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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 14th December, 2021

+ **W.P.(C) 14206/2021**

GALDERMA PHARMA SA

..... Petitioner

Through: Mr.Kamal Sawhney, Advocate
with Mr.Prashant
Meharchandani and Mr.Arun
Bhaduria, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr.Puneet Rai, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

MANMOHAN, J. (Oral)

1. Present writ petition has been filed challenging the certificate dated 18th November, 2021 read with the impugned order passed by the Respondent directing Galderma India to deduct tax @ 10% on dividend income to be paid to the Petitioner for the relevant Financial Year. Petitioner also seeks a direction allowing Galderma India to pay dividend to the Petitioner for the relevant Financial Year after deducting tax @ 5% in terms of the Protocol to the DTAA between India and Switzerland at the time of payment of such dividend.

2. Learned Counsel for the Petitioner states that the impugned certificate dated 18th November, 2021 read with the Impugned Order communicating the reasons passed under Section 197 of the Act rejecting the Petitioner's request for lower withholding of tax @ 5%

on dividends proposed to be distributed by Galderma India to the Petitioner for Financial Year 2021-22 illegal and should be quashed.

3. Learned counsel for the Petitioner states that even though Article 10 of the India-Switzerland DTAA provides for withholding tax @10% on dividend paid by an Indian resident to a Swiss resident entity, the Petitioner claims lower tax rate of 5% provided in India-Columbia DTAA by relying on the MFN clause in para 5 of the protocol to the India-Switzerland DTAA which was signed between India and Switzerland on 30th August, 2010 and is effective from 27th December, 2011.

4. Learned Counsel for the Petitioner submits that this issue is already settled by this Court in *Steria (India) Ltd. v. CIT [2016] 386 ITR 390 (Del)* and *Concentrix Services Netherlands B V v/s. Income Tax Officer TDS & Anr W.P.(C) 9051/2020* and by the Karnataka High Court in *Apollo Tyres Ltd. v. CIT [2018] 92 taxmann.com 166 (Karnataka)* holding that the protocol signed by contracting states is an integral part of the DTAA and provides for automatic application of benefit agreed by India with a member of OECD and that no separate notification/amendment is needed to apply such protocol.

5. Issue notice.

6. Mr.Puneet Rai, learned counsel accepts notice on behalf of the respondent. 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.

7. 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.

8. Having heard learned counsels 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.

9. 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.

10. 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 the India-Switzerland DTAA. Writ petition is disposed of in the aforesaid directions.

MANMOHAN, J

NAVIN CHAWLA, J

DECEMBER 14, 2021/rv