

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 2612/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2010-11)

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| Dy. Commissioner of Income tax (OSD), Range 8(1), Room No. 260A, 2 nd floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020. | बनाम/ v. | M/s Future Value Retail Ltd., Knowledge House, Shyam Nagar, Off JVLR, Jogeshwari (E), Mumbai- 400 072. |
| स्थायी लेखा सं./PAN : AA ECP3041P | | |
| (अपीलार्थी / Appellant) | .. | (प्रत्यर्थी / Respondent) |

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|---------------|------------------|
| Revenue by | Shri G.M. Doss |
| Assessee by : | Shri Vipul Joshi |

सुनवाई की तारीख / **Date of Hearing** : 12-01-2016

घोषणा की तारीख / **Date of Pronouncement** : 29-01-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 2612/Mum/2014, is directed against the order dated 29-01-2014 passed by the learned Commissioner of Income Tax (Appeals)- 16, Mumbai (Hereinafter called "the CIT(A)"), for the assessment year 2010-11.

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Tribunal read as under:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred the disallowance u/s 40(a)(ia) of Credit Card Charges Rs.5,30,13,348/- without appreciating that the said charges are in the nature of "Commission or brokerage" and payment/credit thereof is liable for TDS u/s.194-H of the IT Act."

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred the disallowance u/s 40(a)(ia) of Credit Card Charges Rs.5,30,13,348/- relying on the decision of Hon'ble ITAT, Mumbai, in the case of ITO(TDS) vs. Jet Airways (India) Ltd. (IT-Appeal Nos.7439, 7440 & 74 (Mum) of 2010 dated 17/07/2013) ignoring that the Department did not accept the decision of Hon'ble ITAT and has filed appeal against the same before the Hon'ble Bombay High Court u/s.260A of the IT Act."

The appellant prays that the order of the CIT(A) on the above ground above set aside and that of the ITO/AO/DCIT be restored."

3. The brief facts of the case are that the assessee company is engaged in the business of readymade garments and other products. On perusal of the P&L account of the assessee company, it was observed by the learned assessing officer (Hereinafter called "the A.O.") during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Income Tax Act,1961(Hereinafter called "the Act") that the assessee company has claimed credit card charges of Rs. 5,30,13,348/- under the head "other expenses" against which TDS as per provisions of section 194H of the Act were not deducted. The assessee company was show caused as to why the disallowance u/s 40(1)(ia) of the Act should not be made if TDS is not deducted as per provisions of Section 194H of the Act. In reply, the assessee company submitted that the Bank enters into a merchant establishment (ME) agreement with various merchants, for approving the merchant's establishment for the purposes of processing of transactions made by credit/debit cards at the Merchant's Establishment. In consideration of the Bank agreeing to render the payment processing services, the Merchant shall pay the Bank, the ME commission at the rate as specified in the Agreement. Under the Agreement, the Merchant expressly agrees to the conditions prescribed by the bank to enable the processing of payments for transactions made by valid cards. The assessee company submitted that it is understood that the Bank is not acting as an agent of the Merchants under the

Agreement. The assessee company submitted that as per our understanding the ME commission is not separately paid by the Merchant and is received by the Bank by way of processing charges or discounting charges. For e.g., if the bill amount paid through the card is Rs. 100/-, the Merchant would get, say Rs. 97/- from the Bank against the invoice. The Bank would then collect Rs. 100/- from the card holder, Rs. 3/- being the ME commission of the Bank. The assessee company has relied upon various case laws to support its contention that no TDS is applicable on credit card charges paid. The A.O., however, rejected the contention of the assessee company after analyzing the transaction process in detail and held that the credit card transaction is in the nature of the commission for providing the complex services by using the sophisticated professional skills and technology under an agreement, hence, the provisions of section 194-H of the Act is attracted. The A.O. held that this is a different mode of payment in which the assessee company is not making any payment but the service provider itself deducts the commission from the amount payable and this mode of payment between the assessee company and the banks is clearly covered by the provisions of section 194H of the Act. Provision of section 194H of the Act is clearly attracted to the transactions between the banks and the assessee company for charging commission on providing credit card services. The AO held that the assessee company is liable to deduct the tax on the payment of commission which the assessee company did not do, hence, provisions of section 40(a)(ia) of the Act is attracted because as per the said Act any payment of commission on which no TDS has been deducted is not allowed as deduction under the head "profits and gains of business or profession". Thus, the A.O. vide assessment order dated 22.02.2013 passed u/s 143(3) of the Act disallowed the commission on credit card of Rs. 5,30,13,348/- u/s 40(a)(ia) of the Act on which no TDS was deducted u/s 194H of the Act.

