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

+ **W.P.(C) 14602/2021**

COTECNA INSPECTION SA

..... Petitioner

Through: Mr.Deepak Chopra, Advocate with
Mr.Ankul Goyal, Advocate.

versus

INCOME TAX OFFICER WARD INTERNATIONAL TAX 1 2 1 &
ANR. Respondents

Through: Mr.Ruchir Bhatia, Advocate.

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Date of Decision: 20th December, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present writ petition has been filed challenging the certificate dated 2nd November, 2021 and communication dated 26th November, 2021 issued by Respondent No. 1. Petitioner also seeks directions to Respondent No. 1 to issue a fresh certificate under Section 197 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') prescribing a tax withholding rate of 5% on dividend of Rs. 21,05,26,160/- for the Financial Year 2021-22 in accordance with the India Switzerland DTAA read with the protocol and Most Favoured Nation ("MFN") clause.
2. Learned counsel for the Petitioner states that vide the impugned orders, the application of the Petitioner under Section 197 of the Act had



been disposed of prescribing a rate of 10% on the dividends distributed by Cotecna Inspection India Private Limited (“CI IPL”) to the Petitioner as opposed to the applicable rate of 5% under the India-Switzerland Double Taxation Avoidance Agreement (“DTAA”) read with the MFN clause and the Amending Protocol to the DTAA.

3. He submits that the Protocol to India Switzerland DTAA provides for MFN clause in terms of which when India enters into a DTAA with another member country of the Organisation for Economic Cooperation and Development (“OECD”), wherein India limits its tax deduction at source (“TDS”) to a lower rate than the agreed one between India and Switzerland, then from the date such agreement comes into force, the rates or scope contemplated in such other treaty shall apply to India-Switzerland DTAA. He states that though the India-Switzerland DTAA prescribes a withholding rate of 10%, yet as India has entered into DTAAs with other OECD member countries being Slovenia / Lithuania / Colombia wherein tax rate on dividend income was agreed at a lower rate of 5%, owing to the MFN clause, the lower withholding rate shall also be applicable to any dividend income covered under the India-Switzerland DTAA.

4. Learned counsel for the Petitioner states that the issue involved in the present writ petition is no longer *res integra* as it is covered by the judgment of this Court in *Concentrix Services Netherlands B.V. v. ITO (TDS)*, *W.P.(C) 9051/2020 [2021] 127 taxmann.com 43 (Delhi)* and *Nestle SA v. Assessing Officer, Circle (International Taxation)*, *W.P.(C) 3243/2021*. He states that the impugned order and certificate have been passed in contravention of the settled position of law. He further states that the Respondent cannot disregard the binding judgments of this Court on the



ground that the revenue proposes to file an appeal against such decisions.

5. He also states that in the case of *Deccan Holdings B V v. Income Tax Officer & Anr.*, WP(C) 11921/2021, decided on 25th October, 2021, similar arguments advanced on behalf of the respondents were rejected and the Respondents therein were directed to issue a certificate under Section 197 of the Act prescribing a rate of 5% on dividend.

6. Issue notice. Mr. Ruchir Bhatia, Advocate accepts notice on behalf of the Respondents. He states that since no notification has been issued by the Government of India, the petitioner is not entitled to lower tax rate of 5% provided in India-Columbia DTAA, India-Lithuania DTAA and India-Slovenia DTAA. He further reiterates that the Revenue has not accepted the decision of this Court in the cases of *Concentrix Services Netherlands B.V. v. ITO (TDS)* and *Nestle SA v. Assessing Officer, Circle v. ACIT WP(C) 3243/2021* and is in process of filing Special Leave Petitions before the Hon'ble Supreme Court.

7. Having heard learned counsel for the parties, this Court finds that the issues raised in the present writ petition are no longer *res integra*, as they are fully covered by the judgments of this Court in *Concentrix Services Netherlands B.V.* (Supra) as well as in *Nestle SA* (Supra). In *Concentrix Services Netherlands B.V.* (Supra) it has been held that no separate notification is required insofar as the applicability of the protocol is concerned and the same forms an integral part of the Convention.

8. It is well settled law that the Department cannot refuse to follow binding jurisdictional decision merely on the basis that the Department proposes to file an appeal. The Supreme Court in *UOI v. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711: (1992) 1 SCC 648* has held that



order of higher appellate authorities should be followed ‘unreservedly’ and mere fact that decision is not acceptable to the Revenue cannot be a ground for not following the decision of higher authority.

9. Keeping in view the aforesaid, the impugned order and certificate are set aside and the respondent is directed to issue a certificate under Section 197 of the Act indicating therein that the rate of tax, on dividend, as applicable qua the Petitioner is 5% in India-Switzerland DTAA as held in *Nestle SA* (Supra) which was also under India-Switzerland DTAA.

10. With the aforesaid directions, the present writ petition is disposed of.

MANMOHAN, J

NAVIN CHAWLA, J

DECEMBER 20, 2021

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