Deloitte.

India | Tax & Regulatory | For private circulation only | 16 April 2018

Global Business Tax Alert
Sharp Insights

In Prasar Bharati Doordarshan Kendra* case, Supreme Court upholds Kerala High Court's decision on applicability of Section 194H on payments made to advertising Agencies

**[2018] 92 taxmann.com 11 (SC)*

Issue no: GBTA/08/2018

In this issue:

Facts of the case

- Prasar Bharati Doordarshan Kendra (the taxpayer) is a fully owned Government of India undertaking engaged in telecast of news, various sports, entertainments, cinemas and other programmes.
- The taxpayer entered into agreements with several advertising Agencies (Agencies) to have a better regulation of the practice of advertising and to secure the best advertising services for advertisers.
- The agreement, *inter alia*, provided that the taxpayer would pay 15% by way of commission to the Agencies for telecasting the advertisements given by the said Agencies. Taxpayer decides the tariff for advertising fees that the Agencies can recover from the ultimate customers. As per the agreement, Agencies should adhere to the discipline introduced by the taxpayer in respect of advertisement content.
- The taxpayer was bound by advertisement contract canvassed by the Agencies with the customer.
- During AY 2002-03 and AY 2003-04 the taxpayer paid commission to the Agencies without deducting tax at source. The taxpayer was of the view that advertising Agencies are independent persons/principals and therefore provisions of Section 194H is not applicable.
- The AO was of the view that the provisions of Section 194H of the Act are applicable to the payments made by the taxpayer to the Agencies because the payments made were in the nature of "commission" as defined in the Explanation appended to Section 194H of the Act.
- The AO held the taxpayer to be 'assessee in default' u/s 201(1) of the Income Tax Act, 1961 ('the Act') because the taxpayer had failed to deduct tax at source on payments made to the Agencies.
- Commissioner of Income Tax (Appeals) and the Kerala High Court upheld the assessment order. However, Hon'ble ITAT had set aside the orders of the CIT(A) and AO. Aggrieved by Kerala High Court's order, the taxpayer approached Supreme Court.

Taxpayer's contention

The taxpayer explained that the Agencies purchased the air time and sold it in the market for advertisement to their customers after retaining 15% commission. Therefore, the relationship of the Taxpayer with the Agencies is not that of a principal and an agent. In view of this, the payments made were not in the nature of commission so as to attract the rigor of Section 194H and Section 201 of the Act.

Issue under consideration

Whether commission in the form of discount paid by the taxpayer to the various advertising Agencies were liable to tax withholding under Section 194H of the Act?

Ruling of the supreme court

- The Supreme Court found no merit in the appeals filed by the taxpayer.
- It was of the view that the reasoning and the conclusion arrived at by the AO, CIT (Appeals) and the High Court appears to be just and proper and does not call for any interference.
- The Supreme Court highlighted the following observations it made to conclude that the taxpayer was liable to deduct tax at source under Section 194H on the payments made to the Agencies:
  - The agreement itself has used the expression "commission" in all relevant clauses;
  - There was 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% 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;
  - It was also clear that payment of 15% 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;
  - There was a clause in the agreement that the tax shall be deducted at source on payment of trade discount;
  - The definition of expression "commission" in the Explanation appended to Section 194H being an inclusive definition giving wide meaning to the expression "commission", the transaction in question did fall under the definition of expression "commission" for the purpose of attracting rigor of Section 194H of the Act.

Conclusion

- Once the relationship between parties to an agreement is that of a principal and agent, provisions of Section 194H is triggered. Nomenclature of the payment (i.e. discount or commission) and payment mechanism (upfront or deduction by agent) does not matter.
- The Hon'ble Supreme Court reached the above conclusion, by giving due importance to the relevant provisions of the agreement signed by the taxpayer with the Agencies.
- Non-deduction of tax at source results into levying of interest and may also attract penalty and prosecution provisions of the Act. As such, in view of the above decision, it is advisable to tax deductors to review their agreements and revisit tax positions with respect to applicability of Section 194H on similar payments made.

Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the Dbriefs page

Download the report

Contacts

Ahmedabad
19th Floor, Shapath - V
SG Highway,
Ahmedabad – 380 015.
Tel: + 91 (079) 6682 7300
Fax: + 91 (079) 6682 7400

Bangalore
19th Floor, 46 - Prestige Trade Tower, Palace Road, High Grounds,
Bengaluru,
Karnataka – 560001.
Tel: + 91 (079) 6627 6000
Fax: +91 (080) 6627 6010

Chennai
No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Coimbatore
Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Delhi/Gurgaon
Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Hyderabad
KRB Towers, Plot No. 1-4,
Survey No. 65 to 67,
1st -3rd Floor
Madhapur, Serilingampally(M),
RR District, Hyderabad.
Tel: +91 (040) 6603 2600
Fax:+91 (040) 6603 2714

Kolkata
13th and 14th Floor,
Building – Omega
Bengal Intelligent Park
Block – EP & GP
Sector V, Salt Lake City,
Kolkata – 700091
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Mumbai
Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone (W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Pune
706, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605

Deloitte makes an impact that matters