IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE GEORGE GEORGE K., JUDICIAL MEMBER

I.T.A. Nos. 456-458/Coch/2016
Assessment Years : 2005-06 to 2007-08)

M/s. Parco Diagnostics & Research Centre Pvt. Ltd., Meenchanda, Kozhikode. [PAN:AABCP 3576A]	**Vs.**	The Deputy Commissioner of Income-tax(TDS), Kozhikode.
(Assessee-Appellant)		**(Revenue-Respondent)**

Revenue by	Shri C. Suresh Kumar, CA
Assessee by	Shri A. Dhanaraj, Sr. DR

Date of hearing	29/05/2017
Date of pronouncement	08/06/2017

O R D E R

Per GEORGE GEORGE K.,JUDICIAL MEMBER:

These appeals at the instance of the assessee are directed against the consolidated order of the CIT(A) dated 17/06/2016, in relation to the assessment years 2005-06,2006-07 and 2007-08. The order of the CIT(A) arise out of the orders passed u/s. 201 and 201(1A) of the I.T. Act.

2. Since common issue is raised in these appeals, they were heard together and disposed of by this consolidated order.

3. Grounds raised are identical in all the assessment years, hence grounds pertaining to assessment year 2005-06 are reproduced below:

> *1. The order of the learned Commissioner of Income Tax(Appeals) in I.T.A. No. 108/RI/CIT/CLT/2008-09 dated 17-06-2016, partly allowing the appeal filed by the appellant for the assessment year 2005-06 is infirm in law and contrary to facts and circumstances of the case.*
>
> *2. The lower authorities ought to have found that the business promotion expenses are not liable for tax deduction at source and as such, there is no justification to create the demand u/s. 201(1) r.w.s. 194H and 201(1A) of the I.T. Act, 1961.*
>
> *3. The first appellate authority ought to have found that the expenses incurred by the appellant are on principal to principal basis between the payer and the payee and as such, the provisions of Sec. 194H is not application to the appellant.*
>
> *4. For the above and other grounds that may be urged at the time of hearing, the appellant humbly prays that the Hon'ble Income Tax Appellate Tribunal, Cochin Bench, Cochin-16, may be pleased to cancel the order and allow appropriate relief and render justice to the appellant.*

4. The brief facts of the case are as follows:

The assessee is a company engaged in the business of running a diagnostic centre with CT and MRI scan facilities. For the assessment years 2005-06 to 2007-08, the assessee had debited in its P&L account a sum of Rs.34,29,556, Rs.19,33,632/- and Rs.39,21,576/- respectively as business promotion expenses. During the course of proceedings u/s. 143(3) of the Act, it was noticed by the Assessing Officer that the assessee had not maintained proper vouchers in respect of these expenses and treated the entire business promotion expenses as commission payments to the doctors who referred the cases to the assessee

for scanning and other medical examinations. The Assessing Officer was of the opinion that the assessee ought to have deducted tax at source u/s. 194H of the Act, since these payments made to the doctors were in the nature of commission and since no deduction of tax at source was made by the assessee, the Assessing Officer passed orders u/s. 201 and 201(1A) of the Act. The details of the amounts for which the assessee is made liable u/s. 201 and 201(1A) of the Act in respect of the assessment years 2005-06 to 2007-08 read as under:

AY	Amount debited to P&L	Tax Deductible	Interest u/s. 201(1A)	Total
2005-06	34,29,556	1,71,478	75,416	2,46,894
2006-07	19,33,632	96,682	30,912	1,27,594
2007-08	39,21,576	1,96,079	39,200	2,35,279

5. Aggrieved by the orders passed u/s. 201 and 201(1A) of the Act in respect of the assessment years 2005-06 to 2007-08, the assessee preferred appeals before the first appellate authority. Before the first appellate authority, it was contended that the relationship between the assessee and the doctors cannot be termed as a principal and agent but on a principal to principal basis and hence, provision of section 194H of the Act does not have an application. For the above proposition, the assessee relied on the following judicial pronouncements:

1) CIT vs. Mother Diary India Ltd. 18 Taxman Com 49 (Delhi)
2) Kotak Securities Ltd. vs. dy CIT 18 Taxman.Com 48 (Mumbai)
3) CIT vs. Jai Drinks Pvt. Ltd. 198 Taxman 271 (Del)

6. The CIT(A), however rejected the contentions of the assessee and held that the Assessing Officer is justified in passing the orders u/s. 201 and 201(1A) of the Act. The CIT(A) however partly allowed the appeal of the assessee by reducing the disallowance made by the Assessing Officer in the assessment order with regard to business promotion expenses. The relevant findings of the CIT(A) are as follows:

> *"On going through the submissions, it is seen that the appellant had accepted that these are the payments made to doctors as referral fees, who refer the patients for scanning to the appellant company. If it is a proper expense, I should have been properly vouched. As it is not properly vouched, it appears that all these payments are amounts paid to the doctors. The doctors who are the recipients of these payments have not offered these amounts for taxation as the appellant has not disclosed the information to whom these payments were made. In the absence of the same, the Revenue is losing tax from the recipient doctors. As the appellant was showing it as deduction by debiting it to the P & L account, it is reducing its taxable income. To avoid this lacunae only, the law for deducting TDS on commission or brokerage in the form of Section 194H in the Income Tax Act, 1961 was brought in by the Parliament. After introduction of this section,* ***"any person, who pay on or after 1st 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 10% if the aggregate of such payment is Rs.5,000/- or more."*** *In the present case, the appellant has paid commission to various doctors. Actually, it is in the form of secret commission as the appellant as well as the doctors who received it, never wanted this information to be revealed to the Income Tax Department or to the public. It is because of this reason, these amounts are not vouched.*

