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

+ W.P. (C) 10944/2018

MASTERCARD ASIA PACIFIC PTE. LTD. .... Petitioner

Through: Mr. Harish N. Salve, Senior Advocate  
with Ms. Anuradha Dutt, Mr. Tushar  
Jarwal, Mr. Rahul Sateija and  
Mr. Deepak Thackur, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents

Through: Mr. Vivek Goyal, CGSC for  
respondent No. 1/UOI.  
Mr. Himanshu S. Sinha, Special  
Counsel with Mr. Yash Varmani,  
Advocate for respondent Nos. 2&3/  
Income Tax Department.

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**ORDER**

% **18.08.2020**

**C.M.No.17413/2020 (for early hearing)**

Learned senior counsel for the applicant/petitioner does not wish to  
press the present application at this stage.

Consequently, the present application stands disposed of.

**C.M.No.17940/2020**

The matter has been heard by way of video conferencing.

Present application has been filed by the petitioner seeking stay of

payment of equalization levy under Section 165 A read with Section 166 A of the Finance Act, 2016 as amended by Finance Act, 2020 during the pendency of the present writ petition.

In the present case, the Authority of Advance Ruling has held in the impugned ruling dated 6<sup>th</sup> June, 2018, that the applicant has multiple permanent establishments in India and consequently, the sum received by the applicant from its customer banks located in India is liable to tax in India. In fact, on that basis the respondents are collecting entire tax from the applicant.

However, the applicant's case before this Court is that it is not liable to tax in India as its core business is carried outside India and none of the activities which are carried out in India result in the existence of either a permanent establishment ("PE") or the payment received by it can be characterized as Royalty.

A new levy viz Equalisation Levy has been introduced w.e.f. 01<sup>st</sup> April, 2020 by amendment of the Finance Act, 2016 *vide* the Finance Act, 2020 and is being levied on the entities that do not have a PE in India. Since it is the applicant's case that it does not have a PE in India, it would be liable to pay tax under the new levy. However, according to the applicant, any further payment would result in double taxation.

In reply to the notice issued by this Court, the respondent no.3 has filed a reply-affidavit, in which it is stated as under:-

*"7. In view of the answering Respondent, the Applicant is not liable to pay Equalization Levy under the Finance Act in respect of the subject income as it has a PE in India and the subject income is effectively connected to this PE. This income is subject to income tax under the IT Act. Section 165A (2) provides for an*

*exception for applicability of Equalization Levy for entities that have a PE in India. Such entities are not liable to EL in respect of any income which is effectively connected to their Indian PE. The existence of PE and the consequent taxation of income reasonably attributable to the PE, is a position that neither the Respondent nos. 2 and 3 nor the Applicant can resile from. It arises from the binding effect of the order of the Authority for Advance Rulings (AAR) u/s 245S of the IT Act.*

*8. In conformity with the above legal position, the answering Respondent herein has no desire or authority of collecting the EL from the Applicant in respect of the income on which income tax has been paid by the Applicant either as advance tax or as TDS made by its customer banks in India during the pendency of this writ petition.*

*xxx*

*xxx*

*xxx*

*11. During the course of the hearing on 06/08/2020, it was submitted on behalf of the Applicant that it is fearful of being subjected to penalty in future. It was contended that if it were to succeed in the writ petition on the PE issue, it may be subject to penalty for non-payment of EL for the period of pendency of the writ petition. In this respect. it is submitted that in the event the Applicant succeeds in the writ petition to persuade this court to hold that it does not have a PE in India, then it would be eligible to receive a refund of income tax along with statutory interest. At the same time. it would be liable to pay EL with statutory interest for the period of delay in payment of EL. The Respondent herein being bound by the Ruling of the AAR is not seeking payment of EL, the question of imposition of penalty is premature and academic.*

*xxx*

*xxx*

*xxx*

*14. The respondent would also like to draw attention of the Hon'ble court to the fact that while the petitioner has paid taxes by way of TDS or advance tax, it has not admitted any income in its*

*return of income. Once the writ petition filed before this Hon'ble court is decided, the consequential action under the Income-tax Act, 1961 or the under the Equalization Levy provisions contained in the Finance Act, 2016 (as amended by the Finance Act, 2020) shall be taken as mandated by the law. Hence, there is no cause of action at this stage which could lead to any grievance necessitating this application.”*

In view of the aforesaid reply-affidavit, Mr.Harish N.Salve, learned senior counsel for the petitioner/applicant does not wish to press the present application any further. He, however, prays that the stand of the respondent no.3 be recorded and it be held bound by the same.

This Court is of the view that the respondent no.3 can have no objection to being held bound by its own averments in the reply/counter affidavit. Consequently, the averments made in the aforesaid paragraphs by the respondent no.3 are accepted by this Court and respondent no.3 is held bound by the same.

With the aforesaid directions, the present application stands disposed of.

The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

**MANMOHAN, J**

**SANJEEV NARULA, J**

**AUGUST 18, 2020**

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