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

\+ W.P.(C) 7358/2024 and CM APPL. 30722/2024

TRAVELPORT INTERNATIONAL OPERATIONS LIMITED
.....Petitioner

Through: Mr Ajay Vohra, Sr. Advocate with Mr Manuj Sabharwal, Mr Drona Negi and Mr Devvrat Tiwari, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME-TAX CIRCLE INT. TAX 3(1)(1), DELHI & ORS. .....Respondents

Through: Mr Puneet Rai, SSC with Mr Ashvini Kumar, Mr Rishabh Nangia and Mr Nikhil Jain, Advocates.

**CORAM:**
**HON'BLE THE ACTING CHIEF JUSTICE**
**HON'BLE MR. JUSTICE TUSHAR RAO GEDELA**

**<u>O R D E R</u>**

% **12.12.2024**

1. The petitioner has filed the present petition impugning an order dated 15.04.2024 (hereafter *the impugned order*) passed by the Assessing Officer (hereafter *AO*) and a certificate dated 04.04.2024 (hereafter *the impugned certificate*) issued under Section 197 of the Income Tax Act, 1961 (hereafter *the Act*) fixing the rate of withholding tax at 6%.

2. The AO has attributed 15% of the receipts as income attributable to the petitioner's Permanent Establishment (PE) in India and has applied the tax rate of 40% to determine the rate of withholding tax at the rate of 6%.

3. It is the petitioner's case that the said calculation does not take into account the expenses incurred by the petitioner. It is material to note that there is no cavil that 15% of the petitioner's revenue is required to be

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attributed to its PE. It is submitted that the said issue was the subject matter of appeals before the Income Tax Appellate Tribunal (ITAT), which travelled to this court as well as the Supreme Court. The learned ITAT had attributed 15% of the total revenues from India to its PE in India. The petitioner had contested the said finding, *inter alia*, on the ground that the petitioner does not have a PE in India as well as the quantum of attribution of income to the said PE. The Revenue had also appealed the decision of the learned ITAT in confining the attribution of revenue to 15% of the receipts. The cross appeals for the earlier AYs (AY 2007-08 to AY 2014-15) were dismissed by this court by a common order dated 08.12.2023 passed in ITA No. 718 of 2023 captioned ***The Commissioner of Income Tax-International Taxation-3 v. Travelport Global Distribution System B.V.: Neutral Citation: 2023:DHC:8991-DB***, and other connected matters. The Revenue as well as the petitioner had appealed the said decision before the Supreme Court, which was disposed of by a common order dated 19.04.2023 in Civil Appeal No. 6511-6518/2010. We consider it apposite to refer to the following extracts of the said decision:

> "**9.** Appeals were filed by the respondents before the Tribunal and the Revenue also filed cross objections on a different aspect about which, we are not now concerned. The Tribunal held that the respondents herein constituted Permanent Establishment *('PE')* in two forms, namely, fixed place PE and dependent agent PE (*'DAPE')*. At the same time, the Tribunal also held that the Lion's share of activity was processed in the host computers in USA/ Europe and that the activities in India were only minuscule in nature. Therefore, as regards attribution to the PE constituted in India, the Tribunal assessed it at 15% of the revenue and held, on the basis of the functions performed, assets used and risks undertaken (FAR) that this 15% of the total revenue was the income accruing or arising in India. This 15% worked out to 0.45 cents. But the payment made to the distribution agents was

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USD 1/ EURO 1 in many cases and much more in some cases. Therefore, the Tribunal held that no further income was taxable in India.

**10.** The Revenue filed miscellaneous applications, but the same were dismissed by the Tribunal clarifying that after apportioning the revenue, no further income was taxable in India, as the remuneration paid to the agent in India exceeded the apportioned revenue.

**11.** Appeals were filed both by the Revenue and Assesses against the orders of the Tribunal before the Delhi High Court. The Delhi High Court dismissed the appeals filed by the Revenue on the ground that no question of law arose in these matters. The Delhi High Court held that insofar as attribution is concerned, the Tribunal had adopted a reasonable approach.

**12.** Aggrieved by the orders passed by the Delhi High Court, the Revenue has come up with the above appeals.

**13.** Assailing the Judgment of the High Court, it was argued by Shri Vikramjeet Banerjee, learned Additional Solicitor General: ***(i)*** that the attribution of only 15% of the revenue as income accruing / arising in India within the meaning of Section 9(1)(i) of the Income Tax, 1961 read with Article 7 of the Treaty, was completely wrong; and ***(ii)*** that the computers placed in the premises of the travel agents and the nodes/leased lines form a fixed place PE of the respondent in India.

**14.** We do not think that we need to go into the second contention of the learned Additional Solicitor General, for the simple reason that the approach of the Tribunal and the High Court on the question of attribution appears to be fair and reasonable."

4. It is apparent from the above that whilst the Supreme Court had accepted that 15% of the gross revenue was attributable to the petitioner's PE, the Supreme Court also accepted the ITAT's decision in holding that there is no income taxable in India on account of the petitioner's expenses exceeding the gross revenue attributable to its PE being 15% of the total revenue generated.

5. Undisputedly, the AO is required to take into account the petitioner's

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expenses in determining the rate of withholding tax. Income tax is chargeable on income and not on the gross receipts. As noticed at the outset, the AO has determined the rate of withholding tax on the basis of the gross revenue attributable to the petitioner's PE in India, which was determined at 15% of the total revenue, and applied tax at the rate of 40% on the said portion of the gross revenue. The said calculation does not factor in any allowance for expenses.

6. In view of the above, the impugned order cannot be sustained. We, accordingly, set aside the impugned order as well as the impugned certificate and remand the matter to the AO to consider afresh. We request the AO to decide the petitioner's application as expeditiously as possible and preferably within a period of four weeks from date. Pending application also stands disposed of.

**VIBHU BAKHRU, ACJ**

**TUSHAR RAO GEDELA, J**

**DECEMBER 12, 2024/***tr*

*Click here to check corrigendum, if any*

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