$~151

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

\+ W.P.(C) 7489/2024 and CM APPL. 31191/2024 (Stay)

AGODA COMPANY PTE LTD ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Rajeev Mishra, Mr. Sanand Ramakrishnan and Mr. Sanjeev Kumar Mahra, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION CIRCLE 1 1 1 & ANR. ..... Respondents

Through: Mr. Sunil Agarwal, Mr. Shivansh B. Pandya, Mr. Viplav Acharya and Mr. Utkarsh Tiwari, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE AMIT BANSAL

O R D E R

% **22.05.2024**

CM APPL. 31192/2024 (Ex.)

Allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 7489/2024 and CM APPL. 31191/2024 (Stay)

1. We take note of the challenge which stands raised in the instant writ petition and to the reassessment action which has been initiated. As would be evident from a reading of the impugned notice issued under Section 148A(b), the respondents had essentially taken notice of certain transactions which were reflected in the GST returns. On the basis thereof, they formed the opinion that total transactions

amounting to INR 26,22,79,508/- had escaped assessment.

2. Although the petitioner had, while responding to an earlier notice under Section 133(6) of the Income Tax Act, 1961 [‘**Act**’] provided all details, it additionally filed a detailed reply upon receipt of the aforenoted communication.

3. Principally and for the purposes of examining the challenge at this stage, we take note of the following stand which was taken by the petitioner:-

> “2.Your goodself rightfully shared the summary of GST returns filed by Agoda Singapore during the period AY 2020-21. However, the said compliance bas been undertaken owing to specific provision under GST Laws which requires a foreign e-commerce operator to act as a deemed seller for unregistered properties supplied through the platform. Below we have also shared a brief summary of relevant provision for your perusal.
>
> **Relevant extract of Section 9(5) of the CGST Act**
>
> "Section 9(5) - The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services.
>
> Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax: "
>
> **Relevant extract of Notification No.17/2017 - Central Tax Rate dated 28th June, 2017**
>
> "In exercise of the powers conferred by sub-section (5) of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies that in case of the following categories of services, the tax on intra-State supplies shall be paid by the electronic commerce operator-
>
> (i) . . . .
> (ii) services by way of providing accommodation in hotels, ... "
>
> xxxx xxxx xxxx

4. Further, your goodself may note that the GST liability as reported in the returns is the value of accommodation services provided by unregistered accommodation partner through the platform. In other words, the taxable supplies mentioned in the subject notice pertains to the supplies made by unregistered partners on which the Company has already discharged tax under GSTR 1/ 3B on their behalf. The values as mentioned in the notice do not pertain to the Company's business income and relate to the supplies made by unregistered accommodation partners through the Company's platform. The Company merely facilitates the supplies between the unregistered accommodation partners and guests, the actual supplier being the unregistered accommodation partners of such services.

5.We wish to reiterate that the specific provision under GST applies only to foreign ecommerce operators.
Accordingly, the aforesaid GST filings under the deeming fiction of Section 9(5) does not have any-relation to taxability of Agoda under the provisions of the Income Tax Act, 1961.

Note on applicability of Income Tax provisions

6. The Company is a tax resident of the Singapore and is eligible to claim benefits of the India-Singapore Double Taxation Avoidance Agreement ('Tax Treaty'). The Assessee 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 travellers) can make reservations at such accommodations.

xxxx xxxx xxxx

10. In continuation to the aforesaid submission, it may be noted that the income of the Company is commission income from accommodations for facilitating bookings on its online platform. Courts in India have held in unison that commission earned by a non-resident is in the nature of a business income. The taxing rights in respect of such business income rests with the other contracting state and not with India under the provision of the Act and the various tax treaties in the absence of a Permanent Establishment ('PE') under the provisions of the applicable tax treaties. It has been upheld by courts that commission earned by foreign travel agents is not chargeable to tax in India[2]. Since, the Company does not have a PE in India under the provisions of the Tax Treaty, the commission earned from India by the Company is taxable in Singapore and not in India."

4. However, and while passing the order under Section 148A(d) of the Act, the respondent has observed as follows:-

> "8. The following facts will also have a bearing on the existence of PE in India:
>
> (i). The assessee has developed a online booking System which is like a 'Market Place' or a 'platform'. This platform is used by the customer/agents to reach accommodation through travel agents (subscriber) and make bookings thereon.
>
> (ii). 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 traveller in India, the online booking system is spread in India. The payment made by the traveller 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.
>
> iii. 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."

5. We find that the respondent has clearly failed to accord due consideration to the issue which stood raised and in any case has accorded no cogent reasons to reject the challenge. The issue of the income earned from commission being not liable to be taxed under the relevant Double Taxation Avoidance Agreement ['**DTAA**'] has been cursorily rejected based on an assumption that a Permanent Establishment ['**PE**'] exists in India and that the agents of the petitioner are liable to be viewed as Dependent Agent PEs ['**DAPE**'].

6. Since the order fails to accord due consideration and record reasons, we came to form the prima facie opinion that the order is rendered unsustainable on this short ground alone.

7. At this stage, Mr. Agrawal, learned counsel for the respondent, submitted that rather than the matter being entertained and kept pending on the Board of this Court, the end of justice would warrant, the matter being remitted to the Assessing Officer ['**AO**'] for considering the reply of the petitioner afresh subject to all rights and

contentions being kept open.

8. We, accordingly, allow the instant writ petition and set aside the order dated 31 March 2024 passed under Section 148A(d) as well as the consequential notice under Section 148 of the Act.

9. The matter shall stand remitted to the desk of the AO which shall commence proceedings afresh and from the stage of receipt of the reply submitted by the petitioner.

10. All rights and contentions of respective parties are kept open.

YASHWANT VARMA, J

AMIT BANSAL, J

MAY 22, 2024/ RW