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

+ W.P.(C) 8578/2019 & CM APPL. 35454/2019

GE HYDRO FRANCE (FORMERLY KNOWN AS ALSTOM
HYDRO FRANCE) Petitioner

Through: Mr. Sachit Jolly, Advocate.

versus

INCOME TAX OFFICER, TDS WARD 1(3)(2), INTERNATIONAL
TAXATION & ORS. Respondents

Through: Mr. Ruchir Bhatia, Senior Standing
Counsel with Mr. Shlok Chandra and
Ms. Madhura M.N., Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **23.01.2020**

1. We have heard learned counsel for the parties. The Petitioner has assailed the order dated 05.07.2019 passed by Respondent No. 1 under Section 197 of the Income Tax Act directing deduction/withholding of tax at the rate of 10 % on the payments made to the Petitioner by THDC India Limited from 05.07.2019 to 31.03.2020. The Petitioner also seeks a direction to Respondent No. 1 to issue order/certificates under Section 197 of the Act at a 'nil' rate in respect of THDC India Limited in pursuance of Petitioner's application filed on 23.04.2019. Alternatively, the Petitioner seeks a direction to the Respondent No. 1 to issue order/certificates under Section 197 of the Act at the lower rate of 1.5% to THDC India Limited, in pursuance of Petitioner's application filed on 23.04.2019.

2. In the immediately preceding year, the Petitioner was issued withholding tax certificate at rate of 1.5 % of payments made by THDC India Limited in pursuance of the contract which continues to remain in force and is operational in the current year. The justification sought to be offered by Mr. Bhatia, learned Senior Standing Counsel - who appears for the Revenue, for issuing the impugned withholding tax certificate at the rate of 10 % on payments made by THDC India Limited, is that the Respondents had conducted a survey, and the Respondents are in the process of issuing notices for reopening of assessments on the premise that the income derived from THDC India Limited is liable to tax in India, since it is derived by the Permanent Establishment (PE) of the Petitioner in India. He has also placed reliance on the notification No. 8/2018 dated 31.12.2018 issued by the Directorate of Income Tax (Systems) of the CBDT in pursuance of Rule 28 (2) of the Income Tax Rules which reads as follows:

28. Application for grant of certificates for deduction of income-tax at any lower rates or no deduction of income-tax.

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(2) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents and the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the furnishing of Form No.13.

3. We find that in the counter affidavit as filed, neither of these pleas have been taken. The reasons for issuing withholding tax certificates at the rate of 10 % on payments to the Petitioner by THDC India Limited cannot be improved upon, in view of the judgment of the Supreme Court in ***Mohinder Singh Gill v. Chief Election Commr.***, AIR 1978 SC 851. Further in the counter affidavit, the Respondents have tried to justify the granting of certificate for deduction of tax at source at the rate of 10 % by contending that the total turnover of the Petitioner for the assessment years 2013-14 to 2018-19 from its business operations in India is Rs. 601.91 crores. The AO has assessed 10% of the revenue/sales as profit, and has attributed 35% of such profit as attributable to business done through the Petitioner's PE in India in the respective years covered in the survey.

4. We find merit in the submission of Mr. Jolly, learned counsel for the Petitioner that if, for the sake of argument, we were to accept the averments made in the counter affidavit, yet the impugned order is not sustainable for the reason that the total revenue for all the five years i.e. from F.Y. 2015-16 to F.Y. 2019-20 that could be taken into consideration, put together comes to Rs. 504.70 crores (as calculated by the summation of the amounts pertaining to each relevant financial year, appearing in the counter affidavit filed by the respondents). The Respondents have themselves admitted that the profit attribution of 26 % has been upheld by this Court to PE in India in respect of cases of GE Group and, therefore, if one were to assume deemed profitability of 10 % and apply attribution of 26 % as relied upon by the Respondents in the counter affidavit, the total tax payable for the five years would still not justify the Respondents applying withholding rate of 10 % on

the expected receipts by the Petitioner from THDC India Limited. If highest attribution of 35 % is applied, even then the Respondents cannot justify the withholding rate of 10%. Further, the respondents have alleged that the sales and service break up of the receipt from THDC contract is not clear from the details provided by the Petitioner. The Petitioner has, on the contrary, maintained that the Respondents have completely glossed over the fact that the THDC contract was a purely supply contract, which has been explained in the application filed by the Petitioner under Section 197 of the Act. We find that the Respondents have not examined the aforesaid fact in the correct perspective and have applied a profit attribution rate of 35 % straightaway and issued the certificate withholding tax at the rate of 10 %.

5. Pertinently, the Respondents have sought to justify withholding tax at the rate of 10 % for the current year in respect of payments received from THDC India Limited by taking into account the assumed tax and interest liability under Section 234B and 234C by considering the business turnover of the Petitioner in India from assessment year 2013-14 onwards. Prima facie, this is not permissible in view of rule 28AA (2) (ii) which reads as follows:

“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) xxxxxx

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

(iii) xxxxxx

(iv) xxxxxx”

(emphasis supplied)

6. The notification dated 31.12.2018 issued by the Directorate of Income Tax (Systems) of the CBDT by resort to Rule 28 (2) of the Income Tax Rules, 1962 cannot enlarge the scope of the Respondents to consider the assessed, returned or estimated income for a period in excess of the last four previous years. Rule 28 (2) is merely an empowering rule, which empowers the named authorities looking after the “systems” to lay down procedure, format and standards for insuring secured capture and transmission of data, and uploading of documents and for evolving and implementing appropriate security, archival and retrieval policies in relation to furnishing of form No. 13.

7. We also find that the Respondents have not taken into consideration the tax already paid by the Petitioner in the previous years and the computation tendered in Court proceeds on the assumption that no payment has been made by the Petitioner. On that premise, tax as well as interest under Section 234B and 234C have been added, which cannot be the case.

8. In the above circumstances, following the earlier orders of this court in ***Bently Nevada LLC v. Income Tax Officer, Ward-1(1)(2), International***

Taxation & Anr. bearing number W.P.(C) 7744/2019 dated 29.07.2019 and ***Lufthansa Cargo AG V. Deputy Commissioner Of Income Tax And Anr.,*** bearing number W.P.(C) 9136/2019 dated 06.11.2019, we quash the impugned order dated 05.07.2019 issued by the Respondents prescribing withholding tax at the rate of 10 % in respect of the Petitioner's contract with THDC India Limited. We also direct the Respondents to consider the matter afresh and issue a fresh withholding tax certificates under Section 197 of the Act after taking into account the aspects taken note of hereinabove. Till then, the Petitioner shall continue to remain bound by the withholding tax certificate issued in respect of the immediately preceding year i.e. at the rate of 1.5% qua the payments received by it from THDC India Limited. The Respondents should ensure compliance of this order by taking appropriate steps for modifying the systems within the next one week.

9. The writ petition is disposed of in the above terms.

10. This order be given *dasti* under the signatures of Court Master.

VIPIN SANGHI, J

SANJEEV NARULA, J

JANUARY 23, 2020

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