

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI
BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
ITA No.3938/Mum/2018
(Assessment Year: 2012-13)**

DCIT(TDS)-2(1) Room No.614, K.G.Mittal Bldg. Charni Road Mumbai-400 020	Vs.	PFIZER Ltd. Patel Estate, S.V.Road Jogeshwar (West), Mumbai-400 012
		PAN/GIR No.AAACP3334M
Appellant)	..	Respondent)

&

**C.O. No. 201/Mum/2019
(Arising out of ITA No.3938/Mum/2018)
(Assessment Year: 2012-13)**

PFIZER Ltd. Patel Estate, S.V.Road Jogeshwar (West), Mumbai-400 012	Vs.	DCIT(TDS)-2(1) Room No.614, K.G.Mittal Bldg. Charni Road Mumbai-400 020
PAN/GIR No.AAACP3334M		
(Appellant)	..	Respondent)

Revenue by	Shri. Kumar Padmapani Bora, DR
Assessee by	Shri. Kirit Kumar, AR
Date of Hearing	20/11/2019
Date of Pronouncement	27/11/2019

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the revenue and cross objection filed by the assessee is directed against order of the Ld. Commissioner of Income Tax (Appeals)-60, Mumbai dated 21/03/2018 for the AY 2012-13. Since, the facts are identical and issues are common, for

the sake of convenience, the appeal filed by the revenue and cross objection filed by the assessee were heard together and are disposed-off by this consolidated order.

ITA No.3938/Mum/2018:-

2. The revenue has raised the following grounds of appeal.

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deciding the issue under section 194J, whereas assessing officer has passed order considering commission payment under section 194H and deleted the default of Rs. 2,03,46,0127- u/s 201(1) and Rs. 73,24,564/-u/s.201(1A)?"

2. On the facts and in the circumstances of the case and in law the Ld, CIT(A) erred in holding that the assessee and treating it as principal to principal transaction without considering nature of business of such alleged stockiest, who is getting fixed commission of 2% of sale price and not taking any or all Risk as of principal while retailers?

3. whether in the facts and circumstances of the case, the CIT(A) erred in deleted the non- deduction u/s201(1) and interest u/s.201(1A) without appreciating the fact that payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered or for any services in the course of buying and selling of goods within the meaning of section 194H of the Act?

4. " Whether in the facts and circumstances of the case the precedence given to the mode and manner of transaction over legislative intent which apparently intended to apply IDS under section 194H on consideration under whatever, name , allowed or paid in an alternative manner in lie of services rendered by the agent to the principal is justified?"

4. The appellant craves leave to amend or alter any ground or add a new ground or add a new ground which may be necessary."

3. The brief facts of the case are that the assessee is engaged in the business of trading, manufacture of drugs, pharmaceuticals and consumer health care products. The modus operandi of the business of the assessee is that the stockiest is placed orders on the assessee

and goods are transferred to the clearing and forwarding agents. The CFA packs and dispatches the goods to the stockist against the payments. The assessee has sold its product through super stockists. As per the arrangements between the assessee and CFA, the assessee has allowed 2% margin on total goods sold by the stockiest. During the course of TDS proceedings, the Ld. AO issued notice u/s 201(1) and 201(1A) of the Act, and called upon the assessee to explain as to why TDS shall not be computed, in respect of margin allowed to stockiest u/s 194H of the I.T. Act, 1961. In response, the assessee submitted that as per the arrangement between the parties, the assessee sales goods to stockiest on a principal to principal basis and not on principal to agent and accordingly, no tax is deductible at source on the sales made to the stockiest. The Ld. AO, after considering relevant submission of the assessee observed that the contention of the assessee appears to be largely correct, however, he, further stated that the issue remains under dispute at higher appellate forums and accordingly, held that the assessee is an assessee in default u/s. 201(1) and 201(1A) of the Act, and accordingly computed short deduction of TDS on total amount of consideration paid to stockiest @10% u/s 194H of the I.T. Act, 1961. Similarly, the Ld. AO has computed interest u/s 201(1A) on said short deduction of TDS.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed a elaborate written submissions on the issue, which has been reproduced in page No. 3 to 9 of Ld.CIT(A) order. The Ld.CIT(A), after considering relevant submissions of the assessee and also, by

following the decision of Hon'ble Bombay High Court in the case of M/s Interwork India Pvt.Ltd. in ITA No. 161/Mum/2011, order dated 01/04/2014 held that the transactions between the assessee and stockiest is in the nature of sale, because the assessee has raised invoices, which includes excise duty and sales tax payable on goods, as in case of normal sale of goods. Therefore, he opined that there is no need to deduct TDS on margin allowed to stockiest, because the said transactions is on principal to principal basis, but not on principal to agent basis. The relevant findings of the Ld. CIT(A) are as under:-

DECISION

I have considered the facts of the case, submission of the appellant and order passed under section 201(1)/ 201(1A) of the Act of year under consideration I have also gone through me appellate order passed by my predecessor on 06.06.2014 where the identical Issues were involved.

I have also perused the copy of agreement. On perusal of the sample invoice raised by the appellant and the argument of the A,R. that invoices are inclusive of Excise Duty and Sales Tax as in case of normal sale of goods found to be in order. The A.R. further stated that at the time of the sale title of goods was also passed to the stockiest. therefore. this is a complete sale. The A.O. has not produced any evidence on record to show that it was not a complete sale. The appellant is a pharmacy company manufacturing drugs which has to be stored in particular condition. Thus through its agreement it is ensuring that the drugs are stored in a particular manner If it is not done it will not be beneficial for end users. Ensuring the facility for optimum handling of drugs, no way connotes that the stockiest were providing managerial services.

