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

+ W.P.(C) 7679/2022

GE HYDRO FRANCE

..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aditya Vohra, Adv.

versus

INCOME TAX OFFICER WARD INTERNATIONAL

TAX 1(3)(2) & ANR.

..... Respondents

Through: Mr. Aseem Chawla, SSC with
Ms. Monica Benjamin, JSC,
Ms. Pratishtha Chaudhary, Mr.
Naveen Rohila & Ms. Nivedita,
Advs.

58

+ W.P.(C) 11833/2022

UK GRID SOLUTIONS LIMITED

..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aditya Vohra, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX,

INTERNATIONAL TAX, CIRCLE 3(1)(1) Respondent

Through: Mr. Puneet Rai, SSC with Mr.
Rishabh Nangia & Mr. Ashvini
Kumar, Advs.

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+ W.P.(C) 11834/2022

GRID SOLUTIONS OY (LTD)

..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aditya Vohra, Adv.

versus

INCOME TAX OFFICER WARD INTERNATIONAL

TAX 1(3)(2) & ANR.

..... Respondents



Through: Mr. Aseem Chawla, SSC with
Ms. Monica Benjamin, JSC,
Ms. Pratishtha Chaudhary, Mr.
Naveen Rohila & Ms. Nivedita,
Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV**

ORDER

08.05.2024

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PER: PURUSHAINDRA KUMAR KAURAV, J.

1. In the present batch of writ petitions, a common challenge has been laid to the validity of certificates issued under Section 197 of the Income Tax Act, 1961 [“Act”]. The petitioners impugn the orders dated 09.05.2022 [W.P. (C) 7679/2022], 06.06.2022 [W.P. (C) 11833/2022] and 11.05.2022 [W.P. (C) 11834/2022], whereby, they have been subjected to a withholding tax rate of 4% for the Financial Year [“FY”] 2022-23 in respect of receipts received from various customers which was asserted to be taxable as business income under Section 9(1)(i) of the Act.

2. Each writ petition is governed by different Double Tax Avoidance Agreement [“DTAA”], however, bearing in mind the nature of the order which we propose to pass, the variations in applicability of DTAA's will not have much significance. The facts are being extracted from W.P. (C) 7679/2022 for deciding the issue at hand.

3. The petitioner is a foreign company incorporated under the laws of France. It had entered into independent contracts with National Hydroelectric Power Corporation Limited [“NHPCL”] and THDC India Limited [“THDC”] for offshore and onshore supply of plant and



equipment. It is the contention of the petitioner that it had no Permanent Establishment [“PE”] and that the revenue earned from the said supplies would not be taxable as business income in India.

4. While relying upon the certificates issued under Section 197 of the Act, it is averred that the respondents, starting from FYs 2012-13 to 2020-21 in case of NHPCL for different contracts and FYs 2017-18 to 2020-21 in respect of contract with THDC, had granted withholding tax certificate at a lower rate. It was submitted before us that in the assessments concluded for assessment years [“AYs”] 2016-17 and 2017-18, applying the provisions of deemed profitability as per Sections 44BB and 44BBB of the Act, the assessing officer had attributed 35% of such profits from offshore supply to the PE, resulting in effective tax rate of 1.40% on the gross receipts from offshore supply. It was, therefore, contended that the manner of computation of 4% withholding tax rate for the purposes of Section 197 of the Act is arbitrary and without any cogent justification.

5. However, it is the case of the respondents that the petitioner has engaged in artificial fragmentation of functions with an objective of evading tax. As per the respondents, the orders consequent to the issuance of certificate under Section 197 of the Act record that in assessments for earlier years, it has been held that the petitioner has a PE in the form of a fixed place and dependent agent PE through GE Power India Ltd. It was, therefore, contended that the computation of withholding tax rate does not suffer from any infirmity, inasmuch as, the AO relied upon Section 44BBB of the Act and estimated 10% of receipts as deemed profit and taxed at 40%, resulting in tax rate of 4%.

6. It is noteworthy that when the matter was taken up for hearing on 12.10.2022, following interim order was passed by this Court: -



“1. These applications were listed before us for hearing on 15.09.2022 when we had asked the counsel for the respondents/revenue to obtain instructions in the matter as to whether or not directions similar to those passed by us in WP(C) 9593/2022 and WP(C) 10055/2022 via order dated 28.07.2022 could be passed.

