



**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. Income Tax Appeal No. 6 / 2018

Pr. Commissioner of Income Tax, Jaipur-II, Jaipur.

-----Appellant

Versus

Shri Shailendra Garg, C/o M/s Garment Craft India (P) Ltd. F-47,
Malviya Industrial Area, Jaipur

-----Respondent



For Appellant(s) : Mr. Prabhansh Sharma for Mr. R.B. Mathur

HON'BLE MR. JUSTICE K.S.JHAVERI

HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Judgment

15/02/2018

1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby the tribunal has dismissed the appeal of the department and confirmed the order of CIT(A).

2. Counsel for the appellant has framed following substantial questions of law:-

"i) Whether in the facts and circumstances of the case, the ITAT was justified in upholding the order of CIT(A) in deleting the addition of Rs.6637834/- u/s 40(a)(ia) made by the Assessing Officer for non deduction of tax at source and holding the same not to be covered u/s 194H of Income Tax Act.

ii) Whether in the facts and circumstances of the case, the ITAT was justified in deleting the addition of Rs.179838/- made for depositing the employees' contribution to PF & ESI beyond the prescribed time limit provided in the respective Acts.



iii) Whether in the facts and circumstances of the case, the ITAT was justified in holding that the employees' contribution to PF & ESI are governed by the provisions of Section 433 and not by section 36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act."

3. The facts of the case are that the case of the assessee was picked up for scrutiny assessment and the assessment under

section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was framed vide order dated 10th March, 2014.

While framing the assessment, the AO made additions in respect of disallowance on account of non deduction of tax under section

194H by invoking provisions of section 40(a)(ia) of the Act of Rs.

66,37,834/-, delayed payment of PF and ESI of Rs. 1,79,838/-,

unrecognized liability lying in the shape of Suspense amount Rs.

10,02,378/-, interest on loan against property of Rs. 7,24,527/-,

business promotion expenses of Rs. 1,03,750/-, disallowance on

account of sales tax and income tax payment of Rs. 3,113/- and

disallowance of telephone expenses of Rs. 33,159/-. Being

aggrieved, the assessee preferred an appeal before Id. CIT (A),

who after considering the submissions partly allowed the appeal.

While partly allowing the appeal, the Id. CIT (A) deleted the

addition made on account of non-deduction of tax by invoking

provisions of section 40(a)(ia) of Rs. 66,37,834/- and deleted the

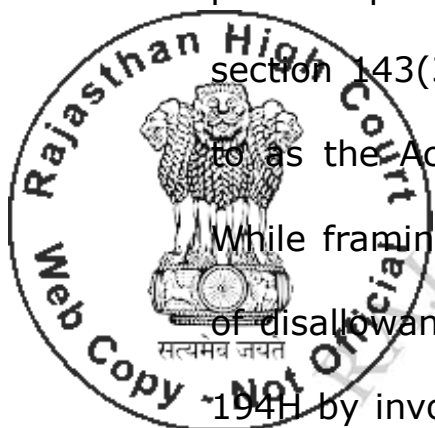
addition made on account of delayed payment of PF & ESI

contribution. He, however, confirmed the additions made on

account of disallowance of telephone expenses and business

promotion expenses. Further, the Id. CIT (A) deleted the addition

made on account of interest expenses of Rs. 7,24,527/- and





confirmed the addition made on account of money lying on Suspense account of Rs. 10,02,378/-.

4. While considering the matter, the tribunal has observed as under:-



6.2. We have heard Id. D/R and perused the material available on record. We find that the issue is well settled by the various judicial precedents including the judgment of Hon'ble Rajasthan High Court in the case of CIT vs. SBBJ (2014) 265 CTR 471 (Raj.), Jaipur Vidhyut Vithran Nigam Ltd., 265 CTR 62 (Raj.), ACIT vs. Om Metals & Minerals Pvt. Ltd. XLII Tax World 51 (JP) in favour of the assessee. Therefore, considering that the employee's contribution of EPF and ESI has been deposited before due date of filing of the return, the assessee is entitled for deduction. Thus the addition is deleted. The grounds of the department are rejected.

7.2. We have heard Id. D/R, perused the material available on record and gone through the orders of the authorities below. The Id. CIT (A) has deleted the addition by observing as under :-

"6.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. An amount of Rs. 7,63,334/- was found debited under the head "Interest to Others" and included an amount of Rs. 7,24,527/- paid to HDFC Bank being the amount of interest on loan against property. As noted by the Assessing Officer, the assessee was required to furnish the details of loan alongwith the purpose and utilization of such loan. However, no details were produced before the Assessing Officer and this fact has been admitted in appellate proceedings also that the details were not submitted before the Assessing Officer due to oversight. However, in the present proceedings also no details have been submitted. The Authorized Representative has pleaded that since the assessee is behind bars due to some legal cases, he is unable to produce any further details. The Assessing Officer had opined that the assessee is liable to prove that the expenses



(interest on loan) were incurred wholly and exclusively for the purpose of the business, and in the absence of the same, has disallowed this expenditure. The authorized Representative has submitted that the books of account were produced during the assessment proceedings and the loan is still outstanding to an extent of Rs. 1,93,54,731/- and appearing in Schedule 2 of the audited balance sheet of M/s. Garment Crafts. While it is true that the details of this loan were not submitted during assessment proceedings but the same is appearing in the books of accounts which were produced and examined by the Assessing Officer. The Assessing Officer has not brought out any reason as to how he has concluded that the loan was not used for the purpose of business. Since, the loan as well as the interest amount is appearing in the audited books of account, there is nothing on record to show that the amounts were utilized for other than business purposes, the disallowance made by the Assessing Officer is deleted. This ground of appeal is allowed."

The Id. D/R has not brought on record any contrary material to controvert the above findings of the Id. CIT (A). Therefore, considering the above observations, we find no reason to interfere in the order of Id. CIT (A), which is hereby affirmed. The ground of the revenue is rejected."

5. Even otherwise, the issue no.1 is squarely covered by the decision of this court in the case of assessee himself in D.B. ITA No.70/2017 decided on 11.10.2017 wherein it has been held as under:-

He has taken us the order of AO which reads as under:-

"It is observed from the Direct Income mentioned in Schedule No. 6 of the audit report that the assessee has shown advertisement revenue of Rs. 22271252/- & further reduced Rs. 13197053/- in the form of discount on advertisement. In order to examine the nature



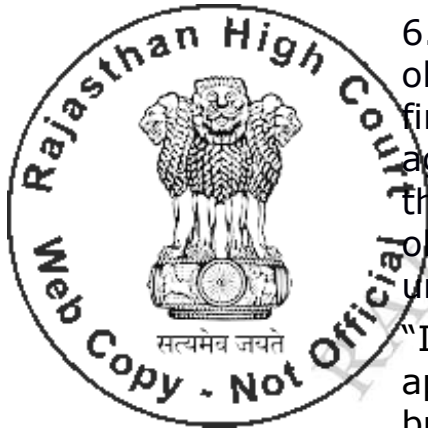
of alleged discount, the assessee was asked to explain the nature of such head of alleged discount with supporting documents. The assessee vide written reply dt. 24.12.2009 has tried to explain that discount is allowed to the customers whose advertisement has been published in the news paper. Further explained that the assessee is raising bill of full amount of charges and then credit note is issued for discount against advertisement charges and finally net payment i.e. net of discount is received from customers. The discount is not allowed to any middle man, it is credited or paid to the persons of whom advertisement is published in news paper.



