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Delhi High Court: MasterCard not liable to pay Equalisation Levy, pending decision of the Delhi HC in a separate case challenging PE status

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Brief background and the Judgement of the Authority of Advance Rulings (AAR)

1. An advance ruling was sought by MasterCard Asia Pacific Pte Ltd, Singapore (the assessee), regarding the taxability of fee received from Indian banks and other financial institutions for its 'payment processing services' in India.
2. The assessee had received transaction processing fee in exchange for authorization, clearing and settlement of card-based transactions and additional fee for incidental services. Further, each Financial Institution was equipped with a MasterCard Interface Processor (MIP), an electronic device that connected the financial institution to the MasterCard network. The assessee's subsidiary in India (MasterCard India), owned and maintained MIPs and also provided support services.
3. The AAR, in its order dated June, 2018, had held that the assessee provided the 'transaction processing services' through the MIP and MasterCard Network(transmission towers, leased lines, fibre optic cables and transmission nodes), thereby constituting a Fixed Place Permanent Establishment (PE) of the assessee in India under the India-Singapore tax treaty (tax treaty). The AAR noted that MIPs and MasterCard network, situated in India, were at the disposal of the assessee and facilitated the examination and verification of a transaction, failing which the transaction would not be authorised. Further, on account of the fact that all facilities and service personnel of MasterCard India were at the disposal of the assessee, it too constituted Fixed Place PE of the assessee in India.
4. The AAR also held that the assessee constituted Service PE in India on account of the fact that assessee's employees visited India and performed integral activities. Further, observing that MasterCard India habitually secured orders for the assessee, the AAR held that the assessee also constituted a Dependent Agent PE in India.
5. The assessee filed a Writ Petition in the Delhi High Court against the order of the AAR, where decision is still pending.
6. The assessee moved to the Delhi High Court separately seeking stay on payment of Equalisation Levy on digital transactions.

Contentions of the assessee before the High Court - regarding Equalisation Levy

1. The assessee had a PE in India, owing to the binding nature of the order of the AAR and resultantly, it was paying income tax on service fee received.
2. Section 165A (2) of the Income Tax Act provides an exception for the applicability of Equalisation Levy for entities that have a PE in India. The assessee submitted that if it were to succeed in the writ petition before the High Court, on the PE issue, it would be liable to pay tax as per the provisions of Equalisation Levy. However, any further payment would lead to double taxation.
3. The assessee thus filed an application before the High Court, seeking stay of the payment of Equalisation Levy under Section 165A read with Section 166A of the Finance Act, as amended by Finance Act 2020, during the pendency of the writ petition.



Decision of the High Court

1. In reply to the notice issued by the High Court, the department filed a reply affidavit admitting that it was bound by the order of the AAR that stipulated that the assessee had a PE in India. The department stated that it had 'no desire' to collect Equalisation Levy in respect of income on which income tax has been paid by the applicant either as advance tax or as deduction of tax at source, made by its customer banks in India, during the pendency of writ petition.
2. The department also submitted that if the assessee succeeds in persuading the court that it does not have a PE in India, then it would be eligible to receive a refund of income tax, with interest. However, at the same time, it would be liable to pay Equalisation Levy, with statutory interest for the period of delay.
3. The department considered itself bound by the decision of the AAR, did not seek payment of Equalisation Levy, and considered the question of imposition of penalty on non-payment of the same as 'premature and academic'.
4. The High Court accepted the assertions made by the department in the reply affidavit and held it bound by the same. Thus, the assessee would not be liable to pay any equalisation levy, unless the writ petition is decided in the assessee's favour.

Nangia Andersen LLP's Take

The ruling comes as a relief to MasterCard as its income would not be subject to double taxation (regular income tax as well as Equalisation Levy). Concurrently, it shall also be of assistance to those foreign entities whose cases are pending disposal in respect of creation of PE in India, as they would be spared from the simultaneous imposition of Equalisation Levy.

The laws governing Equalisation Levy are clear in respect of its non-applicability in cases where specified digital services are provided by an entity, having a PE in India. Where a PE is created, the foreign entity is liable to pay income tax and abide by the compliance framework stipulated by the Income Tax Act. The judgment brings further clarity on the issue and establishes once again, that a legitimate case shall always be honoured.

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