4. Aggrieved by the assessment orders dated 22.02.2013 passed u/s 143(3) of the Act by the AO, the assessee company carried the matter in appeal before the CIT(A) and submitted that TDS u/s 194H will be attracted only in the case of payment of any income by way of “commission or brokerage”, hence, such tax deduction is required at the time of payment or credit of such commission income to the account of the payee. The assessee company submitted that section 194H of the Act will be attracted when a principal-agent relationship between the payer and payee exists. The assessee company submitted that the bank is not acting “on behalf of” the merchant establishment in dealing with third parties. The bank cannot be considered as an agent of the merchant establishment. To support this contention, the assessee company relied upon the decision of the ITAT, Mumbai Bench decision in the case of Kotak Securities Ltd. v. DCIT.

5. The CIT(A) accepted the contentions of the assessee company by relying upon the decision of Mumbai Bench of the Tribunal in the case of ITO v. Jet Airways India Ltd. (2013) 37 taxmann.com 379 (Mumbai – Tribunal) wherein the Tribunal held as under:-

“1. Section 194H of the Income Tax Act, 1961 – Deduction of tax at source, Commission or brokerage (Credit card charges) – Assessment year 2007-08 to 2009-10 – Whether, payments to banks on account of utilization of credit card facilities are in nature of bank charges, and not in nature of commission within meaning of section 194H, and therefore, no tax is required to be deducted on same – Held, yes (para 10)[in favour of assessee].

II. Section 195 of the Income Tax Act, 1961 – Deduction of tax at source – payment to nonresident [Certificate for non-deduction]-assessment year 2007-08 to 2009-10 ‘Whether, where certificate under section 195(3) was issued to bank for receiving payments without deduction of tax at source for specific financial years mentioned therein, it could not be held that it was effective only from date of issuance – Held, yes [para 15] [in favour of assessee].”

The CIT(A) also observed that similar issue has been considered by the Jaipur Bench of the Tribunal in the case of Gems Paradise in ITA No. 746/JP/2011 for the assessment year 2008-09 dated 2-2-2012 wherein the Tribunal held that the provisions of section 194H of the Act are not applicable as the banks make payments to the taxpayer after deducting certain fees as per the terms and conditions in the credit card and it is not a commission but a fee deducted by the banks. In the case of commission retained by the credit card companies, however, it cannot be said that the bank acts on behalf of the merchant establishment or that even the merchant establishment conducts the transaction for the bank. The CIT (A), in nutshell, held that payments made to the banks on account of utilization on credit card facilities would be in the nature of bank charges and not in the nature of commission within the meaning of section 194H of the Act and hence no TDS is required to be deducted u/s 194H of the Act. The CIT(A) also relied upon decision of Jaipur Bench of the Tribunal in the case of Bhandari Jewellers in ITA no. 745/JP/2011 dated 02-02-2012 for assessment year 2008-09 and decision of Hyderabad Tribunal in the case of DCIT v. Vah Magna Retail Private Limited in ITA No. 905/Hyd/2011 dated 10/04/2012 for assessment year 2007-08. Accordingly, the CIT(A) vide orders dated 29-01-2014 deleted the addition of Rs. 5,30,13,348/- made u/s 40(a)(ia) of the Act for non deduction of TDS u/s 194H of the Act on commission paid to credit card companies by the assessee company by holding the same to bank charges.

