

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

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 2513/Del/2017  
(Assessment Year: 2010-11)**

M/s ESRI India Technologies Ltd., (formerly NIIT GIS Limited) 8, Balaji Estate, 1 <sup>st</sup> Floor, Guru Ravi Das Marg, Kalkaji, New Delhi-110019.	Vs.	Addl. CIT, Range-13, New Delhi.
<b>PAN No: AAACN2216L</b>		
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : Shri Gaurav Jain, CA and  
Shri Deepesh Jain, CA  
**Revenue by** : Ms. Rakhi Vimal, Sr. DR

**ORDER**

**Per Anadee Nath Misshra, AM**

**(A)** This appeal by Assessee is filed against impugned appellate order of Learned Commissioner of Income Tax (Appeals)-6, Delhi, ["Ld. CIT(A)", for short], dated 16.02.2017 for Assessment Year 2010-11. The grounds of appeal are as under:

**"GROUND I: DISALLOWANCE OF BANK GUARANTEE CHARGES U/S 40(a)(i) OF THE INCOME TAX ACT, 1961 ("the Act") AGGREGATING TO Rs. 3,90,289/-.**

1.1 On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income tax (Appeals) - 6, Delhi ["the CIT"] erred in upholding the disallowance of bank guarantee charges of Rs. 3,90,289/- paid to bank u/s. 40(a)(i) of the

*Act on the alleged ground that the Appellant failed to deduct tax at source therefrom.*

1.2 *The Appellant humbly prays that it be held that no tax is deductible on the bank guarantee charges under the provisions of the Act and accordingly, the disallowance of the same u/s. 40(a)(ia) be deleted.*

*Without prejudice to the above,*

**GROUND II: NO DISALLOWANCE U/S. 40(a)(ia), WHERE THE PAYEE HAS OFFERED THE SUM TO TAX**

2.1 *If it is held that tax was deductible on the bank guarantee charges, the Appellant humbly prays that it be held that since the payee has included the said charges in its return of income for relevant assessment year, filed u/s. 139 and has paid the tax due on the income declared in such return, no disallowance u/s. 40(a)(ia) of the Act can be made in respect thereof.*

**Ground III; GENERAL**

*The Appellant craves leave to add, amend, alter and/or delete any/ all f the above grounds of appeal. "*

**(B)** The central issue in dispute in this appeal, is regarding allowability of assessee's claim for expenses on account of bank guarantee charges amounting to Rs. 3,90,289/-. The AO had disallowed the aforesaid claim U/s 40(a)(ia) of Income Tax Act, 1961 ("I.T. Act", for short) on the ground that the assessee had not deducted tax at source. At the time of hearing before us, both sides [representatives for the Assessee as well as for Revenue] were in agreement that the issue is squarely covered in favour of the assessee by CBDT Notification dated 31.12.2012 vide No. SO 3069(E) [No. 56/2012(F. No. 275/53/2012-IT(B))] issued U/s 197A (1F) of I.T. Act-; effective from 01-01-2013; and also by the following judicial precedents:

1. *CIT v. JDS Apparels (P.) Ltd.: 370 ITR 454(Del.)*
2. *DCIT v. PRL Projects & Infrastructure Ltd.: ITA No. 5010/Del/2015 (Del Trib.)*

3. *ACIT v. Jaypee Sports International Ltd.: ITA No. 4279 to 4281/Del/2015 (Del Trib.) [relevant extracts]*
4. *DCIT vs. Kotak Securities : 50SOT 158 (Mum Trib.)*
5. *ACIT vs. Jet Airways : ITA No. 5264/Del/2012 (Mum Trib.)*
6. *DCIT vs. Laqshya Media (P.) Ltd.: 182 TTJ 318 (Mum Trib.)*

**(B.1)** A copy each of the aforesaid precedents and the aforesaid CBDT Notification dated 31-12-2012 referred in foregoing paragraph **(B)** of this order was also filed from the assessee's side during appellate proceedings.

**(B.1.1.)** After hearing both sides, we find that both sides agree that the issue in dispute is covered in favour of the assessee by the aforesaid CBDT Notification dated 31-12-2012 and by the aforesaid precedents referred in foregoing paragraph (B) of this order.

**(B.1.1.1)** In the case of CIT vs. JDS Apparels (P) Ltd. (supra), the Hon'ble Delhi High Court has held as under:

*"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.*

*17. Another reason why we feel Section 40(a)(ia) of the Act should not have been invoked in the present case is the principle of doubtful penalization which requires strict construction of penal provisions. The said principle applies not only to criminal statutes but also to provisions which create a deterrence and results in punitive penalty. Section 40(a)(ia) is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the assessee's property and other economic interests. It operates and inflicts hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalization would come into play. The detriment in the present case, as it is noticeable, would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer in the present case. The aforesaid principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty deterrent may be preferred. In Maxwell's The Interpretation of Statutes, 12th edition (1969) it has been observed:—*

*"The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the element of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."*

**(B.1.1.2)** In the case of Kotak Securities Ltd. vs. DCIT (Supra), Mumbai Bench of

ITAT has held as under for Assessment Year 2004-05:

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

*194H. Commission or brokerage - 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 194H. 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 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 194H 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 v. 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 194H, 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 v. Asstt. CIT [2011] 16 taxmann.com 343 (Delhi - Trib.), Foster's India (P.) Ltd. v. ITO [2009] 29 SOT 32 (Pune) (URO), and Ajmer Zila Dugdh Utpadak Sangh Ltd. v. ITO [2009] 34 SOT 216, principal agent relationship is a sine qua non for invoking the provisions of Section 194H. 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 194H 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 194H, the question of levy of interest under section 201(1A) cannot arise."*

