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

% *Date of Decision: 31.08.2023*

+ **W.P.(C) 2335/2023 & CM APPL. 8849/2023**

AMAZON WEB SERVICES INDIA PVT
LTD & ANR.

..... Petitioners

Through: Mr. Porus Kaka, Sr. Adv. with Mr.
Rohit Jain, Mr. Aniket D Agrawal,
Mr. Samarth Chaudhari & Mr.
Manish Kanth, Adv.

versus

INCOME TAX OFFICER & ANR.

..... Respondents

Through: Mr. N Venkataraman, ASG with
Mr. Ruchir Bhatia, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioners have filed the present petition impugning an order dated 01.02.2023 (hereafter '**the impugned order**') passed by the Assessing Officer (hereafter '**the AO**') disposing of the application filed by petitioner no.1 (hereafter '**AWS India**') under Section 195(2) of the Income Tax Act, 1961 (hereafter '**the Act**') for determination of the appropriate proportion of the sum payable to petitioner no.2 (hereafter '**AWS USA**'), chargeable to tax, for the purposes of withholding tax deducted at source (TDS).



2. AWS India claims that it is engaged in the business of reselling web services to third party customers in India. AWS USA is a company, which has its principal place of business in the United States of America and is, *inter alia*, engaged in the business of providing web services to its customers and resellers world-wide, including AWS India.
3. AWS USA is a tax resident of the United States of America and holds a tax residency certificate (TRC).
4. AWS India claims that in terms of the Reseller Agreement between AWS India and AWS USA, it was appointed as a non-exclusive reseller of web services on a principal to principal basis. In terms of the said Reseller Agreement, AWS India claims that it is authorized to resell web services to its customers in India. It claims that it independently enters into contracts in its own name with Indian customers and raises invoices directly on such customers. It also receives funds from its customers directly. AWS India makes payments to AWS USA for the purchase of web services, for the purpose of reselling the same to its customers. According to AWS India, such payments are not chargeable to tax in the hands of AWS USA. In its application, AWS India claimed that AWS USA's receipts are chargeable to the Equalisation Levy under Section 165A of the Finance Act, 2016 which was paid. It claimed that the payments made by it are not chargeable to income tax under the Act either as fees for technical services (FTS) or royalty under Section 9 of the Act or under the Double Taxation Avoidance Agreement between India and the United States of America (hereafter '**Indo-US DTAA**').



5. In view of the aforesaid claims, AWS India sought a certificate from the AO for nil withholding of tax in respect of the reseller fee paid by AWS India to AWS USA.

6. AWS India claimed that AWS USA does not own, lease or operate any data centres in India. Such data centres are owned and operated by independent domestic entities and the transactions *inter-se* AWS USA and such entities are on an arm's length basis.

7. AWS India's claim that the reseller fees paid by it is not chargeable to tax, is founded on the basis that AWS USA does not have any permanent establishment (hereafter '**PE**') in India; the reseller fee is liable for Equalisation Levy at the rate of 2% of the gross amount of the consideration, and the same has been duly paid by AWS USA and accepted by the Government of India; the reseller fee is neither in the nature of royalty nor FTS chargeable under Section 9(1)(vi) or 9(1)(vii) of the Act; and such payments are not chargeable under the Indo-US DTAA.

8. The AO did not accept AWS India's contention that AWS USA does not own, lease or operate any cloud infrastructure in India, *inter alia*, on the ground that AWS India was not forthcoming with the relevant information. The AO proceeded on the information as available in the public domain and concluded that AWS USA had significant infrastructural assets (data centres) in India, which constituted its PE. He also concluded that the contractual arrangement between AWS India and AWS USA met the criteria of a business connection and thus its



income attributable to its PE was chargeable to tax.

9. The AO held that the AWS USA had a large global infrastructure footprint built around 30 regions and 96 availability zone with each availability zone consisting of one or more data centres. The AO also concluded that AWS USA had offices in several cities in India. He did not accept AWS India's claim that data centres in India were owned and operated by separate entities and had no connection with the customers availing the services in India. The AO concluded that the data centres/availability zones constituted ASW USA's fixed place of business through which its core business is carried out.

10. Accordingly, the AO held that the reseller fees paid by AWS India to AWS USA would fall outside the scope of Equalisation Levy and would be chargeable as business income under the provisions of the Act.

11. In view of the conclusion that AWS USA provides cloud computing services through infrastructure in the form of regions, availability zones, data centres located in India, which constitute its PE in India; the AO held that the payments made by AWS India to AWS USA were attributable to its PE in India.

12. The AO then ascertained the information as available in the public domain, in particular, the consolidated financial statement of the holding company (Amazon.com) for the financial year 2021 as available on the internet. He found that the income of Amazon Web Services (AWS) was around 30% of the net sales. He proceeded on the



assumption that the financial figures of AWS as reflected in the consolidated accounts related to AWS USA.

13. The AO also observed that a necessary adjustment was required to be carried out, as AWS USA had received several concessions from the State Government which would have a positive impact on its profit margins. He estimated the profit margin to be 10% higher than that of AWS as disclosed by the financial accounts of AWS USA. Accordingly, he estimated 40 % of the reseller fess paid by AWS India to AWS USA was the profit margin of AWS USA.

14. Accordingly, the AO directed AWS India to withhold 16% of the remittance on account of reseller fee paid to AWS USA for the financial year 2022-23 in respect of reseller fee proposed to be remitted from 27.09.2022 to 31.03.2023.

15. The petitioners (AWS India and AWS USA) have assailed the impugned order on several fronts. First, they claim that AWS USA is a tax resident of the United States of America and are thus entitled to benefits of Indo-US DTAA. Mr Kaka, learned senior counsel appearing for the petitioners referred to the TRC issued by the Department of Treasury, Internal Revenue Service of the United States of America, in support of the petitioners' claim. Thus, AWS USA could not be denied the benefit of Indo-US DTAA. Second, he relied on the decision of the Income Tax Appellate Tribunal (ITAT) in AWS USA's case for the assessment year 2014-15 and 2016-17 (ITA No.522 & 523/Del/2023, decided on 01.08.2023) and drew the attention of this Court to the



observations made to the effect that it was not disputed that AWS USA is a tax resident of the United States of America and had opted to be governed by the beneficial provision of Indo-US DTAA.

16. It was further contended that the ITAT had in AWS USA's case for the assessment years 2014-15 and 2016-17 rejected the Revenue's contention that the amounts paid by AWS India to AWS USA be treated as royalty.

17. Third, the petitioners also dispute the Revenue's contention that AWS USA has any PE in India. They claim that the data centres in India are operated by separate local entities. The payments made to the said entities are on an arm's length basis and therefore cannot be considered as PE. Mr Kaka also referred to the decision of the Supreme Court in ***Assistant Director of Income Tax – I, New Delhi v. E-Funds IT Solution Inc. : (2018)13 SCC 294*** in support of their contention that the onus to establish that the assessee has a PE rests on the Revenue.

18. He contended that AWS USA is not liable to tax and it was, however, liable to pay the Equalisation Levy which it has paid.

19. Mr. N Venkataraman, learned ASG appearing for the Revenue has stoutly contested the contentions advanced on behalf of the petitioners (AWS India and AWS USA). He submitted that AWS India had withheld vital information from the Department, including the financial statement of AWS USA for the previous financial years, which would be essential for determining the proportion of income chargeable to tax. He contended that AWS USA was not only servicing



clients in India through its PE, but also servicing clients overseas from its PE in India. He contended that sufficient material was now available with the Department to hold that AWS USA had PE in India.

20. Next, he contended that although AWS India was claiming to be a mere reseller, it had registered itself with the Ministry of Information and Technology as a cloud service provider. Thus, AWS India was an extension of AWS USA in India. He also submitted that the petitioners have not provided the necessary information as demanded and, thus, were precluded from claiming the certificate of withholding tax at a nil rate.

21. He also submitted that the decision in the assessment proceedings relating to AWS USA cannot be relied upon as the Department had already initiated proceedings for reopening of the said assessments and the same are pending.

22. We have heard Mr. Kaka, learned senior counsel and Mr. Venkatraman at some length.

23. It is apparent from the plain reading of the impugned order that the AO had decided AWS India's application based on information in the public domain and on the basis of certain assumptions which are *ex-facie* erroneous. The AO proceeded on the basis that the revenue of AWS reflected as a part of the consolidated statement of Amazon.com pertains to AWS USA. The petitioners have clarified that the financial figures of AWS in the consolidated financial accounts of Amazon.com as available in the public domain refer to the consolidated amount of



various entities relating to the vertical of Web Services. The financial figures of various entities, which are operating as a part of the said vertical, including AWS USA, were clubbed together for the purposes of reflecting the consolidated figures relating to the vertical of AWS. The said figures do not relate to AWS USA alone.

24. We find that the AO has proceeded on the basis that AWS USA is not an incorporated entity but a Limited Liability Company (LLC) and therefore, the Indo-US DTAA is inapplicable insofar as AWS USA is concerned. This assumption is *ex-facie* erroneous and there is no material on record to support this view. The suffix 'Inc.' does indicate that AWS USA is an incorporated entity. It is also not disputed that the tax assessments of AWS USA in the preceding years were also framed on the assumption that AWS USA is an incorporated entity. This fact has not been disputed by the Revenue at any stage prior to the passing of the impugned order. It was also submitted that there was no question or query raised by the AO regarding whether AWS USA was an incorporated entity or an LLC. In our view, the AO has clearly erred in proceeding on the basis that the Indo-US DTAA is not applicable in the case of AWS USA.

25. The Revenue's stand that AWS USA has PE in India, is a contentious one. However, even if it is assumed that the data centres in India are owned or operated by AWS USA (which as noted above is highly disputed), the AO has not carried out the exercise of determining the proportion of income that is attributable to the PE in accordance with paragraph no.3 of Indo-US DTAA.



26. We are, *prima facie*, unable to accept that the entire amount payable by AWS India to AWS USA can be considered as revenue attributable to AWS's PE (if any) in India and that no part of it is attributable towards entities overseas. The exercise conducted by the AO of determining the revenue attributable to a PE, which also requires allowance for deduction of material expenses to be made is clearly flawed.

27. It is also settled law that the proceedings under Section 195(2) of the Act are only for the purpose of determining the proportion of income chargeable to tax for the limited purpose of determining the withholding of tax. The determination under Section 195(2) of the Act does not constrain the Revenue in any manner from correctly assessing the payee's income chargeable to tax in accordance with the law. It would, *prima facie*, follow that if there is already a determination in the payee's own case; the AO would normally give due consideration to the same, in considering the application under Section 195(2) of the Act. However, in this case it appears that the AO has proceeded on the exercise of a *de novo* assessment in proceedings, completely disregarding the orders of the ITAT arising from the assessment proceedings relating to AWS USA's.

28. Having stated the above, we also find merit in the Revenue's contention that AWS India had not provided AWS USA's financial information for the preceding years, which may be essential in determining the application under Section 195(2) of the Act. We are unable to appreciate AWS India's response that the entire information



related to AWS USA is available on the portal of the Department and thus could be retrieved by the AO. For the purpose of Section 195(2) of the Act, the applicant is required to provide the necessary information. It would not be open for the applicant to refrain from providing the same on the ground that AO may be able to access the same otherwise.

29. It is also relevant to note that the Revenue has already issued notices under Section 148 of the Act for re-opening the assessments of AWS USA. As noted hereinabove, the learned ASG has stated that there is substantial information available with the Revenue to assess AWS USA's income as chargeable to tax under the Act. He had also contended that AWS USA had withheld vital information in the assessment proceedings.

30. It is apparent that the Revenue now seeks to re-look at AWS USA's assessment and chargeability of its income to tax in India.

31. In view of the above, we were inclined to remand the matter to the AO for reconsideration afresh, since he has proceeded on the basis that the information as necessary is not available. As noted above, this in turn is because, according to the AO, the petitioners had failed to provide the necessary information. However, a considerable period of time has already elapsed and the scope of proceedings under Section 195(2) of the Act are limited to determining the TDS to be withheld. It is also apparent that the contentions sought to be raised by the Revenue are contentious and re-examination of the same would also involve some time. It is unlikely that there would be a *quietus* to the disputes in



the near future.

32. Considering that the nature of these proceedings is confined to withholding of tax, and that the financial year 2022-23 is already over, this Court had suggested to the parties that without prejudice to their rights and contentions regarding the chargeability of AWS USA's income under the Act, a total of 10% be withheld (less 2% Equalisation Levy that has already been paid) as withholding tax.

33. We also made this suggestion in view of the *interim* order dated 14.09.2022 passed by the Coordinate Bench of this Court in WP(C) 12045 of 2022 captioned ***Google Asia Pacific Pte Ltd. v. Commissioner of Income Tax & Ors.***

34. The learned counsel for the parties have expressed their willingness to accept the suggestion *albeit* without prejudice to the rights in the assessment proceedings relating to AWS USA.

35. In view of the above, the impugned order is modified to the aforesaid extent. AWS India shall withhold 8% of payments, payable or paid to AWS USA, for the period in question and deposit the same with the Revenue authorities.

36. AWS India had filed an application in September, 2022, which was disposed of by the impugned order. The learned counsel for the petitioners states that the present order be confined to the period from 01.11.2022 to 31.03.2023 as the payments for the period prior to that have already been made.



37. In view of the above, we consider it apposite to modify the impugned order to be applicable only for the limited period from 01.11.2022 to 31.03.2023. However, it is clarified that the Revenue is not precluded from taking any measures for the period prior to 01.11.2022 on the basis that neither any application under Section 195(2) of the Act was filed for the aforesaid period nor was it considered by the AO.

38. We further direct that the withheld tax in terms of the impugned order as modified in the aforesaid terms be deposited with the concerned tax authorities within a period of one week from today. In the event that the amount is so deposited; it would constitute a full discharge of AWS India's obligation to withhold and deposit the tax in respect of payments to AWS USA without any recourse by the Revenue.

39. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 31, 2023
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