

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.117/Del./2017
(ASSESSMENT YEAR : 2012-13)**

M/s. Navnirman Highway Project Pvt. Ltd., vs. DCIT, Circle 18(1),
C/o Bajpai & Company, New Delhi.
602, Ansal Bhawan,
16, K.G. Marg,
New Delhi – 110 001.

(PAN : AADCN2058F)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Shashwat Bajpai, Advocate
REVENUE BY : Ms. Rinku Singh, Senior DR

Date of Hearing : 22.08.2019

Date of Order : 03.09.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Navnirman Highway Project Pvt. Ltd.,
(hereinafter referred to as the 'assessee') by filing the present
appeal sought to set aside the impugned order dated 10.10.2016
passed by the Commissioner of Income - tax (Appeals)-6, New
Delhi qua the assessment year 2012-13 on the grounds inter alia
that :-

“1. That the Order passed by the Id. CIT(A) is contrary to facts and bad in law.

2. That on the fact and circumstances of the case and in law, the Ld. CIT(A) was not justified in upholding the decision of the Assessing Officer to disallow the expenditure of Rs.18,40,032, on account of bank guarantee commission.

3. That on the fact and circumstances of the case and in law, the Ld. CIT(A) has grossly misconstrued CBDT Notification No. 56/2012 dated 31.12.12 and erred in holding that the scheme presupposes that a payment notified under this notification was not exempt earlier.

4. That on the fact and circumstances of the case and in law, the Ld. CIT(A) has grossly failed to consider the object behind the notification which was to reduce the hardship and compliance burden to the deductee.

5. That on the fact and circumstances of the case and in law the Ld. CIT(A) has failed to followed the judgment of the Mumbai ITAT in Kotak Securities Ltd. v. DCIT, [2012] 18 taxmann.com 48 (Mum.) which squarely covers the issue holding that Bank guarantee commission is not liable to TDS under section 194H.

6. That on the fact and circumstances of the case and in law, the Ld. CIT(A) failed to consider that a beneficial circular and/or interpretation should be applied retrospectively.”

2. Briefly stated the facts necessary for adjudication of the issue at hand are : Assessing Officer (AO) disallowed bank guarantee commission under section 14A (ia) of the Income-tax Act, 1961 (for short ‘the Act’) on the ground that under new scheme which came into force w.e.f. 01.01.2013, payments in the nature of those mentioned in Notification No.56/2012 are not covered within the definition of interest u/s 2(28A) of the Act and as such, exemption provided u/s 194A(3)(iii) is not available to such payment. So, the assessee was required to deduct the TDS on

the bank guarantee commission/fee of Rs.18,40,332/- debited to profit & loss account and the same is, therefore, disallowed and added back to the income of the assessee.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has confirmed the addition by dismissing the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Ld. AR for the assessee by relying upon the order passed by the coordinate Bench of the Tribunal in case cited as ***Kotak Securities Ltd. vs. DCIT, TDS Circle 2 (1), Mumbai – (2012) 14 ITR (T) 495 (Mumbai-Trib.)*** contended that bank guarantee commission partakes character of interest u/s 2(28A) of the Act and as such, addition is not liable to be sustained. However, on the other hand, Id. DR for the Revenue relied upon the order passed by the Id. CIT (A) but has not controverted the decision rendered by the coordinate Bench of the Tribunal by bringing on record any other decision contrary to it.

6. Coordinate Bench of the Tribunal decided the identical issue in favour of the assessee by returning following findings :-

“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 is set out, and the context in which expression ‘commission’ appears in section 194H, 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 Dugdha 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 fee 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."

7. So, following the decision rendered by the coordinate Bench of the Tribunal, when the bank has issued bank guarantee on behalf of the assessee there is no principal – agent relationship between the bank and the assessee which is a mandatory condition for invoking the provisions contained u/s 194H and in these circumstances, the assessee was not liable to deduct tax at source

u/s 194H from payment of bank guarantee commission to the bank. Moreover, bank guarantee commission also partakes the character of interest u/s 2(28A) of the Act and as such, exemption provided u/s 194A(3)(iii) is available to the assessee qua such payment. So, we are of the considered view that the Id. CIT (A) has erred in not following the decision rendered by the coordinate Bench of the Tribunal in *Kotak Securities Ltd.* (supra) on the ground that the decision of *Kotak Securities Ltd.* (supra) is not applicable having been pronounced before the issue of Notification No.56/2012 dated 31.12.2012 because ordinarily any provision of the statute has to be read having prospective effect and not having retrospective effect unless it is specifically provided. So, when there is no principal – agent relationship between the bank and the assessee, deduction of tax at source on commission or brokerage is not required for. Consequently, addition made by the AO and confirmed by the Id. CIT (A) is ordered to be deleted, thus the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 3rd day of September, 2019.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 3rd day of September, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-6, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.