

# TAX FLASH NEWS

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## TDS on cloud service related payment is restricted to 8 per cent, since 2 per cent EL was paid

Recently, the Delhi High Court in the case of Google Asia Pacific Pte Ltd<sup>1</sup> (the taxpayer) dealt with the issue of deduction of tax at source on the Google Cloud Service related payments which were already subjected to 2 per cent Equalisation Levy (EL). As an interim measure, the High Court allowed the foreign taxpayer to receive the payment from an Indian entity post deduction of tax @ 8 per cent instead of 10 per cent under the India-Singapore tax treaty (tax treaty), since 2 per cent of EL was already paid on this transaction.

### Facts of the case

The taxpayer, a Singapore based entity, is engaged in the business of providing cloud services in India. During the Financial Year (FY) 2021-22, the Assessing Officer (AO) had issued a tax deduction certificate under Section 195(2) of the Income-tax Act, 1961 (the Act) directing Google Cloud India Pvt. Ltd. (GCI) to deduct tax at source at the rate of 10 per cent at the time of making payment to the taxpayer. The taxpayer filed a writ petition before the High Court challenging the higher withholding tax certificate issued by the AO. The taxpayer asked to permit GCI to make payments without deduction of tax at source. The taxpayer contended that it had already been subjected to EL of 2 per cent on the payments under consideration and the order passed by the AO will create a double jeopardy.

Alternatively, it was contended that it should be permitted to receive the remittances, after suffering a withholding tax of only 8 per cent. It would protect the interest of the Revenue, since 2 per cent EL was already paid.

Further the taxpayer relying on the decision of Epcos Electronic Components S.A.<sup>2</sup> contended that the withholding tax rate of 10 per cent as prescribed under the tax treaty is inclusive of the applicable surcharge and cess and therefore, no additional surcharge or cess is required to be imposed. Therefore, 10 per cent withholding rate is the maximum that can be imposed in terms of the tax treaty.

### High Court decision

The High Court referred the decision of Epcos Electronic as well as the Frequently Asked Questions (FAQs) issued by the CBDT where it was clarified that no additional surcharge and cess should be applied over and above the 10 per cent rate as prescribed under the tax treaty. Accordingly, the High Court directed that purely as an interim measure, the taxpayer would be entitled to receive its payment from GCI after deduction of tax at the rate of 8 per cent.

### Our comments

The Finance Act, 2020 introduced 2 per cent EL on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services. Subsequently, the issue arose with respect to interplay of taxability of services under royalty/FTS provisions vis-à-vis the EL provisions. The Finance Act, 2021 clarified that EL shall not apply if consideration is taxable as Royalty/FTS under the Act, read with tax treaty. Thus, when the transaction is not taxable as royalty/FTS, the taxpayer may become liable to pay EL.

In the instant case, though the taxpayer had already paid EL, the tax department wanted to tax the same transaction under the royalty provisions. The High Court, as an interim measure, directed that the taxpayer would be entitled to receive the cloud service related payment after deduction of tax at the rate of 8 per cent.

<sup>1</sup> Google Asia Pacific Pte Ltd v. CIT (W.P.(C) 215/2022) – Taxsutra.com

<sup>2</sup> Epcos Electronic Components S.A. v. UOI [2020] 316 CTR 126 (Del)

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