Payment of hoarding charges are liable to sec. 194C TDS and not sec. 194-I TDS

Summary – The Mumbai ITAT in a recent case of Ogilvy & Mather (P.) Ltd., (the Assessee) held that where assessee, engaged in business of advertising and marketing communication services, availed services of creative consultants, it was required to deduct tax at source under section 194J while making payments to them

Where assessee made payments of hoarding charges to different parties, it was required to deduct tax at source under section 194C

Facts

- The assessee company was engaged in the business of advertising and marketing communication services. It received services of creative consultants.
- The assessee had deducted tax at source in terms of the provisions of section 194J considering that the payment made to the creative consultants was in the nature of professional fee paid.
- The Assessing Officer thus opined that the terms of the employment of the consultant showed that it was a case of employer-employee relationship and, therefore, the payments made by the assessee were liable to be subjected to tax deduction at source in terms of section 192.
- The Assessing Officer thus held that assessee was in default within the meaning of section 201(1) for having short deducted the tax at source.
- The Commissioner (Appeals) confirmed the order of Assessing Officer.
- On second appeal:

Held

- Ostensibly, the terms and conditions of appointment of creative consultants by the assessee do establish that it is a case where assessee has hired the services of independent professionals in connection with its activity of rendering advertising/marketing communication services to its clients. Notably the consultants hired by the assessee had charged service tax from the assessee and they were not entitled to any benefits of employment which were normally associated with an employer-employee relationship, namely Provident fund, gratuity, leave encashment, etc.
- So however, the case set up by the Assessing Officer is that the terms of employment involve rendering of services for fixed period; utilizing the infrastructure facilities and consumables provided by the assessee company in rendering services; restriction on the consultants to work out of the premises of the assessee, etc. On this aspect, the assessee has explained that having regard to the nature of business of the assessee, it was functionally and otherwise found desirable that such consultants work out of the premises of the assessee for reasons of confidentiality, *etc*. It has been pointed out that the consultants are not prohibited from rendering services to other concerns, but

the only restriction being that they are not entitled to render services in the similar field as being rendered to the assessee. It has been explained that the aforesaid condition is a mechanism to safeguard the interest of the assessee company to protect its own business from the competitors.

- The restrictive covenants which are sought to be interpreted by the Assessing Officer to mean that it establishes an employer-employee relationship between assessee and the consultants have to be understood in the context of the business realities in which the assessee operates. Such restrictions cannot imbibe an employer-employee relationship to the contract with consultants. It is also quite clear that that the benefits of an employer-employee relationship which are normally available, do not apply to the impugned consultants, for instance, provident fund, leave encashment, gratuity benefits, etc.
- In conclusion, therefore, the plea of the assessee is upheld and the order of Commissioner (Appeals) is set aside. The Assessing Officer is directed to treat the payments made to the creative consultants as liable for deduction of tax at source under section 194J of the Act and not under section 192 of the Act. As a consequence, the demand raised on account of shortfall of deduction of tax at source under section 201(1) of the Act and interest under section 201(1A) of the Act *qua* the aforesaid issue is hereby set aside.