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

% Judgment Reserved on*: 23.12.2025*
Judgment delivered on*: 14.01.2026*
Judgment uploaded on*: As per Digital Signature~*

\+ **W.P.(C) 16158/2025 & CM APPL. 66147/2025**

ERNST AND YOUNG LLP .....Petitioner
versus
ASSISTANT COMMISSIONER OF INCOME TAX, INTERNATIONAL CIRCLE-1-2-2, NEW DELHI .....Respondent

Advocates who appeared in this case

For the Petitioner : Mr. Kamal Sawhney, Mr. Arun Bhadauria and Mr. Nishank Vashishta, Advocates

For the Respondents : Mr. Indruj Singh Rai, SSC, Mr. Sanjeev Menon, JSC and Mr. Gaurav Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. This petition has been filed with the following prayers:-

> *"(i) Issue a writ of certiorari and/or any other writ, order or direction in the nature of certiorari setting aside the Impugned Certificate dated 17.09.2025 r/w Impugned Order dated 17.09.2025;*
> *(ii) issue a writ of mandamus and/or any other writ, order*

or direction in the nature of mandamus directing the respondent to issue a "nil withholding" certificate for prospective payments amounting to 17,50,00,00,000/- to be paid by the petitioner to its payee Ernst & Young (EMEIA) Services Limited from the date of section 195(2) application till 31.03.2026. And/ Or
(iii) Issue any other appropriate writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. In substance the challenge in this petition is to the certificate and order dated 17.09.2025 passed under Section 195 of the Income Tax Act, 1961 (the Act), whereby the respondent has concluded and authorised the petitioner herein to pay or credit any payment covered under the nature of payment being business income by withholding tax at the rate of 5.25%.

3. We may reproduce paragraph no.4 of the impugned order, which reads as under:-

"4. It has further claimed that the amount expected to be paid to recipient does not satisfy the 'make available' test and thus does not fall within the ambit of Fees for Technical Services ('FTS') as defined under Article 13 of India-UK DTAA as already held by Authority of Advance Ruling in AAR No.820/2009. Further, the applicant contended that the recipient does not have any Permanent Establishment ('PE') in India and in this respect, it has submitted No PE Declaration and TRC issued to the recipient of the recipient for AY 2022- 23, it has been noticed that the contention of the applicant that the recipient does not have any PE in India is not tenable. This fact has already been discussed in detail in the assessment order of the recipient for AY 2022-23. In the said order, it was held that there exists Virtual Service PE of the recipient in India. Thus, income from India is liable to be taxed as business income arising due to Virtual Service PE as per Article 5(k) of India -UK DTAA."

4. The case of the petitioner as submitted by Mr Kamal Sawhney, learned counsel for the petitioner is that the sole basis for the respondent to reject the petitioner's application for grant of Nil Withholding Certificate for the payment proposed to be made to Ernst & Young (EMEIA) Services Limited (*EMEIA*, hereinafter), a UK based entity, holding that it constitutes business income of EMEIA and is chargeable to tax, is in view of the existence of a virtual service permanent establishment of EMEIA as per Article 5(k) of the India-UK Double Taxation Avoidance Agreement (*DTAA*, hereinafter).

5. He has submitted that the conclusion arrived at by the assessing officer is unsustainable in view of the fact that the issue virtual service permanent establishment has been decided against the Revenue by the jurisdictional Income Tax Appellate Tribunal (ITAT) in the case of ***Clifford Chance Pte. Ltd. v. ACIT, [2024] 160 taxmann.com 424 (Delhi - Trib.).*** The appeal preferred by the Revenue against the said order has been dismissed by this Court in ***Commissioner of Income Tax, International Taxation-1, New Delhi v. Clifford Chance Pte. Ltd, 2025:DHC:10838-DB*** wherein this Court while interpreting a similar treaty provision pertaining to service permanent establishment in the context of India-Singapore Double Taxation Avoidance Agreement, i.e. Article 5(6), clearly held that the provision only contemplates rendering of services by employees present within the contracting country and as such the concept of a virtual service permanent establishment cannot be read into the said provision, as it is not for the Court to read in concepts which are not expressly provided for by the treaty. In effect, it is his endeavour to contend that the provision of Article 5(2)(k) of the India-UK DTAA is *pari materia* to Article 5(6) of the India-

Singapore DTAA, which was the subject matter of interpretation in ***Clifford Chance (supra).***

