Discount granted by Tata Sky to distributor couldn't be considered as commission under sec. 194H TDS

Summary – The Mumbai ITAT in a recent case of Tata Sky Ltd., (the Assessee) held that where assessee, engaged in business of providing DTH services, sold set top Box (STB) and recharge coupon vouchers to distributors at a discounted rate, discount so offered could not be considered as commission and, hence, not liable for deduction of tax at source under provisions of section 194H

Installation of dish antenna and incidental hardware by installation service providers (ISPs) amounted to work contract under section 194C and no technical expertise was required so as to make assessee liable under provisions of section 194J

Document management services was not a technical or professional work which required special skills, thus, provision to section 194J could not be applied

Facts

- The assessee-company was engaged in business of providing Direct to Home (DTH) services in the brand name of Tata Sky. The provision of this service required installation of set top box and dish antenna at the customer's premises. The assessee had entered into agreement with distributors for sale/distribution of set-top boxes, prepaid vouchers, recharge vouchers (RCVs) etc. As per the agreements, STBs and RCVs were sold to distributors at a discounted price. The distributors/dealers sold these items to customers/subscribers of the assessee-company at a price not exceeding the MRP mentioned for the product.
- The Assessing Officer held that the assessee was liable to deduct tax at source in respect of payments made to the distributors as discount for sale of STBs and recharge coupons as same was 'commission and brokerage' and the same was income in the hands of distributions for service relevant of assessee. He therefore, treated the assessee to be in default as per the provisions of section 201(1).
- On appeal, the Commissioner (Appeals) also upheld the order of the Assessing officer.
- On second appeal:

Held

- The assessee in this case is engaged in business of providing direct to home (DTH) services. The assessee it entered into agreement with the distributor for sale of Set Top Box (STB) and recharge coupon vouchers. As per agreement products are sold to distributor at discounted price, as agreed. The distributor/dealer sells these items to customers/subscribers at a price not exceeding MRP on the product. As per the agreement payment of each order for the above items is to be made by distributor either at the time of placing the order or at the time of delivery. Apart from the above assessee also provides festival/seasonal discounts to the distributors. For these discounts assessee

© 2018, Tenet Tax & Legal Private Limited

does not make any payment rather it issues credit notes and same is subsequently adjusted from the payment due from the distributor. The expenditure of discount is recognized in books of account. But the same is netted from sale, so in the financial statements the discount amount is not reflected.

- In this factual scenario the Assessing Officer has held assessee to be in default as per section 201(1) for non-deduction of tax at source under section 194H in respect of discount offered to distributor and, consequently, making the assessee liable for interest under section 201(1A). In the above factual background the issue has been dealt with by the Assessing Officer and Commissioner (Appeals). They have found the assessee to be liable for deduction of tax at source on a variety of planks as mentioned in detailed order of the Commissioner (Appeals).
- Bombay High Court in the case of *CIT* v. *Piramal Healthcare Ltd.* [2015] 230 Taxman 505/55 taxmann.com 534, *CIT* v. *Qatar Airways* [2011] 332 ITR 253/[2012] 20 taxmann.com 598 (Bom.) and *Intervet India (P.) Ltd.* (*supra*) would show that the the assessee's plea that the assessee should not be visited with the liability to deduct TDS for non-deduction of tax at source under section 194H on the difference between the discounted price at which it is sold to the distributors and the MRP upto which they are permitted to sell, is cogent and is sustainable view. As noted hereinabove the Jurisdictional High Court in the case of *Piramal Healthcare Ltd*. (*supra*) and *Qatar Airways* (*supra*) has found that the difference between MRP and the price at which item is sold to the distributor cannot be held to be commission or brokerage. Similarly in the case of *Intervet India (P.) Ltd.* (*supra*), the Bombay High Court has held that when the assessee had introduced sales promotion scheme for distributors to boost sale of its product when it passed on incentives to distributors/dealers/stockists through sale credit notes and claimed it, then since the relationship between assessee and distributors/stockists was that of principal to principal and infact distributors were customers of assessee to whom sales were effected either directly or through consignment agent, it cannot be treated as commission payment under section 194H. Thus, it follows on similar facts it has been held that the distributors are customers of the assessee to whom sales are affected. The discounts and credit notes credited cannot be considered to be commission payment under section 194H. Similarly on similar facts, the Karnataka High Court in the case of *Bharti Airtel Ltd.* v. *Dy. CIT* [2014] 52 taxmann.com 31/[2015] 228 Taxman 219 (Mag.)/372 ITD 33 which has been duly followed by the ITAT Mumbai in *Jt. CIT* v. *Bharat Business Channels Ltd.* [2018] 92 taxmann.com 216/170 ITD 628 (Mum. - Trib.) has decided the same issue in favour of the assessee. Though one is aware that the Commissioner (Appeals) has referred to the decisions in favour of the revenue on similar issue of Delhi High Court, but however as held by the Apex Court in the case of *Vegetable Products Ltd.* (*supra*) if two views are possible, one in favour of the assessee should be adopted. Moreover, the ratios of decision of jurisdictional High Court as mentioned hereinabove are also in favour of the assessee. Hence, there is no question of taking a contrary view following the other High Courts. The remarks of the Commissioner (Appeals) on the jurisdictional High Court decision are totally uncalled for, neither permissible nor sustainable.

© 2018, Tenet Tax & Legal Private Limited

- Hence, in the background of the aforesaid discussion and precedent, the assessee was not liable to deduct the tax at source on the impugned amounts in this case.

© 2018, Tenet Tax & Legal Private Limited