**(B.1.1.3)** Taking cognizance of the aforesaid order in the case of Kotak Securities Ltd. vs. DCIT (Supra), co-ordinate Bench of ITAT, Delhi has held as under in the case of DCIT vs. PRL Projects & Infrastructure Ltd. Vide order dated 31/08/2017 in ITA No. 5010/Del/2015 for Assessment Year 2011-12:

*"5. We have heard the rival submission and have perused the material on record. Regarding the disallowance of Rs. 40,19,608/- u/s 40(a)(ia) of the Act, it has seen that this issue is covered in favour of /" the assessee by order of ITAT Mumbai Bench in the case of Kotak Securities Limited vs. DGIT (TDS) (supra) wherein the Mumbai Bench of the ITAT has held that there is no principal - agent relationship between the bank issuing the bank guarantee of the assessee. The Mumbai Bench has noted that when the bank issues a bank guarantee on behalf of the assessee, all it does is to accept the commitment of making payment of a specified amount to the beneficiary on demand and it is in consideration of this commitment that the bank charges of fee which is termed as 'bank guarantee commission'. The ITAT Mumbai Bench\* has further noted that while it is termed as 'guarantee commission', the same is not in the nature of commission as it is understood in common business parlance and in context of section 194H. The ITAT Mumbai Bench went to hold that no TDS was deductible on such bank guarantee commission. It is seen that the Ld. CIT (A) also has relied on this order of ITAT Mumbai Bench while allowing relief to the assessee and, further, during the course of proceedings before us, the department could not point out any contrary judgement which could give relief to the department on this issue. Accordingly, we refuse to interfere on this issue and uphold the adjudication of the Ld. CIT (A).*

**(B.1.1.4)** Vide consolidated order dated 31/08/2017 in the case of ACIT vs. Jaypee Infratech Ltd. (supra) for Assessment Year 2011-12 to 2013-14 (in ITA Nos. 4284, 4285, 4286/Del/2015) also, similar view was taken by Co-ordinate Bench of ITAT, Delhi and it was held as under:

*" 27. Ground No. 3 of the appeal of the Revenue is against TDS on bank guarantee charged. While Ground No. 3 of the appeal of the Revenue is covered by ground No. 3 of the appeal in case of Jaypee Sports International Ltd. wherein we have held that bank guarantee charges are not subject to TDS u/s 194H of the Act. In view of this ground, No. 3 of the appeal of the Revenue is dismissed."*

**(B.1.1.5)** In DCIT vs Lakshya Media (P.) Ltd. (Supra), Mumbai Bench of ITAT held as under:

*"6. As regards "guarantee fees" paid which has been held to be liable for TDS under section 194H by the AO, we are unable to accept the contention of the AO, because the assessee has sought its banks like HDFC Bank, Dena Bank and Yes Bank to issue guarantee in its favour for which bank has charged certain amount as 'guarantee fee'. To fall within the ambit and scope of section 194H, the payment has to be in the nature of "commission or brokerage". The Explanation to section 194H defines the phrase 'commission and brokerage' in the following manner:—*

*"'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".*

*Thus, it is sine qua non that there has to be a principal - agent relationship for a payment to be treated as commission or brokerage. The recipient of the income must act on behalf of the principal. Here the banker does not act on behalf of the assessee for rendering any kind of service. The contract of guarantee does not give any rise to principal - agent relationship between the assessee and the bank and, therefore, the consideration received by the bank on account of guarantee commission cannot be reckoned as commission as contemplated under section 194H and accordingly, there was no requirement to deduct TDS on this payment. Thus, on this score also, the order of the Ld. CIT(A) is affirmed. Before us, the Ld. Counsel had also brought to our notice a CBDT Circular No.56 of 2012 (sic) wherein it has been clarified that 'guarantee fee' paid to a nationalized bank will not be subject to withholding tax. Thus in view of the CBDT Circular also the ground raised by the revenue cannot be sustained and accordingly, the same is dismissed.*

**(B.1.2)** Respectfully following the aforesaid precedents in the cases of CIT vs. JDS Apparels (P.) Ltd. (Supra), Kotak Securities Ltd. vs DCIT (supra), DCIT vs PRL Projects & Infrastructure Ltd. (Supra), ACIT vs. Jaypee Infratech Ltd. (Supra) and DCIT vs. Lakshya Media (P.) (Supra); and considering that both sides agree that the issue regarding allowability of bank guarantee charges of aforesaid amount of Rs. 3,90,289/- is squarely covered in favour of the assessee, by the aforesaid precedents; and as

neither side has brought any facts and circumstances to our attention to warrant a view different from the view taken in the aforesaid precedents; we set aside the aforesaid impugned order dated 16.02.2017 of Ld. CIT(A) and direct the Assessing Officer to allow the aforesaid amount of Rs. 3,90,289/- claimed by the assessee as bank guarantee charges.

**(C)** In the result, appeal of the assessee is allowed.

Order pronounced in the Open Court on 03/10/2019.

**Sd/-**  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(ANADEE NATH MISSHRA)**  
**ACCOUNTANT MEMBER**

Dated: 03/10/2019  
(Pooja)

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	
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	