The contention put forth by the assessee has been considered carefully but not found convincing for the reason that the alleged discount claimed to have been allowed to the customers are not discount but infact it is a commission allowed to the persons through whom advertisement is received for publishing in news paper. It is also appropriate to mention here that all persons including laymen know that in this line of business, only commission is given to the middle men through whom advertisements are received. In this line of business, no advertisement can be received without any middlemen or news agency from the remote as well as various corners of the city area. The assessee has also failed to furnish the name & complete address of the persons to whom such alleged discount claimed to have been allowed nor filed any copy of credit note in support of his claim. In view of above circumstances, the identity of recipients of the alleged discount as well as contention of assessee remained completely unverified and not subject to verification. Further all the news publishers nominate their news agencies in their network for receiving advertisement for which commission is paid. Being of similar nature of business, the assessee has adopted the same practice to avoid litigation of the Income tax provisions he has changed the nomenclature of the expenses and claimed to have been allowed alleged discount as against commission. Because on the payment of commission, TDS is required to be made as per rates prescribed under section 194H of I.T. Act and deposit the same into the Central Government account within prescribed time limit otherwise the same shall not be allowed as expenditures u/s 40(a)(ia) of the I.T. Act. Due to change of nomenclature, the



nature of expenses can not be changed. Infact the discount claimed to have been given is commission & TDS on payment of such commission (alleged discount) should have been made but the assessee has failed to deduct the TDS & violated the provisions of section 194H thus the amount of Rs.13197053/- is not allowed as expenditure in view of provisions of section 40(a)(ia) of the I.T. Act and added the same to the total income of assessee.



6. He contended that the CIT(A) while observing in para 4.1 has specifically given finding that the AO could have inquired in the agency and everything and he remanded back the matter to the AO. For ready reference the observations of CIT(A) are reproduced as under:-

"I have duly considered the submissions of the appellant. The appellant is engaged in the business of publication of newspaper by the name of Mahaka Bharat. The appellant had paid discount of Rs. 1,31,97,053/- to his customers and various advertising agencies. The nomenclature of "discount paid" was evident from the entries in the books of account, audited profit & loss account wherein the expenditure was duly recorded as discount paid and tax audit report in Form No. 3CD wherein auditors had not made any qualification. All these documents categorically mentioned that discount was paid on advertising revenues. The AO however concluded without making any inquiries or bringing any material on record that the alleged discount was in nature of commission. The AO thereafter made a commission was allowed to the agents. The AO held that the assessee had changed the nomenclature just to escape from the provisions of section 402(a)(ia) of the IT Act. The AO further held that the assessee was required to deduct TDS in light of provisions of section 194H of the IT Act and made the impugned disallowance of Rs. 1,31,97,053/- u/s 40(a)(ia) of the IT Act. On careful consideration of the facts, I find that the AO has not made any sort of inquiry from the customers or the advertising agencies. The books of account of the assessee were duly audited and complete details in this regard were available to the AO. The AO had no basis to hold that the discount of Rs. 1,31,97,053/- was allegedly in the nature of commission except for making general observations. While doing so, the AO also



ignored the entries in the books of account, the credit notes issued by the assessee to his various customers and advertising agencies."

7. He contended that the Tribunal while considering the matter has observed as under:-

"In the consideration of entirety of facts and circumstances. We hold that the amount paid by way of discount to the advertisement agencies, springs from a relationship on principal to principal basis and does not constitute commission as contemplated by provisions of Section 194H of the Act. In view thereof, we see no infirmity in the order of the learned CIT(A) in holding that the provisions of Section 40(a)(ia) of the Act are not applicable and thereby deleting the disallowances. The order of the learned CIT(A) is upheld."



8. It is contended that the Tribunal has gone on entirely different basis therefore, the issue is required to be decided in favour of the department and the assessment made by the AO is required to be restored.

8.1. He has also strongly relied upon the decision of Kerala High Court in case of Commissioner of Income Tax vs. Director, Prasar Bharti reported in [2010] 325 ITR 205 (Ker.) wherein it has been held as under:-

"2. Respondent is a fully owned Government of India undertaking engaged in telecast of news, various sports, entertainments, cinemas and other programmes. Advertisement income is a major source of revenue for all telecasting companies including the respondent. Advertisements are canvassed through agents appointed by the respondent under agreement with them. Advertising agencies recognised by the respondent are of two types, the unregistered agencies which are not entitled to any credit facility and the other type are registered agencies which are given accreditation and credit facility with Doordarshan. In other words, while the first category will be able to telecast advertisement programmes canvassed from customers only on advance payment, the other category can have telecast done before making payments. Advertisement charges are based on air-time used for telecasting advertisement material. Rates are also varying depending upon the time of advertisement. However, these matters have



no relevance for the purpose of deciding this case because the issue involved is whether the commission paid @ 15 per cent by the respondent on advertisement charges remitted by the advertising agencies is subject to TDS as commission under Section 194H of the Act. For easy reference, we extract hereunder the relevant portion of Section 194H for the purpose of deciding this case:

194H. Commission or brokerage--Any person, not being an individual or an HUF, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in Section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct Income Tax thereon @ ten per cent:

Provided....

Provided....

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Ltd. or Mahanagar Telephone Nigam Ltd. to their public call office franchisees.

Explanation--For the purposes of this section--

(i) 'commission or brokerage' includes any payment received or receivable directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.

During hearing copies of agreements executed by the respondent with two parties are produced. The nature of transactions as stated in Annex. B agreement between Doordarshan and its agencies is as follows:

Whereas, for the better regulation of the practice of advertising and to secure the best advertising service for advertisers, the Doordarshan Commercial Service has agreed to

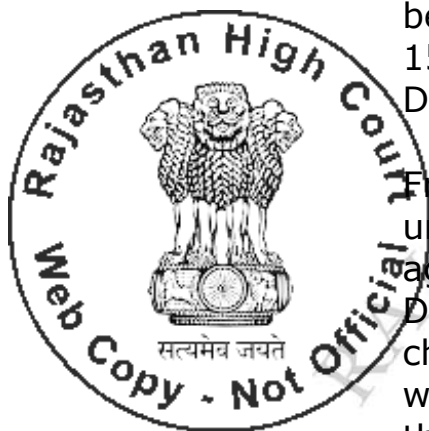




allow commission in respect of advertisements placed by any advertising agent and accredited by it.

(2) By the agency : In consideration of the accreditation herein afforded and of the commission to which the agency will be entitled by reason of such accreditation.

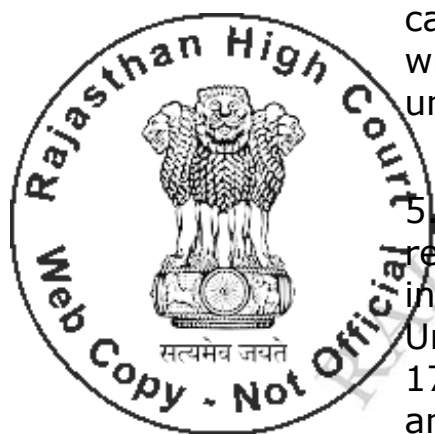
(c) the remuneration of the agency for placing advertisements in the commercial service shall be in the form of standard agency commission of 15 (fifteen) per cent to be paid by the Doordarshan Commercial Service.



From the above it is very clear that parties have understood their relationship as principal and agent and what is paid to the agent by Doordarshan is 15 per cent of advertisement charges collected and remitted to it by the agent which is in the form of commission payable to the agent by Doordarshan. Counsel for the respondent referred to one of the agreements where the commission is referred to as standard discount and contended that the arrangement between respondent and advertising agency is not agency but is a principal to principal arrangement of sharing advertisement charges. We are unable to accept this contention because advertisement contract entered into between the customer and the agency is for telecasting advertisement in Doordarshan channels. The agent canvasses advertisement on behalf of Doordarshan under agreement between them and the advertisement charges recovered from the customers are also in accordance with tariff prescribed by Doordarshan which is incorporated in the agreement. Further it is specifically stated in the agreement that advertisement material should also conform to the discipline introduced by Doordarshan which is nothing but a Government agency which cannot telecast all what is desired to be telecast by advertising agencies. In fact, Doordarshan is bound by advertisement contract canvassed by advertising agencies and it is their duty under the agreement between them and the advertising agencies to telecast advertisement material in terms of the contract which the agency signs with the customer. In our view, the transaction is a pure agency arrangement between the respondent and the advertising agencies because one acts for the other and the act of the agent binds the respondent in their capacity as



principal of the agent. It is pertinent to note that commission or brokerage defined under Explan. (i) to Section 194H has a wide meaning and it covers any payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered. In this case, no one can doubt that 15 per cent commission paid to advertising agencies by the Doordarshan is for canvassing advertisements on behalf of the respondent. So much so, the payment of 15 per cent, by whatever name called, whether discount or commission, falls within the definition of "commission" as defined under Explan. (i) to Section 194H of the Act.



5. Even though counsel for the respondent has relied on the decision of the Gujarat High Court in Ahmedabad Stamp Vendors Association v. Union of India MANU/GJ/0167/2002 : (2002) 176 CTR (Guj) 193 : (2002) 257 ITR 202 (Guj) and a decision of learned Single Judge of this Court in M.S. Hameed and Ors. v. Director of State Lotteries and Ors. MANU/KE/0446/2001 : (2001) 165 CTR (Ker) 481 : (2001) 249 ITR 186 (Ker) and contended that commission payable cannot be subjected to deduction, we are unable to accept this argument because the case decided by the Gujarat High Court pertains to sale of stamp by the Government to stamp vendors at a discount and the case decided by this Court pertains to sale of lottery tickets to the agents at a discounted price. In both the cases, the purchasers, namely, stamp vendors and lottery agents purchased stamps and lottery tickets respectively at a discounted price and they run the business at their risk. They will get the discount retained by the Government only if stamp paper or lottery ticket is sold and destruction of the stamp paper or lottery ticket before sale in their hands will be a complete loss to them. Therefore the transactions of purchase at discounted price and sale at face value were rightly treated as not agency transactions by the Courts. On the other hand, in this case, on facts and based on terms of agreements between parties, we find that the transaction is pure agency arrangement whereunder respondent allows the agents to canvass advertisement for them at tariff prescribed by the respondent on payment of commission of 15 per cent. We therefore allow the appeals reversing the orders of the Tribunal and restore the orders of assessment confirmed in first appeals. However

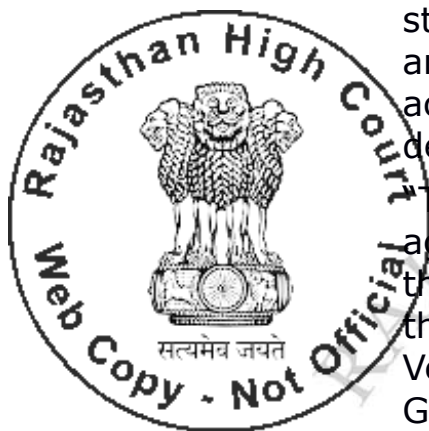


it is for the respondent to invoke, if permissible, the indemnity clause and recover the levies from the agents."

9. We have heard counsel for the appellant.

10. We have gone through the order and proceedings of the matter. It is not in dispute that the amount which has been received by the assessee was after deducting the commission, stock brokerage or whatever term is awarded and the same has been shown in the books of accounts and as stated by Mr. Mathur, if the details are to be given reads as under:-

The advertisement are to be procured by such agencies at the rates and terms decided between them and advertiser, assessee has no involvement therein. In the case of Kerala State Stamp Vendors Association vs. Office of the Accountant General, the Hon'ble Kerala High Court held that what is liable for TDS is commission of brokerage and not the incentives given on the basis of principal to principal relations."



6. Regarding issues no.2 & 3 relating to PF & ESI, the controversy is pending before the Supreme Court in SLP No.16249/2014 (The State of Rajasthan CIT, Jaipur vs. M/s. State Bank of Bikaner and Jaipur), hence, the issues are decided subject to SLP.

7. In that view of the matter, no substantial questions of law arises.

8. The appeal stands dismissed.

(VIJAY KUMAR VYAS)J.

(K.S.JHAVERI)J.

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