REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4964 OF 2022
(ARISING OUT OF SLP (C) NO. 9233 OF 2020)

NATIONAL PETROLEUM CONSTRUCTION COMPANY ....Appellant (s)

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE 2(2), INTERNATIONAL TAXATION,
NEW DELHI & ANR. ....Respondent (s)

J U D G M E N T

Indira Banerjee, J.

Leave granted.

2. This appeal is against the judgment and final order dated 20th December 2019 passed by High Court of Delhi dismissing the Writ Petition being Writ Petition (C) No.8527 of 2019 filed by the Appellant against the refusal of the Respondent No.1 to modify the Certificate dated 26th June 2019 issued to the Appellant for the Financial/Previous Year 2019-20, corresponding to the Assessment Year 2020-21, under Section 197 of the Income Tax Act 1961, hereinafter referred to as the

"IT Act", for Tax Deduction at Source (TDS) at the rate of 4% in respect of payments received by the Appellant from Oil and Natural Gas Company Ltd. hereinafter referred to as the "ONGC" towards work done out of India as well as within India.

3. The Appellant, National Petroleum Construction Company, is a company incorporated under the laws of the United Arab Emirates (UAE) and is a tax resident of that country. The provisions of the Agreement for Avoidance of Double Taxation hereinafter referred to as the "AADT" between India and the UAE apply in determining the taxable income of the Appellant under the IT Act.

4. The Appellant is, *inter alia*, engaged in the fabrication of Petroleum Platforms, Pipelines and other equipment, installation of Petroleum Platforms, Submarine Pipelines, onshore and offshore oil facilities and coating of Pipelines.

5. Pursuant to different tender notices issued by ONGC from time to time, the Appellant submitted tenders, *inter alia*, for installation of Petroleum Platforms and submarine Pipelines. The tenders submitted by the Appellant were accepted and contracts were executed by and between the Appellant and ONGC. The first contract was executed by and between the Appellant and ONGC in the Financial Year 1996-97, corresponding to the Assessment Year 1997-98.

6. On 28th August 2005, the Appellant was awarded a contract termed as Contract No. MR/OW/MM/NHBS4WPP for Well Platform Project-

II hereinafter referred to as 'LEWPP Contract' pursuant to a global tender floated by ONGC in July 2005. This was the third contract between the Appellant and ONGC. Later on 23rd November 2006, the Appellant entered into another contract termed as Contract No. MR/OW/MM/C-Series/03/2006, hereinafter referred to as 'C-Series Contract', for C-Series Project.

7. The scope of work as described in the "General Conditions of Contract" for LEWPP Contract and C-Series Contract included "Surveys (pre-engineering, pre-construction/pre-installation and post-installation), Design, Engineering, Procurement, Fabrication, Anticorrosion & Weight coating (in case of rigid pipeline), Load-out, Tie-down/Sea fastening, Tow-out/Sail-out, Transportation, Installation, Hook-up, Installation of submarine pipelines, Installation and hook-up of submarine cables, Modifications on existing facilities, Testing, Pre-commissioning, Commissioning of entire facilities as described in the bidding document".

8. The contracts referred to above included various activities. Whilst the activities relating to survey, installation and commissioning were done entirely in India, the platforms were designed, engineered and fabricated overseas - at Abu Dhabi.

9. The Appellant has been filing its Income Tax Returns from the Assessment Year 1997-98. The Appellant's income has been computed on a presumptive basis by taxing the gross receipts pertaining to the

activities in India, less verifiable expenses at the rate of 10% and the receipts pertaining to activities out of India at the rate of 1%.

10. The Appellant adopted the said basis for computing its assessable income and filed its returns for the Assessment Year 1999-2000 onwards. Accordingly the returns filed by the Appellant for the Assessment Years 2004-05, 2005-06 and 2006-07 were processed under Section 143(1) of the IT Act. However, the returns filed by the Appellant for Assessment Years 2007-08 and 2008-09, were not accepted by the Assessing Officer, hereinafter referred to as the 'AO'.

11. The AO passed a Draft Assessment Order dated 31st December 2009 for the Assessment Year 2007-08 holding that the Appellant had a Fixed Place Permanent Establishment in India in the form of a Project Office at Mumbai. The AO further held that Arcadia Shipping Ltd. (ASL), agent of the Appellant had a Permanent Establishment in India, which constituted a Dependent Agent Permanent Establishment, hereinafter referred to as "DAPE", of the Appellant.

12. With regard to the Appellant's contention that the fabricated material was sold to ONGC outside India, the AO found that the contract was a turnkey and a composite contract and was not divisible as claimed by the Appellant. Accordingly, the AO held that the entire contractual receipts including the payments for activities performed outside India were taxable in India. The consideration received by the Appellant for design and engineering was held to be Fees for Technical

Services, hereinafter referred to as the 'FTS'. Since, the Appellant had not maintained separate books pertaining to the contract, the AO estimated the Appellant's profit at 25% of the consideration received from ONGC.

13. The Appellant did not accept the Draft Assessment Order and filed its objections before the Dispute Resolution Panel hereinafter referred to as the "DRP". The DRP held that Article 5 of the AADT provided an inclusive definition of 'Permanent Establishment' (PE) and that the Appellant's Project Office constituted a PE of the Appellant in India. The DRP concurred with the AO that ASL was a DAPE of the Assessee.

14. The DRP observed that pre-engineering or pre- design survey, claimed to be done by a sub-contractor employed by the Appellant, was an integral part of the contract and the time spent by the sub-contractor would also constitute the time spent by the Appellant in India in computing residence in India for over nine months during the Assessment Year, in terms of the AADT.

15. The DRP rejected the contention that the contract was a divisible contract and the income of the Appellant for the activities done outside India was not taxable under the IT Act.

16. The Appellant filed an appeal against the order of the assessment passed by the AO before the Income Tax Appellate Tribunal hereinafter referred to as the "ITAT". The ITAT concurred with the AO and rejected the Appellant's contention that it did not have a PE in India. The ITAT

also concurred with the AO that the establishment of ASL in India was a DAPE of the Appellant.

17. The ITAT, however, accepted the Appellant's contention that the contract could be segregated into offshore and onshore activities and the Appellant's income for the activities carried on out of India could not be attributed to its PE in India.

18. The ITAT rejected the Appellant's contention that the tax payable should be computed as per the formula adopted in the preceding years, i.e. 10% of the receipts attributable to activities in India, less expenses in India and 1% of the receipts attributable to activities carried on overseas.

19. By a judgment and order dated 29th January 2016, in the Appeal being ITA No. 143 of 2013, filed by the Appellant and other related Appeals filed by the Revenue, the Division Bench of the High Court of Delhi concurred with the view of the ITAT that consideration for activities carried on overseas could not be attributed to the Appellant's PE in India. The Court observed that it was not disputed that invoices raised by the Appellant specifically indicated whether the work was done outside India or in India. Thus, even though the contracts might be turnkey contracts, the value of the work done outside India was segregable.

20. Two contracts were concluded by and between the Appellant and ONGC, one dated 30th September 2016, hereinafter referred to as

LEWPP Contract, and the other dated 7th February 2018, hereinafter referred to as the R-series Contract, which have led to this Appeal. The Appellant received payments for work done under the said two contracts in the Previous/Financial Year 2019-20 corresponding to the Assessment Year 2020-21.

21. By a judgment and order dated 9th May 2017 in Writ Petition being Writ Petition (C) No. 2117 of 2017, the High Court of Delhi set aside a Certificate dated 31st January 2017 issued by the Respondent No.1 under Section 197 of the IT Act, requiring deduction of TDS at the rate of 4% on all payments made by ONGC to the Appellant for activities out of India and in India in respect of the contract dated 30th September 2016. The R-series Contract was executed after the judgment of the High Court dated 9th May 2017, referred to above. The High Court had no occasion to consider the R-series contract.

22. On or about 8th May 2019, the Appellant applied for a certificate under Section 197 of the IT Act for deduction of Nil tax on payments received from ONGC for activities carried on outside India, in the Financial Year 2019-20 in relation to the aforesaid contracts.

23. The Respondent, Income Tax Authorities raised queries on its portal, to which the Appellant responded by a letter dated 21st May 2019 addressed to the Respondent No.1. On further query from the Income Tax Department, the Appellant filed a reply on 13th June 2019 pointing out that no income from activities outside India could be

brought to tax in India. The Appellant also submitted a table showing the similarities between the contracts forming the subject-matter of the decision of the High Court and the contracts in the year under consideration, that is, the Financial Year 2019-20.

24. By the said letter dated 13th June 2019, the Appellant pointed out that for over two and half months since the start of the Financial Year 2019-20, no certificates had been issued to the Appellant under Section 197 of the IT Act as a result of which the Appellant was suffering undue hardship as its cash flow was being hampered. The Appellant, therefore, requested the Respondent No.1 to issue certificate at the earliest. On 17th June 2019, the Appellant submitted activity-wise key dates for each platform under the R-Series and LEWPP Contracts to the Respondent No.1.

25. By letter dated 22nd June 2019, addressed to the Respondent No.1, the Appellant answered further queries. However, in view of the financial crunch faced by the Appellant, the Appellant requested :

> *"The Applicant humbly submits that since it is facing financial hardship as the first quarter of FY 2019-20 has come to an end and it is yet to have the lower withholding tax certificate, the Applicant (without prejudice to its legal position), is willing to offer a concession to have the certificate at the tax rate of 4% plus applicable surcharge and cess for the entire contractual revenues, which is in line with the recently concluded assessment proceedings for AY 2016-17 in Applicant's own case, where your goodself concluded that the entire contractual revenues were chargeable to tax under Section 44BB of the Act at an effective tax rate of 4% plus applicable surcharge and cess.*

In light of the above, it is our humble request to your goodself to kindly issue the certificate at your earliest convenience."

26. The Appellant contends that a certificate of Nil TDS, for payments received in respect of activities outside India, should have been issued to the Appellant, in deference to decisions rendered by various Appellate Authorities from the Assessment Years 2007-08 to 2015-16, opining that income in respect of activities out of India was not taxable in India and as also the judgments of the Delhi High Court referred to above.

27. In the Assessment Year 2018-19, the Respondent had followed the same approach as in the Assessment Year 2017-18 and issued a certificate dated 10th April 2018 under Section 197 of the Act for Nil TDS in respect of payments for activities outside India. This direction was in respect of both LEWPP Contract as well as R-Series Contract.

28. However, in departure from the position taken in the previous years, the Respondent No.1 issued a certificate dated 26th June 2019 under Section 197(1) of the IT Act for the Financial Year 2019-2020 corresponding to the Assessment Year 2020-2021 directing ONGC to deduct TDS at the rate of 4% on receipts in respect of activities both outside and inside India.

29. The Appellant filed a Writ Petition under Article 226 of the Constitution of India being Writ Petition (C) No.8527 of 2019, *inter alia*,

challenging the said certificate dated 26th June 2019. The Writ Petition has been dismissed by the judgment and order impugned in this Court.

30. Mr. Ganesh appearing on behalf of the Appellant forcefully argued that the Respondent No.1 had erred in law in not granting Nil rate TDS to the Appellant for the financial year 2019-20 under Section 197 of the IT Act.

31. Mr. Ganesh argued that Appellant was assessed for Assessment Years 2007-08, 2008-09 and 2009-10 in respect of contracts similar to the above noted contracts and was held not to be taxable in India. Even though the Assessing Authority had, from the Assessment Year 2007-08 taken the view that revenue in respect of activities outside India were taxable in India, the ITAT being the Appellate Authority, held to the contrary. The Appellate Authority had all along taken the stand that the Appellant has no Permanent Establishment in India and no such income from activities outside India would be chargeable to tax in India.

32. Mr. Ganesh relied upon the judgment rendered by the High Court in the Appellant's own case in respect of the Assessment Years 2007-08 and 2008-09 which is reported in (2016) 383 ITR 648. The Delhi High Court analyzed the contract of the Appellant with Respondent ONGC and held that the project office of the Appellant did not constitute a Fixed Base Permanent Establishment under the provisions of the Double Taxation Avoidance Agreement. The question of splitting profits arising from the contract into two categories, that is, profits attributable to

India and profits attributable to overseas activities did not arise. The judgment was followed in respect of appeal of the Respondent for the Assessment Year 2009-10. Mr. Ganesh argued that R-Series and LEWPP Contracts relevant to the Assessment Year in question that is Assessment Year 2020-21 corresponding to the Previous Year 2019-20, are identical to the contracts considered by the Appellate Authority in Appellant's own case in relation to the Assessment Years 2007-08, 2008-09 and 2009-10.

33. The Delhi High Court issued notice to the Revenue Authorities, in response to which a counter affidavit was filed enumerating the grounds and reasons justifying the issuance of the impugned certificate.

34. After hearing the parties at length, the High Court held that an administrative decision was subject to judicial review under Article 226 of the Constitution of India only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Judicial review is directed not against the decision but the decision making process. The High Court did not find any such arbitrariness in the approach of the concerned Respondents in the exercise of their jurisdiction, that called for interference under Article 226 of the Constitution of India. The High Court found that the reasons in the note-sheet could not be said to be so fallacious, unfair or unreasonable that they required intervention of the High Court.

35. The High Court further observed and held:

"18. Sub Section (1) of Section 195 of the Act provides that any person responsible for paying to a non-resident, any sum chargeable to tax under the provisions of the Act, shall, at the time of credit of such income to the account of the payee, or at the time of the payment thereof in cash or by the issue of a cheque or draft or any other mode, whichever is earlier, deduct income-tax thereon at the rates enforced.

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24. ... As of now, we are not concerned with a regular assessment proceeding but, with determination of rate of tax deduction. On perusal of reasons, it becomes manifest that during the course of enquiry under Section 197 of the Act, the petitioner was asked to furnish the details regarding the scope and nature of the aforenoted contracts. Revenue contends that for the R-series contracts, the petitioner has made contradictory statement regarding commissioning period and period of as-built documentation etc. Petitioner, in its submission dated 22.06.2019, contends that commissioning work is not undertaken by them for the R-series contracts, and the same is to be performed by ONGC. Without going into the question as to whether the petitioner's stand is contradictory, we may note that the Assessing Officer while exercising its power under Section 197, during the course of the enquiry, cannot undertake an exhaustive exercise to determine this issue conclusively. We find force in the submissions of Mr. Raghvendra Kumar Singh that the question as to whether the petitioner has constituted a PE, cannot possibly be undertaken in the enquiry having regard to the time frame permissible under law for deciding the application under Section 197 of the Act. The reasons shown to us also take note of the fact that in the immediate preceding years i.e., AY-2016-17 and AY- 2017-18, for which regular assessment has been completed, petitioner has been held to have a Permanent Establishment (PE) in India, and its total income from the contracts with ONGC have been held to be taxable under the IT Act. Section 44BB of the Act is applied, and 10% of the contractual receipts were considered as business profits. The rate of tax being 40%, a certificate was, accordingly, issued @ 4%. For the other assessment years as well, assessment has been completed and appeal is pending before the appellate authorities. The Petitioner, obviously, disputes the finding of the Respondent as erroneous and misplaced, on the ground that for AY- 2015-16, the first appellate authority-following the decision of this Court in petitioner's own case, has held that the petitioner has no PE in India. Be that as it may, for AY-2016-17 and 2017-18, this question has been determined against the petitioner. It is well-settled proposition that in tax jurisprudence, the principle of res judicata is not applicable to income tax proceedings... [Ref:

New Jehangir Vakil Mills Co. Ltd. v. CIT: [1963] 49 ITR 137 (SC) (Full bench)]. "It is well settled that in matters of taxation there is no question of res judicata because each year's assessment is final only for that year and does not govern later years, because it determines only the tax for a particular period." [Ref: Instalment Supply (P) Ltd. v. Union of India : AIR 1962 SC 53 (Constitution bench)].

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27. In the present case, there cannot be any dispute that existence of PE is required to be determined by law for each year separately on the basis of the scope, extent, nature and duration of activities in each year. In this regard, the contracts in question i.e. R-series contracts dated 07.02.2018 and LEWPP series contracts dated 30.09.2016 would have to be taken into consideration. Concededly, this Court in its decision dated 09.05.2017 did not have the occasion to consider the R-series contract dated 07.02.2018. The Court only considered the contract dated 30.09.2016 as noted in para -1 of the said decision. There is thus, a distinguishing feature - the R-series contract has not been considered by this Court in its order dated 09.05.2017. Moreover, in the instant case, the reasons record that the two contracts are indivisible, and the petitioner cannot divide the contractual receipts in two categories viz. inside India and Outside India services. The installation PE will come into existence, if "project or activity continues for a period of more than 9 months" under Indo-UAE DTAA. This question of fact will have to be determined separately for each assessment year, and we are informed that for AY-2016-17 and AY-2017-18, the determination is presently against the petitioner. We cannot accept the petitioner's contention that the assessment proceedings for the AYs 2007-08, 2008-09 and 2009-10 have already determined this question in favour of the petitioner and there is no change in any circumstances. This question would require to be determined and finding of the fact would have to be arrived at, by a careful consideration of terms of contract, determination whereof cannot be undertaken in the proceedings under Section 197 of the Act.

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29. Further, the petitioner's contention that under each of the contracts, the installation activities were completed in less than 9 months, and that the scope of R-series contracts, did not include commissioning activities, are all factual aspects which cannot be examined while exercising judicial review over the decision of the respondent under Section 197 of the Act.

30. The petitioner has relied upon the judgments in Ishikawajima-Harima Heavy Industries: [2007] 288 ITR 408 (SC) and Hyundai Heavy Industries: [2007] 291 ITR 482 (SC), which do not appear to be applicable to the facts of the present case. In Ishikawajima (supra), the Supreme Court held that for a non-resident entity to be taxed in India, it should carry on business through a permanent establishment in India, and income taxed is on the basis of extent appropriate to the part played by permanent establishment in those transactions, and that only such part of the income, as is attributable to the operations carried out in India can be taxed in India. In the said case, a clear distinction could be identified between onshore and offshore activities. In the present case, the respondents contend that no such distinction is clearly identifiable from the contracts in question. Further, the said cases (Ishikawajima (supra) and Hyundai heavy Industries (supra)) relate to assessment proceedings, whereas, in the present case, we are concerned with proceedings for grant of certificate under section 197. The scope of enquiry and investigation in both these proceedings is different, especially after the introduction of Explanation 2 to section 195 and at the stage of section 197 proceedings, the question of existence of permanent establishment is not required to be gone into. Therefore, having regard to the aforesaid provision, we cannot direct the Revenue to hold that the petitioner does not have a PE and give the consequent effect of such finding while deciding an application under Section 197 of the Act. Determination of all these questions would have to be undertaken during the course of regular assessment.

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32. ...However, we cannot ignore the fact that Petitioner took categorical stand and prevailed upon the revenue to accept the declaration made in the said communication. Although the declaration was qualified, yet, since the petitioner requested the respondent to deduct the tax @ 4% + applicable surcharge & cess for the entire contractual revenues, revenue was justified in accepting the same and the petitioner cannot be permitted to resile there from, once the department has accepted petitioner's proposal."

36. It is well settled that the obligation to deduct TDS is limited to appropriate proportion of income chargeable to tax under the IT Act that forms part of the gross sum of money payable to the non-resident. A person paying any sum to a non-resident is not liable to deduct any tax at source if such sum is not chargeable to tax under the IT Act, as held

by this Court in ***G E India Technology Centre Pvt. Ltd. v. Commissioner of Income Tax and Another***[1]***.***

37. The High Court rightly held that the question of whether the Appellant had PE, could not possibly be undertaken in an enquiry for issuance of Certificate under Section 197 of the IT Act, having regard to the time-frame permissible in law for deciding an application, more so, when regular assessment had been completed in respect of the immediate preceding year and the Appellant found to be taxable under the IT Act at 10% of the contractual receipts. The Assessing Authority found that the Appellant had PE in India in the concerned Assessment Years. The appeal of the Appellant is possibly pending disposal.

38. As held by the High Court, it is well settled that the principle that *res judicata* is not applicable to income tax proceedings because assessment for each year is final only for that year and does not cover later years.

39. Whether the Appellant had PE or not, during the Assessment Year in question, is a disputed factual issue, which has to be determined on the basis of the scope, extent, nature and duration of activities in India. Whether project activity in India continued for a period of more than nine months, for taxability in India in terms of the AADT, is a question of fact, that has to be determined separately for each Assessment Year.

1 (2010) 327 ITR 456 (SC)

40. It may be true, that for a non-resident entity to be taxed in India, it should carry on business through a Permanent Establishment in India, as held by this Court in ***Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income Tax, Mumbai***[2] *and* ***Commissioner of Income Tax and Anr. v. Hyundai Heavy Industries Co. Ltd.***[3]. However, the judgments would only be attracted if there were a definite finding that the Appellant did not have any PE in India during the Assessment Year in question, which as stated above, would also depend on the duration and scope of the activities in India. The nature, extent and the duration of work done in India, could vary from year to year.

