

The Central Board of Direct Taxes (CBDT) clarifies the applicability of withholding taxes on payments made to production houses and advertisement agencies

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The CBDT vide its circulars dated 29 February 2016 has clarified the following issues in respect of withholding tax applicability in the following scenarios:

1. Tax deduction at Source ('TDS') on payments made by broadcasters/telecasters to production houses (Circular No. 04/2016); and
2. TDS on payments made by television channels/publishing houses to advertisement companies (Circular No. 05/2016)

A. TDS on payments by broadcasters/telecasters - Circular No. 04/2016 dated 29 February 2016

Background

The issue of whether payments made by a broadcaster/telecaster to production houses for the production of content/ programme are liable to TDS under Section 194C of the Income-tax Act, 1961 ('the

Act') as 'works contract' or under Section 194J of the Act as a contract for 'professional or technical services' has given rise to several disputes.

Clarification issued by the CBDT

The CBDT has clarified that while applying the provisions of TDS on a contract for content production, a distinction is required to be made between (i) a payment for production of content/ programme as per the specifications of the broadcaster/ telecaster and (ii) a payment for acquisition of broadcasting/ telecasting rights of the content already produced by the production house.

In this regard, the CBDT has clarified that in the first situation 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 telecaster/ broadcaster, such a contract is covered by the definition of the term 'work' under Section 194C of

the Act and accordingly should be subject to tax under that section.

However, in a case where the telecaster/ broadcaster acquires only the telecasting / broadcasting rights of the content already produced by the production house, the CBDT has clarified that the same would not be regarded as a 'contract' for carrying out any 'work' and therefore not liable to TDS as per Section 194C of the Act. Such payments would however be liable to TDS under other sections of the Act.

B. TDS on payments by television channels/ publishers - Circular No. 05/2016 dated 29 February 2016

Background

Another issue which has been a subject matter of controversy is whether the fees/ charges retained by advertising companies (typically 15% of the billing) from media companies for canvassing/ booking advertisements is 'commission' liable to TDS under Section 194H of the Act or 'trade discount' which is not liable to TDS under the Act. In this respect, proceedings for non-withholding of taxes has been initiated on media companies in the past.

In this case, it has been the contention of the assessee 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 discount and not commission and, therefore, outside the purview of TDS under Section 194H. The 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 liable to TDS under Section 194H of the Act.

Clarification issued by the CBDT

The CBDT has 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. In this context, the CBDT has placed reliance on the decision of the Allahabad High Court in the case of Jagran Prakashan Ltd¹ and the Delhi High Court in the case of Living Media Limited² wherein it was held that the relationship between the media company and the advertising agency is that of 'principal-to-principal' and, therefore, not liable to TDS under Section 194H of the Act. CBDT has also noted that, the SLPs filed by the Department in the case of Jagran Prakashan and Living Media have been dismissed by the Supreme Court vide order dated 5 May 2014 and order dated 11 December 2009, respectively. The CBDT further notes that while these decisions have been rendered in the case of print media, the ratio can equally apply to electronic media/ television advertising.

The CBDT has also clarified that 'commission' referred to in Question No. 27 of Circular No. 715 dated 8 August 1995 does not refer to payments made by media companies to advertising companies for booking of advertisements but refers to payments for engagement of models, artists, photographers, sportspersons, etc.

In addition to the above, the CBDT has also noted that there are two types of payments involved in the advertising business:

- a) Payment by client to the advertising agency; and
- b) Payment by advertising agency to the television channel/ newspaper company.

In respect of the above, the CBDT, while placing reliance on Question Nos. 1 and 2 of its Circular No. 715 dated 8 August 1995, has clarified that while payments by clients to advertising agencies will be subject to TDS under Section 194C of the Act (as works contract), there will be no TDS on payments made by advertising agency to the media company.

Dhruva Comments:

The clarifications issued by the CBDT are indeed welcome and will provide much needed clarity to the

¹ Jagran Prakashan Ltd v DCIT (TDS) [345 ITR 288 (Allahabad)(2012)]

² CIT v Living Media India Ltd (ITA No. 1264/2007, dated May 6, 2008)

broadcasters/ telecasters and television channels/
publishers on this issue. Further, the circular will also
help to put to rest the pending litigation around
these issues.

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