> *7. In view of the above, it is very clear that the appellant was bound to deduct tax at source on these payments. Had they effected TDS, the recipient doctors would have been forced to disclose this income in their returns of income. By not deducting tax, the appellant helped the recipient doctors to evade tax. Therefore, the decision of the Assessing Officer to invoke the provisions of section 201 rws 194H on these payments is correct. In view of this, I confirm the action of the Assessing Officer for all these three years."*

7. The assessee being aggrieved, has filed the present appeals before the Tribunal. It was contended by the Ld. Counsel for the assessee by relying on the Board's Circular No. 5/2012 dated 1-8-2012 that the commission paid to the doctors cannot be termed as freebies. It was submitted that only freebies such as Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector industries can be disallowed u/s. 37 of the I.T. Act. The learned AR, relying on Board Circular No. 5/12 dated 29/02/2016 contended that the assessee's relationship with that of the doctors is on a principal to principal basis and provision of section 194H does not have application.

7.1 The Ld. DR present strongly supported the orders of the Income Tax authorities.

8. I have heard the rival contentions and perused the material on record. Section 194H was introduced by Finance Act (No. 2), 1991 with effect from

01/10/1991. The object and extent of the new provision was explained by the Board in its Circular No. 621 dated 19/12/1991 (1992) 195 ITR Statute 154). The relevant portion of the Board Circular No. 621 dated 19/12/1991 reads as follows:

> *"Insertion of a provision for deduction of tax at source from payments in the nature of commission, brokerage, etc.:- 59. Income by way of commission (not being insurance commission referred to in section 194D) and brokerage is, at present, not subject to deduction of tax at source. This is one source of income where the incidence of tax evasion is very high. A new section 194H relating to deduction of tax at source has, therefore, been inserted. Under this section, the person responsible for paying any income by way of commission or brokerage for services rendered (not being professional services) or for any services in the course of buying or selling of goods etc., shall deduct income-tax thereon at the rate of ten per cent. However, no such deduction shall be made where the amount of payment or the aggregate amount of payments, in a financial year, does not exceed two thousand or five thousand rupees. The new section will not apply when payments are made by individuals or Hindu undivided families. The expressions "commission or brokerage" and "professional services" have been defined in the Explanation to the section."* (Underline supplied)

8.1 In the instant case, it is admitted by the assessee that the payments are made to the doctors as reference fees. These are admittedly cash payments and not through banking channels. The assessee does not have a case that the doctors have disclosed these payments made by the assessee in their returns of income and paid due taxes to Government. Admittedly, the payments made by the assessee to the doctors are taxable in the hands of the doctors. The payments are actually in the form of secret commission and the assessee as well

as the doctors who received it never wanted this information to be revealed to the Income Tax Department or to the general public. Had the assessee effected TDS on these payments, the doctors would have been compelled to disclose this income in their returns of income. The assessee by not deducting tax at source, had aided the doctors to evade income tax which was due to the Central Government.

8.2 The explanation of term 'Commission' or 'brokerage' in section 194H of the I.T. Act is an inclusive definition. An inclusive definition only seeks to specifically include the meaning given in the Explanation within the term 'Commission' or 'Brokerage'. The explanation given for 'Commission or Brokerage' in Section 194H of the Act being an inclusive definition, does not exclude the ordinary meaning of 'Commission' or 'Brokerage'. Therefore, the ordinary or the dictionary meaning of the term 'Commission' or 'Brokerage' also need to be examined. Moreover whether the payment made by the assessee falls within the term 'Commission' or 'Brokerage' is to be examined necessarily from the point of view of the payer/assessee, namely the scanning centre. The assessee payee while making payments as referral fees to the doctors is not providing any professional services. The payment of referral fees not being in lieu of professional services, the same cannot be excluded from the provisions of section 194H of the Act.

The ordinary and dictionary meaning of the term 'Commission' or 'Brokerage' reads as follows:

i) *a system of payment based on a percentage of the value of sales or other business done, or a payment to someone working under such a system*
(Cambridge Dictionary)

ii) *a fee for services rendered based on a percentage of an amount received or collected or agreed to be paid (as distinguishable from salary).*
(Vocabulary.com)

iii) *a sum typically a set percent of value involved in a transaction.*
(Oxford Dictionary)

iv) *Commission is a sum of money paid to a sales person for very sale that he or she makes. If a sales person is paid on commission, the amount they receive depends on the amount they sell.*
(Collins English Dictionary)

v) *Mutually agreed upon, or fixed by custom or law, fee according to an agent, broker or sales person for facilitating, initiating or executing a commercial transaction.*
(Business Dictionary)

8.3 The payment made by the assessee as referral fees is directly proportionate or percentage of an amount received by the assessee for providing CT scan and MRI scan and such payment comes within the term 'Commission or Brokerage'. In the light of the above said reasoning and ordinary dictionary meaning of 'Commission', I am of the view that the order passed by the Assessing Officer u/s. 201(1) and 201(1A) of the Act and which was sustained by the CIT(A) is

correct and in accordance with law. Therefore I uphold the same. It is ordered accordingly.

9. In the result, the appeals filed by the assessee are dismissed.

Pronounced in the open court on 8t -06-2017.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Place: Kochi
Dated: 8th June, 2017
GJ
Copy to:
1. M/s. Parco Diagnostics & Research Centre Pvt. Ltd., Meenchanda, Kozhikode.
2. The Assistant Commissioner of Income-tax (TDS), Kozhikode.
3. The Commissioner of Income-tax(Appeals), Kozhikode.
4. The Commissioner of Income-tax (TDS), Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin