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

\+ W.P.(C) 4550/2022

BOOKING.COM BV .....Petitioner

Through: Mr. Ajay Vohra, Sr. Advocate with Mr. Rajeev Mishra, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR. .....Respondents

Through: Mr. Puneet Rai, Sr. St. Counsel with Mr. Ashvini Kumar, Mr. Rishabh Nangia, Jr. St. Counsel

\+ W.P.(C) 4560/2022 CM APPL. 40937/2023

BOOKING.COM BV .....Petitioner

Through: Mr. Ajay Vohra, Sr. Advocate with Mr. Rajeev Mishra, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR. .....Respondents

Through: Mr. Puneet Rai, Sr. St. Counsel with Mr. Ashvini Kumar, Mr. Rishabh Nangia, Jr. St. Counsel

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**
**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA**

**O R D E R**

**%** **27.11.2024**

1. The petitioner has filed the above captioned petitions impugning the notices dated 30.03.2021 (hereafter *the impugned notice*) issued under Section 148 of the Income Tax Act, 1961 (hereafter *the Act*) in respect of the assessment years (AYs) 2016-17 and 2017-18. The petitioner also impugns the orders dated 08.12.2021 (hereafter *the impugned order*), whereby the objections raised by the petitioner for initiating the reassessment

proceedings were rejected.

2. The reasons recorded for initiating the assessment proceedings under Section 147 of the Act; objections raised by the Assessee in support of the reasons recorded for initiations of the said proceedings; and the impugned order passed rejecting the petitioner's objections are similar in material aspect and, therefore, these petitions are being disposed of by this common order. However, for the purpose of the present order, we shall refer to the specific facts as obtaining in W.P.(C) No.4550/2022 which concerns the initiation of the assessment proceedings under Section 147 of the Act in respect of the AY 2016-17.

3. The Assessing Officer (hereafter *the AO*) issued the impugned notice under Section 148 of the Act stating that it had reasons to believe that the petitioner's income chargeable to tax in respect of the AY 2016-17 had escaped assessment within the meaning of Section 147 of the Act and called upon the petitioner to furnish its return of income in respect of said AY.

4. In compliance of the said notice, the petitioner filed its return of income for the AY 2016-17 on 31.05.2021. The petitioner also requested the AO to furnish the reasons recorded for initiating of proceedings under Section 147 of the Act, which were thereafter furnished to the petitioner.

5. The relevant extract of the reasons recorded for initiating the proceedings are set out below: -

> "The case was reflected under AIMS module of ITBA under the category of Non- filers of Income Tax return for the AY 2016-17. The assessee, BOOKING.COM.B.V. having PAN

**AAGCB2395A**, is a company and has not filed return of income for the AY 2016-17.

2. Therefore, information available in ITS-AIR details was analyzed and it was observed that the assessee, during the financial year 2015-16 relevant to A.Y. 2016- 17 has been involved in following transactions:

| S. No. | Nature of Transaction | Amount |
|---|---|---|
| 1 | Payment of Non-residents (Section 195) | 23952420 |
| 2 | Professional or Technical Fees (Section 194J) | 130188 |
| 3 | Payment to Contractor (Section 194C) | 224891 |
| 4 | Commission or Brokerage (Section 194H) | 13129556 |
| 5 | Remittance to a non-resident or to a foreign company | 17316765 |
| | **Total** | 54753220 |

3. It is pertinent to mention that though the assessee has indulged in above transactions during the year, the assessee has chosen not to file return of its income for the year under consideration in spite of having taxable income.

4. To verify the nature of these transactions and to give an opportunity to the assessee to explain the same, the assessee was issued letter **ITBA/AIM/S/95/2020- 21/1031493850(1)** through ITBA on 15.03.2021 to explain the abovementioned transaction and reason for not filing ITR for the year. The assessee was requested to make compliance by 20.03.2021. However, no reply has been received from the assessee till date.

Further ITS details from ITBA, 360 Degree data, E-filing portal and 26AS data from CPC TDS has been verified and found that no ITR has been filed by the assessee whereas transactions amounting to Rs.54753220/-has been carried out during the year under consideration.

