

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-6103/Del/2015
(Assessment Year: 2012-13)**

ACIT Circle-77(1) New Delhi	Vs.	Spice Jet Ltd. 319, Udyog Vihar, Phase-IV Gurgaon PAN : AACCR1459F
Appellant		Respondent

**Assessee by : Sh. Tarundeep Singh, Adv.
Revenue by : Ms. Deepika Mittal, CIT(DR)**

Date of Hearing	26.02.2019
Date of Pronouncement	28.02.2019

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.:

This appeal is preferred by the revenue against the order dated 28.08.2015 passed by the Ld. Commissioner of Income Tax (Appeals)-41, New Delhi for assessment year 2012-13.

2.0 The brief facts of the case are that the assessee is a company engaged in the business of Civil Aviation. For the year under consideration, an order dated 19th March, 2014 u/s 201(1)/(1A) of the Income Tax Act, 1961 (hereinafter called "the Act") was passed by the

Assessing Officer (AO), wherein the AO held the assessee to be an “assessee in default” for non-deduction of TDS in respect of following items :

(a) Passenger Service Fee (“PSF”) collected by the assessee from embarking passengers and handed over to various airports / authorities; and,

(b) Amounts retained by banks for rendering credit card processing services from the payments received by such banks from the passengers for booking tickets to fly in the aircrafts operated by the assessee.

2.1 Being aggrieved, the assessee filed an appeal before Ld. CIT (Appeals). The Ld. First Appellate Authority allowed the appeal and held that the assessee was not required to deduct TDS on the above items. Aggrieved, the department is now in appeal before the ITAT and the following grounds of appeal have been raised:-

“1. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee was not liable to deduct tax at source from the payment of Passenger Service Fee (PSF) made by it to the Airport Operators particularly when the assessee, on its own, has deducted at source from the payments of PSF from 2012 onwards.

1.1 *Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the PSF paid by the assessee to the Airport Operators was not covered under the definition of fee for professional of technical services given in the Explanation to section 194J of the I.T. Act and the assessee was not liable to deduct tax at source under section 194J of the I.T. Act particularly when the assessee, on its own, has deducted tax at source from the payments of PSF from 2012 onwards?*

1.2 *Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in not confirming the order of the Assessing Officer treating the assessee as an assessee in default u/s 201(1) in respect of the amount of tax which has not been deducted under section 194J of the I.T. Act particularly when the Assessee, on its own, has deducted tax at source from the payments of PSF from 2012 onwards?*

1.3 *Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in not confirming the order of the Assessing Officer treating the assessee as an assessee in default u/s 201(1) in respect of the amount of tax which has not been deducted under section 194J from the payments of PSF and levying interest thereon under section 201(1A) of the I.T. Act particularly when the assessee, on its own, has deducted tax at source from the payments of PSF from 2012 onwards ?*

2. *Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that the amount retained by a bank/credit card agency out of the sale consideration of the tickets booked through credit /debit cards is not covered under the definition of “commission or brokerage”*

given in the Explanation (i) to section 194H of the I.T.Act and the assessee was not liable to deduct tax at source under section 194H in respect of this amount particularly when the CBDT notification No.56/2012 dated 31.12.2012 was not effective for the relevant year?

2.1 Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in not confirming the order of the Assessing Officer treating the assessee as an assessee in default u/s 201(1) in respect of the amount of tax which has not been deducted under section 194H and levying interest thereon under section 201(1A) of the I.T. Act?

2.2 Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in holding that a bank / credit card agency is not an agent of the assessee and thereby clearly ignoring the facts that in the entire process of facilitation of credit / debit card booking, the bank / credit card agency is nothing but a constructive agent for the airline company?

2.3 Whether on the facts and in the circumstances of the case and in law, the CIT (A) was justified in ignoring that the Explanation (i) to section 194H gives an inclusive definition of “commission or brokerage” and has wide coverage to clearly include the percentage of the sale consideration of the ticket, booked through credit / debit cards, retained by the bank / credit card agency?”

3. Before us, the Ld. CIT (DR) vehemently contended that the assessee was liable to deduct TDS on payment of PSF. By relying upon the findings recorded by the AO in his order u/s 201(1) of the

Act, it was submitted by her that the Ld. CIT (A) has erroneously allowed the claim made by the assessee. The Ld. CIT (DR) further relied upon Office Memorandum dated 30th June, 2008 issued by the CBDT in support of her contention that PSF was a receipt taxable in hands of the relevant Airport Authority and, therefore, the assessee ought to have deducted TDS on said payments.

4. On the other hand, the Ld. AR, Shri Tarandeep Singh, Advocate submitted that the Ld. CIT (Appeals) has correctly allowed the claim made of the assessee. In this regard, the Ld. AR, relying on the decision of the Mumbai Bench of the ITAT in the case of Jet Airways submitted that since PSF was collected by the assessee from the passengers on behalf of the Airport Authority there was no legal mandate to deduct TDS. The Ld. AR further submitted that the coordinate Bench decision in the case of Jet Airways has also been upheld by the Hon'ble Bombay High Court which has been reported in 395 ITR 230 (Bom). The Ld. AR further cited CBDT Circular No.21/2017 dated 12th June, 2017 wherein it is stated that the Department has accepted the decision of Hon'ble Bombay High Court and that no further appeal has been filed before the Hon'ble Apex Court.

5.0 We have carefully considered the facts of the case and the arguments advanced by both the sides. In Grounds 1 to 1.2 the dispute is whether TDS ought to have been deducted on payment of Passenger Service Fee (PSF). Before dwelling further, it would be relevant to first consider the nature of PSF. PSF is a fee which is collected by the airline companies on behalf of Airport Operators as per Rule 88 of the Indian Aircraft Rules 1937. PSF includes two components i.e., Security Component and Facilitation Component. Fee is levied on the passengers by Airport Authority of Indian (AAI) to meet the expenditure on security and passenger facilities at the Airport. Security Component collected by the Airport Operator is kept separately in an Escrow Account which is primarily use to pay for Security related expenses to CISF. In order to facilitate collection of PSF from passengers and for administrative convenience, the airlines companies have been instructed with the responsibility of collecting PSF from the passengers and subsequently deposit the same with the Airport Operator. In his order passed u/s 201(1) the AO has held that the assessee was liable to deduct TDS on payment of PSF as per provision of section 194J of the Act. In this regard, it was held by the AO as under:-

“4.4 The nature of payment on account of PSF made to Airport Operator(s) by the airline companies is to meet the security related

expenses of the airport, and considering the two components thereof, namely – (a) security component for the purpose of providing security related service along with related equipment and (b) facilitation component for the purpose of facilitating scanning facility, extension of watch hours, maintenance of airports, etc. The nature of payment made by way of PSF by the airline companies to the Airport Operators are, therefore, clearly comes under the realm of the provisions of section 194J of the Act and the payer of PSF i.e., the Airline company ought to have deducted tax on such PSF.

4.5 More so, it is pertinent to elicit that the Airports Economic Regulatory Authority (AERA), a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 determines various tariff for the aeronautical services in India has laid out Standard Operating Procedure for Account / Audit of Passenger Service Fee (Security Component) for the Airport Operators, wherein it has been spelled that, in terms of clarification dated 30.6.2008 issued by the Central Board of Direct Taxes (CBDT), the receipts on account of PSF (SC) are taxable as income in the hands of the airport operators and it shall be the responsibility of the Airport Operators to account for the Tax Deducted At Source, if any, by the Airlines from the payments on account of PSF”

5.1 Before the Ld. CIT (Appeals), two broad objections were raised by the assessee challenging the findings recorded by the AO alleging that payment of PSF attracted TDS. First, the assessee relied on the decision of the Hon'ble Delhi High Court in case of Cargo Linkers

reported in 218 CTR 695 (Del) and the decision of the Mumbai Bench of the ITAT in the case of ACIT vs. Jet Airways Ltd. reported in 146 ITD 682(Mum). It was submitted by the assessee before the Ld. First Appellate Authority that as per these decisions payment of PSF does not attract TDS liability. Secondly, it was submitted that the payee has accounted for PSF in its taxable income and, therefore, as far as assessee is concerned it could not be held to be an “assessee in default”.

5.2 The Ld. CIT (Appeals) found merit in both the above submissions. In the impugned order, following the decisions of Hon’ble Delhi High Court in the case of Cargo Linkers (supra) and Mumbai ITAT in the case of Jet Airways (supra), it was held by the Ld. CIT (Appeals) that the assessee was not required to deduct TDS on PSF collected by it and passed on to the relevant Airport Authority. The Ld. CIT (Appeals) also found merit in the alternative contention advanced by the assessee and held as under:-

“4.5.7 Further, as clarified by the appellant in its letter dated 24.08.2015, the appellant had offered proof that the amount in question was disclosed by recipients in their returned income. This has been discussed in para 3.1 on page 15 to 17. The appellant had very much submitted certificate from Cochin International Airport. For Airport Authority of India, the appellant had pleaded that Airport Authority of India’s accounts are subject

to CAG audit; lastly in respect of Mihan India Pvt. Ltd., the appellant was prevented by sufficient cause (closing down of business operations) from submitting CA certificate. The AO was in a position to accept assessee's submissions but he chose to ignore them."

5.3 In our considered opinion, the findings recorded by the Ld. First Appellate Authority merit to be upheld. The issue as to whether the payment of PSF attracts liability to deduct tax at source is now well settled. The Coordinate Bench of this Tribunal in case of Jet Airways (*supra*) has considered identical issue and has opined as under :-

"12. We have carefully considered the rival submissions and perused the orders of the authorities below and the relevant material evidence brought on record. Let us first see the cause of PSF, cause lies in Rule 88 of the Indian Aircraft Rules, 1937, which provides as under:—

"the licensee is entitled to collect fees to be called as Passengers Services Fees(PSF) from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security services"

A perusal of the aforementioned rule clearly shows that it is a statutory liability for every licensee to collect PSF. Since it is a statutory liability and the meaning given by the statute has to be considered and in this case the Indian Aircraft Rules, 1937 has used the term "Fees", therefore, same meaning has to be given while considering the PSF. It is not in dispute that the assessee is only acting as a conduit between the embarking passengers and the

Central Government agency. This view is also fortified by the fact that out of Rs.200/-, Rs.130/- is the security component, which is deposited in a separate escrow account, which is operated and can be utilized by airport concerned only to meet the security related expenses of that airport.

13. *Further it is pertinent to note that the CBDT in its Office Memorandum dated 30-06-2008 has clearly stated the fact that the licensee of the airport i.e. the airport operator, is required to collect the PSF is initially collected by the concerning airlines from the passengers and then handed over to the respective airport operator/authority. Thus, it is absolutely clear that the assessee only collects the PSF from the passengers for and on behalf of the airport authority/operator and passes the same to the airport authority/operator. This view would also be made very clear by the answer to question No.24 given by the CBDT it is Circular No.715, dated 8th August, 1995, which relates to clarification of various provisions relating to tax deduction at source. Question No.24 reads as under:—*

"Question 24: Whether in a case of composite arrangement for user of premises and provision of manpower for which consideration is paid as a specified percentage of turnover, section 194-I of the Act would be attracted ?

Answer: If the composite arrangement is in essence the agreement for taking premises on rent, the tax will be deducted under section 194-I from payments thereof."

The facts under consideration show that the PSF is a statutory liability without demarcating/earmarking the area taken on rent , nor it is a case of systematic use of land specified for consideration under an arrangement, which carries the characteristics of lease or

tenancy. A mere use of the land and payment charged, which is not for the use of the land but for maintenance of the various services including technical services would not technically bring the transaction and the charges within the meaning of either lease or sub-lease or tenancy or any other agreement or arrangement or any nature of lease or tenancy and rent. For these observations, we draw support from the decision of the Hon'ble Madras High Court in the case of CIT v. Singapore Airlines Ltd. [2012] 209 Taxman 581/24 taxmann.com 200.

14. It would not be out of place to consider the CBDT Circular No.1/2008, dated 10th January, 2008 relating to the clarification regarding the applicability of provisions of Section 194-I of the Act to payments made by the customers on account of cooling charges to the cold storage owners, wherein the CBDT had the occasion to consider the representations in respect of the issue, whether the customer hires the building, plant and machineries etc., without packages for reservation for a required period are kept in cold storage after paying cooling charges. The CBDT, thus, clarified that the customer is also not given any right to use any demarcated space/place or the machinery of the cold storage and thus does not become a tenant. Therefore, the provisions of 194-I is not applicable to the cooling charges paid by the customers of the cold storage. Applying the same analogy, the PSF charges paid by the assessee on behalf of its customers, do not attract the provisions of Section 194-I of the Act.

15. Considering all these judicial decisions in the light of the facts of the case, we do not find any error/omission in the findings of the CIT(A). Hence, the assessee succeeds and the revenue fails and the

findings of the CIT (A) are confirmed. Accordingly, grounds No.1 & 2 are hereby dismissed.”

5.4 The decision of Tribunal in case Jet Airways (supra) has been upheld by the Hon'ble Bombay High Court. In this regard the Hon'ble High Court has held as under:-

(e) *We find in the present facts the respondent collects PSF from only its embarking passengers for and on behalf of the Airport Operator. In terms of Rule 88 of the Indian Aircraft Rules the Airport Operator is entitled to collect PSF which provides as under:—*

"the licensee is entitled to collect fees to be called as Passengers Services Fees (PSF) from the embarking passengers at such rate as the Central Government may specify and is also liable to pay for security component to any security agency designated by the Central Government for providing the security services."

(f) *Thereafter attention was invited to an order dated 9th May, 2006 of the Ministry of Civil Aviation (Government of India) which entitle the Airport Operator to collect the PSF from the embarking passengers and out of Rs. 200/- collected per passenger, an amount of Rs. 70/- would be retained by the Airport Operator towards passenger facilitation while the balance Rs. 130/- would be handed over to CISF for security arrangements. Thus this cannot be considered to be as a payment made by the Airline-respondent. It is payment made by the passenger which is only routed through the airline. For this reason the order also records the fact that the above amount handed over to the Airport Operator is not claimed as an expenditure by the respondent-assessee. Further the impugned order places reliance upon the decision of the Madras High Court in Singapore Airlines (supra). This decision of the Madras High Court*

was carried in appeal by the Revenue to the Supreme Court. By its decision reported as Japan Airlines Co. Ltd. v. CIT [2015] 60 taxmann.com 71/234 Taxman 175/377 ITR 372, the view of the Madras High Court was upheld. In the case before the Supreme Court, the issue for consideration was whether landing and take-off charges paid by the airline to the Airport Operator would be covered within the meaning of rent as provided under Section 194-I of the Act. The Apex Court while upholding the view of the Madras High Court held that when the airlines pay for landing and parking charges, "treating such charges as charges for "use of the land" would be adopting a totally naive and simplistic approach which is far away from reality. We have to keep in mind the substance behind such charges. When the matter is looked into from this angle, keeping in view the full and larger picture in mind, it becomes very clear that the charges are not for use of the land per se and therefore it cannot be treated as rent within the meaning of section 194-I of the Act." It may be observed that the Apex Court did further observe that in view of the explanation to Section 194-I of the Act, the normal/popular meaning of the word "rent" stood expanded. However, primary requirement is that the payment must be for use of the land or building and mere incidental/minor/insignificant use of the same while providing other facilities and services would not make it a payment made for use of land/buildings. This is more so as the submission of the Revenue itself before us is that the payment of PSF is for use of secured building and furniture. Therefore the use of land/or building in this case is only incidental. Thus the ratio of the decision of the Apex Court in Singapore Airlines (supra) would apply on all fours to the present facts.

(g) *As the substance of the PSF is not for use of land or building but for providing security services and facilities to the embarking passengers the decision of the Apex Court in Singapore Airlines (supra) would cover the issue in favour of the respondent-assessee. Consequently, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.*”

5.5 The Ld. AR has further cited CBDT Circular No.21 of 2017 wherein the CBDT has stated that it has accepted the above view of Hon'ble Mumbai High Court. In this regard, the CBDT Circular states as under:-

“2. A dispute arose on applicability of the provisions of section 194-I of the Act, on payment of Passenger Service Fees (PSF) by an Airline to an Airport Operator. The Hon'ble High Court of Bombay in CIT v. Jet Airways (India) Ltd. declined to admit the ground relating to applicability of provisions of section 194-I of the Act on PSF charges holding that no substantial question of law arises. While doing so it relied on the judgment of the Hon'ble Supreme Court dated 4-8-2015 in the case of Japan Airlines and Singapore Airlines² where the Apex Court held that in view of Explanation to section 194-I of the Act, though, the normal meaning of the word 'rent' stood expanded, however, the primary requirement is that the payment must be for the use of land and building and mere incidental/minor/insignificant use of the same while providing other facilities and service would not make it a payment for use of land and buildings so as to attract section 194-I of the Act.

