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

+ W.P.(C) 215/2022

GOOGLE ASIA PACIFIC PTE LTD

..... Petitioner

Through Mr.Deepak Chopra with Mr.Anmol
Anand and Ms.Priya Tandon,
Advocates.

versus

COMMISSIONER OF INCOME TAX & ANR.

..... Respondents

Through Mr.Sunil Agarwal, senior standing
counsel.

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Date of Decision: 03rd February, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J (ORAL)

1. The matter has been heard by way of video conferencing.
2. Present writ petition has been filed challenging the certificate dated 20th December 2021 issued under section 195(2) of the Act directing Google Cloud India Pvt. Ltd. (GCI) to deduct tax at source at the rate of 10% at the time of making payment to the Petitioner. Petitioner further seeks a direction to permit GCI to make payments to the Petitioner without deduction of tax at source during financial year 2021-22 relevant to assessment year 2022-23 under the Google Cloud Services Reseller Agreement.

3. At the outset, the learned counsel for the petitioner submits that this Court in *Sumo Logic vs. Commissioner of Income Tax International Taxation & Anr*, WP(C) 8720/2021 has taken cognizance of identical facts and issue and has issued notice to Respondent Nos.1 & 2.

4. Issue notice. Mr. Sunil Agarwal, Advocate accepts notice on behalf of Respondent Nos.1 & 2. He prays for and is granted six weeks time to file the counter affidavit. Rejoinder affidavit, if any, to be filed before the next date of hearing.

5. List the matter before the Joint Registrar (Judicial) for completion of pleadings on 11th May, 2022.

C.M.No.603/2022

6. This matter had originally been listed for hearing on 06th January, 2022. In support of the interim application, learned counsel for the Petitioner had submitted that given that the Petitioner has already subjected itself to EL of 2% on the payments under consideration, the impugned order creates a double jeopardy since in the impugned order, GCI i.e. the payer has been asked to withhold 10% tax as per the provision of section 115A of the Act read with the DTAA. Hence, he submitted that without prejudice to the rights and contentions, the Petitioner be permitted to receive the subject matter remittances, after suffering a withholding of only 8%. This contention is on the basis that the impugned order imposes a 10% withholding in terms of the DTAA. He submitted that this would protect the interest of the Revenue in terms of the impugned order, since 2% EL had already been paid/ will be paid on the payments received/ to be received under the Google Cloud Services Reseller Agreement.

7. On the above proposal of the Petitioner, Mr. Agarwal had sought time to seek instructions, which have now been received and placed before the Court. This Court had permitted the Senior Standing Counsel to receive instructions, which have now been received and placed before the Court. In these instructions, the AO has proposed that instead of directing GCI to deposit 8%, the Court may direct GCI to deposit INR 98.69 crores (inclusive of surcharge and cess), on the estimated payment of INR 1106.41 crores under the Google Cloud Services Reseller Agreement. A calculation of the above amount has been placed before the Court, in terms of the letter dated 10th January, 2022 issued by the Income Tax Officer TDS Ward-1(3)(2)(International Taxation), New Delhi.

8. Learned counsel for the Petitioner has pointed out that withholding the rate of 10% as prescribed under the DTAA is inclusive of the applicable surcharge and cess and therefore no additional surcharge or cess is required to be imposed. This position, he submits is settled by this Court in *Epcos Electronic Components S.A. v. UOI, (2020) 316 CTR 126* and therefore, the 10% withholding rate is the maximum that can be imposed in terms of the DTAA. He also submits that this position has also been clarified by the CBDT in the Taxpayer Information Series 44, under Chapter 8 [Frequently Asked Questions on (FAQs) Royalty and FTS and Related matters], issued by the Directorate of Income Tax dated 19th July, 2013, copy whereof has also been placed on record. Thus, he submits that the maximum tax liability on the proposed payments under Google Cloud Services Reseller Agreement as per the application filed by GCI for the year consideration could only be 110.64 crores. He points out that in the letter dated 10th January, 2022 issued by the ITO, this figure has been taken at 120.82 crores, which is

incorrect and consequently the computation of 98.69 crores, after considering the impact of 2% EL is also incorrect. He further submits that the actual amount payable, being the 8%, would be quantified at 88.51 crores (to be paid progressively), as there is no applicability of additional surcharge or education cess in respect of the same as per the provisions of the DTAA. He also submits that given this interim arrangement, the fact that although the impugned order directs a 10% withholding, the deposit of 8% by GCI should not be construed as any non-compliance of the impugned order so as to attract the provisions of section 201 of the Act on GCI. He accordingly submits that the appropriate directions may be issued in this regard towards the interim arrangement.

9. We have considered the rival contentions and have also perused the operative part of the impugned order (page 77 of the writ petition), wherein the Respondent No. 2 has made the payments under consideration liable for a withholding at the rate of 10% in accordance with section 115A of the Act read with the DTAA. We have also perused the decision of this Court in *Epcos Electronic* (Supra) as well as the FAQ issued by the CBDT, wherein it has been held that no additional surcharge and cess is to be applied over the 10% rate as prescribed under the DTAA. In that view of the matter, we direct that purely as an interim measure, the Petitioner would be entitled to receive its payment from GCI subject to a deduction of 8% to be paid to the Respondent No.2 progressively. This interim arrangement is being made under the orders of this court. The deposit of 8% should not be treated as any non-compliance of the impugned order.

10. With this direction, the present application stands disposed of.

C.M.No.5933/2022

11. By way of this application, the Petitioner has filed the amended memo of parties, wherein the payer i.e. Google Cloud India Pvt. Ltd. has been impleaded as proforma respondent – Respondent No. 3.

12. The application is allowed and the amended memo, filed along with this application, is directed to be taken on record.

13. Accordingly, the application stands disposed of.

MANMOHAN, J

NAVIN CHAWLA, J

FEBRUARY 3, 2022

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