5 Thus, the above facts indicate that the assessee has failed to file return of income for the year under consideration as per the provisions of Section 139 while prime facie the assessee was having taxable income during the year. Provisions of Sec 139 of the Income Tax Act, 1961 are reproduced below:

*** *** ***

6. Therefore, in view of above facts and as per information available on record, the full and true disclosure with regard to the above transactions have not been made by the assessee company. In view of explanation 2 to clause a of proviso of section 147 of the Income Tax Act, 1961, where a return of income has not been furnished by the assessee and it is noticed that the total income of any other person in respect of which he is assessable under the IT Act, 1961 during the year exceeded the maximum amount which is not chargeable to income tax. **Keeping in view all the above, I have reason to believe that an amount at least of Rs. 54753220/-has escaped assessment in case of BOOKING.COM.B.V. for the A.Y. 2016-17 within the meaning of Section 147/148 of Income Tax Act, 1961.**

6.2 *** ***

6.3 The assessment/re-assessment proceedings in this case for A.Y. 2016-17 pertain to period within four years from the end of relevant assessment years at the time of issue of notice, necessary sanction has to be obtained from Addl. Commissioner of Income Tax, in view of the amended provisions of section 151 w.e.f. 01.06.2015. The necessary sanction in this regard is being obtained separately from Addl. Commissioner of Income Tax, Range 1(1)(Intl Taxn.-01), New Delhi before the issue of notice u/s 148."

6. The petitioner filed its objections to the initiation of the proceedings on 02.09.2021. It is petitioner's case that it is a tax resident of the Netherlands and therefore, is entitled for the benefits under the India-Netherlands Double Taxation Avoidance Agreement (hereafter *the DTAA*). The petitioner claims that it did not have any income chargeable to tax in India and, therefore, was not liable to file its return of income.

7. However, the objections as raised by the petitioner were rejected by the AO by an order dated 08.12.2021, which is impugned in the present petitions.

8. The petitioner claims that it operates as an online reservation system through which the participating entities (such as hotels, guesthouse, etc.) offering their accommodations make available the information relating to rooms available with them for reservations. The visitors by accessing the petitioner's website make reservations of the rooms/accommodations offered by the participating entities. The petitioner charges commission from the participating entities at an agreed percentage of the gross amount paid by the travellers using the petitioner's facility to book accommodation with them.

9. The petitioner submits that the participating entities offer their available capacity on website [booking.com] by using a self-service internet tool. The petitioner claims that such entities determine the room price and other terms and conditions of providing accommodation to travellers.

10. The petitioner states that a person making reservations through booking.com transacts directly with the participating entities. The petitioner

claims that it acts as an intermediary between the persons booking the accommodations and the participating entities offering the accommodations on the petitioner's platform [booking.com]. The participating entities pay commission to the petitioner on the business generated from room bookings secured through the petitioner's web platform.

11. It is also the petitioner's case that its reservation system [web platform - booking.com] is hosted by the servers outside India. The petitioner claims that its revenue model is based on receiving commissions from the participating entities and it does not receive any revenue from the customers of the participating entities, who book rooms / accommodation through the platform operated by the petitioner.

12. In the objections dated 02.09.2021 filed by the petitioner also extracted the relevant portion of the standard contracts entered into with the participating entities. The same is set out below: -

> "1.2 Booking.com operates an online reservation system through which participating accommodations (such as hotels, guesthouses, etc.) can make their rooms available for reservation, and through which visitors of its website (such as travelers) can make reservations at such accommodations. After the booking has materialized and the travelers/ bookers have checked out of the accommodation, Booking.com charges commission from the accommodation at an agreed percentage of the amount earned by the accommodation from the travelers. The accommodations can offer their available capacity on the Booking.com website by using a self-service internet tool. The accommodations determine and set their own room price. When a

booker makes a reservation, the transaction occurs directly between the accommodation and the booker. Booking.com acts as an intermediary between the booker and the accommodation and is not a contracting party in the transaction between the accommodation and the booker. This online reservation system (i.e. Booking.com platform) itself is hosted on servers outside of India. Pursuant to this arrangement, Booking.com was in receipt of commission from the Indian accommodations for the subject AY. A sample contract based on which such payments were received is enclosed herewith for your ready reference as **Annexure 1**. Para 2.3 of the contract clearly underscores the fact that the commission is payable by the accommodations to Booking.com only in a scenario where booking actually materializes (para 2.3.2). The relevant portion is reproduced hereunder for your ready reference-

> "2.3.2 The aggregate Commission per reservation is equal to the multiple of (i) the number of nights stayed at the Accommodation by the Guest, (ii) the booked rate per room per night (excluding sales taxes and such other applicable national, governmental, provincial, state, municipal or local taxes or levies (the '**Taxes'**)) and such other extra's, fees and surcharges which are included in the offered rate at the time of booking of the room by a Guest on the Platforms (such as breakfasts, meals (half-board or full-board), bicycle rental, late check outs/early check in fees, extra person charges, resort fees, roll-away beds, theatre tickets, service fees, etc.), (iii) the number of booked rooms by the Guest, and (iv) the relevant Commission

percentage set tout in the Agreement......"