3. *The Board has accepted the above view of the High Court of Bombay. Accordingly, it is now a settled position that section 194-I of the Act, will not apply on PSF.*
4. *In view of the above, henceforth, appeals may not be filed by the Department on the above settled issue, and those already filed may be withdrawn/not pressed upon.”*
- 5.6 From the above decided precedents, it is clear that the issue in dispute is now no more *res integra*. In the case of Jet Airways (*supra*) it was claimed by the department that payment of PSF attracted TDS liability u/s 194-I of the Act and in the instant case it is held by the AO that payment of PSF attracted TDS liability u/s 194J of the Act. However, this too, in our considered view would not make any difference. As is clear from the findings recorded by the Coordinate Bench in the case of Jet Airways (*supra*) which have been upheld by the Hon'ble Bombay High Court, PSF cannot be considered to be a payment made by the assessee airline. PSF is a payment made by the passenger which is only routed through the assessee airline. It is undisputed that the amount handed over by the assessee airline to the Airport Operators has also not been claimed as expenditure by the assessee in its books of account. The Hon'ble Bombay High Court has further held that PSF is a statutory levy and the assessee airline is only acting as a conduit between the embarking passengers and the Central Government Agency. Clearly therefore, even the provisions of

section 194J of the Act would not apply. Respectfully following decision of Jet Airways (*supra*) it is held that assessee was not required to deduct TDS u/s 194J on payment of PSF.

5.7 We may also deal with the other contentions advanced by the Ld. CIT (DR). The Ld. Departmental Representative has relied on the CBDT Office Memorandum dated 30th June, 2008. CBDT in its office Memorandum has opined that PSF is an income which is chargeable to tax in the hands of relevant Airport Authority. In this regard it is relevant to note that the Coordinate Bench of Tribunal in the case of Mumbai International Airport Pvt. Ltd. reported in 184 TTJ 229 (Mum) has held that PSF is not an income u/s 2(24) of the Act in hands of the relevant Airport Operator. The Coordinate Bench has further held that the CBDT Office Memorandum is not binding on the Tribunal and the same cannot override the provisions of the Act. In this regard, the Coordinate Bench has held as under:-

“14.18 The aforesaid discussion takes us to the second issue wherein we have been called upon to decide about the binding legal force of the opinion expressed by CBDT and MOCA vide their office memorandum/instructions for determining taxability of the impugned amount. It is admitted fact on record that the assessee company collected PSF-SC in view of the order issued by MOCA vide its order dated 09th May, 2006. The terms of the order have been modified/amended from time to time as per the

requirements. One such order issued by MOCA was issued on 20th June, 2007. Subsequently, CBDT issued an Office Memorandum dated 30/06/2008 in pursuance to the request made by the concerned officials of MOCA regarding taxability of PSF-SC, wherein it has been observed that since the assessee company was collecting this amount in the course of business and assessee was rendering facilitation and securities services whether in-house or outsourced, therefore, the amount collected by the assessee in the form of PSF-SC was in the nature of income of the assessee and liable to be taxed in its hands. In support of its view, reliance has been placed by the Board on the judgement of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (supra) with a view to fortify its opinion. Subsequently, Ministry of Civil Aviation's office issued an order dated 19-01-2009 laying down accounting/audit procedure in respect of PSF-SC. It was intended to act as Standard Operating Procedure (SOP) for accounting/audit of PSF-SC by the airport operator. In the aforesaid document, the whole procedure was duly explained how the amount has to be collected and to be kept in escrow account and to be disbursed for the purpose of security. Relying upon the Office Memorandum issued by the CBDT dated 30-06-2008, it was mentioned therein that the tax component may be charged to the PSF-SC account in proportion to its liability on standalone basis. The assessee was of the opinion that the aforesaid amount was not taxable in the hands of the assessee company, and therefore, while filing the return the same was not included in the taxable income by the assessee. But during the course of assessment proceedings, the AO was of the opinion that the said amount was taxable in the hands of the assessee in view

of Office Memorandum of CBDT dated 30-06-2008 and instructions dated 19-01-2009 issued by MOCA. With a view to clarify the situation, representation was made before the CBDT as well as MOCA. In response, MOCA issued a letter dated 15-11-2010 wherein it was stated that the matter was examined with the Ministry of Finance and accordingly it is clarified that the whole amount of PSF – SC including security component was revenue receipt, and thus it was taxable under the Income-tax Act.

14.19 The assessee challenged before us, the validity and binding force of the aforesaid Office Memorandum issued by the CBDT and clarification received by MOCA. It has been noted by us firstly that in none of these documents, there seems to have been made any application of mind by the concerned authorities while expressing their opinion. None of the authorities have considered the aspect that the impugned amount was collected in the fiduciary capacity by the assessee. None of the authorities have stated that under what provisions of law, the aforesaid amount can be brought to tax in the hands of the assessee. The CBDT in its Office Memorandum has made a reference to the judgment of the Hon'ble Supreme Court in the case of Chouringhee Sales Bureau (supra). But facts of that case have not been discussed. The aforesaid judgment has different facts, wherein, the amount of sales-tax was received by the said assessee and deposited in its bank account. The funds got mixed in assessee's accounts. Thus, in case of non payment by the said assessee, the same became income of the seller (the said assessee), whereas the facts are totally different in the case before us. The amount here was collected purely in fiduciary capacity and the same was deposited

in escrow account on which assessee had no control at all; the assessee had no discretion at all upon its usage. No reasoning has been made out by the CBDT while issuing its opinion as to how the said judgment was applicable on the facts of this case. It is noted by us that aforesaid judgment came up for consideration before many courts wherein its true meaning and scope of its applicability was explained time to time. In one such matter having similar facts as to the assessee before us, Hon'ble Allahabad High Court explained correct application of aforesaid judgment in the case of CIT v. Sita Ram Sri Kishan Das [1982] 11 Taxman 52/[1983] 141 ITR 685 (All.). In this case, the facts were that said assessee was a commission agent and was accountable for the recovery (called as Market Fee) which he made from the sellers of agricultural produce in terms of Krishi Utpadan Mandi Rules framed under the U.P. Krishi Utpadan Mandi Adhiniyam, 1964. The Revenue treated the amount so collected by the agent as part of its taxable income being a trading receipt in view of judgment of Hon'ble Supreme Court in the case of Chowringhee Sales Bureau, supra. After analysing the facts of the case, it was held by the Hon'ble Court that the market fee realised by the commission agent does not form part of his trading receipt as he (the commission agent) held this amount only as a trustee for and on behalf of the Market Committee. Hon'ble Court applied the judgment of Hon'ble Supreme Court in the case of CIT v. Sitaldas Tirathdas [1961] 41 ITR 367 and distinguished that of Chowringhee Sales Bureau (P.) Ltd.(supra).

14.20 Thus, at the outset, it is clearly visible that both the authorities expressed their opinions without proper application of

mind and without examining the nature of impugned receipt within the framework of provisions of Income-tax Act, 1961.

14.21 Apart from that, the binding effect of Office Memorandum issued by CBDT, clarification issued by MOCA is also under question. It has been argued that it has been held by Hon'ble Supreme Court many times that circulars issued by the Board are binding upon the authorities working under it, viz. the AO, etc. but these are not binding upon the appellate authorities including Income Tax Appellate Tribunal. We have examined this aspect also carefully. It is noted that as per section 119 of the Act, the CBDT has been empowered by the legislature to issue orders, instructions or directions to all the Income-tax authorities working under it for proper administration of the I.T. Act. And it has also been provided that this shall be binding upon the Income-tax authorities. But it is further noted that a proviso has been added to sub section (1) of section 119 which says that no such orders, instructions or directions shall be issued:- (a) so as to require any income-tax authority to make a particular assessment or to dispose a particular case in a particular manner; or (b) so as to interfere with the discretion of the Commissioner (Appeals) in exercise of his appellate functions. It is clear from the perusal of aforesaid proviso that neither the Board has power to decide the taxability of a particular receipt nor has it got any power to interfere with the appellate functions of Commissioner (Appeals), which is judicial in nature. Thus, in view of the aforesaid legal scenario coupled with facts of this case as discussed above, we have strong doubts if at all the Board could have issued any instructions to decide the taxability of amount collected by the

assessee company on account of PSF –SC in a purely fiduciary capacity. This task of determination of taxability has been left by the legislature upon the shoulders of the designated AO, who is obliged under the law to determine the same strictly in accordance with the provisions of the Income-tax Act, 1961.

14.22 Further, aforesaid clarification issued by the Board in this case is actually an "Office Memorandum". It is an inter departmental communication. In our view, Office Memorandum would not carry the legal force of binding effect. Further, it has been provided in section 119 that orders, instructions and directions shall be binding upon the income-tax authorities. It is noted that Income-tax Appellate Tribunal does not fall under the list of Income-tax Authorities as has been provided in section 116 of the Act. Thus, these orders, instructions and directions shall not be binding upon the Income-tax Appellate Tribunal. Further it is noted that these have been held to be not binding upon the CIT (A) as stated above. Therefore, there is no question of there being any binding effect upon the Income-tax Appellate Tribunal of any such communication issued by the Board.

14.23 It is noted by us that this issue is not res integra, as it has been settled by Hon'ble jurisdictional High Court and Hon'ble Supreme Court in many cases. It was held by Hon'ble Bombay High Court in the case of Banque Nationale De Paris (supra) that circulars cannot override or detract from the provisions of the Act in as much as section 119 of the Act has empowered the CBDT to issue orders, instructions or directions for the proper administration of the Act. Hon'ble High Court has taken into consideration various earlier judgments of Hon'ble Supreme Court

on this issue. Similarly, the Hon'ble Supreme Court in the case of Hero Cycles (P.) Ltd. (supra) held that circulars can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee. It is further noted that law in this regard was further analysed by Hon'ble Supreme Court in the case of UCO Bank (supra). It was observed by the Hon'ble Supreme Court that CBDT has power to tone down the rigour of the law and ensure enforcement of its provisions of issuing circulars. The Board has been given for the purpose of just, proper and efficient management of work of assessment. However, these are not meant for contradicting or nullifying any provision of the statute. Relying upon its earlier judgement comprising of three judges in the case of Keshavji Ravji & Co. v. CIT [1990] 49 Taxman 87/183 ITR 1 (SC), it was inter-alia observed that Board cannot pre-empt judicial interpretation and the scope and ambit of a provision of the Act. Also, a circular cannot impose on the taxpayer a burden higher than what the Act itself on a true interpretation, envisages. The task of interpretation of the law is exclusively the domain of the Courts. However, the Board has the statutory power u/s. 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure proper administration of the fiscal statute and such circulars would be binding on the authorities enshrined in the Act.

14.24 Thus, taking guidance from the aforesaid legal discussion as has been clarified by the Hon'ble jurisdictional High Court as well as by Hon'ble Supreme Court, it is clear that the Office Memorandum issued by CBDT to MOCA cannot hold an amount as taxable, if the same is otherwise not taxable as per the

provisions of the Income-tax Act, 1961. Further, as far as the clarification issued by MOCA is concerned, it is noted that the role of MOCA was confined to issuing Standard Operating Procedures and other guidelines to the airport operators to ensure that funds collected by the assessee company in the fiduciary capacity on behalf of MOCA are properly kept and disbursed for the designated purposes only. It has no jurisdiction to determine the taxability of the impugned amount. It clearly had no jurisdiction in holding the same as taxable and, therefore, to that extent its order/clarification has no authority in the eyes of law and the same has been rightly ignored by the assessee as well as by the appellate courts while determining the taxability of the impugned amount.”

5.8 For the reasons stated above, grounds 1 to 1.2 are dismissed.

6.0. In Ground Nos.2 to 2.3, the Revenue challenges relief granted by the Ld. CIT(Appeals) by holding that the amount retained by Banks/ Credit Card Agencies out of Sale consideration of the tickets booked through credit / debit cards is not covered under the definition of “commissioner or brokerage” as per section 194H of the Act. In this regard, in the order u/s 201(1) of the Act, the AO held that there is an implied agency relationship between the assessee airline and the banks and, therefore, the charges retained by the Banks are in the nature of commission or brokerage. In his order it is held by the AO as under:-

“3.2 In the instant case, the first condition i.e., for any services rendered is clearly covered. The bankers received payment from the merchant established i.e., the assessee for the Payment Gateway services rendered by the bankers. The services rendered by the bankers are clearly in the nature of recovery of bills from the customers on behalf of the assessee and the payments made against this service by the assessee is undoubtedly in the nature of commission which is being charged by the bankers on each such transaction. More so, the assessee has not directly received the payments from the customers, but it is the banks which are collecting the payments for the assessee from the customers and giving it to the assessee. Hence the banks are clearly acting as an agent on behalf of the assessee albeit the agreement, entered between the parties, does not visibly depict the relationship between them as “Principal and Agent”.

6.1 The Ld. CIT (Appeals) has, in the impugned order, held that the charges retained by the credit card companies/banks are not in the nature of commission or brokerage. While arriving at this conclusion, the Ld CIT (A) has followed the decision of Hon’ble Jurisdictional High Court in the case of CIT vs. JDS Apparels Pvt. Ltd. reported in 370 ITR 454 (Del).

6.2 Before us, the Ld. CIT (DR) relied on the order passed by the AO.

6.3 Per contra, the Ld. AR submitted that the issue is now settled by the order of Jurisdictional High court in the case of M/s JDS Apparel

(supra) and submitted that, therefore, the findings of Ld. CIT (A) should be upheld.

6.4 We have carefully considered the facts of the case and the submissions made by the rival parties. We find that the issue in dispute stands fully covered by the decision of the Hon'ble Jurisdictional High Court in the case of JDS Apparel (supra) wherein the Hon'ble High court has held as under :-

“15. Applying the above cited case law to the factual matrix of the present case, we feel that Section 194H of the Act would not be attracted. HDFC was not acting as an agent of the respondent-assessee. Once the payment was made by HDFC, it was received and credited to the account of the respondent-assessee. In the process, a small fee was deducted by the acquiring bank, i.e. the bank whose swiping machine was used. On swiping the credit card on the swiping machine, the customer whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, the acquiring bank realised and recovered the payment from the bank which had issued the credit card. HDFC had not undertaken any act on "behalf" of the respondent-assessee. The relationship between HDFC and the respondent-assessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. It is noticeable that the bank in question or their employees were not present at the spot and were not

associated with buying or selling of goods as such. Upon swiping the card, the bank made payment of the bill amount to the respondent-assessee. Thus, the respondent assessee received the sale consideration. In turn, the bank in question had to collect the amount from the bankers of the credit card holder. The Bank had taken the risk and also remained out of pocket for sometime as there would be a time gap between the date of payment and recovery of the amount paid.

16. The amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. The intention of the legislature is to include and treat commission or brokerage paid when a third person interacts between the seller and the buyer as an agent and thereby renders services in the course of buying and/or selling of goods. This happens when there is a middleman or an agent who interacts on behalf of one of the parties, helps the buyer/seller to meet, or participates in the negotiations or transactions resulting in the contract for buying and selling of goods. Thus, the requirement of an agent and principal relationship. This is the exact purport and the rationale behind the provision. The bank in question is not concerned with buying or selling of goods or even with the reason and cause as to why the card was swiped. It is not bothered or concerned with the quality, price, nature, quantum etc. of the goods bought/sold. The bank merely provides banking services in the form of payment and subsequently collects the payment. The amount punched in the swiping machine is credited to the account of the retailer by

the acquiring bank, i.e. HDFC in this case, after retaining a small portion of the same as their charges. The banking services cannot be covered and treated as services rendered by an agent for the principal during the course of buying or selling of goods as the banker does not render any service in the nature of agency.”

6.5 The issue involved in present appeal being identical to that decided by the Hon'ble Jurisdictional High Court, respectfully following the verdict of M/s JDS Apparel (*supra*) it is held that the assessee was not required to deduct TDS on charges retained by Bank / credit card agencies out of the sale consideration of tickets booked through credit / debit cards. It is held that provision of section 194H are not attracted. As a result, grounds 2 to 2.3 are dismissed.

7.0 In the final result, the appeal of the department is dismissed.

Order pronounced in the open court on 28.02.2019.

Sd/-
(G.D.AGRAWAL)
VICE PRESIDENT

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 28.02.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	Dictated on dragon
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	