

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA NOS. 3517 MUM/2015 : A.Ys : 2009-10 & 2010-11
& 3518/MUM/2015**

DCIT, Range-10(1)(1),
Mumbai
(Appellant)

Vs. M/s. Home Solutions Retail
India Ltd.,
Knowledge House, Shyam
Nagar, Off Jogeshwari-Vikhroli
Link Road, Jogeshwari (E),
Mumbai 400 060 (Respondent)
PAN : AABCH4844F

**CO NOS. 90 & 89/MUM/2017 : A.Ys : 2009-10 & 2010-11
(In ITA Nos. 3517 & 3518/MUM/2015)**

M/s. HSR Wholesale & Retail
Private Limited (Earlier known
as Home Solutions Retail
(India) Ltd.),
Knowledge House, Shyam
Nagar, Off Jogeshwari-Vikhroli
Link Road, Jogeshwari (E),
Mumbai 400 060
(Cross Objector)
PAN : AABCH4844F

Vs. ITO, Ward-25(1)(5),
Mumbai (Respondent)

**Assessee by : Shri Vipul Joshi
Revenue by : Shri Rajat Mittal**

**Date of Hearing : 15/06/2017
Date of Pronouncement : 13/09/2017**

ORDER**PER G.S. PANNU, AM :**

The captioned appeals by the Revenue and Cross-objections by the assessee are directed against the separate orders of CIT(A)-17, Mumbai dated 13.03.2015, pertaining to Assessment Years 2009-10 & 2010-11 respectively, which in turn have arisen from separate orders dated 08.03.2013 passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') and u/s 143(3) of the Act.

2. In both the captioned assessment years the appeals preferred by the Revenue raise common issues. The appeal of the Revenue in ITA No. 3517/Mum/2015 for Assessment Year 2009-10 is taken as the lead case, which is directed against the order of CIT(A)-17, Mumbai dated 13.03.2015, which in turn has arisen from the order dated 08.03.2013 passed by the Assessing Officer under section 143(3) of the Act.

3. In this appeal, the Revenue has raised the following Grounds of appeal :-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s. 40(a)(ia) without appreciating that the provisions of sec. 194H are attracted in respect of payments made on account of commission on credit cards.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowance of Rs. 1,63,86,611/- out of finance costs,

Rs. 2,53,64,535/- as administrative expenses for effecting the sale/purchase, without appreciating that running a circular transactions requires diversion of resources and these expenses are not incurred for the purposes of business.

3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowance of Rs. 1,63,86,611/- out of finance costs for effecting the sale/ purchase, without appreciating the factual finding of the AO that funds flow for running circular transactions was through various over draft accounts and thus has a bearing on the financial costs and these expenses are not incurred for the purposes of business and have been rightly disallowed.*

4. *With out prejudice to the above grounds, On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance of Rs. 2,53,64,535/- as administrative expenses for effecting the sale/ purchase to profit offered to tax on circular transactions by wrongly applying analogy of section 14A, without appreciating the fact that such disallowance in such an analogy should have been restricted till the gross receipts in circular transactions.”*

4. The respondent-assessee before us is a company, which is engaged in the business of retailing of consumer durables, electronics, furniture & fixtures, home products, etc. For the assessment year under consideration, it filed a return of income declaring a loss of Rs.70,41,26,128/-, which was subject to a scrutiny assessment whereby the loss has been assessed at Rs.61,08,04,982/- after making certain disallowances, which were carried in appeal before the CIT(A). The CIT(A) allowed partial relief, and Revenue is in appeal before us assailing some of the reliefs allowed by the CIT(A) in terms of the aforesaid Grounds of appeal.

5. Insofar as Ground of appeal no. 1 is concerned, the relevant facts are that in the course of assessment proceedings, the Assessing Officer noted that assessee had incurred expenditure by way of Commission of Rs.4,82,51,000/- on credit card payments. Notably, while carrying out its business of retailing, assessee-company also receives payments from its customers through credit/debit cards. The sale proceeds are collected by the concerned bank and after deducting its Commission, the net amount is credited to the account of the assessee. The amount deducted by the bank is considered as an expense under the head 'Commission' by the assessee. The Assessing Officer was of the opinion that assessee was required to deduct tax at source on such Commission paid to the collecting bank for the processing of the credit card payments in terms of Sec. 194H of the Act. Since the assessee had made no deduction of tax at source, the Assessing Officer invoked Sec. 40(a)(ia) of the Act and disallowed the corresponding expenditure of Rs.4,82,51,000/-. The assessee assailed the stand of the Assessing Officer before the CIT(A) on varied grounds, *inter-alia*, contending that the transactions in question did not invite the provisions of Sec. 194H of the Act. The CIT(A) has accepted the plea of the assessee and concluded that no tax was required to be deducted at source on the fee (i.e. Commission) charged by the bank on the processing of the credit card transactions. According to the CIT(A), the payments made to the bank in relation to processing of credit card transactions are in the nature of bank charges and not in the nature of Commission within the meaning of Sec. 194H of the Act. In coming to such a conclusion, the CIT(A) relied upon the following decisions of the Tribunal :-

- i) ITO vs. Jet Airways (India) Ltd. (2014) 147 ITD 133 (Mumbai);
- ii) Gems Paradise, ITA No. 746/JP/2011 dated 2.2.2012 of Jaipur Bench of Tribunal;
- iii) Bhandari Jewellers, ITA No. 745/JP/2011 dated 2.2.2012 of Jaipur Bench of Tribunal; and,
- iv) Dy. CIT vs. Vah Magna Retail (P.) Ltd., ITA No. 905/Hyd/2011 dated 10.4.2012 (Hyderabad Bench of Tribunal).

Apart from the aforesaid decisions of the Tribunal, the CIT(A) also relied upon an unreported judgment of the Hon'ble Delhi High Court in the case of *JDS Apparels Pvt. Ltd. vs. CIT, ITA No. 608/2014 dated 18.11.2014* whose relevant discussion has also been reproduced by him in para 2.3.3 of his order. In this manner, the CIT(A) set-aside the action of the Assessing Officer to invoke Sec. 40(a)(ia) of the Act and deleted the addition of Rs.4,82,51,000/-. Against such a decision of the CIT(A), Revenue is in appeal before us.

6. Before us, the Id. DR has reiterated the stand of the Assessing Officer, namely, that the Commission charged by the bank for processing of the credit card transactions was to be understood as payment of the nature specified in Sec. 194H of the Act and, therefore, according to him, the amount of Commission was rightly disallowed u/s 40(a)(ia) of the Act since the requisite tax u/s 194H of the Act was not deducted at source.

7. We have carefully considered the rival submissions. The sum and substance of the dispute before us is as to whether the withholding tax provisions contained in Sec. 194H of the Act are applicable in the context of the fee/commission charged by the bank for processing the credit card transactions. Notably, the assessee is in the business of retailing, and in the course of its business, *inter-alia*, it receives payments from the customers for the goods retailed through credit cards. For such transactions, the bank collects the money on behalf of the assessee and the bank remits the money to the assessee after deducting its charges, which has been given the nomenclature of 'Commission' by the assessee. The amount of 'Commission' so deducted by the bank is claimed as an expenditure by the assessee by way of a debit in its Profit & Loss Account, and as per the Assessing Officer, being a Commission payment, it was liable for deduction of tax at source on the strength of Sec. 194H of the Act. We find that the CIT(A) disagreed with the Assessing Officer and in doing so, he has referred to the various precedents by way of decisions of the Tribunal as well as judgment of the Hon'ble Delhi High Court in the case of *JDS Apparels Pvt. Ltd. (supra)*. Notably, the judgment of the Hon'ble Delhi High Court, in turn, also refers to the judgment of the Hon'ble Gujarat High Court in the case of *Ahmedabad Stamp Vendors Association vs. UOI, 257 ITR 202*. The *ratio decidendi* in the aforesaid judgments is that in order to bring a transaction in the fold of Commission for the purposes of Sec.194H of the Act, an element of agency has to be present. In fact, the Hon'ble Gujarat High Court in the case of *Ahmedabad Stamp Vendors Association (supra)* explained that the

meaning of “Commission or Brokerage” as contained in Sec. 194H of the Act is not wide so as to include any payment receivable directly or indirectly for the services in the course of buying or selling of goods. In fact, the Commission received by the bank for processing of credit card payments cannot be construed as Commission or Brokerage received for any service since the bank does not act as an agent of the assessee in such situations. In the face of the legal position so accepted by the CIT(A), and which is supported by the aforesaid precedents, we find no reasons to interfere with the decision of the CIT(A). Pertinently, before us, no decision to the contrary has been brought out by the Revenue and, therefore, on this count also, we hereby affirm the ultimate decision of the CIT(A). Thus, on this Ground, Revenue fails.

