

आयकर अपीलिय अधिकरण “ए” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य एवं संजय गर्ग, न्यायिक सदस्य

Before S/Shri Rajendra, A.M. and Sanjay Garg, J.M.

आयकर अपील सं./ITA No.5157/Mum/2014, निर्धारण वर्ष /Assessment Year: 2011-12

DCIT (TDS)-2(1) Room No.702, 7th Floor, Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Rd. Mumbai-400 002.	Vs.	M/s. Laqshya Media Pvt. Ltd. Laqshya House , Next to Rameshwar Temple, Saraswati Baug Society Rd.,Jogeshwari (E) Mumbai-400 060. PAN: AAACL 5004 C
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Uday Bhaskar Jakke

Assessee by: Shri S. Sriram

सुनवाई की तारीख / **Date of Hearing:** 23.01.2017

घोषणा की तारीख / **Date of Pronouncement:** 15.02.2017

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य, राजेन्द्र के अनुसार -Per Rajendra, AM:

Challenging the order dated 10/06/2014, of the CIT (A)-14, Mumbai, the Assessing Officer (AO) has filed the present appeal. Assessee-company, engaged in the business of providing outdoor media advertising services, filed its return of income on 30/09/2011. The AO issued notices u/s. 133 (6) of the Act and directed the assessee for filing information about tax deducted at source. While passing the order u/s. 201(1)/201(1A) of the Act, on 21/03/2013, the AO dealt with two payments made under the heads i.) Processing Fees and Guarantee Commission ii.) Holding/ Display Rights.

2. With regard to Processing Fees (Rs. 9.85 lakhs) and Guarantee Commission paid the Banks (Rs. 14.48 lakhs), the AO held that assessee had not deducted tax at source, that it should have deducted tax as per the provisions of section 194H of the Act. It was brought over notice that identical issue had arisen in assessee's own case in ITA No. 1297/Mum/2014 for the AY. 2010-11, that vide its order dated 27/05/2016, the Tribunal had dealt the issue at length and had decided the same as under:

“2. Brief facts of the case are that, the assessee company is engaged in providing outdoor media advertising services to leading Indian and multinational brands. The AO issued notice under section 133(6) to the assessee calling for information on various expenses incurred by it and the tax at source deducted thereon. From the details furnished by the assessee the AO noted that, the TDS has not been deducted on certain payments. He treated the assessee as ‘assessee-in-

default' for alleged failure to deduct taxes on the payment of, "Processing Fee" paid to nationalized banks for obtaining loans; "e-guarantee fee paid to Nationalized Bank for obtaining guarantee; and payment for putting up "advertising hoardings". The relevant details TDS amount and interest levied by the AO are as under:-

S.No.	Nature of payment	Amount paid	Alleged failure to deduct tax	Interest u/s.201(1A)
1.	Processing fee paid to nationalized bank for obtaining loans (default u/s.194J)	40,18,998	4,55,352	1,63,927
2.	Guarantee fee paid to nationalized banks for obtaining guarantee (default u/s.194J)	8,92,665	1,01,139	36,410
3.	Payments for putting up Advertisement hoardings (erroneously treated as Payments for obtaining rights To put up advertisement) (default u/s.194C)	6,65,73,383	1,50,85,529	54,30,790

3. The Ld. CIT(A) agreed with the contention of the assessee firstly, that the processing fee paid to the Schedule Bank is in the nature of upfront interest and falls within the exclusion provided in section 194A(3); secondly, no tax is deductible under section 194J on such processing charges; thirdly, the 'guarantee fees' do not fall within the ambit of "commission" or "brokerage" as to entail TDS; and lastly, on the payment for advertising and hoardings the assessee had deducted TDS on some of the items but most of the items have been capitalized therefore, there is no requirement for TDS to be deducted on such capitalized expenses. The Ld. CIT(A) after considering the submission and material on record decided the first three payments in the favour of the assessee and for the last he directed the AO to delete the payment on items of expenditure which are capitalized and for the balance payment AO should verify the deduction of TDS and recompute the demand accordingly.

4. We have heard the rival submissions and also perused the relevant material placed on record. The first payment is on account of "loan processing fees" paid to the Nationalized Bank. This fee is charged by the bank for, processing the application filed by the borrower and for any inspection of title deeds and documents relating to properties and to verify and creation of charge etc. on the property. The Ld. Counsel's case before us is that, such a payment does not entail deduction of tax, because it is in the nature of service fee on borrowed money and hence it is covered within the meaning and definition of "interest" as defined under section 2(28) and consequently, falls within the exclusion clause provided under section 194A(3). Further, AO has also treated these charges as payment for "managerial services" rendered by the bank and therefore, tax was required to be deducted under section 194J r.w. section 9(1)(vii). The Counsel's case before us is that, such a payment of processing fee cannot be treated for rendering of "managerial services" and in support various decisions have been filed before us. Rather it falls within the ambit of interest as defined under section 2(28A), which provides that, interest includes any service fees or other charge in respect of all monies borrowed. Thus, there was no requirement to deduct the TDS on account of rendering of managerial services. On the other hand, Ld. DR supported the order of the AO.

5. As regards the payment of "processing fee" paid to Nationalized Bank, we agree with the contention of Ld. Counsel that, "loan processing fee" is charged by the banks for processing the application when a borrower approached the bank for a loan. Such a service fee or charge it has been included in the definition of "interest", as given in section 2(28A) which reads as under:-

"'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized".

From the above, it is quite apparent that the definition of interest will include any service fee or any other charge in respect of money borrowed. Here, processing fee definitely falls within such definition and, therefore, it cannot be reckoned as payment for rendering of any managerial services by the bank as held by the AO. This has been reiterated by the ITAT Pune Bench in the following cases:

- i) *Chintamani Hatcheries (P.) Ltd v DCIT, reported in [2000] 75 ITD 116 (Pune) (SMC) and*
- ii) *Ghatge Patil Ltd v ACIT, reported in [2011] 11 taxman.com 168 (Pune)*

Despite such a payment to the Nationalized Bank falls within the ambit of "interest" under section 2(28) but the TDS provisions under section 194A are not applicable, because it falls within the exclusionary provisions as laid down in sub-section (3) of section 194A, specifically subclause (iii)(a) which envisages that, the income credited or paid to any banking company to which Banking Regulation Act, 1949 applies, the provision of section 194A(1) will not apply. In other words, the assessee is not required to deduct TDS on such payment of income paid to any banking company.

Accordingly, the finding of the CIT(A) deciding in favour that the payment of processing fee does not require deducting of TDS is upheld and revenue's ground on this score is dismissed.

6. As regards "guarantee fees" paid which has been held to be liable for TDS under section 194H by the AO, we are unable to accept the contention of the AO, because the assessee has sought its banks like HDFC Bank, Dena Bank and Yes Bank to issue guarantee in its favour for which bank has charged certain amount as 'guarantee fee'. To fall within the ambit and scope of section 194H, the payment has to be in the nature of "commission or brokerage". The Explanation to section 194H defines the phrase 'commission and brokerage' in the following manner:-

"'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".

Thus, it is sine qua non that there has to be a principal – agent relationship for a payment to be treated as commission or brokerage. The recipient of the income must act on behalf of the principal. Here the banker does not act on behalf of the assessee for rendering any kind of service. The contract of guarantee does not give any rise to principal - agent relationship between the assessee and the bank and, therefore, the consideration received by the bank on account of guarantee commission cannot be reckoned as commission as contemplated under section 194H and accordingly, there was no requirement to deduct TDS on this payment. Thus, on this score also, the order of the Ld. CIT(A) is affirmed. Before us, the Ld. Counsel had also brought to our notice a CBDT Circular No.56 of 2012 wherein it has been clarified that 'guarantee fee' paid to a nationalized bank will not be subject to withholding tax. Thus in view of the CBDT Circular also the ground raised by the revenue cannot be sustained and accordingly, the same is dismissed."

Respectfully, following the above order, we decide first two grounds of appeal against the AO.

3. Next effective ground of appeal [GOA iii) & iv)] are about deleting the addition with regard to payments made by the assessee for holding/display rights. We find that the Tribunal in its order dated 27/05/2016 (supra) had dealt the issue as under:

"7. Lastly, coming to the issue of payment on hoarding and display expenses, first of all, from the impugned order it is seen that the Ld. CIT(A) has directed the AO to remove the expenditure which has been capitalized by the assessee in its books of accounts. Once an item of expenditure has been capitalized then there is no requirement for deducting the TDS. Thus, to this extent, there cannot be any infirmity in the order of the CIT(A) and the same is affirmed. For the balance amount the Ld. Counsel submitted that, assessee has filed a breakup of expenditure before the AO and it was explained that these payments were in the nature of:-

- (a) Ground level and beatification;
- (b) Material purchased and installation charges; and
- (c) Purchase of Wall laminated units.

Once that is so, then definitely there is no requirement of deducting TDS under section 194I on such payment, because it does not fall within "rent". Since CIT(A) has already directed the AO to verify, therefore, we also reiterate the same direction that AO should look into the nature of expenses and if the contention of the Ld. Counsel is correct that these are in the nature of aforesaid payments, then there would be no requirement of deducting tax under section 194I. With this direction, this ground of the revenue is treated as dismissed.

8. In the result, appeal filed by the revenue stands dismissed."

Respectfully, following the above we decide both the grounds against the AO.

4. Last ground of appeal is about deleting the interest levied u/s. 201 (1A) of the Act. We have already held that there was no liability to deduct tax at source for the payment made on account of Processing Fees and Guarantee Commission, that there was no short deduction of tax with regard to payments made for holding/display rights by the assessee. So, the issue of levying interest would not survive. Last ground is also decided against the AO.

As a result, appeal filed by the AO stands dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है।

Order pronounced in the open court on 15th February, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 15 फरवरी, 2017 को की गई।

Sd/-
(संजय गर्ग /Sanjay Garg)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 15.02.2017.

Jv. Sr. PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR " A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.