The appellant has also relied on the case laws on this issue namely :-

- a. *The Hon'ble Bombay High Court In the case of M/s. **Intervet India Pvt.Ltd.** in ITA.No.. 161 of 2011 dated 1st April, 2014.*
- b. *Hon'ble ITAT (Mumbai) in the cases of M/s. Piramal Health care Ltd. in its order in ITA No, 7789 to 7792 & 7794/Mum/2011 dated 09,05.2012 for a.Yrs. 2007-08 to 201 1-12.*
- c. *ITO(TDS) vs. Unichem laboratories Ltd. (46 CCH 525)(Mum ITAT)*

In view of the aforesaid discussion, facts of the case, appellate order passed by me predecessor in assessee's own case for A, Y. 2010-11 S 2011-12 and relying on the decision of Hon'ble Bombay High Court as well as decisions of the Hon'ble ITAT cited above, I am of the considered opinion, that the transaction between the appellant and the stockiest amounts to sale. The provisions of TDS of section 194J

are not applicable in view of facts of the case. The addition of Rs. 2,03,46,012/- u/s. 201(1)/201(1A) stands deleted.

Ground 2:

Levy of Interest under section 201(1A) of the Act amounting to Rs. 73, 24,5647

Facts of the case and action of the AO

In the order dated 26 March 2014 passed under section 201(1) and 201(1A) of the Act, the AO has levied interest under section 201(1A) of the Act amounting to Rs. 73,24,564 on account of alleged non-deduction of tax at source on margins earned by the stockiest in Para 6 of the order, alleged interest under section 201(1A) of the Act amounting to Rs. 73,24,564 on the tax deductible at source on the margins earned by the stockiest has been computed as shown below: -

Tax under section 201(1)	Rate of Interest	Number of Months	Period	Amount of interest
2,03,46,012	1%	36	1 April 2011 to 31 March 2014	73,24,564

Appellant's Submission:

As submitted in the aforesaid paras, The Appellant was not in default for non-deduction of taxes on margins earned by stockiest and¹ accordingly, there was no question of levying interest under section 201(1A) of the Act,

Without prejudice to the above, it is submitted that the aforesaid interest has been computed from 1 April 2011 without appreciating the fact that the sales made through the stockiest were spread out throughout the year and accordingly, the interest should not be computed from the first day of the financial year.

DECISION

Since the appellant has not been treated as the deemed defaulter u/s 201(1) as held by me earlier in the order, the question of levying interest u/s 201(1) of the Act is consequential in nature and hence Js also deleted.

in total the appeal is **allowed**

5. The Ld. DR submitted that the Ld.CIT(A) was erred in deciding the issue u/s 194J, whereas the Ld. AO has passed order considering commission payment u/s 194H of the Act, 1961. The Ld. DR, further submitted that the Ld.CIT(A) has failed to appreciate the fact that the relationship between the assessee and stockiest are in the nature of principal to agent relationship and accordingly, whatever margin allowed to stockiest is in the nature of commission, which attracts TDS provisions u/s 194H of the I.T. Act, 1961.

6. The Ld. AR for the assessee, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that this issue is squarely covered in favor of the assessee by the decision of ITAT, Mumbai 'C' bench, in assessee's own case for AY 2012-13 in ITA No. 3295/Mum/2016, where the applicability of provisions of section 194H, in light of agreement between the assessee and stockiest has been examined by the Tribunal and after considering relevant facts, came to the conclusion that the transactions between the assessee and stockiest are in the nature of sale of goods, but not transactions in the nature of principal to agent.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the coordinate bench of ITAT, Mumbai 'C' bench has examined the issue of applicability of provision of section 194H and consequent TDS liability on the assessee on payments made to stockiest for the impugned AY under section 263 proceedings and after considering relevant facts came to the conclusion that the transactions between the assessee and stockiest are in the nature of sales of goods, but not in the nature of principal to agent relationship and consequently, the requirement of deduction of tax at source u/s 194H of the I.T. Act, 1961, does not arise. We further noted that the assessee has filed complete details before the Ld.CIT(A), including agreement between the parties, as per which the modus operandi of the assessee to sale of goods has been explained, as per which the assessee sales goods to stockiest and raises invoices and collects applicable excise duty and VAT. Further, the title in the goods is transferred to the stockiest, at the time of delivery. Therefore, we are

of the considered view that the arrangements between the assessee and the stockiest for sale of goods is in the nature of principal to principal basis, but not in the nature of principal to agent and accordingly, amount paid by the assessee to stockists is not in the nature of commission, which is liable for TDS u/s 194H. The Ld.CIT(A) after considering relevant submissions of the assessee has rightly deleted additions made by the AO toward short deduction of TDS u/s 201(1) and consequent interest u/s 201(1A) of the I.T. Act, 1961. We do not find any error in findings of the Ld.CIT (A) and hence, we are inclined to uphold the findings of Ld.CIT(A) and dismissed appeal filed by the revenue.

8. In the result, appeal filed by the revenue is dismissed.

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9. The assessee has filed cross objection in support of the order of the Ld.CIT(A). We find that the appeal filed by the revenue has been dismissed for the detailed reasons recorded in preceding paragraph in ITA 3938/Mum/2018. Therefore, the cross objection filed by the assessee becomes infructuous and hence, the same is dismissed as not pressed.

10. In the result, appeal filed by the revenue is dismissed and cross objection filed by the assessee is also dismissed.

Order pronounced in the open court on this 27 /11/2019

ITA No.3938/Mum/2018
Co.No.201/Mum/2019
PFIZER Ltd.

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 27 /11/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai