

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH, MUMBAI**

**[Coram: Justice P P Bhatt (President)
and Pramod Kumar (Vice President)]**

ITA No. 4214/Mum/2019
Assessment year: 2012-13

Qantas Airways LimitedAppellant
*C/o Danta Marketing Services Pvt Ltd
8th floor, B Wing, RNA Corp Park
Kala Nagar, Bandra (East), Mumbai 400 051
[PAN: AAACQ1452H]*

Vs.

Assistant Commissioner of Income Tax
TDS Range 2(2), MumbaiRespondent

Appearances by

None for the appellant

Bharat Andhale for the respondent

Date of concluding the hearing : July 1, 2021
Date of pronouncement of the order : July 5, 2021

O R D E R

Per Pramod Kumar VP:

1. This is an appeal filed by the assessee and is directed against the order dated 12th April 2019 by the CIT(A), in the matter of tax withholding demand raised under section 201 r.w.s. 194I of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2012-13.

2. The assessee before us is an international airline which operates its services to and from, amongst other places, Indian airports. The assessee has entered into an arrangement with Oberoi Airport Services to enable its business and first class passengers to use the airport lounge, run by the Oberoi Airport Services, at Mumbai airport. The assessee has duly deducted tax at source, @ 2% under section 194C, from these payments. These payments were treated as contractual payments for the services rendered by the Oberoi Airport Services. The Assessing Officer was, however, of the view that the payments were in the nature of rental payments for the use of space and, such, are required to be treated as rent. The tax as deduction liability on this basis, was to be computed @ 10% under section 194 I of the Act. Reliance was placed on a judgment of Hon'ble Delhi High Court, in the case of **CIT Vs Japan Airlines Limited [(2010) 325 ITR 298 (Del)]**. Accordingly, a tax withholding demand @8% for short deduction of tax at source was raised, and interest was also levied on the delay in realization of this short deduction of tax at source. Aggrieved, the assessee carried the matter in appeal before the CIT(A). In an elaborate and erudite order, learned

CIT(A) has confirmed the action of the Assessing Officer and declined to interfere in the matter. The assessee is aggrieved and is in further appeal before us.

3. We have heard the learned Departmental Representative, though none appeared for the assessee. Considering the smallness of the issues involved in this appeal and the narrow compass of facts within which it is placed, we deem it fit and proper to dispose of the appeal *ex-parte* qua the assessee on the basis of material on record. We have also perused the material on record and duly considered facts of the case in the light of the applicable legal position.

4. A payment for the use of lounge facilities by the passengers, in our considered view, is clearly in the nature of payment for the use of certain facilities for the passengers. What passenger gets by access to the lounge is the privilege of relaxing in a comfortable place with good ambience, reading material, computer and internet access, and being allowed to consume food and drinks etc. Viewed thus, the tax required to be withheld from these payments, for rendition of services under a contract, is 2% as per the requirements of section 194C. The authorities below are, however, not content by this tax withholding. Their view is that the assessee ought to have treated these payments as rental payments and, accordingly, deducted the tax at source @ 10% under section 194 I. However, the payment of lounge facilities cannot, by any stretch of logic, be characterized as payment "under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—(a) land; or (b) building (including factory building); or (c) land appurtenant to a building (including factory building); or (d) machinery; or (e) plant; or (f) equipment; or (g) furniture; or (h) fittings" as is the condition precedent for invoking section 194 I. The payments in question have been rightly treated as payments for services rendered under a contract, which are covered under section 194C, and, accordingly, we see no infirmity in the deduction of tax at source @ 2% from the payments in question.

5. As regards the decision of Hon'ble Delhi High Court in the case of Japan Airlines (*supra*), relied upon by the Assessing Officer, we find that the said decision is overruled by Hon'ble Supreme Court in the case of **Japan Airlines Ltd vs CIT [(2015) 377 ITR 372 (SC)]**. Learned CIT(A), however, does not give up. He finds certain observations in the said decision to mean that "full and larger picture prevails over a naïve and simplistic approach and that substance of the arrangement is much more important than its form", and uses these observations to justify his conclusions. The lack of a judicious approach by the CIT(A) is glaring. A plain reading of the order of the CIT(A) also shows that admittedly this issue is covered by earlier decisions of the coordinate benches, and yet the authorities below have proceeded to disregard those decisions by distinguishing these binding precedents on some frivolous grounds and their better reasoning. Such an approach cannot meet our judicial approval. We cannot help quoting from the decision of the Hon'ble Supreme Court in the case of **Assistant Collector of Central Excise v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)]**, where the Hon'ble Court has itself quoted from the decision of House of Lords as under:

"We desire to add and as was said in *Cassell & Co. Ltd. v. Broome* [1972] AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in a hierarchical system of courts that there are decisions of the

Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if some one is allowed to have the last word, and that last word, once spoken, is loyally accepted". . . The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system."

6. We wish and hope that the learned CIT(Appeals) takes note of these observations of the Apex Court and permits his better wisdom to yield to the higher wisdom of the Income-tax Appellate Tribunal. His pedantic approach is also not an approach that is conducive to the ease of doing business, on which the Government is placing so much of emphasis. In any event, tax deduction at source is only a vicarious liability, and when primary liability is discharged, a collection demand under section 201 cannot be raised. The recipient, as evident from the statement of facts attached to form 35- a copy of which is filed before us, has already submitted a declaration that all the receipts in question are duly taken into account by the recipient and taxes dues paid on the income embedded therein have been duly paid. The assessment details of the assessee are also furnished by the assessee. The revenue has not even gone through the motions of examining this material. Be that as it may, given our findings above, this aspect of the matter ceases to be relevant on the facts of this case. It's a pity that precious resources of the authorities are being squandered on these technicalities, which have no, or at best minimal, revenue implications. The entire tax in dispute here is around Rs 3 lakhs, there is absolutely no revenue implication as the recipient has admittedly discharged the tax liability on income embedded therein, the issue is admittedly covered by the decisions of the coordinate benches in the assessee's own case, and yet this adventurism has taken place. Thankfully, increasingly such instances are more and more of an exception, and we hope such isolated instances will not overshadow the overall shift in the approach of the income tax authorities. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee and delete the impugned demands raised under section 201 r.w.s. 194 I. The assessee gets the relief accordingly.

7. In the result, the appeal is allowed. Pronounced in the open court today on the 5th July 2021.

Sd/-
Justice P P Bhatt
President

Sd/-
Pramod Kumar
Vice President

Mumbai, dated the 5th day of July, 2021

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai