



CBDT clarifies with respect to the deduction of tax at source on specified payments by broadcasters/television channels to production houses and television channels/publishing houses to advertisement companies

Background

Recently, the Central Board of Direct Taxes (CBDT) has issued a circular¹ on the applicability of the provisions dealing with tax deducted at source (TDS) on payments made by broadcasters or television channels to production houses for the production of content or programmes for telecasting. The CBDT has clarified that where the content is produced as per the specifications provided by the broadcaster/telecaster and the copyright of the content programme also gets transferred to the broadcaster/telecaster, such a contract is covered by the definition of the term 'work' in Section 194C of the Income-tax Act, 1961 (the Act) and, therefore, liable for a deduction of tax at source. However, in cases where the broadcaster/telecaster acquires only the broadcasting/telecasting rights of the content which is already produced by the production house, there is no contract for 'carrying out any work', and such payments are not liable for the TDS under Section 194C of the Act.

The CBDT issued another circular² on the applicability of TDS provisions on payments made by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements. It has been clarified that the deduction of tax is not required on payments made by television channels/newspaper companies to the advertising agency for booking or procuring or canvassing for advertisements. The circulars are summarised as follows:

TDS on payments made by broadcasters or television channels to production houses for production of content or programme for telecasting

The issue of whether the payments made by the broadcaster/telecaster to production houses for the production of content or programmes for telecasting are payments under a 'work contract' or a contract for 'professional or technical services' and, therefore, liable for TDS under Section 194C or 194J of the Act. The CBDT had received various representations in this regard. Accordingly, the

¹ CBDT Circular No. 04/2016, dated 29 February 2016

² CBDT Circular No. 05/2016, dated 29 February 2016

CBDT dealt with the same in the following manner:

- While applying withholding of tax on contract for content production, a distinction is required to be made between:
 - Payment made for the production of content/programme as per the specifications of the broadcaster/telecaster and
 - Payment made for the acquisition of broadcasting/telecasting rights of the content already produced by the production house.

Where the content is produced as per the specifications provided by the broadcaster/telecaster and the copyright of the content programme also gets transferred to the broadcaster/telecaster, the CBDT clarifies that such contracts are covered by the definition of the term 'work' in Section 194C of the Act and, are, therefore, liable for TDS. However, in cases where the broadcaster/telecaster acquires only the broadcasting/telecasting rights of the content already produced by the production house, there is no contract for 'carrying out any work', as required by sub-section (1) of Section 194C of the Act. Therefore, such payments are not liable for TDS under Section 194C of the Act. However, payments of this nature may be liable for TDS under other provisions under Chapter XVII-C of the Act.

TDS on payments made by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements

The issue of the applicability of TDS on payments made by television channels or media houses, publishing newspapers or magazines to advertising agencies for procuring and canvassing for advertisements has been examined by the CBDT in view of representations received in this regard. The CBDT circular states that there are two types of payments involved in the advertising business:

- Payments by clients to the advertising agency and
- Payments by the advertising agency to the television channel newspaper company.

The applicability of TDS provisions on these payments has already been dealt with in the CBDT Circular No. 715³, where it has been clarified that TDS under Section 194C of the Act will apply to the payment by the client to the advertising agency. However, TDS provisions will not be applicable to the payment by the advertising agency to the television channel/newspaper company.

However, another 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) is a '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 trade discounts and not commission and, therefore, outside the purview of TDS under Section 194H of the Act. The tax department, on the other hand, has taken the stand in some cases that since the advertising agencies act on behalf of the media companies for procuring advertisements, the margin retained by the former amounts to constructive payment of commission and, accordingly, TDS under Section 194H of the Act is applicable.

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 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, the media company is not liable for TDS under Section 194H of the Act. Further, the Special Leave Petitions (SLPs) that were filed by the tax department in the aforesaid cases were dismissed by the Supreme Court. Though these decisions are in respect of print media, the ratio is also applicable to electronic media/television advertising as the broad nature of the activities involved is similar.

³ CBDT Circular No. 715, dated 8 August 1995

⁴ Jagran Prakashan Ltd v. DCIT [2012] 21 taxmann.com 489 (All)

The CBDT clarifies that TDS provisions are not applicable to payments made by television channels/newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements. The commission referred to in Question No. 27 of the CBDT's Circular No. 715 does not refer to payments by media companies to advertising companies for the booking of advertisements but to payments for engagement of models, artists, photographers, sports persons, etc. and therefore, is not relevant to the issue of TDS referred to in this circular.

Our comments

With regards to the TDS on the 'agency commission' earned/retained by advertising agencies from media houses, the Courts have held that relationship between the parties is on a principal-to-principal basis, and such payments are in the nature of trade discounts and thus, outside the purview of TDS provisions. With respect to the payments made by TV channels to production houses for the production of content as per the specifications of the TV channel, there are various judicial precedents⁵ in the favour of taxpayers holding that such payments would be subject to TDS under Section 19C of the Act at the rate of 2 per cent (and not under Section 194J of the Act at the rate of 10 per cent). The CBDT has now clarified in line with the judicial precedents on the matter.

This is a welcome step for the Media & Entertainment industry as these circulars provide clarity on certain long drawn tax issues, and it will help to reduce litigation in this area.



⁵ CIT v. Prasar Bharti [2007] 292 ITR 580 (Del), Nitin M. Panchamiya v. Addl. CIT [2012] 73 DTR 202 (Mum), ACIT v. Sahara One Media & Entertainment Ltd. [2014] 41 taxmann.com 488 (Mum)

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