

HC: Lowers Amazon-US's TDS on payments for web services from 16% to "10% less 2%-EL"

*Amazon Web Services India Pvt Ltd & ANR [TS-520-HC-2023(DEL)]
Sep 11, 2023*

CA Om Rajpurohit & Adv. Sakshi Bhardwaj
-AMRG & ASSOCIATES



Facts of the case

In the case of WP(C) 2335/2023, AWS India and AWS USA (petitioners) filed a petition challenging an order issued by the Assessing Officer (AO) concerning the withholding tax deduction on payments made by AWS India to AWS USA. The central issue revolves around determining the proportion of payments subject to withholding tax under Section 195(2) of the Income Tax Act, 1961.

Assessee's contention

Regarding Indo-US DTAA Application:

- Assessee contended that AWS USA, as a tax resident of the United States, is entitled to benefits under the Indo-US Double Taxation Avoidance Agreement (DTAA).
- They argued that the ITAT had previously ruled in favour of AWS USA for specific assessment years, emphasizing that AWS USA is indeed a tax resident of the United States.

Regarding Existence of Permanent Establishment (PE):

- Assessee disputed the existence of a Permanent Establishment (PE) in India. They asserted that data centre in India were operated by separate entities and that payments were made on an arm's length basis.
- They raised concerns about the AO's reliance on public domain information, which they believed was not accurate.

Revenue's contention

Lack of Vital Information:

- The Revenue argued that AWS USA had not provided vital financial information necessary for tax assessment.

- They contended that AWS USA was servicing clients both in India and overseas from its PE in India.

Re-Opening of Assessments:

- The Revenue initiated the process of re-opening AWS USA's assessments, indicating their intent to reassess AWS USA's income tax liability in India.

Held:

The court found several errors in the AO's approach:

- The AO incorrectly assumed that AWS USA was not an incorporated entity but a Limited Liability Company (LLC), making the Indo-US DTAA inapplicable. This assumption was deemed erroneous, as the court recognized AWS USA as an incorporated entity.
- The AO failed to determine the proportion of income attributable to a potential PE in accordance with the provisions of the Indo-US DTAA.
- The court also noted AWS India's lack of cooperation in providing AWS USA's financial information.

To expedite resolution and without prejudice to the ongoing assessment proceedings related to AWS USA's tax liability, the court suggested withholding 8% of payments made by AWS India to AWS USA from 01.11.2022 to 31.03.2023. Both parties accepted this suggestion.

AMRG Take

This case underscores the significance of precise financial information and proper assessment in international business transactions. It highlights the intricacies of tax issues in transactions involving cloud services and the importance of providing necessary information for withholding tax determinations under Section 195(2) of the Act.

Furthermore, the case illustrates the limited scope of Section 195(2) proceedings and the broader authority of tax assessments. It emphasizes the need for cooperation between taxpayers and tax authorities and the consequences of withholding vital information during tax assessments. The court's suggestion of withholding, agreed upon by both parties, aims to expedite resolution while preserving the rights of both parties in ongoing tax assessment proceedings.



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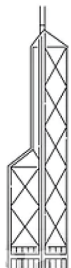
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