2. Messrs Ruchir Bhatia and Shlok Chandra, who appear on behalf of the respondents/revenue in WP(C) 7679/2022 and WP(C) 11834/2022, say that, for the moment, the same directions can be passed in the above- captioned applications as well.

2.1 Mr Puneet Rai, who appears on behalf of the respondents/revenue in WP(C) 11833/2022, submits likewise.

2.2 Besides this, it is also the submission of Messrs Bhatia and Chandra that a direction be issued that if the petitioners fail in the writ petitions the deficit amount would be paid with interest.

3. To be noted, in WP(C) 11833/2022, counter-affidavit has been filed. We are told that the counter-affidavit was filed only on 10.10.2022 and that copy of the same has been served on the counsel for the petitioner in the said matter.

4. Insofar as the remaining two writ petitions are concerned i.e., WP(C) 7679/2022 and WP(C) 11834/2022, counter-affidavits have not been filed, as yet.

5. Given this position, counsel for the parties are agreed that the directions contained in paragraph 18 of the order dated 28.07.2022 passed in WP(C) 9593/2022 and WP(C) 10055/2022 can operate, as indicated above, with an additional direction that in case the petitioners in the above- captioned matters fail, they will pay the deficit amount with interest. For the sake of convenience, the directions contained in paragraph 18 are extracted hereafter:

“18. However, in the interregnum, we are inclined to direct as follows: the petitioner will receive income from the concerned remitters after imposition of withholding tax at the rate of 1.5%; with the caveat, that if the petitioner were to fail in the aforementioned writ actions, the balance amount calculated at the differential rate of 2.5% will be deposited with the revenue post-haste.”

6. Besides the aforesaid direction by which the petitioners will be bound, it is made clear that in case the petitioners were to fail in the writ petitions, they will pay the deficit amount to the respondents/revenue, with interest, as stipulated by the Income Tax Act, 1962 [in short ‘the Act’].



7. At this stage, Messrs Rai, Bhatia and Chandra, counsels for the respondents/revenue, submit that the aforementioned interim directions issued by the Court can be given effect to if an application is moved by the petitioners in terms of the directions issued hereinabove for issuance of the withholding tax certificate to be issued under Section 197 of the Act.

7.1 Mr Ajay Vohra learned senior counsel, who appears on behalf of the petitioners, says that the application will be moved, immediately, on receipt of a copy of the order.

7.2 Once an application is moved, the Assessing Officer will issue a revised certificate in terms of the interim directions issued by us, as expeditiously as possible, though not later than ten days of the receipt of a copy of the order.

8. The applications are disposed of in the aforesaid terms.”

7. Pursuant to the aforesaid interim arrangement, the petitioner has received remittances with a withholding tax rate of 1.5%. It is, however, evidently seen that by this time, the instant writ petitions practically have already been rendered infructuous as a result of the relevant FY under consideration itself having come to an end.

8. At this juncture, Mr. Vohra, learned senior counsel for the petitioners invited our attention to paragraph nos.5 and 6 of the aforesaid order dated 12.10.2022, whereby, it was directed that if the petitioners were to ultimately fail in the writ petitions, they would be required to deposit the balance amount calculated at a differential rate of 2.5%. On the basis of aforesaid submission, learned senior counsel urged that notwithstanding the concerned FY having come to an end, the matters require adjudication on merits and be finally disposed of. Therefore, bearing in mind the contingent nature of the liability which hinges upon the petitioner in terms of paragraph nos.5 and 6 of our interim order, the cases require a finding on merits.

9. Recently, on 03.04.2024, while deciding a similar challenge which was raised before us in W.P. (C) 9593/2022 titled as **GE**



Energy Parts Inc v. Income Tax Officer Ward 1 -3- 2, International Taxation & Ors., and connected matters, the following order was passed:-

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9. Pursuant to the aforesaid interim direction, the petitioner has received remittances with a withholding tax at the rate of 1.5%. By the time these writ petitions were taken up for hearing, it was evident that they had essentially been rendered infructuous consequent to the FYs“ themselves having come to an end. However, Mr. Jolly drew our attention to paragraph 18 of the order passed on 28 July 2022 and which had provided that in case the petition were to fail, the balance amount calculated at a differential rate of 2.5% would be deposited. It was on the aforesaid basis that the writ petitioners prayed for the matters being heard and disposed of finally on merits and notwithstanding the FY having come to an end.

10. In our considered opinion, para 18 of our interim order clearly requires a finding on merits being rendered irrespective of the FY having come to an end since the liability of the petitioner for the period in question would have to be adjudged lest it be put to prejudice and be compelled to pay the differential tax @ 2.5%.

11. One of the primary grounds of challenge which was noticed by the Court while entertaining the writ petition was of the respondents having accepted the profit attribution rate to be 26%. It was in the aforesaid backdrop that the petitioners appear to have contended that the withholding rate of tax would not exceed 1.04%. However, and since they had been adhering to a withholding tax rate of 1.5%, and which was the rate that was admittedly followed for the period spanning FYs“ 2018-19 to 2020-21, the Court had in the interim stipulated that the withholding tax rate would be 1.5%.

12. From a reading of the impugned order, we note that the profit attribution rate of 26% does not appear to be disputed. This is evident from a reading of the following passages as appearing in the impugned order:-

“Permanent Establishment in India

The assessee is a company of the GE Group. In assessments made for earlier years in the assessee's case, the Assessing Officer, holding that the assessee has a PE in India, has attributed 3.5% of gross receipts from supply contracts as income of the PE, which is taxable @ 40% as per the Act. The fact of PE has been upheld by various appellate



authorities including Hon“ble Delhi High Court with profit attribution rate of 26% of PE in India in those cases of GE Group. The taxability of GE Energy Parts Inc. in India is, therefore, to be decided as per the provisions of the Income-tax Act and relevant provisions of the India-USA DTAA. From the facts of the case, there is no doubt that the assessee has a "business connection" under section 9(1)(i) of the Act and have a PE' under the provisions of Art. 5(2) of the India-USA DTAA.”

13. Notwithstanding the authority having noticed the profit attribution rate, it proceeded to frame a withholding tax rate of 4%. Since the factum of the withholding tax rate not exceeding 1.04%, when computed alongside the profit attribution rate of 26%, was not seriously questioned, we find ourselves unable to sustain the order impugned.

14. We accordingly allow the writ petitions and quash the impugned order dated 13 May 2022. However, we hold that the decision taken for FYs 2022-23 and 2023-24, which forms the subject matter of the instant writ petitions, shall consequently not be treated as a precedent for subsequent years. The withholding tax rate question for any other year which may be pending would have to be decided independently.

15. We further observe that since the orders impugned before us stood restricted to an adjudication under Section 197 of the Act alone, all rights and contentions of respective parties on merits are kept open to be addressed in regular assessment proceedings.”

10. Coming back to the facts of the controversy at hand, it is seen that the petitioner has primarily assailed the withholding tax rate of 4% on the ground that it does not have any PE in India and thus, the profits arising from offshore supply of goods are not taxable. It has been canvassed by the petitioner that assumingly, if the PE is established in India, the profits would be taxable in India only to the extent the same are attributable to the Indian PE. Mr. Vohra, however, apprises this Court that during the interregnum, the Income Tax Appellate Tribunal has decided the aforesaid aspect in favour of the petitioner of W.P. (C) 7679/2022, holding that there is no PE of the



petitioner in India and deemed profitability provisions shall not apply. We, however, take note of the submission of the learned counsel for the respondents that the said order of the ITAT has been assailed before this Court. We, therefore, clarify that the challenge to the said aspect would be dealt with as and when the matter comes up for hearing.

11. It is, however, noteworthy that the respondents had been adhering to a lower tax rate in the past FYs and based upon which, the Court had stipulated in the interim that the withholding tax rate would be 1.5%.

12. Thus, considering the aforesaid circumstances as they exist as on date, we are unable to sustain the impugned certificates and consequential orders.

13. We, accordingly, allow the instant petitions and quash the impugned certificates along with the consequential orders. However, we, hereby clarify that the decision in the instant cases shall not be taken as a precedent in deciding the application(s) for subsequent FYs, which shall be dealt with in accordance with law. We have only decided the challenge *qua* Section 197 of the Act, precisely for FY 2022-23, and all other contentions are left open.

14. The petitions are disposed of in the aforesaid terms along with the pending application(s), if any.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 08, 2024/p