Before Ajay Kumar Mittal & Tejinder Singh Dhindsa, JJ.

THE COMMISSIONER OF INCOME TAX (TDS) CHANDIGARH—*Petitioner*

versus

M/S OCM INDIA LIMITED G.T.ROAD—*Respondent*

ITA No. 338 of 2016

May 9, 2018

Income Tax Act, 1961—S.194H—Liability of deduction of tax at source—Definition and scope of commission—held, trade discounts allowed to agents and procured orders and sold goods on behalf of assessee—Not commission—no liability to deduct tax at service.

Held, that since concurrent finding has been recorded by the CIT(A) as well as the Tribunal that the assessee had been debiting trade discount allowed to its commission agents who were acting and procuring orders/effecting sales of its products for and on its behalf, the Assessing Officer was not justified in attracting the provisions of Explanation to Section 194H of the Act. Learned counsel for the appellant has not been able to point out any error or illegality therein.

(Para 14)

Yogesh Putney, Sr. Standing Counsel, *for the appellant-revenue*.

Radhika Suri, Sr. Advocate with Manpreet Singh,Advocate.

AJAY KUMAR MITTAL, ACJ.

(1) In view of the averments made in CM No.19108 CII of 2016, the delay in refiling the appeal is condoned. The application stands allowed.

(2) The appellant-revenue has filed the instant appeal under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 12.6.2012, Annexure A.3, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No.418(ASR)/2011 for the assessment year 2008-09, claiming following substantial question of law:-

"Whether the Hon'ble ITAT was right in confirming the

> order of CIT(A) in reversing the order of the Assessing Officer invoking the provisions of Section 194H of the Income Tax Act, 1961 on the payment of turnover discount of Rs.4,57,52,494/-?"

(3) A few facts relevant for the decision of the controversy involvedas narrated in the appeal may be noticed. During inspection on 20.1.2009 of the office records of the respondent-assessee i.e. M/s OCM India Limited, GT Road, Chheharta, Amritsar, a company engaged in manufacturing andsale of woolen articles, it was noticed that the assessee debited an amount of Rs.4,57,52,494/- to the account of Trade turnover discounts which had been netted out from the gross turnover and did not appear an item of expense in profit and loss account. The assessee pleaded before the Assessing Officer that commission or brokerage arose on account of agency transactions which did not attract TDS for the services rendered by the third party. The Assessing Officer after considering the explanations of the assesseeconcluded that the amount of Rs.4,57,52,494/- being turnover discount was directly or indirectly for the services rendered as per the inclusive definition of the Explanation to Section 194H of the Act. The respondent company was held liable to deduct the tax at source under Section 194H of the Act and a demand of Rs.47,12,507/- on account of TDS and a further amount of Rs.6,59,751/- on account of interest charged under section 201(1A) of the Act was raised. Aggrieved by the order, the respondent assessee filed appeal before the Commissioner of Income Tax (Appeals), [CIT(A)]. Vide order dated 18.4.2011, Annexure A.2, the CIT(A) allowed the appeal filed by the assessee. Not satisfied with the order, the revenue filed appeal before the Tribunal. Vide order dated 12.6.2012, Annexure A.3, the Tribunal dismissed the appeal and upheld the order passed by the CIT(A).

(4) We have heard learned counsel for the parties.

(5) It would be apposite to refer to Section 194H and Explanation (i)thereto, the relevant portion thereof reads thus:-

> "Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the Ist day of June 2001, to a resident, any income by way of commission (notbeing insurance commission referred to in Section 194D) orbrokerage, shall at the time of credit of such income to theaccount 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 tenper cent.

Provided xxxxxxxxxx……………………………….

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 to iv xxxxxx…………………………………….

On plain reading of Section 194H of the Act, it is clear that tax at source is tobe deducted by a person responsible for paying any income by way of"Commission or brokerage". The expression "Commission or brokerage" referred to in this section derives its meaning from the Explanation appended thereto. According to it, "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 professional services); or (ii) for any services in the course of buying or selling of good, or (iii) in relation to any transaction relating to any asset valuable article or thing, not being securities. In order to examine whether Explanation (i) to Section 194H of the Act is attracted, necessarily, it is to be seen whether the assessee has made any payment and, in case it is so, whether it is for service rendered by the payee to the assesseee.