6. Before proceeding further, similarities between the said provision in India-UK DTAA and India-Singapore DTAA are tabulated below:-

Article 5(2)(k) of the India-UK DTAA	Article 5(6) of India-Singapore DTAA
2. The term "permanent establishment" shall include especially *(k) the furnishing of services including managerial services, other than those taxable under Article 13 (Royalties and fees for technical services),* ***within a Contracting State by an enterprise through employees or other personnel****, but only if:* *(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or* *(ii) services are performed within that State for an enterprise within the meaning of paragraph 1 of Article 10 (Associated enterprises) and continue for a period or periods aggregating more than 30 days within any twelve-month period: Provided that for the purposes of this paragraph an enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with, or supplies plant and machinery on hire used or to be used in, the prospecting for, or extraction or production of, mineral oils in that State.*	*6. An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12,* ***within a Contracting State through employees or other personnel****, but only if :* *(a) activities of that nature continue within that Contracting State for a period or periods aggregating more than 90 days in any fiscal year; or* *(b) activities are performed for a related enterprise (within the meaning of Article 9 of this Agreement) for a period or periods aggregating more than 30 days in any fiscal year.*

7. In substance, it is the plea of Mr. Sawhney that in view of the judgment, the respondent should be directed to issue a Nil Withholding Certificate to the petitioner. That apart, he submitted that the respondent had issued the impugned certificate and passed the impugned order after considering all the relevant documents submitted by the petitioner, and there is no contention that it had failed to submit any document as asked for during the examination of the application. He laid stress on the fact that the

relevant agreement between the petitioner and EMEIA was also produced before the assessing officer. Thus, it is after a comprehensive examination of all the relevant documents that the application of the petitioner was rejected by the respondent. He stated that in fact, the respondent in the course of oral hearing had admitted that the petitioner's case could also be covered by the decision of this Court in ***Clifford Chance (supra).***

8. He has relied upon the decision of this Court in ***SFDC Ireland Limited v. Commissioner of Income Tax & Another, 2025: DHC:977-DB*** to contend that in that case, this Court found that the decision of the assessing officer in rejecting the application of the petitioner therein was perverse, and had directed him to issue a Nil Withholding Certificate. He submitted that the petitioner herein stands on an even better footing, as it has the benefit of a precedent in ***Clifford Chance (supra).***

9. On the other hand, Mr. Sanjeev Menon, learned JSC appearing for the Revenue would submit that the instant petition is misconceived and not maintainable either in law or on facts and is liable to be dismissed in view of the availability of an efficacious statutory remedy under Section 264 of the Act for the simple reason that Article 226 of the Constitution of India cannot be invoked to bypass statutory remedies in the absence of a lack of jurisdiction or violation of the principles of natural justice, neither of which arises here.

10. It is his contention that the proceedings under Section 195(2) of the Act are protective and *prima facie* in nature, confined to safeguarding the interests of the Revenue, and judicial review is therefore limited to the

decision-making process and not the merits. As such, the impugned reasoned order warrants no interference, as held by this Court in ***National Petroleum Construction Co. v. Deputy Commissioner of Income Tax, Circle-2(2)(2), International Taxation, New Delhi, [2019] 112 taxmann.com 364 (Delhi)***. The determination of withholding tax @ 5.25% is fully justified and flows directly from the existing and subsisting assessment position of the recipient entity, EMEIA, for AY 2022-23, wherein the assessing officer after detailed examination, held that EMEIA constitutes a virtual service permanent establishment in India under Article 5(2)(k) of the DTAA, and that the income is taxable as business profits with profit attribution at 30%, of which 50% is attributable to India, resulting in an effective taxable margin of 15%.

11. Further, the contention of the petitioner that no permanent establishment exists is founded on an erroneous insistence on physical presence of personnel in India, which finds no support in the text of Article 5(2)(k) of the DTAA, as the treaty merely requires the furnishing of services "*through employees or other personnel*" "*within the contracting state*" and does not mandate physical presence. The reliance of the petitioner on the 90-day threshold under Article 5(2)(k)(i) is legally untenable, as Article 5(2)(k)(ii) expressly prescribes a lower threshold of 30 days where services are rendered to an associated enterprise, and it is an admitted position that the petitioner and EMEIA are associated enterprises. Having regard to the continuous and recurring nature of the group-wide services, it is implausible that they are confined to less than 30 days in any twelve months, and the duration test for constitution of a service permanent establishment therefore

stands satisfied.

12. It is also urged by him that without prejudice to the above, in case if this Court is of the view that the issue arising in the present matter is covered by the judgment in ***Clifford Chance (supra),*** and is to set aside the impugned order, then the matter needs to be remanded back to the assessing officer for fresh consideration in accordance with law, as is the established practice. Reliance in this regard is made to the judgment of this Court in ***SDFC Ireland Limited (supra).***

13. Having heard the learned counsel for the parties and perused the record, the short question that arises for consideration is whether the respondent is justified in issuing the impugned certificate and order rejecting the application of the petitioner for granting a Nil Withholding Certificate.

14. We have already reproduced the relevant paragraph of the impugned order wherein the respondent has provided the reasons for rejecting the application of the petitioner for Nil Withholding Certificate. The assessing officer was of the view that there exists a virtual service permanent establishment of the petitioner in India, thus, the income from India is liable to be taxed as business income under Article 5(k) of the DTAA. The contention of Mr. Sawhney is that this being the solitary ground for the respondent to reject the application, the same is untenable in law.

15. Suffice it to state, the issue of virtual service permanent establishment had come up for interpretation before us in the case of ***Clifford Chance (supra)*** though in the context of the provisions of the India-Singapore DTAA. The comparative table, as reproduced by us above, makes it clear

that the provisions relevant to the instant case, in the India-UK DTAA and the India-Singapore DTAA are *pari materia.* In ***Clifford Chance (supra)*** we interpreted the words *"within a Contracting State through employees or other personnel"* as under:

> *42. Article 5(6)(a) of the DTAA reads "An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services… within a Contracting State through employees or other personnel…". The words "within a Contracting State" and "through employees or other personnel" contemplates rendition of services in India by the employees of the non-resident enterprise, while mandating a fixed nexus; a physical footprint within India. The term 'within' has a certain territorial connotation and in the absence of personnel physically performing services in India, there can be no furnishing of services 'within' India. A plain reading of the whole provision would thus reveal that, it such rendition of services by employees present within the country which would constitute a service permanent establishment.*
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> *43. & 44. xxxx xxxx xxxx*
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> *45. The law insofar as the present controversy is concerned, is clear and unambiguous. The DTAA, which has been carefully drafted and executed after numerous rounds of bilateral deliberations and negotiations at the highest level, must necessarily be interpreted strictly. If something is conspicuous by its absence, the presumption is that it has deliberately been done so. It is not for courts to read in concepts which are not expressly provided for by the treaty. The guiding principle here is that language which is not explicitly included in treaty provisions cannot be artificially read into such provisions by way of judicial fiction.*
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> *46. As already stated, Article 5(6) of the DTAA only contemplates rendering of services by employees present within the country. If that be so, it is not for this Court to analyse the status or merits of*

a virtual service permanent establishment which does not find mention either in the DTAA or in the domestic Act. As such, the contention of the Revenue that a virtual service permanent establishment of the assessee has been established for AYs 2020-21 and 2021-22 cannot be accepted."

16. It is apparent that both the DTAAs contemplate rendition of services in India by the employees of non-resident enterprises. Since the words "*within the Contracting State*" has a territorial connotation, in the absence of personnel physically performing services in India, there can be no rendering of services within India and as such there can be no virtual service permanent establishment as contended by the Revenue, more so, when such a concept is not contemplated by the DTAA or the domestic Act. As such, the submission of Mr Menon justifying the impugned order cannot be accepted. His plea that Article 5(2)(k) of the DTAA merely requires furnishing of services through employees or other personnel within the Contracting State and does not mandate physical presence, is unmerited, in view of the law laid down in ***Clifford Chance (supra)***.

17. Mr. Sawhney submitted that in view of the facts which arise for consideration in this case, this Court may exercise the powers under Article 226 of the Constitution of India and set aside the order without remanding the matter to the assessing officer, which submission is contested by Mr. Menon. We are of the view that it shall be appropriate to set aside the impugned certificate and order, both dated 17.09.2025 and remand the matter back to the assessing officer, who shall pass a fresh order on the application filed by the petitioner keeping in view the conclusion drawn by us, within a period of two weeks from the date of receipt of the copy of this

order, as an outer limit.

18. It is ordered accordingly.

19. The petition and the pending application is disposed of in the above terms.

V. KAMESWAR RAO, J

VINOD KUMAR, J

JANUARY 14, 2026
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