41. It is reiterated that in the immediately preceding Assessment Year, the Assessing Authority proceeded to assess the Appellant on the basis that it did have a Permanent Establishment (PE) in India. Moreover, as rightly held by the High Court, ***Ishikawajima-Harima Heavy Industries*** (supra) *and* ***Hyundai Heavy Industries*** (supra) related to assessment proceedings whereas this case pertains to issuance of certificate under Section 197 of the IT Act. The scope of enquiry and investigation in proceedings for grant of Certificate under Section 197 of the IT Act is different from the scope of assessment proceedings. The High Court rightly declined to direct the Revenue to hold that the Appellant did not have PE in India.

2 (2007) 288 ITR 408 (SC)

3 (2007) 291 ITR 482 (SC)

42. By its letter dated 22nd June 2019, referred to above, the Appellant made a request to the Revenue for issuance of Certificate under Section 197(1) of the IT Act permitting deduction of TDS at the rate of 4% plus applicable surcharge and cess, for all contractual receipts, in line with assessment proceedings for the Assessment Year 2016-2017 without prejudice to its legal position, since the Appellant had been facing financial hardship and urgently required funds. On 26th June 2019, the Respondent No.1 issued the impugned Certificate directing ONGC to deduct TDS at the rate of 4% for all sums receivable in respect of activities both outside and inside India.

43. The impugned Certificate being as per the request of the Appellant, it is not open to the Appellant to make a volte-face and challenge the impugned Certificate.

44. It may be true that the letter of request dated 22nd June 2019, of the Appellant, referred to above, for issuance of a Certificate under Section 197 of the IT Act, for TDS at the rate of 4% on all receipts was without prejudice to the rights in law and contentions of the Appellant. Such a request without prejudice to the rights and contentions of the Appellant would not operate as estoppel against the Appellant in any Assessment Proceedings, Appellate proceedings or any other proceedings. However, the impugned Certificate having been issued as per the Appellant's own request, the Appellant is estopped from questioning the impugned Certificate by initiation of proceedings under

Article 226 of the Constitution of India. The Appellant itself made a request for Certificate for TDS at the rate of 4% on all receipts.

45. There is no such infirmity in the reasoning of the High Court which calls for interference of this Court under Article 136 of the Constitution of India. As rightly held by the High Court, since the Appellant requested issuance of Certificate for deduction of TDS at 4% of taxable value it is not for the Appellant to challenge the certificate. Moreover, it appears that in the final assessment for one or two preceding Assessment Years it was found that the Appellant did have PE in India. Appeals are pending. In any event, Tax deducted at source is adjustable against the tax, if any, ultimately assessed as payable by the Assessee and any excess tax deducted is refundable with interest. Interference is not warranted at this stage.

46. Moreover, in course of hearing, Counsel for the Revenue handed us a Draft Assessment Order, issued in respect of the Assessment Year in question, that is 2020-21, holding that the Appellant had PE in India and was liable to tax in India under the IT Act.

47. Needless to mention that any observation made by this Court or by the High Court will not influence the final assessment which has to be made in accordance with law taking into account all relevant facts and circumstances or any appeal therefrom. In the event, it is found that the Appellant is not liable to tax, the Appellant will be entitled to refund of TDS with interest.

48. The Appeal is dismissed.

.....J
[INDIRA BANERJEE]

NEW DELHI;
JULY 29, 2022

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4964 OF 2022

(ARISING OUT OF SLP(C) No. 9233 OF 2020

NATIONAL PETROLEUM CONSTRUCTION COMPANY ...APPELLANT

Versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE 2(2)(2), INTERNATIONAL TAXATION,
NEW DELHI & ANR. ...RESPONDENTS

J U D G M E N T

J.K. Maheshwari, J.

Leave granted.

2. After going through the judgment and the opinion formed by esteemed Justice Ms. Indira Banerjee, I respectfully disagree to the conclusions as drawn for the reasons to follow.

3. On perusal of detailed facts as stated in the order, it is clear that appellant-company is incorporated under the laws of United Arab Emirates (in short 'UAE') and is engaged in the business of Surveys (pre-engineering, pre-construction/pre-installation and post-installation), Design, Engineering,

Procurement, Fabrication, Anticorrosion & Weight coating (in case of rigid pipeline, Load-out, Tie-down/Sea fastening Tow-out/Sail-out, Transportation, Installation, Hook-up, Installation of submarine pipeline, installation and hook-up of submarine cables, Modifications on existing facilities, Testing, Pre-commissioning, Commissioning of entire facilities as described in the biding document. Since the year 2007-2008, the ONGC was granting contract to the appellant to carry out the work. For the assessment years 2007-2008 and 2008-2009, the C-Series and LEWPP contracts were granted to the appellant on year to year basis. After completion of those contracts as per the record of the case, the payment of zero percent tax on the income outside India in terms of the assessments were in question. The High Court of Delhi passed the order on 29.01.2016 for the said assessment years i.e. 2007-2008 and 2008-2009 to the said contracts wherein it was held that assessee did not have the PE in India and earned profit attributable to that PE and in fact the income was from the activities carried out outside of India. However, the orders of assessment for the years 2007-2008 and 2008-2009

respectively as well as the corresponding orders passed by the ITAT in the corresponding appeals were set aside. It has been brought to knowledge that Civil Appeal No.8761/2016 filed against the said order is pending before this Court.

4. On perusal of the provisions of the Income Tax Act (for short "IT Act"), it reveals the proceedings of the assessment falls under Chapter XIV of the IT Act, which includes return of income, permanent account number, scheme for submission of returns through tax return and its preparation, assessment, rectification of mistake etc. While the present case relates to certificates for deduction at lower rate or no deduction of income at source, which falls in Chapter XVII of the IT Act. Therefore, what is the recourse and considerations available to the assessing officer at the time of issuance of the certificate under Section 197(1) of the IT Act or he has to rely upon the assessment orders of the previous years.

5. While examining the said issue in the facts and context of the present case, some provisions are required to be referred. As per Section 6(3) of the IT Act for the resident in India, the income inside the country is taxable. Under sub-section (3), it

is specified that if any Indian company is said to be a resident in India in any previous year or its place for effective management in that year was in India the income of such is taxable. By the explanation, the place of effective management has been clarified whereby it is clear that if any commercial decision necessary for the conduct of a business of an entity as a whole or in substance is made, it would be called as a place of effective management.

6. As per Section 5(2) of the IT Act, it is clear that subject to the other provisions of the Act, the total income of any previous year of a person who is a non-resident includes all income from whatever sources derived either is received or is deemed to be received in India in such year by or on behalf of such person; or accrues or arises or is deemed to accrue or arise to him in India during such year. Explanation (1) of it clarifies that income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section on account of the fact that it has been taken into account in the balance sheet prepared in India. Explanation (2) removes the doubts whereby the income which has been included in the total

income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India. The aforesaid provision has been brought with an intent to check the double taxation. Thus, from above for clarity, it is reiterated that any income outside India to a non-resident would not be taxable in India even if it is specified in the balance sheet prepared in India.

7. By a judgment of this Court in the case of **G.E. India Technology Centre Pvt. Ltd. (supra)** in the context of Section 195(1), interpretation of the word "chargeable" under the provisions of IT Act has been made by which it is clarified that a person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the I.T. Act. Further, the Court clarified where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act.

8. It is not in dispute in the present case that incorporation of the appellant's company is under the laws of UAE. In the context, the treaty/agreement entered by India with foreign countries including UAE, are recognized under Chapter IX starting from Section 90 onwards and for avoidance of double tax, the procedure has been prescribed in Chapter X. In the above said agreement/treaty between India and UAE known as Agreement of Avoidance of Double Taxation (in short "AADT") was executed. Clause (1) and (6) of Article 7 of the said agreement are relevant to the present case, which are reproduced for ready reference as under:

> *"(1). The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."*
>
> *"(6). For the purposes of preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary."*

Perusal of the aforesaid makes it clear that enterprises of a contracting state shall be taxable in the said state unless the business is carried out in other contracting state through a permanent establishment situated there. It is further clarified that the profit of the enterprises may be taxed in other state to the extent of the profit attributable to that PE. The determination thereof shall be on year to year basis and the deviation, if any, may be based on good and sufficient reasons to the contrary. Thus, it is clear that the income earned in India may be taxable even by an entity which is not incorporated in India but the profit earned for a contract carried out outside India by such entity shall not be taxable. The issue regarding establishment of PE at a place where the work is required to be executed, and profit earned attributable to that PE is a matter of enquiry based on the material brought on record during assessment for the said assessment year.

9. But for the purpose of tax deduction at source at lower rate or no deduction during contractual period, the assessing officer has been empowered under Section 197(1) to issue a certificate to that effect in the manner so prescribed as

specified in Chapter XVII of Income Tax Act which relates to collection and recovery of tax. On perusal of the scope of the said Chapter, it is clear that the assessment in respect of the income is required to be made later in relevant assessment year but the tax on such income may be payable by deduction at source by way of advance payment or as specified in Sub-Section 1A of Section 92 of IT Act as the case may be. As the present case relates to quashment of the TDS certificate dated 26.06.2019 and seeking relief to issue the fresh certificate under Section 197, therefore, for ready reference, it is hereby reproduced as thus:

> *197. **Certificate for deduction at lower rate.** (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA, 194LBB, 194LBC, 194M, 49[194-O] and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.*

> *(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.*
>
> *(2A) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith*.

Bare reading of it makes clear that in the case of any income of the person, income tax is required to be deducted at the time of credit or as the case may be at the time of payment at the rates in force as per various sections specified, including Section 195 subject to the rules made under Sub-Section 2A. The rules have been framed to carry out the purpose of the act which are known as Income Tax Rules, 1962. The present case relates to Section 195 of the IT Act which pertains to the payment of tax deducted at source by non-residents. As per the provision of Section 197, if the assessing officer is satisfied that the total

income of the recipient justifies any lower rate or no deduction of income tax as the case may be, he shall issue a certificate to the assessee on an application submitted by him. The said certificate shall be valid until it is cancelled by the assessing officer. Section 2A was introduced conferring powers to the Board having regard to the convenience of the assessee and the interest of revenue, and the rule is made to submit application and the conditions for issuance of certificate, notifying it in Official Gazette. Pursuant thereto, a notification dated 29.03.2011 was published in the Official Gazette specifying the cases and the circumstances under which the application may be made for grant of certificate and, the conditions for satisfaction of assessing officer who may grant certificate.

10. By way of the said notification dated 29.03.2011, amendment in the Income Tax Rules, 1962 was made and these Rules are known as Income Tax (Second Amendment) Rules, 2011 by which Rule 28 AA has been added. The said rule was further amended by notification dated 25.10.2018. The said amended rules are relevant for this case, however, reproduced as thus:

"Certificate for deduction at lower rates or no deduction of tax from income other than dividends*.*

28AA . (1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax.

(2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:—

(i) *tax payable on estimated income of the previous year relevant to the assessment year;*

(ii) *tax payable on the assessed or returned 2[or estimated income, as the case may be, of last four] previous years;*

(iii) *existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;*

(iv) *advance tax payment 3[tax deducted at source and tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28];*

(v) *omitted on 25.10.2018*

(vi) *omitted on 25.10.2018*

(3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

['(4) The certificate for deduction of tax at any lower rates or no deduction of tax, as the case may be, shall be issued direct to the person

responsible for deducting the tax under advice to the person who made an application for issue of such certificate:

Provided that where the number of persons responsible for deducting the tax is likely to exceed one hundred and the details of such persons are not available at the time of making application with the person making such application, the certificate for deduction of tax at lower rate may be issued to the person who made an application for issue of such certificate, authorising him to receive income or sum after deduction of tax at lower rate.

(5) The certificates referred to in sub-rule (4) shall be valid only with regard to the person responsible for deducting the tax and named therein and certificate referred to in proviso to the sub-rule (4) shall be valid with regard to the person who made an application for issue of such certificate.

(6) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for issuance of certificates under sub-rule (4) and proviso thereto and the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the issuance of said certificate."

11. From the above, it is clear for issuance of a certificate under Section 197 of the IT Act, an application shall be made to assessing officer under sub-rule (1) of Rule 28. The assessing officer after recording satisfaction that existing and estimated

tax liability justifies the deduction of tax at lower rate or no deduction of tax as the case may be shall issue certificate. While exercising the power to issue a certificate, the assessing officer is required to follow the procedure as per sub-rule (2). The assessing officer shall consider the existing and estimated liability that what may be tax payable on estimated income of the previous year; tax payable on the assessed or returned income of the last four years from previous year; existing liability under the IT Act; advance tax payment i.e. tax deducted and collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of Rule 28. Thus, for the purpose of issuance of certificate under Chapter XVII of Section 197 of the IT Act, the procedure for determination has been prescribed to the assessing officer on which satisfaction may be recorded by him.

12. It is further required to say that for assessment under Section 143, the assessment of total income or loss may be computed by the assessing officer in a return filed by the assessee for the said assessment year after making adjustment

and disallowing exemptions wrongly claimed. Thereafter, the recovery can be made by an order of the competent officer as per Second Schedule of the IT Act read with Sections 222 and 276 alongwith Sections 220 & 221 with interest and penalty. Thus, in my considered view the issuance of the certificate under Section 197(1) is based on the existing and estimated tax liability after recording satisfaction by assessing officer following the procedure so prescribed, in rules, but the procedure for assessment as specified in Chapter XIV of the IT Act is different.

13. The High Court in the impugned order relied upon the proceedings of the Revenue Department, which has been referred in para 10 of the judgment. As per the proceedings referred, the department has acknowledged the High Court order dated 29.01.2016 and said that for assessment years 2007-2008 to 2010-2011 there was no PE in India, but the department filed the appeal C.A. No.8761/2016 is pending before this Court. In para 10(7), the High Court further referred the decision of Delhi High dated 09.05.2017 passed in W.P.(C) No.2117/2017 and CM No.9268/2017. The said judgment is

solely on the issue of issuance of the certificate under Section 197 relates to the financial year 2016-2017. As per the ratio of the said judgment, it is clear that the certificate issued by the respondent no.1 regarding deductions of the TDS at the rate of 4% on the entire payment made by the ONGC was set aside. Following the said decision, the department issued the certificate for financial year 2016-2017 at the rate of 4% excluding surcharge and cess for inside India revenue and at the rate of 0% for outside India revenue. Further for financial years 2017-2018 and 2018-2019 certificates were issued following the said decision of Delhi High Court for both type of contracts i.e. LEWPP and R-Series. Thereafter, it was recorded that assessments for assessment years 2015-2016 and 2016-2017 have been completed with a finding that activities of the appellant were covered under Section 44BB of the IT Act. It was further recorded that the assessment for assessment year 2017-2018 was selected under CASS which is still pending. Thereafter, noting was made that it is difficult to bifurcate the revenue generated by onshore and offshore activities. However, the rate of deduction proposed was at the rate of 4%. The

relevant excerpt of note sheets further reflect that the demand of existing liability was Rs.35.88 crores for the year 2015-16 and 2016-17 but later it was reduced to Rs.2.67 crores out of which Rs.2.63 crores pertained to assessment year 2017-18 which was still under scrutiny for assessment, thus there appear no existing demand. The said note sheets of the Revenue do not reflect that clause (i), (ii), (iii) and (iv) of Rule 28AA(2) of Rules regarding estimated and assessed liability of last four previous years; existing liability and advance tax payment i.e. deducted and collected at source till the date of submitting application have been considered for determination, and the assessing officer had applied its mind prior to issuance of desired certificate.

14. On perusal of the findings recorded in the impugned order, it reveals that Delhi High Court made unreasonable attempt to distinguish previous order dated 09.05.2017 relying the note sheets of the revenue and tried to distinct LEWPP and R-Series contracts. In my considered view on admitting the certificates @ 0% tax deductions for both LEWPP and R-Series contracts for the preceding financial years, the High Court was

not justified to make distinction between two types of contracts. In fact the Court must see the satisfaction recorded by the assessing officer after determination of the issues specified in Rule 28AA(2). The appellant reiterated that the terms of LEWPP contract and R-Series contract were identical while department without disputing the said fact relied upon the orders of assessment passed in previous years without bringing on record the fact of estimated liability. In my view, distinction drawn, accepting the contention of the revenue by the High Court ignoring admission of issuing certificate for both types of contracts is completely misplaced. In fact, the certificate under Section 197(1) is issued during a financial year and on closing of the said financial year, assessment may be made after submission of the return of income and documents with respect to the income from the contract of that particular year. The department may enquire about establishment of PE and income attributable to that PE in assessment proceeding but while dealing the issue of issuance of certificate under Section 197(1) relying upon said issues by the High Court is not justified. During course of hearing, the counsel for the

appellant handed over two orders dated 08.09.2021 passed by Commissioner of Income Tax (Appeals) for assessment year 2016-2017 and 2017-2018 allowing the appeals filed by the appellant challenging the assessment order for respective assessment year. While allowing the appeal, Commissioner of Income Tax held that the appellant did not have PE during relevant financial year and accordingly in absence of PE contract receipts were not taxable in India.

15. The record of the case indicates that for the financial year 2017-18 two certificates each dated 08.06.2017 (Annexures P-6 & P-7) were issued for zero TDS which is related to the assessment year 2018-19. Similarly, for financial year 2018-19 (assessment year 2019-20) two certificates dated 10.04.2018 and 08.05.2019 (Annexures P-8 & P-9 respectively) were issued for zero TDS. Therefore, after the order of the High Court dated 09.05.2017, it may be a relevant consideration to assessing officer to record satisfaction, which has not been considered by the High Court. The reply of the appellant dated 22.06.2019 has been referred in the impugned order stating that the appellant reserve its right subject to legal objections and

requested for issuance of certificate at the rate of 4% plus applicable surcharges and cess because of financial hardship. In my opinion, the said letter cannot influence the wisdom of the Court, where the prescribed procedure under Rule 28AA has not been followed by the assessing officer. However, on the basis of letter dated 22.06.2019 no lineage contrary to prescribed procedure can influence the Court.

16. As per discussion made above, in my view, since there was no change in circumstances and the situation of the appellant in the financial years 2017-2018 and 2018-2019 (assessment years 2018-19 and 2019-20) respectively and at the financial year 2019-20 in question (assessment year 2020-21), are the same, however, the principle of consistency ought to be followed while considering the application under Section 197 of the IT Act. This Court in the case of **M/s Radhasoami Satsang, Saomi Bagh, Agra** v. **Commissioner of Income Tax**, (1992) 1 SCC 659 has categorically upheld the principle of consistency in following words:

> ***"16.*** *We are aware of the fact that strictly speaking res judicata does not apply to income*

tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

17. *On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter — and if there was no change it was in support of the assessee — we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961.*

18. *Counsel for the Revenue had told us that the facts of this case being very special nothing should be said in a manner which would have general application. To are inclined to accept this submission and would like to state in clear terms that the decision is confined to the facts of the case and may not be treated as an authority on aspects which have been decided for general application"*

17. Further, upholding the dictum laid down in **Radhasoami** (supra), in case of **Bharat Sanchar Nigam Limited and Anr.** v. **Union of India and Ors.**, (2006) 3 SCC 1, this Court has held that if facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view in following words:

> ***"20.*** *The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the*

matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction."

18. In view of the foregoing discussion, in my considered opinion the order passed by the High Court is without considering the perspective and scope of issuance of the certificate for deduction of tax at lower rate or no deduction at tax and also without following the prescribed procedure. The High Court has wrongly distinguished the previous judgement dated 09.05.2017 on the premises which is not tenable, and relied upon undertaking dated 22.06.2019 of appellant submitted perforce. After due consideration in my view High Court has committed error in dismissing the writ petition; therefore, I am unable to concur the opinion of the esteemed sister Judge.

19. During hearing, it is said that against the previous judgment of Delhi High Court dated 29.01.2016 C.A. No.8761/2016 is pending, which relates to assessment orders pertaining to financial years 2007-2008 to 2009-2010, but it cannot be connected to the issue of certificate under Section 197(1) of the IT Act for the year 2019-2020. The other judgment

of Delhi High Court dated 09.05.2017 directly deals the issuance of the certificate under Section 197(1) of the IT Act. For the reasons mentioned in detail I endorse the view taken by Delhi High Court as correct and plausible view. Thus, it is made clear here that the TDS certificate granted under Section 197 (1) shall be provisional subject to the assessment of the returned income.

20. In view of the foregoing, the appeal filed by the appellant is hereby allowed setting aside the order of the High Court with a direction to the respondent to reconsider the application of the appellant and issue certificate following the prescribed procedure.

21. Resultantly, this appeal is hereby allowed to the extent indicated hereinabove.

.....J.
[J.K. MAHESHWARI]

NEW DELHI;
July 29, 2022

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4964 OF 2022
(Arising out of SLP (C) No. 9233 of 2020)

NATIONAL PETROLEUM CONSTRUCTION COMPANY … Appellant(s)

VERSUS

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 2(2) INTERNATIONAL TAXATION NEW DELHI & ANR. … Respondent(s)

O R D E R

Leave granted.

In view of the difference of opinion between us, the Registry is directed to place the matter before Hon'ble the Chief Justice of India so that an appropriate Bench could be constituted to hear the matter.

……,J.
(Indira Banerjee)

……,J.
(J.K. Maheshwari)

New Delhi;
July 29, 2022