

Clarification on applicability of withholding tax on payments made to production houses and advertisement agencies

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In brief

On 29 February 2016, the Central Board of Direct Taxes (CBDT) issued circulars (*Circular No. 4/2016 and Circular No. 5/2016*) to clarify the applicability of withholding tax with respect to the following issues:

- Withholding tax on payments made by broadcasters or television channels to production houses for production of content.
- Withholding tax on payments made by television channels and publishing houses to advertising companies for procuring advertisements.

This tax insight provides an overview of the relevant issue and the clarification by the CBDT.

In detail

Withholding tax on payments made by broadcasters or television channels to production houses for production of content (Circular No. 4/2016)

• Issue

In the past, several disputes have occurred as to whether payments made by broadcasters or telecasters to production houses for production of content or programmes are:

- a) payments in the nature of a “work contract” and liable for withholding tax under section 194C of the Income-tax Act, 1961 (the Act); or
- b) a contract for “professional or

technical services”, liable to withholding tax under section 194J of the Act.

• Clarification by the CBDT

The CBDT has clarified that in a contract for production of content, there are two types of payments/ transactions:

- i) payment to the production house for production of content as per the specification of the broadcaster/ telecaster
- ii) payment for acquiring the broadcasting/ telecasting rights of the content already produced by the production house

Under (i), when the production house produces

content as per the broadcaster’s specification and copyright of such content is also transferred to the broadcaster, the CBDT has clarified that such a contract is covered under the definition of “work” under clause (iv)(b) of the Explanation to section 194C of the Act, and hence liable to withholding tax under section 194C of the Act. The CBDT has also stated that this is in line with its clarification in Circular No. 715, dated 8 August 1998 (Question No 3).

Under scenario (ii), where the broadcaster acquires only the broadcasting rights of the content already produced by the production house, the CBDT has clarified that such a contract

is not for “carrying out any work” as per section 194C(1) of the Act. Accordingly, such payments are not liable to withholding tax under section 194C of the Act. However, the CBDT states that these payments may be liable to withholding tax under other sections of the Act.

Withholding tax on payments made by TV channels and production houses to advertising companies for procuring advertisements (Circular No. 5/ 2016)

• **Issue**

An issue that has always been a subject matter of litigation between the taxpayer and the Indian Revenue Authorities (IRA) is whether fees retained by advertising companies/ agencies from television channels (typically 15% of the bill amount) for booking advertisements, is in the nature of “commission” under section 194H of the Act or “discount” that is not liable to withholding tax under the Act.

The taxpayer’s contention has been that since the relationship between the advertising companies and television channels is a principal-to-principal relationship, such payments are in the nature of trade discount and not commission, and are outside the purview of section 194H of the Act.

On the other hand, the IRA’s view is that in certain situations, the advertising agencies act on behalf of the television channels for procuring advertisements, and hence the margin retained by them is in the nature of commission and hence liable to withholding tax under section 194H of the Act.

• **CBDT’s Clarification**

The CBDT has clarified that payments made by television

channels/ newspaper companies to advertising companies for booking advertisements is not liable for withholding tax under the Act.

In this connection, the CBDT has relied on the following decisions wherein the courts held that the relationship between media companies and advertising companies is of a principal-to-principal, and not liable to withholding tax under section 194H of the Act:

- i) Allahabad High Court (HC) in the case of Jagran Prakashan Limited¹; and
- ii) Delhi HC in the case of Living Media Limited²

In this connection, the CBDT has also observed that the Special Leave Petition filed by the IRA in both these cases have been dismissed by the Supreme Court. Though these decisions apply to print media, the CBDT has stated that it would also apply to electronic media/ television advertising, as the nature of activities involved is similar.

The CBDT has also clarified that “commission” referred to in Question No. 27 of its 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, photographers, artists, sportspersons, etc.

In addition, the CBDT has observed that there are two types of payments in the advertising business:

- i) payment by the client to the advertising agency; and
- ii) payment by the advertising agency to the television channel/ newspaper company.

The CBDT has stated that the applicability of withholding tax

on the above payments has already been dealt with in its Circular No. 715 dated 8 August 1995 (Questions No. 1 and 2). Accordingly, the CBDT clarifies that for payments under (i), withholding tax will apply under section 194C of the Act as a works contract, and for payments under (ii), i.e., payment by advertising agency to media company, there will be no withholding tax under section 194C of the Act.

The takeaways

- The clarifications provided by the CBDT is timely and much appreciated by broadcasters and television channels, as it puts an end to litigation on these issues.
- Although CBDT Circular No. 715 provides that withholding tax provisions would only apply when a client makes a payment to the advertising agency and not when the advertising agency makes a payment to the media company (print or electronic media), the CBDT, *vide* Circular No. 5/ 2016 has re-clarified and re-emphasised this aspect.
- These CBDT clarifications provided by the CBDT seem to be in line with one of the objectives of the Finance Minister in the Budget 2016— to reduce litigation and provide certainty in taxation.

Let’s talk

For a deeper discussion of how this issue might affect your business, please contact:

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

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

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