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

***Date of Decision: 29.07.2021***

+ **W.P.(C) 5978/2021 & CM 18888/2021**

VIRGIN ATLANTIC AIRWAYS LTD. ....Petitioner

Through: Mr.Nagesh Kumar Behl, Adv.

versus

PR. COMMISSIONER OF INCOME TAX,  
INTERNATIONAL TAXATION -2, & ORS. .... Respondents

Through: Mr.Sanjay Kumar, Sr. Standing  
Counsel with Ms.Easha Kadian,  
Adv. for the Department.

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

The petition has been heard by way of video conferencing.

1. This petition has been filed by the petitioner challenging the certificate dated 02.06.2021 as also a 'speaking order' issued by the respondent no.2 under Section 197 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') for the Assessment Year 2022-23, directing withholding of the tax deducted at source (TDS) at the rate of 1% for the petitioner. The petitioner further prays for a direction to the respondent nos.1 and 2 for issuing a fresh certificate under Section 197 of the Act, directing withholding of NIL TDS in terms of Article 8

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By:SHALGO BATRA

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of the Double Taxation Avoidance Agreement entered between India and the United Kingdom (hereinafter referred to as 'DTAA').

2. The petitioner is a foreign company incorporated in the United Kingdom under the laws of United Kingdom and is registered in India under Section 592 of the Companies Act, 1956, as a branch office of a foreign company.

3. The petitioner is a tax resident of the United Kingdom and has been filing income tax returns in India as a 'non-resident'.

4. The petitioner has been engaged in aircraft operations in international traffic and claims that there is no other income derived/earned in India, except for the nominal interest of income tax refund, if any, in some years, on which the Income Tax Department is deducting TDS at the rate of 30%.

5. The learned counsel for the petitioner claims that being a tax resident of the United Kingdom, which is also the petitioner's place of effective management for the purposes of the Act and the DTAA, income of the petitioner is non-taxable in India and accordingly, assessment under Section 143(3) of the Act for the Assessment Year(s) 2008-09 till 2017-18 have been completed at NIL taxable income.

6. The petitioner further claims to have been consistently receiving withholding tax certificates in the previous years under Section 197(1) of the Act allowing a NIL rate of tax withholding for the Assessment Year(s) 2009-10 to 2019-20. For the Assessment Year(s) 2020-21 and

2021-22, the petitioner was issued certificates directing withholding of TDS at nominal rate of 0.01%. The petitioner claims that although no official reason for the same was given by the respondents, the petitioner was informed verbally that as a result of computerization of the process of issue of certificate under Section 197 of the Act by the respondent no.3, software of the Income Tax Department did not accept NIL rate of tax, therefore, certificate under Section 197 of the Act was issued applying a nominal rate of TDS at 0.01%. The petitioner claims to have not challenged the same because the amount was insignificant.

7. On 30.03.2021, the petitioner again applied for the issuance of certificate under Section 197 of the Act at NIL rate of tax, however, instead was issued the Impugned Certificate dated 02.06.2021, increasing the TDS withholding amount to 1%. The respondent no.2 also uploaded the Impugned 'speaking order' on its website, observing as under:

*"Sir/Madam,*

**Sub: Speaking order**

*In view of submissions filed by the applicant and similar to earlier withholding tax order, it is noticed the projected receipts claimed by the assessee are estimated in nature and the assessee may have other sources of income also. Therefore, to protect the interest of revenue, after considering all these facts, the certificate withholding tax rate at approved rate (excluding*

*surcharge and cess) is issued to the applicant after receiving necessary approval of the higher authorities.”*

8. The learned counsel for the petitioner submits that the respondent no.2 has not only circumvented the mandate of Rule 28AA of the Income Tax Rules, 1962, but even otherwise has failed to take into account the provisions of the DTAA as also the permission letter dated 15.02.2003 issued by the Reserve Bank of India (RBI) to the petitioner which prohibits the petitioner from carrying out, by itself or in partnership or otherwise in association with others, any activity of trading, commercial or industrial nature in India without prior approval from the RBI. The petitioner states that it has not sought any such permission from the RBI and in any case, the increased withholding of tax could not have been applied to its business of transportation of goods and persons by air.

9. He places reliance on the judgment of this Court in ***Manpowergroup Services India Pvt. Ltd. vs. Commissioner of Income Tax (TDS)-1, New Delhi & Anr.*** 2020 SCC OnLine Del 1844 as also ***Lufthansa Cargo AG vs. Deputy Commissioner of Income Tax & Anr.*** 2019 (11) TMI 759.

10. On the other hand, the learned counsel for the respondents submits that the petitioner has an alternate efficacious remedy in form of a Revision Petition under Section 264 of the Act. He further submits that the Assessing Officer had duly noted the response

received from the petitioner to the queries raised by the Assessing Officer and as the petitioner failed to supply the necessary documents to substantiate its claim of earnings being non-taxable, the Assessing Officer was of the opinion that though the profit derived from the main business of the petitioner being the operation of aircraft in international traffic was not taxable in India by virtue of Article 8 of DTAA, yet the petitioner might be engaged in incidental businesses. Therefore, with a view to safeguard the Revenue interest, certificate under Section 197 of the Act to deduct TDS at the rate of 1% was issued by the Assessing Officer. The learned counsel for the respondents also contends that the petitioner has pending income tax refunds on which interest will accrue and therefore, the same would be liable to be taxed as income from other sources for the Financial Year 2021-22.

