IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'B': NEW DELHI)
(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No:- 5076/Del/2018
(Assessment Year: 2013-14)

M/s Elymer International Pvt. Ltd., 13, Rajpur Road, Delhi-110054.	Vs.	ACIT, Circle-8(1), New Delhi.
APPELLANT		**RESPONDENT**
PAN No: AAACE3789P		

Assessee By : Shri V.P. Bansal, CA
Revenue By : Shri Sumit Kumar Varma, Sr. DR

Date of hearing : 06.12.2021
Date of Pronouncement : 10.12.2021

PER RAVISH SOOD, JM :

The present appeal filed by the assessee company is directed against the order passed by the learned Commissioner of Income-tax (Appeals)-34 ("Ld. CIT(A)", for short), dated 29.06.2018, which in turn arises from the order passed by the Assessing Officer ("A.O", for short) under Section 143(3) of the Income Tax Act, 1961 ("the Act", for short) dated 29.02.2016 for A.Y 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us:

"1. That the impugned order is against facts and bad-in-law.

2. That on the facts and circumstances of the case and in law involved, the learned CIT(A) has erred in confirming the addition of Rs. 57,75,629/- made by the AO u/s 40a(ia) of the IT Act, 1961.

3. That on the facts and circumstances of the case and in law involved, the learned CIT(A) has erred in applying the provisions of section 40a(ia) of the IT Act, 1961 on guarantee fee paid to the bank.

4. The appellant craves leave to add, alter, amend or vary the above grounds of appeal before or at the time of hearing."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of energy meters and meter parts had e-filed its return of income for A.Y 2013-14 on 25.09.2013, declaring a loss of (Rs. 9,65,84,777/-). The return of income filed by the assessee was processed as such U/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Section 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee company had paid bank guarantee fee of Rs. 59,96,294/-. Observing, that the assessee which was obligated to have deducted tax at source on the bank guarantee fee of Rs. 57,75,629/- (out of Rs. 59,96,294/-) i.e paid upto 31.12.2012, had failed to do so, the A.O called upon it to explain as to why its claim for deduction of the said amount may not be disallowed u/s 40(a)(ia) of the Act. In reply, the assessee tried to impress upon the A.O that no obligation was cast upon it to deduct tax at source on the amount of bank guarantee fee. However, the A.O holding a view to the contrary, observed, that as payments in the nature of "bank guarantee fee" did not fall within the meaning of "Interest" as defined in Sec. 2(28A) of the Act, therefore, the assessee remained under a statutory obligation to have deducted tax at

source on such amount. Also, it was observed by the A.O, that as the Notification No. 56/2012 issued by CBDT vide F.No. 275/53/2012-IT(B)/SO 3069(E), dated 31.12.2012 r.w Sec. 197A(1F) of the Act, which, inter alia, provided that no tax was required to be deducted at source on the amount of "bank guarantee commission" paid by an assessee to a bank listed in the second schedule to the Reserve Bank of India Act, 1934 (2 of 1934), excluding a foreign bank; was applicable only w.e.f 01.01.2013, therefore, for the period prior thereto i.e upto 31.12.2012 the assessee was obligated to deduct tax at source on the same. Accordingly, the A.O backed by his aforesaid observations disallowed the assessee's claim for deduction of "bank guarantee fee" of Rs. 57,75,629/- u/s 40(a)(ia) of the Act.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that the bank guarantee fee paid by the assessee company was exigible for deduction of tax at source u/s 194H of the Act, the Ld. CIT(A) was of the view that as the assessee had failed to comply with the said statutory obligation, therefore, no infirmity did emerge from the order of the A.O who had rightly disallowed the assessee's claim for deduction of the said amount u/s 40(a)(ia) of the Act. Accordingly, the Ld. CIT(A) finding favor with the view taken by the A.O dismissed the appeal.

5. The assessee being aggrieved with the order of the Ld. CIT(A) has carried the matter in appeal before us. At the very outset of the hearing of the appeal, it was submitted by the learned Authorized Representative ("Ld. A.R", for short) for the assessee, that as no obligation was cast upon the assessee company to deduct tax at source on the amount of bank guarantee fee, therefore, both the lower authorities had

grossly erred in disallowing the assessee's claim for deduction of "bank guarantee fees" u/s 40(a)(ia) of the Act. In support of his aforesaid contention the Ld. A.R had relied on the judgment of the Hon'ble High Court of Delhi in the case of **CIT vs. JDS Apprels Pvt. Ltd. (2015) 370 ITR 454 (Del).** Backed by his aforesaid contention, it was submitted by the Ld. A.R that the disallowance made by the A.O u/s 40(a)(ia) being unsustainable in law was liable to be vacated.

6. Per contra, the leaned Senior Departmental Representative ("Ld. Sr. D.R", for short) relied on the orders of the lower authorities.

7. We have heard the Ld. Authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncement that have been pressed into service by the Ld. A.R in order to drive home his aforesaid claim. Controversy involved in the present appeal lies in a narrow compass i.e. as to whether or not the bank guarantee fee of Rs. 57.75 lac paid by the assessee till 31.12.2012 was exigible for deduction of tax at source?. Issue as to whether any obligation is cast upon an assessee to deduct tax at source on the fees charged by a bank for rendering banking services had been deliberated upon by the Hon'ble Jurisdictional High Court in the case of **CIT vs. JDS Appraisal Pvt. Ltd. (2015) 370 ITR 454 (Del).** In the case before the Hon'ble High Court, the department had held the assessee in default for not having deducted tax at source on the fee that was charged by the bank for providing card swiping machine to the assessee before them. After exhaustive deliberations, it was observed by the Hon'ble High Court that as the amount retained by the Bank in the case before them

was in the nature of a fee that was charged for having rendered the banking services and, the same could not 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, therefore, no obligation was cast upon the assessee to deduct tax at source u/s 194H on the fee that was charged by the bank. By way of an analogy that can safely be drawn from the aforesaid judicial pronouncement, we are of the considered view, that as stated by the Ld. A.R, and rightly so, the assessee in the case before us could not have been saddled with any obligation to deduct tax at source on the bank guarantee fee that was charged by the bank for rendering banking services in the normal course of its business i.e standing as a guarantee to third parties qua the contractual obligations of the assessee. In fact, we find that a coordinate bench of the Tribunal, viz. **ITAT, Bench 'E', Delhi** in the case of **M/s Navnirman Highway Project Pvt. Ltd. Vs. DCIT, Circle 18(1), New Delhi, ITA No. 117/Del/2017, dated 03.09.2019**, had observed, that when a bank issues 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, thus, no obligation was cast upon the assessee to have deducted tax at source on the amount of bank guarantee commission paid to the bank. Apart from that, it was therein observed, that as bank guarantee commission partook the character of interest u/s 2(28A) of the Act and as such, exemption provided u/s 194A(3)(iii) qua such payment was available to the assessee, therefore, no obligation on the said count too was cast upon the assessee to deduct tax at source on the said amount. Backed by its aforesaid

observations, the Tribunal had vacated the disallowance u/s 40(a)(ia) that was made by the department by holding the assessee as being in default for not having deducted tax at source on the amount of bank guarantee fee u/s 194H of the Act. Also, we find that a similar view was way back taken by the ITAT, Mumbai in the case of Kotak Securities Ltd. Vs. DCIT, TDS Circle 2(1), Mumbai (2012) 14 ITR (T) 495 (Mum). It was observed by the tribunal that the scope of the expression 'commission' was to 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. It was therein further observed, that when a 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, on demand, to the beneficiary, and it is in consideration of this commitment that the bank charges a fees which is customarily termed as 'bank guarantee commission, which though is termed as 'guarantee commission', it is however not in the nature of 'commission' as it is understood in common business parlance and in context of Sec. 194H, as the same is not a transaction between principal and agent so as to attract the tax deduction requirements under Sec. 194H.

8. In the backdrop of our aforesaid observations, we are of a strong conviction that both the lower authorities had erred in treating the assessee as being in default for not having deducted tax at source on the amount of bank guarantee fee u/s 194H of the Act. Accordingly, de-hors any obligation on the assessee to deduct tax at source on the

amount of bank guarantee fees within the meaning of section 194H of Act, no disallowance of the aforesaid amount of Rs. 57,75,629/- could have been made u/s 40(a)(ia) of the Act. We, thus, not being able to persuade ourselves to subscribe to the view taken by the lower authorities, set-aside the order of the Ld. CIT(A) and vacate the disallowance u/s 40(a)(ia) of Rs. 57,75,629/- made by the A.O. The **Grounds of appeal nos. 2 and 3** are allowed in terms of our aforesaid observations.

9. The **Grounds of appeal nos. 1 and 4** being general are dismissed as not pressed.

10. Resultantly, the appeal filed by the assessee company is allowed in terms of our aforesaid observation.

Order pronounced in the open court on 10/12/2021.

Sd/-	Sd/-
(G.S. PANNU)	**(RAVISH SOOD)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 10.12.2021
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	