting documents.

15. It appears that the earlier years assessment statements were also called for, which shows the taxable income was accepted as NIL, yet there is no discussion found in the file notings, as to on what basis the decision was taken to withhold tax at source in respect of payments made to the petitioner in India at the rate of 0.5%.

16. Following the decision in ***Bentley Nevada LLC*** (supra), we accordingly quash the certificate dated 29.05.2019 and direct the Respondents to apply mind afresh to all the relevant circumstances and issue a fresh certificate. Till the fresh certificate is issued, the Petitioner's receipts of payment shall be subject to Nil rate of deduction of tax at source in respect of payments made to it in India.

17. *Dasti.*

VIPIN SANGHI, J

SANJEEV NARULA, J

NOVEMBER 06, 2019

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