

Supreme Court holds commission payments to advertising agencies liable to TDS

Summary

The Supreme Court ('SC')¹ has held that 'commission' payment by Prasar Bharati ('the appellant') to its 'accredited' advertising agencies, for procurement of advertisement, is liable to tax deduction at source (TDS) under provisions² of Income-tax Act, 1961 (the Act).

Facts of the case

- The Appellant is engaged in running of the TV channel "Doordarshan". The Appellant entered into agreements with several advertising agencies for procuring advertisement to be telecast on its TV channel.
- The agreement provided that Appellant would pay a commission of 15 per cent to the agencies for the advertisement revenue generated by them. The agreement also provided that the agency was to retain the commission earned and not to part with the same either directly or indirectly with any other person.
- During Assessment Years 2002-2003 and 2003-2004, the Appellant paid a sum of INR 2.6 crore and INR 2.3 crore, respectively to various Agencies towards commission as per the Agreement. The Appellant did not withhold any tax on such payments.
- The tax officer examined whether the payments were liable to TDS under the provisions of the Act and whether the Appellant had withheld tax on such payments.
- Based on the contents of the agreement, the tax officer did not accept the Appellant's contention that the transaction was on a principal-to-principal basis and held that such commission was liable to TDS under the provisions of the Act. The tax officer also levied interest on amount of TDS in default.
- The first appellate authority i.e. Commissioner (Appeals) concurred with tax officer's view. However, on appeal by the Appellant, the Income Tax Appellate Tribunal (ITAT) set aside the orders passed by tax officer and Commissioner (Appeals).

¹ The Director, Prasar Bharati vs Commissioner of Income Tax [(2018) 92 taxmann.com 11 (SC)]

² Section 194H of the Act

- Aggrieved by the ITAT's order, Revenue filed an appeal in Kerala High Court (HC) wherein the HC reversed the ITAT's decision.

SC ruling

- The SC agreed with view taken by HC that payment by Appellant to various agencies during AYs 2002-03 and 2003-04 are in the nature of 'commission' and subject to TDS under the provisions of the Act. The SC also upheld proceedings to levy interest for non-deduction of tax.
- The SC noted that as per the agreement, the agencies were required to secure minimum business for the Appellant to maintain their 'accredited' status. Referring to various clauses in the agreement, the SC rejected Appellant's stand that the relationship with the agencies was that of principal – principal.
- The SC observed that the Agreement itself used the expression 'commission' and the inclusive definition of 'commission' as per the Act gives a wider meaning to the term, hence, such commission was liable to TDS.
- The Appellant placed reliance on Allahabad High Court's decision in case of Jagran Prakashan Ltd³. The SC held that the facts of the Appellant's case are distinguishable and hence disregarded Appellant's reliance on Allahabad HC.

Our comments

The Central Board of Direct Taxes(CBDT) has accepted the judgement of Allahabad High Court in case of Jagran Prakashan Ltd and in 2016 issued a circular⁴ clarifying 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.

The SC has not considered the aforesaid circular in the present case. However, given the fact that SC has held that facts of current case are distinguishable from the case of Jagran Prakashan, the circular should still operate in principal-to-principal arrangements.

³ Jagran Prakashan Ltd. vs. Deputy Commissioner of Income Tax(TDS) [345 ITR 288]

⁴ Circular No. 05/2016 dated 29th February, 2016 [F.No. 275/06/2016-IT(B)]



© 2018 Grant Thornton India LLP. All rights reserved.

“Grant Thornton in India” means Grant Thornton India LLP, a member firm within Grant Thornton International Ltd, and those legal entities which are its related parties as defined by the Companies Act, 2013.

Grant Thornton India LLP is registered with limited liability with identity number AAA-7677 and has its registered office at L-41 Connaught Circus, New Delhi, 110001.

References to Grant Thornton are to Grant Thornton International Ltd (Grant Thornton International) or its member firms. Grant Thornton International and the member firms are not a worldwide partnership. Services are delivered independently by the member firms.

www.grantthornton.in

