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

% *Date of decision: 12.01.2023*

+ **W.P.(C) 14766/2022 and CM APPL. 45399/2022**

WTS ENERGY DMCC

.....Petitioner

Through: Mr Sachit Jolly with Mr Rohit Garg
and Ms Disha Jham, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 3 (1)(1)
& ANR.

.....Respondents

Through: Mr Sunil Agarwal, Sr. Standing
Counsel.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. The substantive prayers made in the writ petition reads as follows:

*“a) A Writ, Order or Direction in the nature of Certiorari quashing the Impugned Order issued on 25.08.2022 against application dated 28.06.2022 and Impugned Certificate dated 25.08.2022 passed by the Respondents under section 197 of the Act directing the deduction of tax at the rate of 10% on payments to be made to the Petitioner;
b) A Writ, Order or Direction in the nature of mandamus directing the Respondents to issue orders/certificates under Section 197 of the Act at a 'Nil' rate of tax withholding for the period until 31.03.2023;
c) An ad-interim Writ, Order or Direction in the nature of mandamus directing the Respondents allowing the Petitioner to receive the consideration from the customers at lower rate of 4% during the pendency of present writ petition.”*

2. Notice in the writ petition was issued by the coordinate bench of this Court on 19.10.2022, wherein, *inter alia*, it was recorded that the petitioner seeks a direction for issuance of a certificate under Section 197 of the

Income Tax Act, 1961 [in short, “the Act”] as lower withholding tax certificate(s) under Section 197 of the Act had been issued in Financial Years (FYs) 2019-2020, 2020-2021 and 2021-2022.

3. Mr Sachit Jolly, who appears on behalf of the petitioner, has informed us that although the petitioner had sought issuance of certificates under Section 197 of the Act at “Nil” rate for the aforementioned FYs, the certificates were issued pegging the withholding tax at 4%.

4. To be noted, in the instant case, we are concerned with FY 2022-2023.

5. We may note, that since counter-affidavit was not filed by the respondents/revenue, the petitioner/assessee had moved an application i.e., CM APPL. 191/2023 to close the respondents/revenue’s right to file the counter-affidavit.

5.1 This application came up before us on 05.01.2023.

6. In order not to prejudice the stand of the respondents/revenue, we had called upon Mr Sunil Agarwal, who appears on behalf of the respondents/revenue, to file the counter-affidavit by 10.01.2023.

6.1 The counter-affidavit, for whatever reason, has not been filed.

6.2 Mr Agarwal has, however, returned with instructions in the matter.

7. Having considered the instructions received by Mr Agarwal, we are of the view, that the best way forward will be that a certificate under Section 197 is issued, pegging the withholding tax rate at 4%, which was also the position that obtained in FYs 2019-2020, 2020-2021 and 2021-2022.

8. We may note, that Mr Jolly has informed us, that for FY 2019-2020 (AY 2020-2021) and FY 2020-2021 (AY 2021-2022), return has been filed, wherein subject income was offered for tax at 4%.

9. Mr Jolly says, that intimation under Section 143(1) of the Act has been issued.
10. We may also observe, that what is, in substance, the issue, is: whether the subject income earned by the petitioner can be treated as Fees for Technical Services (FTS), as is contended by the respondents/revenue.
11. Concededly, the Double Tax Avoidance Agreement obtaining between India and UAE does not contain any article concerning FTS.
12. The petitioner, who is a non-resident and does not have a PE in India, claims that the subject income is “business income.”
13. It is because of these varying stands, that a dispute arose with regard to the rate at which withholding tax had to be pegged.
14. Thus, for the foregoing reasons, the rate of withholding tax, for the moment, will be pegged at 4%.
15. The respondents/revenue will issue a certificate under Section 197 of the Act as expeditiously as possible, though not later than two weeks from today.
16. Needless to state, the aforesaid direction has been issued without prejudice to the rights and contentions of both parties.
17. Consequently, the writ petition and pending application are disposed of in the aforesaid terms.
18. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JANUARY 12, 2023 / tr