(6) Having crystallized the legal position, we proceed to examine various pronouncements relied upon by learned counsel for the parties. Learned Counsel for the revenue, on the strength of judgments in ***Commissioner of Income Tax*** *versus* ***Director, Prasar Bharti***[1]***, Commissioner of Income Tax*** *versus* ***Idea Cellular Ltd.***[2]***, Vodafone Essar Cellular Ltd.*** *versus* ***Assistant Commissioner of Income Tax (TDS)***[3]***, Bharti Cellular Limited*** *versus* ***Assistant Commissioner of Income Tax***[4]***, Hindustan Coca Cola Beverages***

[1] (2010) 325 ITR 205(Ker)
[2] (2010) 325 ITR 148 (Delhi)
[3] (2011) 332 ITR 255 (Ker)
[4] (2011) 244 CTR (Cal) 185

Private Limited *versus* ***Income Tax Officer***[5] assailed the decision of the tribunal.

(7) In ***Prasar Bharti's*** *case (supra),* the assessee a fully owned Government of India undertaking was engaged in telecast of news, various sports, entertainments, cinemas and other programmes. Advertisements were canvassed through agents appointed by Doordarshan. The agent canvassed advertisements on behalf of Doordarshan under the agreement between them and the advertisement charges recovered from the customers were also in accordance with the tariff prescribed under the agreement. The agreement contained a provision permitting advertising agencies to retain 15% of the advertising charges payable by them to Doordarshan towards Commission from out of the charges received for advertising services from customers. In those circumstances, it was held that provisions of Section 194 of the Act andthe Explanation (i) thereto was attracted. It was not a case of trade discountas is the present case in hand.

(8) In ***Idea Cellular Limited's*** *case (supra),* the Delhi High Court was examining the issue where the assessee was providing cellular telephone network by appointing distributors for selling prepaid SIM Cards. The assessee had been allowing discount to the distributor which was held to be constituting Commission and provisions of Section 194H of the Act and Explanation appended thereto attracted. The distinguishing feature in the saidcase was that the assessee was engaged in the business of providing Cellular telephone network through a card called Subscriber Identification Module (SIM). Pre-paid or post-paid connections were provided to the subscribers through distributors called pre-paid market associates (PMAs) appointed by the assessee to whom assessee had offered discount to its distributors for the prepaid calling services. The High Court reversing the judgment of the Tribunal had concluded that in view of the nature of transaction therein, the discount was infact in the nature of the Commission for the services rendered by the agents for services provided by the assessee to the subscriber. In the present case, the assessee had been deducting the trade discount allowed to the dealers under the heading 'turnover incentive' and the same had been reduced from the sale which is distinct from the facts of the case before the Delhi High Court.

(9) Similar issue arose before the Kerala High Court in

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[5] (2005) 98TTJ (JP) 1

Vodafone Essar Cellular Limited's *case (supra).* The issue was adjudicated in favour ofthe revenue relying upon decision of the Delhi High Court in ***Idea Cellular Limited's*** *case (supra)*. The Calcutta High Court in ***Bharti Cellular Limited's*** *case (supra)* also expressed in favour of the revenue in view of judgments of the Delhi and Kerala High Courts.

(10) Learned Counsel for the Assessee had cited judgments in ***The Bhopal Sugar Industries Limited*** *versus* ***Sales Tax Officer Bhopal***[6], ***Ahemdabad Stamp Vendors Association*** *versus* ***Union of India***[7], ***Commissioner of Income Tax*** *versus* ***Qatar Airways***[8] and ***M.S. Hameed and others*** *versus* ***Director of State Lotteries and others***[9].

(11) Heavy reliance was placed by learned Counsel for the assessee in ***Ahemdabad Stamp Vendors Association's*** *case (supra).* The issue before the Gujarat High Court in the said case was whether tax at source wasrequired to be deducted under Section 194H of the Act where a licensed vendor of stamp paper was collecting the stamp papers from the Government and then depositing the value of the stamp papers less the discount with the Government in terms of Gujarat stamps supply and sales Rules, 1987 (in short, 1987 Rules). It was held that the discount made available to the licensed stamp vendors under the provisions of 1987 Rules, does not fall within the expression "Commission or brokerage" under Section 194H of the Act. The relevant observations read thus:-

> "It is also not possible to accept the contention of Mr. Naik for the Revenue that the definition of "commission or brokerage" as contained in the Explanation to section 194H is so wide that it would include any payment receivable, directly or indirectly, for services in the courseof buying or selling goods and that, therefore, the discount availed of by the stamp vendors constitutes commission or brokerage within the meaning of section 194H. If this contention were to be accepted, all transactions of sale from a manufacturer to a wholesaler or from a wholesaler to a semi wholesaler or from a semi-wholesaler to a retailer would be covered by section 194H. To fall within the

