



Since the payment made by the taxpayer is in kind, the provisions of Section 194J of the Income-tax Act are not applicable for deduction of tax at source

Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Red Chillies Entertainment Pvt. Ltd.¹ (the taxpayer) held that since the payment made by the taxpayer is in kind, the provisions of section 194J of the Income-tax Act, 1961 (the Act), dealing with deduction of tax at source on fees for professional or technical services, are not applicable.

Facts of the case

- The taxpayer is a company engaged in production of feature films and television programs. For the Assessment Year under consideration, taxpayer filed its return of income on 30 September 2009, declaring loss of INR58,457,272.
- During the assessment proceedings, the Assessing Officer (AO) verifying the information/details available on record, found that the taxpayer debited an amount of INR5,258,118 towards expenditure on gift.
- The taxpayer explained that it had given gift of certain items to its business associates who had worked for the film. It was submitted by the taxpayer that they are in the nature of perquisites to the concerned persons towards their contribution for the production of the film. The taxpayer also submitted that it has paid fringe benefit tax on such gift items, hence, it is allowable as expenditure.

- The AO observed that the taxpayer being the producer of the movie, the transaction between the taxpayer and the concerned persons cannot be considered as in the nature of gift as taxpayer being a company there is no love and affection between the taxpayer and the concerned persons to term the transaction as 'gift'.
- The AO was of the view that since the 'gift' is nothing but revenue paid to the concerned persons towards their services rendered for the film, the taxpayer has to deduct tax at source on such professional fees paid to them in terms of section 194J of the Act. Since the taxpayer has failed to deduct tax on the value of the gift items, the deduction claimed was disallowed under section 40(a)(ia) of the Act.
- The Commissioner of Income-tax (Appeals) [CIT(A)] confirmed the addition by holding that gift is nothing but professional fees paid to the concerned person, hence, attracts the provisions of section 194J of the Act.

Tribunal's ruling

- As far as the factual aspect is concerned, there is no dispute that instead of making payment in cash or in money terms to some of the actors/actresses, who acted in the movie, the taxpayer has paid in kind which has been termed as 'gift'.
- On a reference to the provisions contained in section 194J of the Act, it is evident that any person not being an individual or HUF responsible for paying to a resident any sum by way of fees for professional services or technical services, etc., is required to deduct tax at source.

¹ Red Chillies Entertainment Pvt. Ltd. v. ACIT ITA no.1577/Mum./2013 AY 2009-10
This decision also covers other issues, however, this Flash news only deals with the issue pertaining to the deduction required to be made under Section 194J of the Act and resultant allowability of the expenditure

- The Tribunal referred to the decision of H.H. Rama Verma², relied upon by the taxpayer, where the Supreme Court while referring to the expression 'any sum paid' used in section 80G, held that 'any sum' referred to in the provision would only mean cash amount of money.
- The Tribunal further referred to the decision of the Karnataka High Court in the case of Hindustan Lever Ltd.³ where, referring to the provisions of Section 194B of the Act, the High Court held that since the payments are in kind there is no requirement of deduction of tax at source.
- The Tribunal also referred to the decision of the Karnataka High Court in the case of Chief Accounts Officer, Bruhat Bangalore Mahanagar Palika⁴ and applying the principles in the decisions referred above, held that since the payment made by the taxpayer is in kind, the provisions of section 194J of the Act are not applicable.

Our comments

The issue with respect to applicability of Tax Deducted at Source (TDS) provisions to payments made in kind has been a subject matter of debate before the Courts/Tribunals.

In the case of K.C. Suresh⁵, the taxpayer received a Maruti car as prize money. The Kerala High Court held that the deduction of tax at source under Section 194B of the Act in respect of the value of the car is valid. Subsequently, Section 194B of the Act has been amended by the Finance Act, 2007 to provide that in case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of the whole winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings. However, Section 194J of the Act does not provide for such a specific provision.

In the case of Kanchanganga⁶ the non-resident company received the charter-fee in the shape of 85 per cent of fish catch in India. The Supreme Court held that sale of fish and realization of sale consideration of fish by it outside India amounted to a receipt in India and the income earned by the non-resident company was chargeable to tax under section 5(2) of the Act. Therefore, the taxpayer was liable to deduct tax under Section 195 of the Act on

the payment made to the non-resident company. It seems the Supreme Court has upheld the applicability of TDS provisions under Section 195 of the Act to payments made in kind.

Section 195 of the Act refers to 'any other sum' chargeable to tax in India. Similarly, Section 194J of the Act refers to payment of 'any sum' on which tax needs to be deducted. However, the Mumbai Tribunal held that the provisions of Section 194J of the Act are not applicable to payment made in kind.



² H.H. Sri Rama Verma v/s CIT [1990] 187 ITR 308 (SC)

³ CIT v. Hindustan Lever Ltd. [2014] 361 ITR 001 (Kar)

⁴ CIT v. Chief Accounts Officer, Bruhat Bangalore Mahanagar Palike, [2015] ITA no.94 of 2015 and 466 of 2015, dated 20th September 2015 (Kar)

⁵ K.C. Suresh v. Director of Lotteries [1993] 199 ITR 267 (Ker)

⁶ Kanchanganga Sea Foods Ltd. v. CIT [2010] 325 ITR 540 (SC)

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