6. Aggrieved by the orders of the CIT(A) dated 29-01-2014, the Revenue is in appeal before the Tribunal.

7. The ld. D.R. fairly conceded that this issue is squarely covered in favour of the assessee company by the decision of the Mumbai Bench of the Tribunal in the case of Jet Airways India Ltd. (supra). The ld. D.R. submitted that the Revenue has not accepted the decision of the Tribunal in the case of Jet

Airways India Ltd. (supra) and on appeal, the matter is still pending before the Hon'ble Bombay High Court. The ld. D.R. also referred to the CBDT Notification No. 56/2012 [F. No. 275/53/2012-IT(B)/SO 3069(E), dated 31.12.2012 wherein it is stated that

“in exercise of the powers conferred by sub-section (1F) of section 197A of the Income Tax Act, 1961 (32 of 1961), the Central Government hereby notifies that no deduction of tax under Chapter XVII of the said act shall be made on the payments of the nature specified below, in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934) excluding a foreign bank.

(i)...

(ii)...

(vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank

2. This notification shall come into force from the 1st day of January, 2013.”

8. We have heard the rival contentions and also perused the material available on record and the case laws relied upon. In the instant appeal, the assessee company has incurred credit card charges of Rs. 5,30,13,348/- which is claimed as an business expenses. No tax has been deducted at source u/s 194H of the Act. We have observed that the issue is squarely covered in favour of the assessee company by the decision of co-ordinate Bench of Mumbai Tribunal in the case of Jet Airways India Ltd. (supra) whereby it was held that the credit card commission to the banks are in the nature of normal bank charges and are not in the nature of commission within the meaning of Section 194H of the Act , and therefore no tax is required to be deducted at source on the same u/s 194H of the Act. The

finding of the Tribunal in Jet Airways India Limited (supra) are reproduced hereunder:

“9. We have carefully considered the submissions of the ld. Representatives of the parties and the orders of the authorities below. We have also carefully considered the provisions of section 194H of the Act. We observe that the similar issue has been considered by the Jaipur Bench of the Tribunal in the case of Gems Paradise (supra) and the Tribunal held vide paragraph 27 of the said order that the provisions of section 194H of the Act are not applicable as the banks make payments to the assessee after deducting certain fees as per the terms and conditions in the credit card and it is not a commission but a fee deducted by the banks. The said paragraph 27 of the order is reproduced below :

"27. After considering the orders of the AO and ld. CIT (A), we find that assessee deserves to succeed in this regard. Section 194H is applicable where any commission has been paid by the Principal to the commission agent. This is not a case of commission agent as assessee sold its goods through credit card and on presentation of bill issued against credit card, the bank makes payment to the assessee after deducting agreed fees as per terms and conditions in case of credit card. This is not a commission payment but a fees deducted by the bank. If there is an agreement, that is agreement between the credit cardholder and the bank. Bank is a Principal and to spread over its business, a scheme is floated by bank i.e. issuance of credit cards. Bank issues credit card to the various customers who purchase the various credit cards on the agreed terms and conditions. One of the major condition is that if credit card holder does not make payment within the prescribed time limit then they charge 2% penal amount of bill which is raised by

the shop keeper against sale of its items through credit card. Bank cannot refuse the payment to the shop keeper who sale their goods through credit card. Only in those cases where goods are found damaged and credit card holder inform the bank that the material purchased by them is damaged or defective and request the bank not to make the payment, in such cases only bank can withhold the payment, otherwise the bank has to make the payment to the shop keeper. Therefore, in our considered view, there is no such relation between the bank and the shop keeper which establishes the relationship of a Principal and Commission Agent. Technically it may be written that bank will charge certain percentage of commission but this is not a commission because assessee sells its goods against credit cards, and on presentation of bills, the bank has to make the payment. It is not the case that bank has advised the assessee to sell their goods to its customers then he will pay the commission. It is reversed in a situation as bank issued credit cards to the credit card holders on certain fees or whatever the case may be and the card holder purchases material from the market through his credit card without making any payment and that shop keeper presents the bill to the bank against whose credit card the goods were sold and on presentation of bill as stated above the bank makes the payment. Therefore, in our considered view, provisions of section 194H are not attracted in this type of transaction. Therefore, we hold that addition made and confirmed by ld. CIT (A) was not justified. Accordingly, the addition made and confirmed by ld. CIT (A) is deleted."

