

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

ITA/458/2008

COMMISSIONER OF INCOME TAX, TDS,
KOLKATA

-Versus-

ABP PRIVATE LIMITED

Appearance:

Mr. Tilak Mitra, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Mr. Agnibesh Sengupta, Adv.

Mr. S. Datta, Adv.
Ms. Anupa Banerjee, Adv.
. . . for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 20th March, 2023

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the order dated 31st January, 2008 passed by the Income Tax Appellate Tribunal, B - Bench, Kolkata (the 'Tribunal') in ITA No.1332/Kol/2007 for the assessment year 2004-05.

This appeal was admitted on 8th September, 2008 for the following substantial question of law:

"Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in law in holding that trade discount allowed by the assessee to INS accredited Advertising Agent was not in the nature of Commission and therefore not subjected to TDS under the provision of Section 194H of the Income Tax Act"

We have heard Mr. Tilak Mitra, learned standing counsel appearing for the appellant/revenue and Mr. J.P. Khaitan, learned senior counsel assisted by Mr. Agnibesh Sengupta, learned advocate appearing for the respondent/assessee.

The substantial question of law which has been framed for consideration has been answered in favour of the respondent/assessee in several decisions. We note the following decisions which refers in favour of the respondent/assessee. First of the decision was in the case of *CIT Vs. Living Media India Limited* in ITA No.1264 of 2007 passed by the High Court of Delhi dated 6th May, 2008. The Court analysed an identical arrangement of the respondent/assessee in various advertising agencies and the control exercise by the Indian Newspaper Society (INS) and held that no tax need to be deducted at source under the provisions of Section 194H of the Act. The second decision which will enure in favour of the respondent/assessee is the decision of the High Court of Allahabad in *Jagran Prakashan Ltd. Vs. Deputy*

Commissioner of Income Tax (TDS), reported in (2012) 345 ITR 288 (All.). The third decision is of the High Court of Bombay in the case of *Principal Commissioner of Income Tax Vs. Dempo Industries (P.) Ltd.*, reported in (2021) 126 taxmann.com 112 (Bom.) wherein the Court held that the trade discount given by the assessee, engaged in business of publishing and selling newspaper, to newspaper vendors and advertising agencies was not in the nature of commission and no TDS was to be deducted under Section 194H on same.

The revenue seeks to place reliance on the decision of High Court of Kerala in the case of *CIT Vs. Director, Prasar Bharati*, reported in (2010) 325 ITR 205 (Ker.) which was affirmed by the Hon'ble Supreme Court in *Director, Prasar Bharati Vs. Commissioner of Income Tax*, reported in (2018) 403 ITR 161 (SC). On going through the decision in the case of *Prasar Bharati* (supra) we find that the case is clearly distinguishable on facts. In fact, the decision of the Kerala High Court reported in (2010) 325 ITR 205 (Ker.) considered by the High Court of Allahabad in the case of *Jagran Prakashan Ltd. Vs. Deputy Commissioner of Income Tax (TDS)*, reported in (2012) 345 ITR 288 (All.) and the decision was distinguishable. When the matter travelled upto the Hon'ble Supreme Court, at the instance of *Prasar Bharati*, in paragraph 37 of the judgement reported in (2018) 403 ITR 161 (SC) the Hon'ble Supreme Court noted the decision of the Allahabad High Court in

Jagran Prakashan and held that the facts of the said case are entirely different. Therefore, the decision and the case of Prasar Bharati is clearly distinguishable and not applicable to the facts and circumstances of the case on hand. More importantly after the decision of Jagran Prakashan and the decision of Living Media India Limited, the CBDT issued Circular being No.5 of 2016 dated 29th February, 2016. For better appreciation, the entire Circular is quoted hereunder :

"The issue of applicability of TDS provisions 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 Board in view of representations received in this regard.

2. It is noted that there are two types of payments involved in the advertising business :

- (i) Payment by client to the advertising agency, and*
- (ii) Payment by advertising agency to the television channel/newspaper company.*

The applicability of TDS on these payments has already been dealt with in Circular No.715 dated 8-8-1995, where it has been clarified in Question Nos.1 & 2 that while TDS under section 194C (as work contract) will be applicable on the first type of payment, there will be no TDs under section 194C on the second type of payment e.g. payment by advertising agency to the media company.

3. However, another issue has been raised in various cases as to whether the fees/charges taken or retained by advertising companies from media

companies for canvassing/booking advertisements (typically 15% of the billing) is 'commission' or 'discount'. It has been argued by the assesseees 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, TDS under section 194H is attracted.

4. The issue has been examined by the Allahabad High Court in the case of Jagran Prakashan Ltd. And Delhi High Court in the matter of Living Media Limited and it was held in both the cases that the relationship between the media company and the advertising agency is that of a 'principal-to'-principal' and, therefore, not liable for TDS under section 194H. The SLPs filed by the Department in the matter of Living Media Ltd. And Jagran Prakashan Ltd. Have been dismissed by the Supreme Court vide order dated 11-12-2009 and order dated 5-5-2014, respectively. Though these decisions are in respect of print media, the ratio is also applicable to electronic media/television advertising as the board nature of the activities involved is similar.
5. In view of the above, it is hereby 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. It is also further clarified that 'commission' referred to in Question No.27 of the Board's Circular No.715 dated 8-8-1995 does not refer to payments by media companies to advertising companies for booking of advertisements but to payments for engagement of models, artists, photographers, sportspersons, etc. and, therefore, is not relevant to the issue of TDS referred to in this Circular."

In terms of the above Circular, it has been clarified by the Board 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. It has been further clarified that the word 'commission' referred to Question No.27 of the Board's Circular No.715 dated 8th August, 1995 does not refer to payments by media companies to advertising companies for booking of advertisements but to payment for engagement of models, artists, photographers, sportspersons, etc. and, therefore, is not relevant to the issue of TDS referred in this Circular.

Thus, the legal position as understood by the CBDT is clearly in favour of the respondent/assessee. On going through the order passed by the Tribunal, we find that the Tribunal deeply examined the factual position more importantly, the various clauses as contained in the rules and regulations prescribed by the Indian

Newspaper Society of which clauses 20, 23 and 25 were referred to and after analysis of those clauses, the learned Tribunal held that it is clear that there is no principal and agent relationship between the newspaper and the advertising agency. Thus, both on facts as well as in law, the respondent/assessee has to succeed and the revenue has to fail.

In the result, the appeal [ITA/458/2008] filed by the revenue stands dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)