It is also pertinent to point out para 2.4.2 of the contract which puts the onus of withholding taxes and related compliances on the accommodations – …..2.4.2 The Accommodation is responsible for withholding and reporting relevant taxes (i.e., mentioned above in 2.4.1 under d) applicable to the Commission due to Booking.com according to the relevant tax regulations and the practices and requests of the tax authorities. The Accommodation shall bear and be responsible for the payment and remittance of the taxes applicable to the Commission (payments) and the associated late payment interests and penalties imposed by the tax authority for failing to withhold and report any taxes applicable to the Commission. If required, the Accommodation shall be solely responsible to negotiate and agree with the relevant tax authorities on the tax treatments of the Commission (payments). The Accommodation shall upon first request of Booking.com provide Booking.com with (photo-scanned) copies of tax payment certificates/tax exemption certificates upon each remittance of the Commission. The Accommodation represents and covenants that it duly registered with all relevant tax authorities (including applicable statutory (local) revenue collection authorities) an a hotel or other accommodation provider……"

13. It is material to note that the AO had issued the impugned notice

under Section 148 of the Act solely for the reason that the AO had found that certain entities had deducted tax at source (TDS) in respect of the amount credited or paid to the petitioner.

14. It is material to note that the facts as asserted by the petitioner have not been controverted by the Revenue. The fact that certain entities in India had deducted and deposited the withholding tax with the Revenue would suggest that the payments made by the participating entities to the petitioner is the petitioner's income chargeable to tax in India. If the petitioner's contention is accepted that its income is not chargeable to tax, the participating entities were not required to deduct the tax on the amount credited or paid to the petitioner. However, according to the petitioner, its income is not chargeable to tax in India and certain entities had erroneously deducted TDS. The petitioner had in brief set out its nature of business and had clearly asserted that it was entitled only to receive commission from the participating entities, which according to the petitioner is not chargeable to tax as petitioner is not a resident in India.

15. In its objection, the petitioner also referred to the provisions of Section 194C, 194H and 194J of the Act and pointed out that the said sections are applicable only in respect of the payments to a resident. Since the petitioner is not a tax resident of India, the said sections are inapplicable. The petitioner also emphasised that its commission under the agreement with the participating entities is on net of tax basis. Thus, if any tax is chargeable to commission, the same is required to be borne by the payer (participating entities).

16. In the aforesaid context, the only question to be examined by the AO was whether the payments made to the petitioner were chargeable to tax in India under the Act.

17. Whilst the tax was required to be deducted at source on the income chargeable to tax, but the fact that certain parties had deducted the tax may not be sufficient, by reverse reasoning, to hold that the payments on which the tax had been deducted is chargeable to tax. We find that the AO had not considered the issue whether, in the given facts as stated by the petitioner, its income is chargeable to tax. It is also material to note that none of the facts as asserted by the petitioner have been controverted. The AO has decided to continue with the reassessment proceedings solely on the ground that certain entities had deducted the tax at source on payments made to the petitioner.

18. Mr Rai, the learned counsel appearing for the Revenue has earnestly contended that since the AO has not examined the issue of chargeability in the context of the facts as set out by the petitioner, the matter ought to be remanded to the AO for considering the objections furnished by the petitioner afresh. However, the impugned notice under Section 148 of the Act be not set aside at this stage.

19. We are inclined to accept the said contention. Since, the AO has not examined the question regarding the chargeability of tax and has rejected the petitioner's objection solely on the ground that certain entities had deducted the tax at source on the payments made to the petitioner, we consider it apposite to remand the matter for considering afresh.

20. In view of the above, the impugned order dated 08.12.2021 disposing

of the objections raised by the petitioner is set aside. The matter is remanded to the AO to consider the petitioner's objection afresh in the light of the observations made in this order.

21. The petitions are disposed of in the aforesaid terms. Pending applications also stand disposed of.

**VIBHU BAKHRU, J**

**SWARANA KANTA SHARMA, J**

**NOVEMBER 27, 2024**

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*Click here to check corrigendum, if any*