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6 AIR 1977 SC 1275
7 (2002) 257 ITR 202 (Guj.)
8 (2011) 322 ITR 253 (Bomb.)
9 (2001) 249 ITR 186 (Kerela)

aforesaid Explanation, the payment received or receivable, directly or indirectly, is by a person acting on behalf of another person (i) for services rendered (not being professional services), or (ii) for any services in the course of buying or selling of good, or (iii) in relation to any transaction relating to any asset, valuable article or thing. The element of agency is to be there in case of all services or transaction contemplated by Explanation (i) to section 194H. If a car dealer purchases cars from the manufacturer by paying price less discount, he would be the purchaser and not the agent of the company, but in the course of selling cars, he may enter into a contract of maintenance during the warrant period, with the customer (purchaser of the car) on behalf of the company. However, such services rendered by the dealer in the course of selling cars does not make the activity of selling cars itself an act of agent of the manufacturer when the dealings between the company and the dealer in the matter of sale of cars are on “principal to principal” basis. This is just an illustration to clarify that a service in the course of buying or selling of goods. When the licensed stamp vendors take delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities (buying from the Government and selling to the customers) can betermed as service in the course of buying or selling of good.

In view of the above discussion, we uphold the contention urged on behalf of the petitioner’s association that the discount made available to the licensed stamp vendors under the provisions of the Gujarat Stamps Supply and Sales Rules, 1987, does not fall within the expression “commission” or “brokerage” under section 194H of the Income-tax Act, 1961. The impugned communication dated March 14, 2002, from the Income- tax Officer, TDS 4, Ahmedabad, to the Senior Treasury Officer, Ahmedabad, is, therefore, quashed and set aside, and so also the consequential instructions dated March 19, 2002 (annexure “D” to the petition) issued by the Senior Treasury Officer, Ahmedabad, to the secretary of the petitioner’s association are quashed and set aside.”

(12) Adverting to the factual matrix herein, admittedly, the assessee debited an amount of Rs.4,57,52,494/- to the account of "Trade Turnover Accounts" which had been netted out from the gross turnover and did not appear as expense in the profit and loss account. The Assessing Officer held that the said amount being turnover discount was directly or indirectly for the services rendered as per Explanation to Section 194H of the Act and thus demand on account of TDS and interest under Section 201(1A) of the Act was raised. On appeal before the CIT(A), the issue was whether the trade turnover discount amounting to Rs.4,57,52,494/- was subject to TDS under Section 194H of the Act by treating it as commission/brokerage to its dealers so as to be covered under Explanation to Section 194H of the Act. The CIT(A) recorded that the assessee had been debiting commission amounting to Rs.1.84 crores paid to its commission agents appointed territory wise which were acting and procuring orders/effecting sales of its products for and on its behalf and getting commission varying from place to place and quality of the product to product. Thus the Assessing Officer was held to be not justified in attracting the provisions of Section 194H read with its Explanation to the trade discount allowed by the assessee to its buyers/customers/direct trade dealers without involvement of any inter-mediator/commission agents. The relevant findings recorded by CIT(A) read thus:-

> "I have considered the appellant's submissions and gone through the A.O.'s assessment order under appeal together with the case law relied upon by both sides. The only disputed point to be decided is as to whether the trade turnover discount amounting to Rs.4,57,52,494/- are subject to TDS under Section 194-H by treating it as commission/brokerage to its dealers alleged by the A.O. appellant's commission agents and as such covered under the Explanation given below Section 194-H or not. It is an undenying fact that the A.O. has not carry out any independent verification under Section 133(6) from the trade dealers so as to confirm the appellant-company's book version and or examiningas to whether the trade dealers are accounting for the turnover discount in their books of accounts or not. The appellant- company has all along been arguing that this a part and parcel for his consistent trade practice being followed year after year to allow trade

discount to the trade dealers so as to boost its turnover and this has been credited to the respective accounts of the trade dealers during the closing of the account books and on the other hand, it has been debiting commission amounting to Rs.1.84 crore paid to its commission agents appointed territory- wise which are acting and procuring orders/effecting sales of appellant's products for and on behalf of the appellant-principal and getting commission varying from place to place and quality of the product to product. Further, the A.O. has failed to established and bought on record any living instance on the basis of which it can be safely inferred that trade discount is only a sham arrangement and the payment has not been actually made to the trade dealers, Neither, the A.O. has bought on record any solid information coming to his possession which could led that the trade discount is virtually a commission paid to the intermediaries. On the contrary, it has been all along the appellant's contention that after the deal in a particular case is over, it loses its right over the same and it becomes the absolute property of the customer/buyer who was also paid trade discountso as to motivate towards appellant's products in the open market full of competition. It is a general trade phenomenon amongst all the business community to enter into sale transaction directly with the customer and also procure orders through its commission agents. I am of the considered opinion that the A.O. has not appreciated the entire state of affairs of the appellant company in its true business spirits and in the right perspective. He has rather misled himself in inter-mixing the two types of sales i.e. direct sales and indirect sales through commission agents. Further, I find force in the case laws relied upon by the appellant, cited supra. Further, it is not the A.O.'s case that the appellant-company has contravened the provisions of Section 194-H in respect of commission of Rs.1.84crores debited by it to its profit & loss account. In the totality of facts and peculiar circumstances of the case, it would be in the interest of justice to hold that the A.O. is not justified in attracting provisions of

> Section 194-H read with its Explanation to the trade discount allowed by the appellant-company to buyers/customers/direct trade dealers without involvement of any inter-mediator/commission agents. Accordingly, the hugedemand of Rs.53,72,258/- created under Section 201(1) read with Section 201(1A) of the Income Tax Act, 1961 is hereby deleted being unwarranted and not liable as per the provisions of Section 194-H read with its Explanation, as the department has failed to bring on record any solid documentary evidence to established nexus and relationship between the appellant company principal with that of the direct trade dealers as that of a commission agents/contractors/intermediates."

(13) The said findings have been affirmed by the Tribunal with following observations:

> "We have heard the rival contentions and perused the facts ofthe case. There is no dispute to the fact that the assessee had debited the amount of Rs.4,57,52,494/- to turnover incentive and the same has been reduced from the sales. The explanation ofthe assessee that the discount is given under various schemes as mentioned hereinabove, has not been accepted by the AO for no reasons. There is no material on record before the AO that such discount offer is a commission within the meaning of Section 194-H of the Act. No iota of evidence or document has been placed on record by the assessing authority that the assessee has paid or debited the commission in its account. The AO has relied upon the decision in the case of ***Hindustan Coco Cola Beverages Pvt. Ltd. Vs. ITO ITAT (JP) (2005) 98 TTJ (JP) 1*** along with other decisions of various courts of law. The AO has not established how the present case is identical to the facts in the case of ***Hindustan Coco Cola Beverages Pvt. Ltd. Vs. ITO*** (supra). Since in the case of ***Hindustan Coco Cola Beverages Pvt. Ltd. Vs. ITO*** (supra), the brief facts are that the assessee is a company engaged in manufacture and distribution of non- alcoholic packed glass bottle and plastic crates. The said company has been filing TDS return in respect

of TDS of salary, contract/sub-contract and interest but no TDS return in respect of commission payment has been filed. A survey u/s 133 A of the Act was conducted on 20th Dec., 2002 on business premises for the purpose of verification regarding TDS being made by the assessee. During the course of survey, a trial balance showing affairs of the company for the period between 1st Jan., 2002 to 19th Dec., 2002 was obtained. From this trial balance, it was found that distributor commission has been debited by an amount of Rs.4,75,22,929/-. However, it was found that no TDS was deducted and paid on corresponding credit entries or commission payment whatsoever. The distributors of the said company had admitted that they have been getting the commission from the said assessee and there were many other facts available before the ITAT, Jaipur Bench, while deciding the issue against the assessee. The assessee in that case was also maintaining books of account, in which he has declared the purchase and sale of the goods. It is in this background that the decision against the assessee and in favour of the Revenue was given by the ITAT, Jaipur Bench, reported in (2005) 98TTJ(Jp)1. There is no such material available in the present case. Also, there is nothing on record, how the cases relied upon by the A.O. are identical to the facts of the present case. The Ld. Counsel for the assessee has relied upon the decisions of various courts of law before the Ld. CIT(A) and before us. In the facts and circumstances of the case, we are of the view that the assessee company has not contravened the provisions of Section 194-H of the Act and the AO has decided the issue without considering the explanation of the assessee and, therefore, the Ld. CIT(A) has rightly reversed the order of the Assessing Officer. The Ld. CIT(A) has rightly deleted the demand of Rs.53,72,258/- created under Section 201(1) read with Section 201(1A) of the Act and the assessee cannot be held to be assessee in default. We find no infirmity in the order of the Ld. CIT(A) and the same is upheld. Thus, all the grounds of the Revenue are dismissed."

(14) In the present case, since concurrent finding has been

recorded by the CIT(A) as well as the Tribunal that the assessee had been debiting trade discount allowed to its commission agents who were acting and procuring orders/effecting sales of its products for and on its behalf, the Assessing Officer was not justified in attracting the provisions of Explanationto Section 194H of the Act. Learned counsel for the appellant has not been able to point out any error or illegality therein.

(15) In view of the above, substantial question of law stands answered accordingly. Consequently, the appeal stands dismissed.

Sumati Jund