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* **HIGH COURT OF DELHI : NEW DELHI**

+ **ITA No. 1264 of 2007**

% **Decided on: May 6, 2008**

The Commissioner of Income Tax –XVII
Mayur Bhawan, Connaught Place
New Delhi

..... Appellant

Through: Ms. Rashmi Chopra, Adv.

versus

Living Media India Ltd.
9, K-Block, Connaught Place
New Delhi.

..... Respondent

Through: Mr. Salil Agarwal with
Mr. Prakash Kumar, Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MADAN B. LOKUR, J. (ORAL)

The Revenue is aggrieved by an order dated 31st May, 2007
passed by the Income Tax Appellate Tribunal, Delhi Bench 'H' in ITA



No. 3807/Del/2005 relevant for the Financial Year 2003-2004. 3

2. The Assessee publishes various magazines and in those magazines the Assessee sells or makes available space for advertising. Since the Assessee is a member of the Indian Newspaper Society (INS), it is bound by the rules framed by INS in respect of advertising.

3. Rule 32 of the INS Rules provides that the Assessee give a trade discount to the advertising agency of 15%. On this basis, the Assessee had sold or made available to advertising agencies space for use and for each advertisement, the Assessee gave a trade discount of 15% to the advertising agency.

4. According to the Revenue, the Assessee was in fact giving a commission to the advertising agency. Since the Assessee did not deduct tax at source on the commission so paid as required by Section 194H of the Income Tax Act, 1961 (for short the Act), the Assessing Officer levied tax on the Assessee and also declared it to be an assessee in default under Section 201(1A) of the Act.

5. Feeling aggrieved, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT (A)] who set aside the view expressed by the Assessing Officer. The order passed by the CIT (A) was upheld by the Tribunal and that is how the Revenue is before



us.

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6. It is contended by learned counsel for the Revenue that the CIT (A) had determined the payment of 15% to the advertising agency by the Assessee as commission and this was not challenged by the Assessee. Consequently, the provisions of Section 194H of the Act would come into play. While this is factually so, we are of the opinion that the conclusion arrived at by the CIT (A) really turns the argument upside down.

7. What is first required to be seen is the nature of the contract between the parties and after that determination, it is necessary to find out what is the nature of the payment. What the CIT (A) has done is to determine the nature of the payment and then to determine the nature of the contract. This, we think, is incorrect.

8. On a reading of the contract as well as the order passed by the CIT (A) and the Tribunal, we find that the two authorities below have held it to be a principal to principal contract. That being so, by its very definition, the payment made by the Assessee to the advertising agency cannot be classified as commission. The payment may be called a trade discount or may be described as a concession but since Rule 32 of the INS Rules describes it as a trade discount, we have to proceed on



that basis and by merely describing the trade discount as commission, the Revenue cannot seek to invoke the provisions of Section 194H of the Act.

9. There is a concurrent finding of the CIT (A) as well as the Tribunal that the contract was a principal to principal contract and in terms of that contract what was given by the Assessee to the advertising agency was a trade discount as per Rule 32 of the INS Rules.

10. Under the circumstances, we are of the view that the Tribunal was not in error in coming to the conclusion that commission was not paid by the Assessee to the advertising agency and, therefore, the provisions of Section 194H of the Act could not be invoked by the Revenue.

11. No substantial question of law arises for consideration.

12. Dismissed.


MADAN B. LOKUR, J


MANMOHAN SINGH, J

MAY 6, 2008
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