8. Insofar as Ground of appeal nos. 2 to 4 are concerned, the same relate to a singular issue which can be understood as follows. In the course of assessment proceedings, it was noted by the Assessing Officer that an information was received from the Assessing Officer of M/s. Nitco Ltd. that the said concern had engaged in a circular trading of goods with certain concerns, which included the assessee also, and such transactions were without actual physical delivery of goods. Notably, the Assessing Officer carried out a verification exercise including recording the statement of Shri Gopal Biyani and Shri Dinesh Maheshwari, which showed that M/s. Nitco Ltd. had claimed sales effected to M/s. Pantaloon Retail (I) Ltd. and in turn, M/s. Pantaloon Retail (I) Ltd. had sold the same stock to M/s. Spectacle Industries Ltd. Further, M/s. Spectacle Industries Ltd. had sold same stock back to M/s.

Nitco Ltd. Be that as it may, the Assessing Officer came to conclude that assessee had shown purchase of goods from M/s. Nitco Ltd. and further onward sales to M/s. Spectacle Industries Ltd., and that in actuality no deliveries were taken or given for such transactions by the assessee. The assessee had only received monies against sales effected and paid the amount for the purchases effected, thereby offering the differential amount between the sales and purchases for taxation, which was very nominal. So however, on the aforesaid aspect no addition has been made by the Assessing Officer, instead he disallowed a part of the administrative expenses and the financial expenses incurred by the assessee on the ground that a part of the regular resources of the assessee would have been diverted towards the conduct of such circular transactions. In order to compute such disallowance, the Assessing Officer examined the actual expenditure incurred by the assessee, being salary, wages, bonus etc., communication costs, printing and stationery and miscellaneous expenses, etc. Considering the turnover of circular transactions vis-a-vis the total turnover of business, the proportionate expenses out of total administrative expenses was worked out and accordingly an amount of Rs.2,53,64,535/- was disallowed. Insofar as the financial charges are concerned, the Assessing Officer disallowed an amount of Rs.1,63,86,611/- out of the interest costs. Though the Assessing Officer has made another disallowance in relation to circular trading transactions, namely peak credit attributable to effecting of such transactions amounting to Rs.31,59,000/-, but since the same is not in

appeal before us, and therefore the same is not being referred to any further.

9. Before the CIT(A), assessee assailed the disallowance made out of administrative and finance costs. Insofar as administrative expenditure is concerned, the CIT(A) upheld the stand of the Assessing Officer in principle, but according to him, the expenditure could be disallowed only to the extent of income earned from such transactions and nothing beyond it. Accordingly, he directed the Assessing Officer to restrict the disallowance of Rs.2,53,64,535/- to Rs.6,38,555/- being the profit earned by the assessee through circular transactions and deleted the balance. This is the first aspect of the order of CIT(A) which is in challenge before us. Secondly, with regard to the financial costs, the CIT(A) deleted the entire disallowance on the ground that the assessee was not found to have incurred any finance costs for effecting the impugned circular transactions. This is the second aspect of the order of the CIT(A) which is in appeal before us.

10. At the time of hearing, the Id. DR supported the Grounds of appeal by pointing out that the Assessing Officer was quite justified in disallowing the administrative expenses proportionately on the basis of turnover in the absence of any detail identifying the specific administrative expenses incurred towards effecting the circular transactions. Even with regard to disallowance of financial costs, the Id. DR pointed out that assessee was not in a position to give day-to-day flow of money involved in the circular transactions and, therefore, the

estimated disallowance out of interest expenditure made by the Assessing Officer was quite justified.

11. On the other hand, the learned representative for the assessee vehemently pointed out that the CIT(A) was quite justified in giving relief to the assessee on the issue of administrative expenses and financial costs and relied upon the findings of the CIT(A), which according to him, are unassailable.

12. We have carefully considered the rival submissions. Factually speaking, the order of the Assessing Officer as well as that of CIT(A) reached a concurrent finding that assessee was an intermediary in circular trading carried out by certain companies, and that such trading has been done without effecting actual physical delivery of goods. Notably, the circular trading appears to have started from M/s. Nitco Ltd., which is a manufacturing concern, and through trading-intermediaries, including the assessee, the goods have been sold back to M/s. Nitco Ltd. Insofar as the assessee is concerned, the purchases effected by it and the sales declared, details of which have been tabulated by the Assessing Officer in para 8.11 of the assessment order, clearly brings out that nominal income has been declared by the assessee. Be that as it may, the only dispute before us is the action of the Assessing Officer in attributing a portion of regular expenses incurred by the assessee on account of administrative costs and financial costs to the carrying out of circular trading activity. Insofar as the administrative expenses are concerned, the Assessing Officer

disallowed the expenditure in proportion of circular trading turnover to that of the total turnover of the business. Before the CIT(A), assessee pointed out that it was running a retail business where thousands of sale transactions are taking place across the various retail formats. It was pointed out that so far as the volume of the circular trading transactions are concerned, it was only 447 in number as compared to the overall volume of business transactions of 19,85,691 for the Assessment Year 2009-10. The CIT(A) records that in the Remand report, the Assessing Officer has verified the aforesaid aspect and found that the volume-wise record of transactions with the parties in question of circular trading was very much less as compared to the total number of overall transactions. The CIT(A) concluded that the circular trading transactions undertaken by the assessee are a miniscule of the total transactions. This finding of the CIT(A) has not been negated by the Revenue before us on the basis of any cogent material or evidence. Even otherwise, we find that the aforesaid finding of the CIT(A) is based on the relevant record and is a good factor to test the efficacy of the manner in which the administrative expenditure has been allocated by the Assessing Officer. Even otherwise, we find that when the Assessing Officer himself comes to a finding that circular trading transactions have been effected only on paper without effecting any physical delivery of goods, then, the attributable administrative costs cannot be of the same level as attributable to the transactions of purchase and sales, which are normally being carried out by the assessee in its retail format. Thus, allocating administrative expenditure on the basis of respective turnover will result in an anomalous situation. Under these

circumstances, in our view, the CIT(A) was quite justified in giving a go-by to the methodology adopted by the Assessing Officer to arrive at the disallowance out of administrative expenditure attributable to the circular trading transactions. Hence, we hereby affirm the decision of the CIT(A) to restrict the disallowance to the extent of the income earned by the assessee from the circular trading transactions, and thus, on this aspect, Revenue fails.

13. Insofar as the financial costs are concerned, the CIT(A) noted a specific plea taken by the assessee to the effect that only after the money was received for the sales effected, the payments were made to M/s. Nitco Ltd. for the purchases. Notably, the CIT(A) had considered the Remand report of the Assessing Officer also on this aspect, and he has not noted anything which required him to disagree with the assertions of the assessee. The CIT(A) has concluded that *“As regards the financial cost, it has been found that the appellant had not incurred any financial cost for affecting these transactions therefore, no disallowances on account of financial charges can be made.”* In view of the aforesaid finding of the CIT(A), which is not assailed by the Revenue before us on the basis of any cogent material or evidence, we find no merit in the Ground raised by the Revenue, which is hereby dismissed.

14. Thus, insofar as the appeal of the Revenue for Assessment Year 2009-10 is concerned, same is dismissed.

15. It was a common point between the parties that the facts and circumstances in ITA No. 3518/Mum/2015 for Assessment Year 2010-11 are *pari materia* to those considered by us in ITA No. 3517/Mum/2015 for Assessment Year 2009-10, therefore, our decision therein shall apply *mutatis mutandis* in the said appeal also.

16. So far as the respective Cross-objections filed by the assessee are concerned, the same are merely in support of the order of CIT(A). Since we have already upheld the order of CIT(A) and appeals of the Revenue have been dismissed, the Cross-objections become infructuous and are dismissed as such.

17. In the result, both the appeals of the Revenue as well as the cross-objections filed by the assessee are dismissed.

Order pronounced in the open court on 13th September, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Mumbai, Date : 13th September, 2017

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "C" Bench, Mumbai
- 6) Guard file

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai