



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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.534/Mum./2019
(Assessment Year : 2012-13)

Asstt. Commissioner of Income Tax
TDS Circle-2(1), Mumbai

..... Appellant

v/s

Pfizer Ltd.
1802/1901, The Capital
Plot no.C-70, G-Block
Bandra Kurla Complex
Bandra (E), Mumbai 400 051
PAN - AAACP3334M

..... Respondent

Assessee by : Shri V. Sreekar, CIT(DR)
Revenue by : Shri Vishal Kalra

Date of Hearing - 19.11.2020

Date of Order - 27.11.2020

ORDER

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the Revenue challenging the order dated 16th November 2018, passed by the learned Commissioner of Income Tax (Appeals)-60, Mumbai, pertaining to the assessment year 2012-13.

2. The effective grounds raised are as under:-

"1. Whether On the facts and in the circumstances of the case and in law, the learned CIT(A) was justified in allowing the appeal of the assessee company on the technical grounds that the order u/s 263 of the CIT is annulled by the ITAT, without appreciating the factual and legal matrix brought out by the CIT in his order u/s 263.

2. Whether On the facts and in the circumstances of the case and in law, the learned CIT(A) was justified in relying upon the order passed by the ITAT which refers to the assessee's own case for A.Y. 2010-11 and 2011-12 without appreciating the fact that the facts of the current year are different and are concerned to applicability to provisions of section 194H of the Act and rate applicability u/s 194H and not u/s 194J of the Act, which was adjudicated by CIT(A) FOR A.Y. 2010-11 & 2011-12."

3. Brief facts are, the assessee, a resident company, is engaged in the business of manufacturing and trading in pharmaceuticals, drugs and medicines. In the course of proceeding initiated under section 201(1)/201(1A) of the Income Tax Act, 1961 (for short "*the Act*"), the Assessing Officer noticed that as per the modus operandi of the assessee, the stockiest places orders and goods are transferred to the clearing and forwarding agent. The clearing and forwarding agent books and dispatches the goods to stockiest against cheques received by them. Being of the view that the payments made to stockiest is in the nature of commission, hence, subject to TDS under section 194H of the Act, the Assessing Officer issued show cause notice to the assessee. After perusing the explanation of the assessee, the Assessing Officer concluded that stockiest's margine is 2% of the sales. Since the assessee had not deducted tax on the stockiest's margin, the Assessing Officer treated the assessee as an assessee in

default under section 201(1) of the Act and raised tax demand of ₹ 2,03,46,012 and interest payable under section 201(1A) of the Act at ₹ 73,24,564. Thus, the total demand aggregated to ₹ 2,76,70,576. The aforesaid order dated 26th March 2014, passed by the Assessing Officer under section 201(1)/201(1A) of the Act was subjected to proceedings under section 263 of the Act. The learned Commissioner of Income Tax was of the view that the aforesaid order passed by the Assessing Officer is erroneous and prejudicial to the interests of Revenue as the Assessing Officer has estimated the margin @ 2% instead of 10%. Accordingly, he set aside the order passed under section 201(1)/201(1A) of the Act with a direction to the Assessing Officer to determine the TDS liability by computing the stockiest's margin @ 10% of the gross sales. In pursuance to the direction of learned Commissioner of Income Tax in the order passed under section 263 of the Act, the Assessing Officer passed a fresh order under section 201(1)/201(1A) of the Act on 28th December 2016, raising demand under section 201(1)/201(1A) of the Act by computing the stockiest's margin @ 10% of the gross sales. Against the aforesaid order of the Assessing Officer, the assessee preferred appeal before learned Commissioner (Appeals).

4. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) found

that the order passed under section 263 of the Act, in the meanwhile, has been declared as null and void and has been set aside. Accordingly, he held that the order passed under section 201(1)/201(1A) of the Act in pursuance to the order passed under section 263 of the Act has become infructuous. Therefore, he decided the appeal in favour of the assessee.

5. We have carefully considered the rival submissions and perused the material placed on record. Insofar as the basic facts are concerned, there is no dispute that on 26th March 2014, the Assessing Officer has passed the order under section 201(1) / 201(1A) of the Act raising a demand of ₹ 2,76,70,576, by computing the TDS liability on stockiest's margin determined at 2% of the gross sales. The aforesaid order of the Assessing Officer was subjected to proceedings under section 263 of the Act and learned Commissioner of Income Tax vide order dated 23rd March 2016, set aside the order of the Assessing Officer with a direction to computing TDS liability by determining the stockiest margin at 10% of the gross sales. It is a fact on record that the aforesaid order passed under section 263 of the Act was contested by the assessee before the Tribunal and the Tribunal while deciding the appeal in ITA no.3295/Mum./2016, dated 23rd August 2018, has held that jurisdiction under section 263 of the Act was wrongly exercised and accordingly set aside the order passed under section

263 of the Act. Thus, when the order passed under section 263 of the Act has lost its existence by virtue of the order of the Tribunal, all proceedings consequent to the order passed under section 263 of the Act would automatically become invalid. That being the case, the impugned order dated 28th December 2016 passed under section 201(1)/201(1A) r/w 263 of the Act will automatically lose its existence.

6. There is one more aspect to the issue. In the course of hearing, the learned Counsel for the assessee has brought to our notice that against the original order passed under section 201(1) / 201(1A) of the Act, the assessee had preferred appeal before the learned Commissioner (Appeals). While deciding the said appeal, learned Commissioner (Appeals) held that the transaction between the assessee and the stockiest is in the nature of sale. Therefore, there is no need to deduct tax at source under section 194H of the Act on margin allowed to the stockiest. In other words, learned Commissioner (Appeals) held that the transaction between the assessee and the stockiest is on principal-to-principal basis, hence provisions of section 194H of the Act would not apply. Pertinently, the aforesaid decision of learned Commissioner (Appeals) was contested by the Revenue before the Tribunal. While deciding the issue in ITA no.3938/Mum./2018, vide order dated 27th November 2019, the Tribunal has upheld the decision

of the learned Commissioner (Appeals). Thus, on merits also, it has been held that the provisions of section 194H of the Act would not be applicable to the margin allowed to the stockiest. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) by dismissing the grounds raised by the Revenue.

7. In the result, appeal is dismissed.

Order pronounced in the open court on 27.11.2020

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 27.11.2020

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai