

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH 'B', KOLKATA**

**[Before Shri P.M. Jagtap, AM and Shri S.S. Viswanethra Ravi, JM]**

**I.T.A. No. 441/Kol/2016  
Assessment Year: 2012-13**

**ACIT, Circle - 2, TDS, Kolkata.....Appellant**  
**10B, Middleton Row, 7<sup>th</sup> Floor,**  
**Kolkata - 700071**

**ITD Cementation India Ltd. ....Respondent**  
**Godrej Waterside, Tower No. 1,**  
**Office No. 803, 8<sup>th</sup> Floor,**  
**Plot No. 5, Block - DP,**  
**Sector - V, Salt Lake City,**  
**Kolkata - 700 091**  
**[PAN : CALSI1053C]**

**Appearances by:**

*Shri Arindam Bhattacharjee Addl. CIT (DR), appearing on behalf of the Revenue.*  
*Shri S.K. Dasgupta, FCA appearing on behalf of the Assessee.*

Date of concluding the hearing : November 22, 2017

Date of pronouncing the order : November 22, 2017

**ORDER**

**Per P.M. Jagtap, AM**

This appeal is preferred by the revenue against the order of Ld. CIT (Appeals) - 24, dated 31.12.2015

2. The assessee in the present case is a company which is engaged in the business of construction of infrastructural projects such as port, tunnels, roads and bridges etc. A survey under section 133A of the Act was carried out in the case of the assessee in order to verify the compliance of TDS provision. It was found that the assessee during the F.Y. 2011-12 had made payment of Rs. 11,46,13,000/- to various banks on account of Bank Guarantee Commission without making deduction tax at source. In this regard, reliance was placed by

the assessee on the decision of Mumbai Bench of ITAT in the case of Kotak Securities vs DCIT (TDS) 50 SOT 158 in support of its contention that the Bank Guarantee Commission not being in the nature of "Commission" as envisaged in section 194H, tax at source was not liable to be deducted from the payment of Bank Guarantee Commission under section 194H. This contention of the assessee was not found acceptable by the A.O. in view of CBDT Circular No. 56/2012 issued on 31.12.2012 clarifying that tax at source was not liable to be made from the payment of Bank Guarantee Commission with effect from 1<sup>st</sup> January, 2013. Relying on the said circular, the A.O. held that the assessee was liable to deduct tax at source from the payment of Bank Guarantee Commission made in the F.Y. 2011-12 i.e. prior to 01.01.2013 and since there was failure on the part of the assessee to do so, he treated the assessee as in default for the tax of Rs. 1,14,61,300/- that was liable to be deducted from the payment of Bank Guarantee Commission @ 10%. He also charged interest of Rs. Rs. 34,38,390/- to the assessee under section 201(1A) of the Act. Accordingly, a demand of Rs. 1,48,99,690/- was raised by the A.O. against the assessee vide an order dated 28.03.2014 passed under section 201(1)/201(1A) of the Act.

3. Against the order passed by the A.O. under section 201(1)/201(1A) of the Act, an appeal was preferred by the assessee before the Ld. CIT(A) and after considering the submission made by the assessee as well as the material available on record, the Ld. CIT (A) directed the A.O. to delete the demand raised vide an order

passed under section 201(1)/201(1A) of the Act for the following reasons given in paragraph no. 4 and 5 of his impugned order:

*“In the course of hearing the AR furnished a copy of the appellate order by CIT(A)-I, Kolkata dated 10.12.2013 for F.Y. 2010-11 in which this question whether the bank guarantee commission is hit by the provision of section 194H has been answered. The nature of payment by way of bank guarantee commission is identical in F.Y. 2011-12 and F.Y. 2010-11. The relevant portion of the CIT(A)-I’s decision in the appellate order for F.Y. 2010-11 is reproduced as under:*

*5.2.2 Further, even if the reverse interpretation of this notification exempting bank guarantee from TDS provisions u/s 194H is considered, the Hon’ble ITAT, Mumbai in its order in the case of Kotak Securities vs DCIT(TDS), Circle 2(1), Mumbai 50 SOT 158 (Mumbai) (2012) has clearly held that the bank guarantee commission was not covered under the provisions of section 194H, the Hon’ble ITAT has examined the issue of principal and agent for the purpose of applicability of section 194H on bank guarantee commission . The tribunal has held that the bank guarantee commission was not a transaction between principal and agent so as to attract the tax deduction requirements u/s 194H. It has been held by it as under:*

*“When bank issues the bank guarantee, on behalf of the assessee, all it does is to accept the commitment of making payment of a specified amount to, on demand, the beneficiary, and it is in consideration of this commitment, the bank charges a fees which is customarily termed as bank guarantee commission. While it is terms as guarantee commission, it is not in the nature of commission as it is understood in common business parlance and in the context of the section 194H. This transaction, in our considered view, is not a transaction between principal and agent so as to attract the tax deduction requirement under section 194H”.*

*The order of the Tribunal is therefore very clear that the bank guarantee commission is not in the nature of “commission” as it is understood in common business parlance as well as in the context of section 194H. From the above it is clear that bank guarantee commission is not what has been envisaged under “commission” and “brokerage” as covered u/s 194H.*

*There must be an agency and principal relationship for all services and transaction in order to be covered within the expression "commission & brokerage". Therefore, even if it is presumed that bank guarantee commission was covered under TDS provisions u/s 194H, prior to the issue of notification No. 56/2012, the above decision of Hon'ble ITAT predates the above notification and is also for an assessment year prior to the issue of this notification, it has clearly been held that bank guarantee commission was not covered u/s 194H. Accordingly, considering the above and in view of the above decision of the ITAT, Mumbai which is directly applicable in the case of appellant, it is held that provisions of section 194H are not applicable in the case of bank guarantee commission. The A.O. is accordingly directed to delete the demand raised by him his order u/s 201 read with 201(1A) of the Income Tax Act and this ground of appeal is allowed."*

*5. In my view the issue is covered by the above decision of CIT(A) - 1, Kolkata. There are no special facts in this year which may lead me to a different conclusion. I, therefore, follow the above decision and allow the grounds."*

Aggrieved by the order of the Ld. CIT (A), the revenue has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the demand raised by the A.O. u/s 201(1)/201(1A) was deleted by the Ld. CIT (A) vide his impugned order by relying on the decision of his predecessor in assessee's own case for A.Y. 2011-12 wherein similar relief was allowed by the Ld. CIT (A) after taking into consideration Notification No. 56/2012 and the Co-ordinate Bench of this Tribunal by its order dated 05.05.2017 passed in ITA No. 812/Kol/2014 has already upheld the order of the Ld. CIT (A) deleting the similar demand raised by the A.O. vide its order passed

under section 201(1)/201(1A) of the Act for A.Y. 2011-12 for the following reasons given in paragraph no 6.3 of its order:

*“6.3 Having heard the submissions of Ld. AR for the assessee and perused the material available on records, we are of the view that there is merit in the submissions of the Ld. AR of the assessee, as the propositions canvassed by the Ld. AR for the assessee are supported by the facts narrated by him above. As the Ld. AR for the assessee has stated that it is very much clear that bank guarantee commission is not in the nature of commission as it is understood in the common business parlance as well as in the context of the section 194H of the Act. The bank guarantee commission is not what has been envisaged under “commission” and “brokerage” as covered u/s 194H of the Act. Here in the case under consideration the relationship of agent and principal is absent, therefore, provisions of section 194H does not apply. Considering the factual position explained above, we are of the view that there is no infirmity in the order passed by the Ld. CIT (A), therefore, we confirm the order passed by Ld. CIT (A).”*

5. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of A.Y. 2011-12, we respectfully follow the decision of the Tribunal rendered for A.Y. 2011-12 and uphold the impugned order of the Ld. CIT (A) directing the A.O. to delete the demand raised vide an order under section 201(1)/201(1A) of the Act.

**6. In the result, the appeal of the revenue is dismissed.**

Order Pronounced in the Open Court on 22<sup>nd</sup> November, 2017.

Sd/-

(S.S. Viswanethra Ravi)  
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)  
ACCOUNTANT MEMBER

**Dated: 22/11/2017**  
Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. ITD Cementation India Ltd., Godrej Waterside, Tower No. 1, 8<sup>th</sup> Floor, Plot No. 5, Block – DP, Sector V, Salt Lake City, Kolkata – 700 091.
2. ACIT, Cir 2, TDS, 10B, Middleton Row, 7<sup>th</sup> Floor, Kolkata – 700071.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.  
ITAT, Kolkata