

# TT Alert

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## Withholding tax rate on remittance of Web Service Charges to AWS USA has been lower down

Hon'ble Delhi High Court in its recent ruling<sup>1</sup> has reduced the withholding tax rate on the payment of web service charges by the Amazon Web Services India Pvt Ltd. ('AWS India') to AWS USA from 16% to 8%

### Background

- AWS India is engaged in the business of reselling web services to the third-party customers in India. In pursuant to the Reseller Agreement, AWS India propose to make a payment to AWS USA for the purchase of web services. An application has been filed under S.195(2) of the ITA to AO for determination of withholding tax rate applicable on such payment.
- AWS India claim that the reseller fees to be paid by it is not chargeable to tax basis the following:
  - i. AWS USA is the tax resident of USA and does not have Permanent Establishment ('PE') in India;
  - ii. The reseller fee is liable for Equalisation Levy @ 2% and the same has been duly deposited;
  - iii. The reseller fee is not in the nature of Royalty nor Fee for Technical Services;
  - iv. Such payments are not chargeable to tax under the Indo-US DTAA;
  - v. Mention about the past assessment where ITAT has taken a view that it is not Royalty;

- The AO rejected AWS India's argument and relied on evidence that was in the public domain to reach the conclusion that AWS USA possessed substantial infrastructural assets (data centres) in India which constituted its PE. Additionally, he concluded that the contract between AWS India and AWS USA satisfied the criteria of business connection and thus income attributable to PE was chargeable to tax in India.
- According to AO, AWS USA has a sizable global infrastructure footprint made up of 96 availability zones around 30 regions, each of which contained one or more data centres. It has offices in number of Indian cities. The data centres / availability zones constitute the fixed place through which business of AWS USA is carried out.
- It was concluded by the AO that reseller fees paid by AWS India to AWS USA would not be subject to Equalisation Levy and would instead be charged as a Business Income in accordance with the provisions of the ITA.
- Basis the consolidated financial statement of holding company for the financial year 2021, the AO found that the income of amazon web services was about 30% of the net sales. The AO further noted that AWS USA had received various concessions from the State Government, and it would improve its profit margins, hence necessary adjustment was to be made. He calculated the profit margin to be 10% higher than that as disclosed in the financial accounts. Accordingly, he estimated the profit margin of 40% of the reseller fee and instructed AWS India to deduct 16% of withholding tax. On writ file by AWS India to the High Court, it was held as under.

## High Court decision

- The AO passed the order under S.195(2) of the ITA, based on the information in the public domain and certain assumptions which are ex-facie erroneous. The revenue's stand that AWS USA has PE in India is a contentious one. Further, the AO has not carried out the exercise of determining the proportion of income that is attributable to PE in accordance with India-US DTAA.
- Considering that the proceedings under S.195(2) is confined to withholding of tax and without prejudice regarding the chargeability of AWS USA's income during assessment, High Court held a total of 8% (10% less 2% Equalisation Levy that has already been paid) to be withheld as a tax.

## Key Takeaways

The proceedings under S.195(2) only determine the proportion of income chargeable to tax for the limited purpose of determining tax withholding. The determination under S.195(2) does not constrain the revenue from correctly assessing the payee's income chargeable to tax per the law. It is on the applicant to provide all the relevant information, which may be essential for application under S.195(2).

*'W.P.(C) 2335/2023 & CM Appl. 8849/2023 in the case of Amazon Web Services India Pvt Ltd & Anr. vs. ITO*

### Cases referred by the High Court in its decision:

- Google Asia Pacific Pte Ltd. v. Commissioner of Income Tax & Ors. W.P.(C) 215/2022
- Assistant Director of Income Tax – I, New Delhi v. E-Funds IT Solution Inc: (2018)13 SCC 294

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For any further details or questions, please contact us:

## India Offices

Ravi Mehta  
Managing Director & Head  
Transaction Tax  
ravi.mehta@rbsa.in  
+91 22 6130 6052

Amrita Bhatnagar  
Director  
Transaction Tax  
amrita.bhatnagar@rbsa.in  
+91 22 6130 6071

Aijaz Shaikh  
Manager  
Transaction Tax  
aijaz.shaikh@rbsa.in  
+91 22 6130 6008

### Mumbai

1121, Building No. 11, 2<sup>nd</sup> Floor,  
Solitaire Corporate Park, Chakala,  
Andheri Kurla Road, Andheri (E),  
Mumbai - 400 093  
Tel: +91 22 6130 6000

### Ahmedabad

912, Venus Atlantis Corporate Park,  
Anand Nagar Road, Prahladnagar,  
Ahmedabad - 380 015  
M: +91 97243 44445  
Tel: +91 79 4050 6000

### Gift City (IFSC)

Unit No. 16, Office No. 7,  
Wing D GIFT Aspire 3,  
Block 12, Road 1-D, GIFT SEZ,  
Gandhinagar - 382 355  
M: +91 97243 43847

### Delhi NCR

4<sup>th</sup> Floor, Tower 4B,  
DLF Corporate Park  
Gurugram - Delhi NCR  
Haryana - 122 002  
Tel: +91 12 4694 1100

### Bengaluru

104, 1<sup>st</sup> Floor, Sufiya Elite,  
#18, Cunningham Road,  
Near Sigma Mall,  
Bangalore - 560 052  
M: +91 97435 50600  
Tel: +91 80 4112 8593

### Hyderabad

6-3-248/B/1,  
4<sup>th</sup> Floor, Dhruv Arcade,  
Road Number 1, Banjara Hills,  
Lane opp. Kotak Bank,  
Hyderabad - 500034  
M: +91 90526 60300

## Global Offices

### Dubai

2001-01, Level 20, 48 Burj Gate Tower,  
Downtown, Sheikh Zayed Road,  
PO Box 29734, Dubai, UAE  
M: +971 52 382 2367  
+971 52 617 3699  
Tel: +971 4518 2608  
Email: dubai@rbsa.in

### Abu Dhabi

Unit No. 1102, Al Jamal Building,  
Al Ghatfah St, Al Danah,  
Abu Dhabi  
M: +971 52 617 3699  
Email: abudhabi@rbsa.in

### Singapore

6001 Beach Road,  
#22-01 Golden Mile Tower,  
Singapore - 199589  
Email: singapore@rbsa.in

enquiry@rbsa.in  
www.rbsa.in

