आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी',मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "C", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री जी. मंजूनाथ, लेखा सदस्य**,** के समक्ष

Before Shri JOGINDER SINGH, Judicial Member, and
Shri G. MANJUNATHA, Accountant Member

ITA NO.85/Mum/2016
Assessment Year: 2011-12

DCIT, Circle-6(2)(1), R. No.563, Aayakar Bhavan M.K. Road, Mumbai-400020	**बनाम**/ Vs.	M/s Clear Trip Travel Pvt. Ltd. Unit No.1, Ground Floor, DTC Bldg, Sitaram Mills Compound, N.M. Johi Marg, Lower Parel, Mumbai
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		P.A. No.AACCC6016B

राजस्व **की ओर से** / Revenue by	Shri H.N.Singh CIT-DR
निर्धारिती **की ओर से /** Assessee by	Shri Nitesh Joshi

सुनवाई की तारीख **/ Date of Hearing :**	**30/11/2017**
घोषणा की तारीख/**Date of Pronouncement**	**30/11/2017**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 09/10/2015 of the Ld. First Appellate Authority, Mumbai. The first ground raised by the Revenue pertains to deleting the disallowance made u/s 40(a)(ia) r.w.s 194H of the Income Tax Act, 1961 (hereinafter the Act) for non-deduction of tax at source on the payments for credit card services.

2. During hearing, at the outset, Shri Nitesh Joshi, ld. counsel for the assessee, explained that the impugned issue has already been decided by the Tribunal in favour of the assessee for Assessment Year 2010-11 and 2011-12, which has been followed by the First Appellate Authority. This factual assertion was not controverted by Shri H. N. Singh, Ld. CIT-DR.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the order of the Tribunal dated 16/05/2016 for

Assessment Year 2010-11 in ITA No.5049/Mum/2014, for ready reference and analysis:-

"The Revenue is aggrieved by the impugned order dated 20/05/2014 of the Ld. First Appellate Authority, Mumbai.

2. The only ground raised in the appeal of the Revenue pertains to holding that no TDS was deductible u/s 194H of the Income Tax Act, 1961 (hereinafter the Act), by the assessee on the amount held by the banks/credit card agencies as service charges in respect of credit card services provided by them by further holding that bank/credit card agencies are not agencies of the assessee ignoring the fact that entire process of facilitation of credit card of such bank/agencies are nothing but constructive agents for the assessee company and bringing such charges within the purview of section 194H of the Act.

2.1. During hearing, the ld. DR, Shri V.K. Agarwal, advanced arguments, which is identical to the ground raised. On the other hand, Ms. Rashmi Mishra, Ld. counsel for the assessee, defended the impugned order by placing reliance upon the decision in DCIT vs Vah Magna Retail Pvt. Ltd. and Kotak Securities Ltd. vs DCIT (ITA No.6657/Mum/2011). This factual matrix of the assessee was not controverted by the ld. DR.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that a survey u/s 133A of the Act was carried out at the premises of HDFC Bank Ltd, wherein, pursuant to the inquiries, it was revealed that the discount in the nature of 'commission' withheld by the acquiring bank, while making payments to retail merchant ought to be subjected to TDS @ 10% under Section 194H of the Act. The A.O. observed that the appellant is a company engaged in the business of providing travel agency services. The A.O. observed that during the year under consideration, the acquiring bank had withheld an amount of Rs.11,16,46,150/- as 'transaction charges' (credit card collection charges) while

making payments of billing amount of sales carried out through credit cards, to the appellant company (retail merchant). Since this payment of transaction charges had not been subjected to TDS, a show cause notice was issued to the appellant to show cause as to why it should not be treated as an 'assessee-in-default' u/s.201(1) of the Act. The appellant furnished the written submission, contending inter alia that credit card collection charges are in the nature of bank charges, which are not subject to TDS. The A.O. considered the appellant's submission but did not find it acceptable for the reasoning discussed in detail in para 4 & 5 of the impugned order and accordingly held the appellant as 'assessee-in-default' for non-deduction of tax at source u/s.194H @ 101'0 on the payment of credit card collection charges of Rs.11,16,46,150/-, which worked out to Rs.1,1l,64,615/-. Thus, the A.O. raised the demand of Rs.1,51,83,876/- comprising of the demand of Rs.1,11,64,615/- and interest of Rs.40,19,261/- thereon u/s 201(1A) of the Act.

2.3. On appeal, before the Ld. Commissioner of Income Tax (Appeal), the assessee explained that when a customer books a ticket online through a credit card, the amount is remitted back to the credit card company (bank) to the appellant after deducting charges commonly known as credit card charges, which are intrinsically in the nature of "bank charges" directly deducted by the credit card company/bank and the assessee has no scope for deduction of tax at source, since it is not the assessee, who makes the payment but it is the credit card company/bank that makes the payment to the appellant after deduction of such charges. Reliance was also placed upon CBDT Circular dated 04/01/2013. The First Appellate Authority deleted the addition. The Revenue is aggrieved and is in appeal before this Tribunal.

2.4. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that the impugned issue squarely covered by the decision of the Mumbai Bench of the Tribunal, in the case of Kotak Securities Ltd. (ITA No.6657/Mum/2011) and further in the

own case of the assessee for Assessment year 2011-12. Even otherwise, if the Department has allowed the claim of the assessee for earlier Assessment year and the same has not been reversed by higher authorities, the Department is not expected to take U-turn. The Tribunal in the case of Kotak Securities Ltd. vs DCIT, identically vide order dated 03/02/2012 held as under:-

"2. To adjudicate on this appeal, only a few material facts need to be taken note of. The assesse is a company engaged in stock broking business and is a Member of the Bombay Stock Exchange and National Stock Exchange. During the course of business carried on by the assessee, assessee furnishes bank guarantees, mainly in lieu of margin deposits, to various agencies, such as BSE and NSE. In consideration for issuance of such bank guarantees, banks charge the fees, which is termed as, 'bank guarantee commission'. On 16th November 2006, the assessee was subjected to a survey under section 133A. During the course of this survey, it was noticed that the assessee was not deducting any tax at source from the payments made by the assessee to the banks in respect of 'bank guarantee commission'. In response to the Assessing Officer's requisition to show cause as to why action not be taken against the assessee for non-deduction of tax at source from bank guarantee commission payments, it was inter alia submitted by the assessee that a plain reading of Explanation to Section 194 H, which deals with deduction of tax source from commission or brokerage payments, indicates that the element of agency is essential in case of all the services or the transactions contemplated by Explanation to Section 194 H, and that the transactions or services, which are on principal to principal basis, would not be governed by the said provision requiring tax deduction at source. The assessee also referred to various judicial precedents, including by Hon'ble Gujarat High Court in the case of Ahmedabad Stamp Vendors Association Vs Union of India (257 ITR 202), and by co ordinate benches of this Tribunal in the cases of Baidynath Ayurved Bhawan Ltd Vs JCIT (83 TTJ 409) and ACIT Vs The Samaj (71 TTJ783). None of these submissions, however, impressed the Assessing Officer. He was of the view that, in terms of the provision of Explanation to Section 194 H, 'commission or brokerage" covers any payment, received or receivable – directly or indirectly, for any services in relation to any transaction relating to any asset, valuable or thing. He rejected the assessee's submission regarding principal agent relationship being sine qua non for

invoking the tax deduction at source requirements as "totally incorrect and devoid of any merits" and observed that "the Explanation to Section 194 H is very wide and covers any payments in the nature of any commission or brokerage for any services in relation to any transaction relating to any asset". He further noted that the assessee has taken bank guarantees from various banks and these bank guarantees protect the stock exchanges from any default by the assessee and acts as security for due performance and fulfillment of obligations by the assessee. The bank guarantee commission paid by the assessee for these bank guarantees, according to the Assessing Officer, was liable for deduction at source under section 194 H. The assessee's failure to deduct the tax source was, accordingly, visited with demands raised under section 201(1) r.w.s. 194H, to make good the shortfall in tax deduction at source, and under section 201(1A) r.w.s. 194 H, to compensate interest for delay in realizing the tax deduction at source revenues. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) held that the definition of 'commission or brokerage', as given in Explanation to Section 194 H, is not exhaustive but only inclusive, which, in effect, implies that any payment for commission or brokerage, as understood in common parlance, will also be covered by the said provision. He inter alia observed that "it is evident that the Explanation seeks to include even those payments (besides normal commission or brokerage) which otherwise may not be called 'commission or brokerage' and which are in the nature of payment for services rendered (except for professional services which are covered u/s 194J) by an agent of a principal". "This", learned CIT(A) reasoned, "obviously does not mean that normal commission or brokerage payments are excluded from the purview of Section 194 H". Learned CIT(A) thus upheld , and infact fortified, the stand of the Assessing Officer, and thus confirmed the impugned demands raised under section 201(1)r.w.s. 194 H and under section 201(1A) r.w.s. 194 H. The assessee is aggrieved and is in further appeal before us.

3. We have heard the rival contentions, perused the material on record and duly considered factual matrix of this case as also the applicable legal position.

4. Let us first take a look at Section 194 H, which is reproduced as follows:

Commission or brokerage

194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of 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 ten per cent :

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed five thousand rupees :

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section: Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.

Explanation.—For the purposes of this section,—

(i) "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;

(ii) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) ;

(iv) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

5. A plain reading of the above provision indicates that tax withholding requirements under section 194H apply in respect of 'commission or brokerage', which, in turn, is defined by Explanation to Section 194 H. No doubt, this definition is inclusive but the fundamental question that we really need to consider in the first place is as to what are the connotations of expression 'commission or brokerage' in common parlance, and then proceed to deal with the inclusions thereto by the virtue of specific provision of law.

6. We find that the expression 'commission' and 'brokerage' have been used together in the statute. It is well settled, as noted by Maxwell in Interpretation of Statutes and while elaborating on the principle of noscitur a sociis, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. Explaining this principle in general terms, Hon'ble Shri M.K. Chaturvedi, the then Vice President (MZ) has, in Interpretation of Taxing Statutes (AIFTP Journal : Vol. 4, No. 7, July, 2002, at p. 7), in his inimitable words observed:

Law is not a brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism. Similarly, the rules relating to interpretation are also based on common-sense approach. Suppose a man tells his wife to go out and buy bread, milk or anything else she needs, he will not normally be understood to include in the terms 'anything else she needs' a new car or an item of jewellery. The dictum of ejusdem generis refers to similar situation. It means of the same kind, class or nature. The rule is that when general words follow particular and specific words of the same nature, the general words must be

confined to the things of same kind as specified. Noscitur a sociis is a broader version of the maxim ejusdem generis. A man may be known by the company he keeps and a word may be interpreted with reference to be accompanying words. Words derive colour from the surrounding words.

7. Broom's Legal Maxims (10th Edn.) observes that "It is a rule laid down by Lord Bacon, that copulatio verborum indicat acceptationem in eodem sensu the coupling of words together shows that they are to be understood in the same sense."

8. Let us now deal with legal connotations of these two expressions, namely 'commission' and 'brokerage'. The Law Lexicon (Edited by Justice Y.V. Chandrachud; 1997 Edn.) observes that "in commercial law, commission is a compensation to a factor or other agent for services to be rendered in making a sale or otherwise; a sum allowed as compensation to a servant, factor or agent who manages the affairs of others, in recompense for his services." According to the given definition, "It is an allowance, recompense or reward made to agents, factors and brokers and others for effecting sales and carrying out business transactions. It is generally calculated as a certain percentage on the amount of the transactions on the profits to the principal." The expression 'brokerage' is defined as 'fees or commission given to or charged by a broker'. In turn a broker is defined as "a middleman or agent who, for a commission on the value of transaction, negotiates for others the purchase or sale of books, bonds or commodities, or property of any kind, or who attends to the doing of something for another".

9. In the light of the above discussions, and when we look at the connotations of expression 'commission or brokerage' in its cognate sense, as in the light of the principle of noscitur a sociis as we are obliged to, in our considered view, scope of expression 'commission', for this purpose, will be confined to 'an allowance, recompense or reward made to agents, factors and brokers and others for effecting sales and carrying out business transactions' and shall not extend to the payments, such as 'bank guarantee commission', which are in the nature of fees for services rendered or product offered by the recipient of such payments on principal to principal basis. Even when an expression is statutorily defined under section 2, it still has to meet the test of contextual relevance as section 2 itself starts with the words "In this Act (i.e. Income Tax Act), unless context otherwise requires…", and, therefore, contextual

meaning assumes significance. Every definition in the Income Tax Act must depend on the context in which the expression in set out, and the context in which expression 'commission' appears in section 194 H, i.e. alongwith the expression 'brokerage', significantly restricts its connotations. The common parlance meaning of the expression 'commission' thus does not extend to a payment which is in the nature of fees for a product or service; it must remain restricted to , as has been elaborated above, a payment in the nature of reward for effecting sales or business transactions etc. The inclusive definition of the expression 'commission or brokerage' in Explanation to Section 194 H is quite in harmony with this approach as it only provides that "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" is includible in the scope of meaning of 'commission or brokerage'. Therefore, what the inclusive definition really contains is nothing but normal meaning of the expression 'commission or brokerage'. In the case of South Gujarat Roofing Tiles Manufacturers Association Vs State of Gujarat [(1976) 4 SCC 601], Hon'ble Supreme Court were in seisin of a situation in which an expression, namely 'processing', was given an inclusive definition, but Their Lordships were of the view that "there could be no other meaning of 'processing' besides what is stated as included in that expression" and that "Though 'include' is generally used in interpretation clause as a word of enlargement, in some cases context might suggest a different intention'. Their Lordships then concluded that though the expression used in the definition clause is 'includes', "it seems to us that the word 'includes' has been used here in the same sense of 'means'; this is the only construction that the word can bear in this context". In other words, an inclusive definition, as Their Lordships noted, does not necessarily always extend the meaning of an expression. When inclusive definition contains ordinary normal connotations of an expression, in our considered view, even an inclusive definition has to be treated as exhaustive. That is the situation in the case before us as well. Even as definition of expression 'commission or brokerage', in Explanation to Section 194 H, is stated to be exclusive, it does not really mean anything other than what has been specifically stated in the said definition. Therefore, as held by the coordinate benches in a number of cases including SRL

Ranbaxy Ltd vs ACIT (ITA No. 434/Del/11; order dated 16.12.2011), Fosters India Ltd Vs ITO (117 TTJ 346), and Ajmer Zila Dugdh Utpadak Sangh Ltd Vs ITO (34 SOT 216), principal agent relationship is a sine qua non for invoking the provisions of Section 194 H. In the case before us, there is no principal agent relationship between the bank issuing the bank guarantee and the assessee. 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 termed 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 requirements under section 194H. We are, therefore, of the considered view that the CIT(A) indeed erred in holding that the assessee was indeed under an obligation to deduct tax at source under section 194 H from payments made by the assessee to various banks. As we have held that the assessee was not required to deduct tax at source under section 194 H, the question of levy of interest under section 201(1A) cannot arise.

10. In view of the above discussions, we quash the impugned demands under section 201(1) and 201(1A) r.w.s. 194 H . We, therefore, also see no need to deal with other peripheral legal issues raised by the assessee.

11. In the result, the appeal is allowed."

In the aforesaid decision, the Tribunal has made an elaborate discussion by holding that there is no principal agent relationship between the bank issuing the bank guarantee and the assessee. In another case, in JDS Apparels Pvt. Ltd. vs CIT (ITA No.608 of 2014) order dated 18/11/2014 after having a discussion from the decision from Hon'ble Apex Court in Ahmadabad Stamp Vendor Association, CIT vs Idea Cellular Ltd (2010) 325 ITR 148 (Del.) held that the amount retained by the bank is a fee charged by them for rendering bank services and cannot be treated as commission or brokerage paid in the course of use of any services by a person acting on behalf of another for buying and selling the goods and thus, the

banking services cannot be covered and treated as services rendered by an agent for the principle. It was held that the Assessing Officer was not justified in invoking section 40(a)(ia) of the Act and consequent addition i.e. the charges deducted by HDFC Bank on payment made through credit card. Thus, it is held that no TDS is payable on credit card charges u/s 194H of the Act as the assessee is not required to deduct TDS, consequently, cannot be said to be assessee in default u/s 201(1)/201(1A) of the Act, therefore, we affirm the stand of the Ld. Commissioner of Income Tax (Appeal).

Finally, the appeal of the Revenue is dismissed."

It is noted that in the aforesaid order on identical issue, the Tribunal followed the decision in the case of Kotak Securities Ltd. (ITA No.6657/Mum/2011) and the case of the assessee itself for Assessment Year 2011-12. Identically, vide order dated 28/01/2016 (ITA No.3950/Mum/2014), the Tribunal took identical view and also in order dated 15/11/2016 (ITA No.7352/Mum/2014 and 7353/Mum/2014). No contrary facts were brought to our notice by either side and more specifically the Revenue, therefore, following the decision of the Coordinate Bench, we affirm the order of the Ld. Commissioner of Income Tax (Appeal), resulting into dismissal of this ground of the Revenue.

3. The next ground pertains to deleting the addition of Rs.38 lakhs, holding that nothing was brought on record by the Assessing Officer to prove the addition by observing that it is inflated one. The crux of argument on behalf of the Revenue is that the assessee claimed travelling expenses, which are highly inflated and the Ld. Commissioner of Income Tax (Appeal) merely stated that nothing was brought on record and deleted the addition. The Ld. CIT-DR, invited our attention to the travelling made by Shri Sateesh Andra, Bhavik Banker and Jhanvi Wadhwa, by claiming that these persons visited the places and returned back on the same date and again went to the same place on the same date, therefore, there was no logic behind it. The ld. counsel for the assessee claimed that in between claimed ticket was got cancelled. However, the Ld. CIT-DR insisted that it is not so. At this stage, the ld. counsel for the assessee contended that 50% of such expenses may be disallowed. The Ld. CIT-DR had no objection to the request of the assessee. Thus, on perusal of record and after hearing the rival submissions and also to put an end to the litigation on this count, we reduce the amount to 50% of

the relief granted by the Ld. Commissioner of Income Tax (Appeal) with respect to travelling and convenience expenses. Thus, this ground of the Revenue is partly allowed.

Finally, the appeal of the Revenue is partly allowed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 30/11/2017.

Sd/-	***Sd/-***
(G. Manjunatha)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/11/2017

Shekhar, P.S./नि.स.,

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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