10. *We observe that the said issue was again considered by the Jaipur Bench of the Tribunal in the case of Bhandari Jewellers (supra) and following the above decision of the Tribunal, the Tribunal vide paragraph*

7 of the said order again held that the provisions of section 194H of the Act are not attracted in this type of transactions. It was held that no TDS is required to be deducted on the fees charged by the bank on credit card transactions. We also observe that the similar issue again come up before the Hyderabad Bench of the Tribunal in the case of Vah Magna Retail (P.) Ltd. (supra) and the Tribunal vide paragraph 4 of the said order dismissed the appeal of the department by holding that the amount retained by the principal contractor from the payments made to the contracting persons and there was no requirement for making TDS on the amount. The said paragraph 4 of the order reads as under :

'4. We heard the Learned Departmental Representative and perused the orders of the lower authorities and other material on record. Assessee is a company engaged in the business of direct retail trading in consumer goods. Assessee claimed deduction of Rs.16,34,000 on account of commission paid to the credit card companies, which has been disallowed by the assessing officer in terms of S.40(a)(ia) on account of the failure of the assessee to deduct tax at source in terms of S.194H of the Act, while making the said commission payments. It was the contention of the assessee before the lower authorities that the assessee only receives the payment form the bank/credit card companies concerned, after deduction of commission thereon, and thus, this is only in the nature of a post facto accounting and does not involve any payment or crediting of the account of the banks or any other account before such payment by the assessee. Considering these submission of the assessee, the CIT(A) accepted the claim of the assessee for deduction of the amount of Rs.16,34,000 on the following reasoning :

"9.8 On going through the nature of transactions, I find considerable merit in the contention of the appellant that commission paid to the credit card companies cannot be considered

as falling within the purview of S.194H. Even though the definition of the term "commission or brokerage" used in the said section is an inclusive definition, it is clear that the liability to make TDS under the said section arises only when a person acts on behalf of another person. In the case of commission retained by the credit card companies however, it cannot be said that the bank acts on behalf of the merchant establishment or that even the merchant establishment conducts the transaction for the bank. The sale made on the basis of a credit card is clearly a transaction of the merchant's establishment only and the credit card company only facilitates the electronic payment, for a certain charge. The commission retained by the credit card company is therefore in the nature of normal bank charges and not in the nature of commission/brokerage for acting on behalf of the merchant establishment. Accordingly, concluding that there was no requirement for making TDS on the 'Commission retained by the credit card companies, the disallowance of Rs.16,34,000 is deleted...."

We find no infirmity in the above reasoning given by the CIT(A). We accordingly uphold the order of the CIT(A) and reject the grounds of the Revenue which are devoid of merit.'

We also observe that the Bangalore Bench of the Tribunal by following the said decision of the Hyderabad Bench of the Tribunal has held that the payments made to the banks on account of utilization of credit card facilities would be in the nature of bank charges and not in the nature of commission within the meaning of section 194H of the Act and hence no TDS is required to be deducted u/s 194 H of the Act. In view of the above we hold that the issue is squarely covered in favour of the assessee. Respectfully following the decisions of the Co-ordinate Benches of the

Tribunal we uphold the order of the ld. CIT(A) and reject the grounds No.1 to 3 taken by the department for all the three assessment years under consideration.”

Respectfully following the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of Jet Airways India Ltd. (supra) which is later on again followed by Mumbai Tribunal in the case of Jet Airways India Limited for succeeding assessment year i.e. 2010-11 in 40 taxmann.com 178(Mum-Trib.), we hereby uphold and sustain the orders of the CIT(A) dated 29-01-2014 ordering deletion of the addition of Rs. 5,30,13,348/- made by the AO u/s 40(a)(ia) of the Act for non-deduction of tax at source u/s 194H of the Act on commission paid to credit card companies vide assessment orders dated 22.02.2013 passed u/s 143(3) of the Act . Hence, we sustain the orders dated 29-01-2014 of the CIT(A) in which we have found no infirmities. We order accordingly.

9. In the result, the appeal filed by the Revenue in ITA NO. 2612/Mum/2014 for the assessment year 2010-11 is dismissed.

Order pronounced in the open court on 29th January, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 29-01-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **29-01-2016**

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व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai