

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL NO. 608/2014**

% **Reserved on: 30th September, 2014**
Date of Decision: 18th November, 2014

THE COMMISSIONER OF INCOME TAX-II Appellant
Through Mr. Rohit Madan, Sr. Standing Counsel.

Versus

JDS APPARELS PRIVATE LIMITED Respondent
Through Mr. Sanat Kapoor & Mr. Varun Gupta,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short) impugns the finding recorded by the Income Tax Appellate Tribunal ('Tribunal', for short) in their order dated 7th February, 2014 that the respondent-assessee, JDS Apparels Private Limited had not violated Section 194H of the Act. As a consequence, it has been held that the Assessing Officer was wrong in invoking Section 40(a)(ia) of the Act and accordingly had erred in making addition of Rs.44,65,654/-, i.e. the charges deducted by M/s HDFC Bank Ltd ('HDFC', for short) on the payments made through credit cards.

2. The respondent-assessee had for the Assessment Year 2009-10 filed a return on 30th November, 2009 declaring income of Rs.4,91,69,380/-, which was made subject matter of scrutiny assessment under Section 143(3) of the Act vide order dated 16th December, 2011. The assessment order records that the respondent-assessee was engaged in the business of trading in readymade garments. A letter was received from the Assessing Officer, TDS Circle Mumbai that the respondent-assessee had paid “commission” to HDFC on payments received from customers who had made purchases through credit cards. Survey under Section 133A of the Act had been conducted on HDFC, who had provided card swiping machines to retail merchants, including the respondent-assessee. A credit card holder could make payment by swiping the credit card on the said machines. The details of the bill amount, etc. were thereupon forwarded to the acquiring bank, which is the bank which had provided the machine, i.e. HDFC in this case, which then made payment to the respondent assessee. The payment made to the respondent-assessee was after withholding or deducting the fee payable to HDFC. Thereafter, the acquiring bank, i.e. HDFC recovered the bill amount from the issuing bank of the customer.

3. The Assessing Officer held that the amount earned by the acquiring bank, i.e. HDFC in this case, was in the nature of “commission” and should have been subjected to deduction of tax at source @ 10% under

Section 194H of the Act. As the commission had not been subjected to tax at source, Rs.44,65,654/- should be disallowed under Section 40(a)(ia) of the Act, as this amount had been claimed as an expenditure by the assessee.

4. The aforesaid opinion was affirmed by the Commissioner of Income Tax (Appeals), who held that the transaction in question was in the nature of bill discounting by the acquiring bank, who had paid the bill amount after deducting the commission payable to them. The acquiring bank had taken up the entire risk relating to recovery of payment from the issuing bank. Reference was made to the following portion of the Circular No.619 dated 4th December, 1991, issued by the Central Board of Direct Taxes (CBDT):-

“For the purpose of this Section commission or brokerage includes any payment received or receivable directly by person acting on behalf of another person for services in the course of buying or selling of the goods or in relation to any transaction relating to any assets, value, article or thing.”

5. As noticed above, the Tribunal has held that Section 194H of the Act is not applicable.

6. Section 194H of the Act reads as under:-

“Commission or brokerage.

194H. Any person, not being an individual or a Hindu undivided family, 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 at the rate of ten per cent :

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed five thousand rupees :

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited 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;

(ii) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) ;

(iv) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such

crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.”

7. Section 194H of the Act applies to income by way of commission or brokerage excluding insurance commission referred to in Section 194D of the Act. Tax at source is to be deducted 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 way of cheque/draft or any other mode. The explanation clause (i) states that for the purpose of this section, commission or brokerage includes any payment received or receivable directly or indirectly by a person acting on behalf of another person, (i) for services rendered, not being in the nature of professional services; (ii) any service rendered in the course of buying or selling of goods; and, (iii) in relation to any transaction relating to any asset, valuable article or thing, not being securities. The expression ‘securities’ has been defined clause (iii) to the Explanation.

8. The High Court of Gujarat in ***Ahmedabad Stamp Vendors Association versus Union of India*** [2002] 257 ITR 202 examined clause (i) of the explanation and whether it would be applicable to persons carrying on the business of stamp vendors who purchase stamps from the government treasury and sell them to the public. The Gujarat High Court drew a distinction between a contract of sale and a contract of agency by which an agent is authorized to buy or sell on behalf of the principal. In a

case of agency, the agent is not the owner of the property and does not sell the same of his own accord but as per the directions and instructions of the principal, who is the owner of the property. The profit and loss is that of the principal, and what is paid to the agent is the commission or brokerage. The expressions “commission” and “discount” were distinguished after making reference to the definitions in the Black’s Law Dictionary. The expression “discount”, it was observed, is an allowance or deduction made from the gross sale on any account whatsoever. A “deduction” normally represents a reduction in the original price or a debt such as in case of securities (e.g. treasury bills), which are issued below the face value and are redeemed at the face value. Commission, it was held, is a reward paid to an agent as well as to a salesman, executor, trustee, broker or bailee and is calculated as a percentage of the amount of the transaction or on the profit of the principal. It is a fee paid to an agent or an employee for generating a piece of business or performing a service. In such cases, normally, there exists a fiduciary duty, which has to be discharged by the person to whom commission is paid. The following excerpt from the decision of the Bombay High in ***Harihar Cotton Processing Factory versus CIT***, (1960) 391 ITR 594 (Bom.) was referred to with approval:-

“The expression “commission” has no technical meaning but both in legal and commercial acceptance of the term it has definite signification and is understood as an allowance for service or labour in discharging certain duties such as for

instance of an agent, factor, broker or any other person who manages the affairs or undertakes to do some work or renders some service to another. Mostly it is a percentage on price or value of upon the amount of money involved in a transaction. It can be for a variety of services and is of the nature of recompense or reward for such services. “Rebate”, on the other hand, is a remission or a payment back and of the nature of a deduction from the gross amount. It is sometimes spoken of as a discount or a draw-back. The dictionary meaning of the term includes a refund to the purchaser of a thing or commodity of a portion of the price paid by him. It is not confined to a transaction of sale and includes any deduction or discount from a stipulated payment, charge or rate. It need not necessarily be taken out in advance of payment but may be handed back to the payer after he has paid the stipulated sum. The repayment need not be immediate. It can be made later and in case of persons who have continuous dealings with one another it is nothing unusual to do so.”

Importantly, the Gujarat High Court held that there should be an element of agency in all the three situations as envisaged in clause (i) of the Explanation to Section 194H of the Act.

9. On appeal before the Supreme Court, the decision was upheld by a short order, which is reported as (2012) 348 ITR 378 (SC), observing that the stamp vendors had purchased stamps in bulk and had received a cash discount. The Supreme Court concurred with the judgment of the High Court that the transaction was of sale and Section 194H of the Act had no application. Thus, holding that a contract of agency did not exist.

10. Similar view has been expressed by the Kerala High Court in ***Kerala State Stamp Vendors Association versus Office of the Accountant General and Others*** (2006) 282 ITR 7 (Kerala), wherein it held:-

“No doubt, payment of commission or brokerage in relation to sale or purchase of goods also would attract deduction of tax at source under section 194H of the Act. However, such situation arises only when there is involvement of services of a third party on payment other than the seller and the purchaser of goods or when the recipient of the benefit markets goods as “agent” of the owner and not as independent dealer.”

11. Allahabad High Court in ***Chief Treasury Officer versus Union of India*** (2013) 355 ITR 484 has held that the words “by a person acting on behalf of another person” imply element of agency and must be present in all such services or transactions in order to fall within the expression “commission” and “brokerage”. Reference was made to definition of the term “agent” in the Indian Contract Act and the implication thereof and it was observed that the contract between a principal and an agent primarily is a contract of employment to bring about a legal relationship with a third party and the agent either actually or by law is held to be authorized or employed by the first i.e. the principal, whom he represents. Representative character and derivative authority are distinguishing features of an agent. It was accordingly held that provisions of Sections 194H of the Act were not attracted in the case of stamp vendors.

12. The expressions “commission” or “brokerage” are words of general and common parlance used both commercially and by the common man on the street. Clause (i) expressly seeks to define the expression “commission” or “brokerage” but states that it will include payments received or receivable, directly or indirectly by a person acting on behalf of another if they fall in the three categories. A definition may be exhaustive or restrictive of its common meaning or may be an extensive one. Indeed, there are decisions which observe that use of the word “includes” in the clause can show legislative intent to enlarge the meaning of the words or phrases occurring so as to not only mean and comprehend such things as they signify according to their nature and import, but also things which the interpretation clause declares that they shall include. (see ***CIT versus Taj Mahal Hotel***, (1971) 3 SCC 550). But, this may not always be the case and in certain cases, the expression “includes” has been construed as “equivalent to” and, therefore, given a narrower meaning (see ***South Gujarat Roofing Tiles Manufacturers Association versus State of Gujarat and Others*** AIR 1977 SC 90). Thus, the word “includes” can be used in the sense of the word “means”. The definition clause in such cases is treated as an exhaustive one (see ***Reserve Bank of India versus Peerless General Finance and Investment Company Ltd.*** (1987) 1 SCC 424). Thus, in a

particular context the word “includes” when used, may only mean “comprise of” or “consist of”.

13. It is apparent from the decision of the Supreme Court in the case of ***Ahmedabad Stamp Vendors Association*** (supra) that clause (i) of the Explanation to Section 194H of the Act has been read as exhaustive and not as expansive. This is the reason why the Supreme Court in the short order drew distinction between a transaction of sale and a contract of agency and also between discount and commission/brokerage. Otherwise, the expression “any service rendered in the course of buying or selling of goods” possibly would have encompassed and included the “discount” given to the stamp vendors, who render service during the course of buying and selling of goods, i.e. the stamp papers.

14. Contention could be raised that payment received or receivable directly or indirectly for any services in course of buying or selling of goods need not arise out of a contract of agency or from a relationship of a principal and an agent. The said contention has to be rejected in view of the aforesaid judgments, which positively hold that the three separate conditions when tax at source is required to be deducted would only apply provided the recipient is acting on behalf of another, i.e. relationship of a principal and an agent exists and not otherwise. This interpretation has been consistent and uniformly applied while interpreting clause (i) of the

Explanation to Section 194H of the Act. Appropriate in this regard would be to refer to the decision of the High Court of Delhi in ***Commissioner of Income Tax versus Idea Cellular Limited***, (2010) 325 ITR 148 (Delhi) wherein Explanation clause (i) to Section 194H of the Act had come up for consideration and on interpretation it was held that it would apply only if payment was received or receivable directly or indirectly by a person acting on behalf of another person for (i) services rendered (not being professional) and (ii) for any services in the course of buying or selling of goods or in relation to any transaction relating to an asset, valuable article or thing. The judgment records that the counsel for both the parties, i.e. the Revenue and the assessee, had agreed that the element of agency was to be established in all the aforesaid circumstances (see page 156 placitum 9 of the ITR citation). Thus, this contention if raised would not stand judicial scrutiny on the principles of consistency and certainty. Even otherwise, the view expounded and accepted is plausible, besides being reasonable.

15. Applying the above cited case law to the factual matrix of the present case, we feel that Section 194H of the Act would not be attracted. HDFC was not acting as an agent of the respondent-assessee. Once the payment was made by HDFC, it was received and credited to the account of the respondent-assessee. In the process, a small fee was deducted by the acquiring bank, i.e. the bank whose swiping machine was used. On swiping

the credit card on the swiping machine, the customer whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, the acquiring bank realised and recovered the payment from the bank which had issued the credit card. HDFC had not undertaken any act on “behalf” of the respondent-assessee. The relationship between HDFC and the respondent-assessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. It is noticeable that the bank in question or their employees were not present at the spot and were not associated with buying or selling of goods as such. Upon swiping the card, the bank made payment of the bill amount to the respondent-assessee. Thus, the respondent assessee received the sale consideration. In turn, the bank in question had to collect the amount from the bankers of the credit card holder. The Bank had taken the risk and also remained out of pocket for sometime as there would be a time gap between the date of payment and recovery of the amount paid.

16. The amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. The intention of the

legislature is to include and treat commission or brokerage paid when a third person interacts between the seller and the buyer as an agent and thereby renders services in the course of buying and/or selling of goods. This happens when there is a middleman or an agent who interacts on behalf of one of the parties, helps the buyer/seller to meet, or participates in the negotiations or transactions resulting in the contract for buying and selling of goods. Thus, the requirement of an agent and principal relationship. This is the exact purport and the rationale behind the provision. The bank in question is not concerned with buying or selling of goods or even with the reason and cause as to why the card was swiped. It is not bothered or concerned with the quality, price, nature, quantum etc. of the goods bought/sold. The bank merely provides banking services in the form of payment and subsequently collects the payment. The amount punched in the swiping machine is credited to the account of the retailer by the acquiring bank, i.e. HDFC in this case, after retaining a small portion of the same as their charges. The banking services cannot be covered and treated as services rendered by an agent for the principal during the course of buying or selling of goods as the banker does not render any service in the nature of agency.

17. Another reason why we feel Section 40(a)(ia) of the Act should not have been invoked in the present case is the principle of doubtful

penalization which requires strict construction of penal provisions. The said principle applies not only to criminal statutes but also to provisions which create a deterrence and results in punitive penalty. Section 40(a)(ia) is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the assessee's property and other economic interests. It operates and inflicts hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalization would come into play. The detriment in the present case, as is noticeable, would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer in the present case. The aforesaid principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred. In Maxwell's *The Interpretation of Statutes*, 12th edition (1969) it has been observed:-

“The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.”

18. The aforesaid principles and interpretations can apply to taxing statutes. In the present case we further feel the said principle should be applied as HDFC would necessarily have acted as per law and it is not the case of the Revenue that the bank had not paid taxes on their income. It is not a case of loss of revenue as such or a case where the recipient did not pay their taxes.

19. In these circumstances, we do not find any merit in the present appeal and the same is dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

NOVEMBER 18th, 2014
VKR