# *Payments made by a channel operator to secure advertisements, held liable to withholding tax as "commission" based on specific facts*

*April 11, 2018*

## *In brief*

In a recent decision[1] the Supreme Court (SC) has held that payments made by a channel operator (taxpayer) to appoint third party advertising agencies for securing advertisement business constitutes "commission" and accordingly subject to withholding tax under section 194H of the Income-tax Act, 1961 (the Act).

## *In detail*

***Facts***

- The taxpayer was engaged in telecasting news, sports, feature films and other programmes on its TV channel.
- The taxpayer entered into agreements with several advertisement agencies to secure advertisement business from different customers, for which it paid consideration as 15% of the advertisement revenue.
- The agencies entered into advertisement contracts with different customers as per the terms prescribed by the taxpayer in the agreements with such advertisement agencies.
- The tax officer held that payments made by the taxpayer to the advertisement agencies was in the nature of "commission," and, accordingly, tax was liable to be withheld under section 194H of the Act. This view was upheld by the Kerala High Court (HC) in the taxpayer's case, reversing the order of Income-tax Appellate Tribunal.

***Issue before the Supreme Court***

Whether payments made by the taxpayer to advertisement agencies is covered under the definition of "commission" and will attract withholding tax obligations under section 194H of the Act?

***Revenue's contentions***

Payments made to advertisement agencies were in the nature of "commission" as defined in the explanation to section 194H of the Act, and, accordingly, provisions of section 194H were applicable.

***Taxpayer's contentions***

- The taxpayer and advertisement agencies operated on a principal-to-principal relationship i.e., there was no principal-to-agent relationship.
- The taxpayer contented that the agencies in terms of the agreement, purchased air-time from the taxpayer and then sold it to the customer after retaining 15% of the amount as commission. It

[1] Civil Appeal Nos. 3496-3497 of 2018

was therefore contented that the transaction could not be regarded as that between a principal and an agent.

- Accordingly, consideration paid by the taxpayer to the advertising agencies was not in the nature of commission.

***Supreme Court's decision***

The SC upheld the Kerala HC's decision in the taxpayer's case by observing the following facts:

- The agreement between the taxpayer and the advertisement agencies itself had used the expression "commission".
- The transactions in question did not show that the relationship between the taxpayer and the advertisement agencies was principal-to-principal; rather, it was principal-to-agent.
- In view of the tenure and nature of the transaction, it was clear that the taxpayer was paying 15% to the advertisement agencies by way of commission.
- Payment of 15% was being made to secure more advertisements and to earn more business from the advertisement agencies.
- The agreements specifically stated that tax should have been withheld on trade discounts/ payments to be made to advertisement agencies.

In view of the aforesaid observations, it was held that the payment in question was in the nature of "commission," and, accordingly, tax was required to be withheld under section 194H of the Act.

## The takeaways

This decision of the SC brings more clarity on withholding tax obligations on commission payments. The decision reiterates, that actual conduct of the parties and the terms of the agreement both are required to be examined while analysing the transaction from tax perspective.

## Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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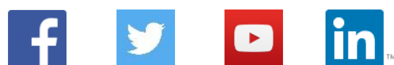


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