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TAX FLASH NEWS

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Payments by television channel entity to advertising agencies are 'commission' under Section 194H of the Income-tax Act and therefore liable for deduction of tax at source

Background

Recently, the Supreme Court in the case of Prasar Bharti[1] (the taxpayer) held that payments made by the taxpayer to advertising agencies are 'commission' under Section 194H of the Income-tax Act, 1961 (the Act). Therefore, the taxpayer has an obligation to deduct tax at source while making payments to such advertising agencies. The Supreme Court observed that the relationship between the taxpayer and the accredited agencies was that of a principal and agent. As per the terms of the agreement, both the parties intended that the amount paid by the taxpayer to the agencies should be paid by way of commission and therefore, they have used the expression 'commission' in the agreement.

Facts of the case

- The taxpayer is known as 'Prasar Bharati Doordarshan Kendra'. It functions under the Ministry of Information and Broadcasting, Government of India. The taxpayer, in the course of their business activities, which include the running of the TV channel called 'Doordarshan', has been regularly telecasting advertisements of several consumer companies.

- With a view to have a better regulation of the practice of advertising and to secure the best advertising services for the advertisers, the taxpayer entered into an agreement with several advertising agencies. In terms of the agreement, the advertising agency was required to make an application to the taxpayer to get the 'accredited status' for their agency so as to enable them to do business with the taxpayer of telecasting the advertisements of several consumer products manufactured by several companies on the appellant's Doordarshan TV Channel.

- The agreement, *inter alia*, provided that the taxpayer would pay 15 per cent by way of commission to the agency. The Agency was to retain the commission/remuneration earned and not to part the same either directly or indirectly with any other person, advertiser or representative of any advertiser for whom it may be acting or has acted as an advertising agency.

- The agreement also provided the manner, mode and the time within which the payment was to be made by the Agency to the taxpayer. The failure to make the payment was to result in losing the accredited status by the Agency. The Agency was to give minimum annual business of INR6 lakhs to the taxpayer in a financial year failing which their accredited status was liable to be withdrawn. The agency was to furnish a bank guarantee for a sum of INR3 lakhs.

[1] The Director, Prasar Bharti v. CIT (Civil Appeal Nos. 3496-3496 of 2018) – Taxsutra.com

- During the year under consideration[2], the taxpayer paid a sum of INR25.67 million and INR22.96 million to various accredited Agencies, with whom they had entered into the aforementioned agreement for telecasting the advertisements given by these Agencies relating to products manufactured by several consumer companies. The amount was paid by the taxpayer to the Agencies towards the commission in terms of the agreement. The taxpayer did not deduct tax on the payments made to the Agencies on the premise that the same was not liable for deduction of tax at source under the Act.

- The Assessing Officer (AO) held that the provisions of Section 194H of the Act are applicable to the payments made by the taxpayer to the Agencies because the payments were made in the nature of 'commission' as defined in the Explanation appended to Section 194H of the Act. The AO held that the taxpayer, therefore, committed default thereby attracting the rigor of Section 201(1) of the Act because they failed to deduct the 'tax at source' from the amount paid to various advertising agencies during the Assessment Years in question as provided under Section 194A of the Act.

- The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO. However the Tribunal allowed the appeals of the taxpayer and set aside the orders of the AO and the CIT(A).

- The High Court held that the provisions of Section 194H are applicable to the payments made by the taxpayer to the Agencies because the payments made were in the nature of 'commission' paid to the Agencies as defined in Explanation appended to Section 194H of the Act and since the taxpayer failed to deduct the 'tax at source' while making these payments to the Agencies in terms of the agreement in question, they committed default of non-compliance of Section 194H resulting in attracting the provisions of Section 201 of the Act.

Supreme Court decision

- The Explanation provided in Section 194H of the Act defines the expression 'commission or brokerage'. It is an inclusive definition and includes therein any payment received or receivable, directly or indirectly by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to assets, valuable article or thing not being securities.

- The High Court was right in holding that the provisions of Section 194H are applicable to the taxpayer because the payments made by the taxpayer pursuant to the agreement were in the nature of 'commission' and, therefore, the taxpayer was under statutory obligation to deduct the tax at the time of credit or/and payment to the payee.

- The agreement itself has used the expression 'commission' in all relevant clauses. There is no ambiguity in any clause and no complaint was made to this effect by the taxpayer. The terms of the agreement indicate that both the parties intended that the amount paid by the taxpayer to the agencies should be paid by way of 'commission' and it was for this reason, the parties used the expression 'commission' in the agreement.

- Keeping in view the tenure and the nature of transaction, it is clear that the taxpayer was paying 15 per cent to the agencies by way of 'commission' but not under any other head. The transaction in question did not show that the relationship between the taxpayer and the accredited agencies was principal to principal rather it was principal and agent.

- The payment of 15 per cent was being made by the taxpayer to the agencies after collecting money from them and it was for securing more advertisements for them and to earn more business from the advertisement agencies.

- Accordingly, it has been held that the payment was in the nature of 'commission' paid by the taxpayer to the advertisement agencies to secure more business for the taxpayer. Once it is held that the provisions of Section 194H apply to the transactions in question, it is obligatory upon the taxpayer to deduct tax while making payments to the advertisement agencies. The non-compliance of Section 194H by the taxpayer attracts the rigor of Section 201of the Act.

- The decision in the case of Jagran Prakashan Ltd[3] relied on by the taxpayer is distinguishable to the facts of the present case. The Supreme Court observed that the facts of each case would decide the nature of payment made by the party. In the case of Jagran Prakashan Ltd., the taxpayer did not have any agreement like the one in the present case wherein in terms of the agreement in the present case, it is unmistakably proved that the payment was being made by the taxpayer to the agencies by way of a 'commission'.

[2] Assessment Year 2002-03 and 2003-04

[3] Jagran Prakashan Ltd v. DCIT [2012] 345 ITR 288 (All)

Our comments

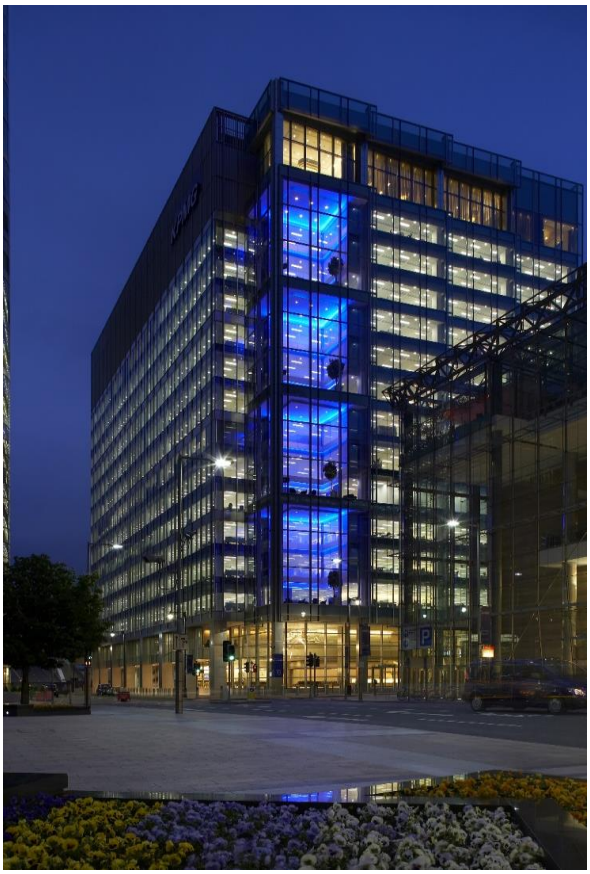
The issue of applicability of TDS provisions on payments made by television channels or media houses to advertising agencies for procuring and canvassing for advertisements has been a matter of debate before the courts. The issue has been raised in various cases as to whether the fees taken or retained by advertising companies from media companies for booking advertisements (typically 15 per cent of the billing) are 'commission' or ' discount' . It has been argued by the taxpayers that since the relationship between the media company and the advertising company is on a principal-to-principal basis, such payments are in the nature of a trade discount and not commission and, therefore, outside the purview of TDS under Section 194H of the Act. The tax department, on the other hand, has been contended that since the advertising agencies act on behalf of the media companies for procuring advertisements, the margin retained by the former, amounts to a constructive payment of commission and, accordingly, TDS under Section 194H of the Act is attracted.

The aforesaid issue has been examined by the Allahabad High Court in the case of Jagran Prakashan Ltd[4] and Delhi High Court in the case of Living Media Limited[5] where it has been held that the relationship between the media company and the advertising agency is that of a ' principal to principal ' and, therefore, media company is not liable for TDS under Section 194H of the Act.

The Central Board of Direct Taxes (CBDT)[6] while referring to the decisions of Jagran Prakashan Ltd. and Living Media Ltd clarified that no TDS is attracted on payments made by television channels/newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements. However, it is important to note that the circular issued by the CBDT is binding on the tax authorities and not on the courts/Tribunal.

In the present case, the Supreme Court while referring to the terms of agreement observed that the relationship between the parties was to be treated as principal-agent. The agreement itself used the expression ‘commission’ in all relevant clauses. Therefore, the payment made by the taxpayer was in the nature of commission income, liable for deduction of tax at source.

In view of the present Supreme Court decision, it is important that the agreements between media companies and agencies are examined on a case-to-case basis to evaluate their impact.



[4] Jagran Prakashan Ltd v. DCIT [2012] 21 taxmann.com 489 (All)
[5] Living Media Ltd (Delhi High Court)
[6] CBDT Circular No. 5/2016, 29 February 2016

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