11. We have considered the submissions made by the learned counsels for the parties. The Impugned ‘speaking order’ has been reproduced hereinabove. Apart from stating that the petitioner may have other sources of income, the Impugned Order does not reflect compliance with Rule 28AA of the Income Tax Rules, 1962. None of the considerations mentioned in Rule 28AA appear to have been considered by the respondent in passing the impugned ‘speaking order’.

12. This Court in ***Manpowergroup Services India Pvt. Ltd.*** (supra) [authored by one of us (Justice Manmohan)], has held that the Assessing Officer cannot ignore the mandate of Rule 28AA of the

Rules and proceed on any other basis, as the Government is bound to follow the rules and standards they themselves have set on the pain of their action being invalidated. In absence of following the said mandate, the Impugned Order passed is liable to be quashed. The relevant extract from the above-mentioned judgment is reproduced hereinbelow:

*“THE ASSESSING OFFICER CANNOT IGNORE THE MANDATE OF RULE 28AA AND PROCEED ON ANY OTHER BASIS AS THE GOVERNMENT IS BOUND TO FOLLOW THE RULES AND STANDARDS THEY THEMSELVES HAD SET ON PAIN OF THEIR ACTION BEING INVALIDATED. CONSEQUENTLY, THE IMPUGNED ORDER IS QUASHED ON THE GROUND THAT THE DECISION MAKING PROCESS IN THE PRESENT CASE IS CONTRARY TO LAW.*

*25. However, this Court is in agreement with the submission of learned standing counsel for the respondent that it is the decision making process and not the decision that can be impugned in a writ petition. To appreciate the decision making process, it is necessary to outline the provision under which the TDS rates have to be determined under Section 197 of the Act. Rule 28AA of the Income Tax Rules prescribes the procedure to be followed by the assessing officer in determining the ‘existing and estimated liability’. The*

relevant portion of Rule 28AA of the Income Tax Rules reads as under:-

“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 [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 [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];”

(emphasis supplied)

26. Perusal of the aforesaid Rule shows that the considerations prescribed under clause (2) are mandatory and the department is bound to determine the yearly TDS rates on the four parameters prescribed therein.

27. It is settled law that the Government is bound to follow the rules and standards they themselves had set on pain of their action being invalidated [See: Amarjit Singh Ahluwalia v. State of Punjab & Ors., (1975) 3 SCC 503 : (1975) 3 SCR 82 and Ramana Dayaram Shetty v. International Airport Authority of India & Ors.; (1979) 3 SCC 489]. Consequently, the assessing officer cannot ignore the mandate of Rule 28AA and proceed on any other basis.

28. However, in the present case, the assessing officer has not followed the aforesaid rule as there is no reference in the impugned reason to any computation carried out under Rule 28AA.

29. In fact, this Court vide order dated 8<sup>th</sup> December, 2020 had granted time to the respondent to place on record the computation of TDS rates under Rule

*28AA, if any. Despite the said opportunity, neither any computation was filed nor was any reasonable explanation given as to why the computation under Rule 28AA was not carried out. Consequently, this Court is of the opinion that the impugned order is liable to be quashed on the ground that the decision making process in the present case is contrary to law.”*

13. In the present case as well, it is not evident from the Impugned Order whether the Assessing Officer has followed the mandate of Rule 28AA of the Rules. In fact, on a specific query in this regard, the learned counsel for the respondents could not deny this position of non-compliance. Therefore, the Impugned Order and the certificate issued are liable to be quashed on this ground.

14. We may also take note of the judgment of this Court in ***Lufthansa Cargo AG*** (supra) wherein under similar circumstances, this Court had held that where an order discloses non-application of mind to germane and relevant considerations including the previous assessment orders and the certificates issued under Section 197 of the Act, the order passed shall be arbitrary and liable to be set aside.

15. This Court in ***Manpowergroup Services India Pvt. Ltd.*** (supra) had also rejected the argument of availability of alternate efficacious remedy to the assessee against the Certificate issued under Section 197 of the Act, and we see no reason to depart from the same.

16. In view of the above, the Impugned ‘speaking order’ and the Certificate dated 02.06.2021 are quashed. The respondents are directed to pass a fresh order in accordance with law. In the meantime, until a fresh certificate is issued by the respondents, the petitioner’s receipts of payment shall abide by the withholding tax certificates for the preceding period at the rate of 0.01%.

17. The petition is disposed of in the above terms. There shall be no order as to costs.

18. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsels through e-mail.

**NAVIN CHAWLA, J**

**MANMOHAN, J**

**JULY 29, 2021/rv/A.**