

India; United States

Amazon India to Pay WHT at 10% (Including 2% Equalization Levy) on Payments to Amazon USA, Says Indian Court

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The Delhi High Court (HC), in the case of *Amazon Web Services India Pvt Ltd & Anr v. Income Tax Officer & Anr.* (W.P.(C) 2335/2023 & CM APPL. 8849/2023), upheld the deduction of withholding tax (WHT) at 10% in aggregate under the Income Tax Act, 1961 (the Act) on payments made by the Indian taxpayer to its US group entity (AWS USA). The HC also ruled that the tax authorities can examine whether AWS USA's income was chargeable to tax in India under separate proceedings.

(a) Facts. The taxpayer (AWS India) was engaged in the business of reselling web services to third party customers in India under the reseller agreement between AWS India and AWS USA. AWS India made payments to AWS USA for the purchase of web services without deduction of WHT on such payments. However, AWS India paid an equalization levy (EL) at 2% of the gross consideration to AWS USA under section 165A of the Finance Act, 2016. Further, it also applied for a certificate from the tax authorities for nil WHT under the Act. The tax authorities (AO) however, held that payments to AWS USA were taxable under the Act, not subject to EL and that AWS India must deduct WHT at 16% before making payment to AWS USA.

(b) Issue. The HC examined the limited issue of WHT under section 195(2) of the Act and the applicable WHT rate.

(c) Decision. The HC pronounced a decision partially in favour of both the parties with observations set out below.

The order of the AO for levy of WHT at 16% was erroneous as it was based on (i) information available in the public domain, (ii) on the assumption that AWS USA was not an incorporated entity but a Limited Liability Company (LLC) and hence, the [India - United States Income Tax Treaty \(1989\)](#) (Treaty) was not applicable in the present case and (iii) on the assumption that AWS USA has a permanent establishment (PE) in India without carrying out the exercise of determination of revenue and profit attributable to the PE.

Further, the AO did not consider AWS USA's assessment proceedings where tax authorities have decided in favour of AWS USA (see [Standard Cloud Computing Services Fees Not Royalty or Fees for Included Services, Indian Court Says \(28 August 2023\)](#)).

Despite the above, the AO may proceed to correctly assess the income of AWS USA in India considering that:

- AWS India refrained from providing the financial statements of AWS USA for the preceding years citing that the information was available in public domain; and
- the tax authorities had issued notices for re-opening the assessments of AWS USA to examine the chargeability of its income in India.

Considering that these proceedings were confined to WHT, and that the financial year 2022-23 was already over, the HC suggested and the parties accepted deduction of an aggregate WHT at 10% (less 2% EL already paid) instead of 16% and deposit it the exchequer within a week from the date of the order. This would not prejudice the rights and contentions of the parties regarding the chargeability of AWS USA's income under the Act.

The decision was pronounced by the HC on 31 August 2023.

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