$~91 to 92

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

91

\+ W.P.(C) 7422/2023 CM APPL. 29443/2024

BOOKING.COM BV .....Petitioner

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

versus

ASSISTANT COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION CIRCLE & ANR. .....Respondents

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

92

\+ W.P.(C) 7060/2024 & CM APPL. 29443/2024

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

ORDER

% **27.11.2024**

1. The petitioner has filed the above captioned petitions impugning the notices issued under Section 148 of the Income Tax Act, 1961 (hereafter *the Act*) for initiating assessment proceedings under Section 147 of the Act in respect of the assessment years (AYs) 2019-20 and 2020-21. The Assessing Officer (hereafter *the AO*) had issued the notice dated 16.04.2023 under

Section 148 of the Act in respect of the AY 2019-20, which is impugned in W.P.(C) No.7422/2023. Similarly, the AO had also issued the notice dated 31.03.2024 in respect of AY 2020-21, which is a subject matter of challenge in W.P.(C) No.7060/2024. The said notices are hereafter referred as *the impugned notices*.

2. The impugned notices were preceded by the orders dated 15.04.2023 and 31.03.2024 passed under Section 148A(d) of the Act in respect of the AYs 2019-20 and 2020-21 respectively, whereby the responses submitted by the petitioner to the notice under Section 148A(b) of the Act were rejected.

3. The controversy involved in the present petition is similar in material aspects and, therefore, these petitions are being disposed of by this common order.

4. The AO had issued the notices under Section 148A(b) of the Act setting out the information, which according to the AO was suggestive of the petitioner's income escaping the assessment for the relevant AYs. The said information essentially, concerned the statements of tax deducted at source by various persons in respect of the amounts paid or credited to the petitioner. The petitioner had not filed its return of income for the relevant years (AY 2019-20 and AY 2020-21). According to the AO, since tax was deducted at source and deposited with the income tax authorities, the petitioner's income – commensurate with the TDS – which was chargeable to tax had escaped assessment.

5. The petitioner filed the objections to the initiation of the reassessment proceedings by a reply dated 20.03.2023 to the notice dated 04.03.2023

issued under Section 148A(b) of the Act in respect of the AY 2019-20 and reply dated 07.03.2024 to the notice dated 16.02.2024 issued under Section 148A(b) of the Act in respect of the AY 2020-21.

6. We consider it apposite to set out the extract of the petitioner's response dated 20.03.2024 and 07.03.2024, which encapsulates the petitioner's factual assertions that its income is not chargeable to tax. The same reads as under:-

> "2.1. 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, and a sample invoice are enclosed herewith for your ready reference as Annexures 2 and 3. Para 2.3 of the contract clearly underscores the fact that the commission is payable by the accommodations to Booking.com only when a 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 out in the Agreement .....*"

2.2. 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 falling 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 is duly registered with all relevant tax authorities (including applicable statutory (local) revenue collection authorities) as a hotel or other accommodation provider ....*"

2.3. The remittances are made through banking channels by the Accommodation to Booking.com; that the source of the 'fund' is the income of the Accommodation itself. The Accommodations have deducted tax at source based on their own understanding, in order to be tax compliant and avoid consequences of non-deduction of tax, without going into the question as to whether the payment made to Booking.com is liable to tax in India in the hands of Booking.com, which has to be ascertained as per the Act or the Tax Treaty, whichever is more beneficial to Booking.com, *vide* section 90(2) of the Act."

7. It is material to note that the petitioner's response to the notices issued under Section 148A(b) of the Act are similar to reasons as recorded for issuance of notice under Section 148 of the Act in respect of AY 2016-

17 and 2017-18. The same are briefly noted in the order passed today in W.P.(C) 4550/2022 and W.P.(C) 4560/2022. For the sake of brevity the same are not reproduced in this order. Suffice to it say that it is the petitioner's case that it is not a tax resident in India. Its income is confined to receiving the commission from entities that use its web platform (booking.com) by offering the accommodation available with them for booking by various customers. It is the case of the petitioner that the petitioner is an intermediary and hosts a web platform, which is used by the participating entities to offer their available accommodation to prospective customers. The persons looking for such accommodation make room reservations with the participating the entities on the basis of the information as available on the petitioner's. It is stated that the contract for providing accommodation is strictly between the person making reservations and the participating entities. The payments are also made directly to the participating entities by the customers.

8. The replies furnished by the petitioner were not accepted by the AO as the AO passed orders under Section 148A(d) of the Act holding that it is a fit case to issue notice under Section 148 of the Act. The AO concluded that the petitioner is carrying out its own business in India through premises in India in the form of dependent agents and accommodations, which are dependent agent PEs (permanent establishments) of the petitioner.

9. We consider it apposite to reproduce the order dated 31.03.2024 issued under Section 148A(d) of the Act which set outs the reasons that had persuaded the AO to hold that it is a fit case for reopening the assessment for the relevant assessment year.

"7. The assessee states that it is a non-resident in the year under consideration, and therefore it has no income chargeable to tax in India. However, the assessee has not filed its tax residency certificate for the year. In absence of the same, it cannot be ascertained whether the assessee is a non-resident for the purposes of the Incometax Act, 1961.

7.1 The assesses, has developed a fully automatic computer information system, which enables display and dissemination of information supplied by various accommodations (such as hotel, guests houses etc), which in turn facilitates, inter alia, reservations, communications, ticketing and related functions on a world-wide basis for the travel industry. The assessee submitted that it has entered into agreements with various agents and accommodations and provides connections between the agent/accommodation and the customer.

7.2 The travel agents in India, who intend to use the aforesaid booking system, use the assessee's platform. Given this business model, the following issues arise for consideration during the assessment year under consideration:-

1. Whether the assessee has a PE in India
2. Whether the travel agents and the accommodations be considered permanent establishments of the assessee in India
3. If so, how much profit is attributable to these PEs.

8. The following facts will also have a bearing on the existence of PE in India:

1. The assessee has developed a online booking System which is like a 'Market Place' or a 'platform'. This platform is used by the customers/agents to reach accommodation through travel agents (subscriber) and make bookings thereon. In its reply, the assessee has contended that online booking system is not a market place or a platform to bring the customers and hotels, guesthouse, accommodations together but only a facility created to help dissemination of information of the accommodations like availability, price etc. In fact, the entire submissions of the assessee are based on this argument that the assessee is only an information provider and mere providing of information about accommodations cannot give rise to income in India. The online booking system is certainly a platform which brings together the travelers and accommodations and facilitates booking of rooms etc by providing Information of availability of rooms and price etc. at one place.

2. The transaction giving rise to the income is carried out in India as the travel agents are in India, the payment is made by the traveler in India, the online booking system is spread in India. The payment made by the traveler is the source of income for the accommodations, the assessee, booking.com & the travel agents. Therefore, by no stretch of imagination it can be argued that assessee has no business connection in India. The assessee has contended that the revenue of the assessee is not generated from the customers in India but from the accommodations, the facility of display of accommodation data information on the online

> booking system, which in tum led the bookings to be made. This contention of the assessee is not correct. Without facilitating customer booking there is no use of online booking system to accommodation and payments made by them to the assessee is only-in connection with business generated by the online booking system. As indicated above the assessee is not providing merely a facility to display Information, but it is a transaction processor and provides comprehensive real-time search, pricing, booking and other processing solutions. Income of the assessee does not accrue to it by mere dissemination of information and accommodations do not make payments for this facility. The online booking system provides a platform to accommodations and booking agents to come together for booking of seat as per availability of the same. Income accrues when the booking is made by the traveler through the travel agent located in India and is determined on the basis of the transaction carried out in India. These transactions were made possible on the platform provided by the assessee in the form of online booking system.
>
> 3.The assessee is carrying out its own business in India through premises in India in the form of dependent agents and accommodations. These agents and accommodations are dependent agent PEs of assessee."

10. Plain reading of the aforesaid reasons indicate that it is based on several assumptions, which are not supported by material on record that were available with the AO. The AO had concluded that the petitioner had

entered into an agreement with various agents. However, the learned counsel for the Revenue does not dispute that there is no material to indicate that the petitioner had entered into an agreement with any agent or travel agent in India. There is no material that the web platform operated by the petitioner is used by the customers to book the accommodation through the travel agents. The AO also concluded that there are travel agents in India and payments made by the travellers in India on the online booking system is paid in India. The AO also observed that the payments made by the travellers is the source of income for the petitioner and the travel agent. The AO also proceeded on the assumptions travel agents are involved with the platform operated by the petitioner. This is evident from the observations made to the effect that "*income accrues when the booking is made by the traveller through the travel agent located in India and is determined on the basis of the transactions carried out in India*". The conclusion that the petitioner is carrying on business through the premises in India in the form of dependent agent PE is also founded on the aforesaid assumption.

11. The learned counsel for the petitioner contended that the reasons as set out in the orders passed under Section 148A(d) of the Act appears to be related to another case.

12. After some arguments, the learned counsel for the Revenue states that the matter may be remanded to the AO to consider the matter afresh. We are inclined to accept this contention.

13. In view of the above, the impugned notices issued under Section 148 of the Act and the orders passed under Section 148A(d) of the Act are set

aside. The matter is remanded to the AO to consider afresh and pass the appropriate orders. If the AO has any material or information that the petitioner has entered into the agreements with the travel agents in India – which the petitioner denies – the same would be shared with the petitioner within the period of three weeks from date, in order to enable the petitioner to meaningfully respond to the same.

14. The petitions stand disposed of in the above terms. Pending applications also stand disposed of.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 27, 2024

M

Click here to check corrigendum, if any