

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No. 1617/Mum/2022  
(A.Y.2017-18)**

Oxford University Press 22 Workspace, 2 <sup>nd</sup> Floor, 1/22 Ansari Road, New Delhi, Delhi, 110002	Vs.	DCIT, International Taxation, Circle-3(2)(2) 16 <sup>th</sup> Floor, Air India Building, Nariman Point Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACO3278K		
Appellant	..	Respondent

Appellant by :	Pratik Shah & Tejal Saraf
Respondent by :	Soumendu Kumar Dash

Date of Hearing	09.01.2023
Date of Pronouncement	30.01.2023

आदेश / O R D E R

**Per Amarjit Singh (AM):**

The present appeal filed by the assessee is directed against the order passed by the ld. CIT(DRP-2), Mumbai-2 dated 14.03.2022 for A.Y. 2017-18. The assessee has raised the following grounds before us:

“1. That on the facts and circumstances of the case and in law, the Learned Assessing Officer (L AO) has grossly erred in disallowing the sales and promotion expenses (including provision) amounting to Rs.84,90,963 incurred by the Appellant under section 40(a)(a) of the Act.

1.1 That the IA AO failed to appreciate that the school support payments made by the Appellant is not in the nature of commission or brokerage as envisaged under section 194H of the Act.

*1.2 That the Id. AO failed to appreciate that there is no principal agent relationship between the Appellant and the Schools and in absence thereof, the subject payment cannot be regarded as commission or brokerage as defined under Explanation to section 1941 of the Act.*

*The above grounds of appeals are without prejudice to each other.”*

2. The fact in brief is that return of income declaring total income at Rs.40,92,22,469/- was filed on 30.11.2017. The case was subject to scrutiny assessment and a notice u/s 143(2) of the Act was issued on 30.08.2018. The assessee company is engaged in the business of publishing and trading of books. Oxford University Press is a department of the university of Oxford and has a branch PE integral branch (Oxford University Press India) with several offices in India. During the course of assessment the A.O observed that during the year the assessee has entered into various international transaction with its associate enterprises having a bearing on its income. Therefore, the reference u/s 92CA(1) of the Act was made to TPO for determination of the Arm's Length Price with reference to all the transactions reported in Form 3CEB filed by the assessee. The TPO has accepted the arm's length price and no adjustment was made.

3. During the course of assessment from the submission made by the assessee the A.O observed that assessee has made certain payments in the form of School Support payment and on the same assessee had not deducted any TDS. In this regard, the explanation offered by the assessee is reproduced as under:-

*“1. The Assessee is in the business of publishing and selling educational books. Assessee's textbooks are prescribed by a large number of schools in India. In certain cases, the Assessee may consider providing a School Support Payment (SSP) to a school for specified educational purposes. The mechanics of an SSP with these schools is as under:*

- Assessee only considers making an SSP to a school after pedagogical discussions regarding the educational books have concluded.*
- Assessee makes SSPs only to private schools or to those societies/trusts that own a group of such private schools. Private schools in India are required to provide 20% of places for*

*'economically needy children. SSPS are made directly to the concerned society/school and not to any official of these institutions or any distributor SSPs do not provide any personal benefit.*

*The Assessee submits that the above payment of SSP is not in nature of commission and thereby not liable to TDS under section 194H of the Act.*

*The explanation to Section 194H of the Act defines Commission as under:*

*“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.”*

*Based on the above definition, it can be seen that Commission is a payment made to any person who is acting as an agent of another person or for any services in relation to a sale/purchase transaction or other prescribed transactions.*

*From the perusal of judicial pronouncements<sup>1</sup>, in this regard, following two principles are required to be satisfied for a transaction to be classified as commission:*

*There must exist a principal-agent relationship between the contracting parties; and*

*The payment must be made for rendering services in connection with a sale/purchase activity.*

*In the instant case wherein the Assessee is paying SSPs to schools, the same cannot be considered as commission on account of following reasons:*

*There is no contractual relationship between the Assessee and schools that relates to a commission or suggests that these payments may be considered as commission.*

*N -alone basis or in the course of buying/selling of goods is being rendered by schools to the Assessee. Thus, it cannot be said that SSP is in lieu of any service rendered by Schools to the Assessee.*

*In absence of any elements as mentioned above, the payment of SSPs made by the Assessee cannot be considered as Commission and thus not liable to TDS under section 194H of the Act*

*The relevant extract of judicial pronouncements is enclosed as **Annexure-1**"*

However, the A.O has not agreed with the submission of the assessee he was of the view that certain percentage of the sale income was earned

by the assessee from selling books to that particular school students has to be paid to the schools as support payments. Therefore, AO considered that the school acted as an agent by receiving a percentage of commission on the sale made by the assessee. Therefore, an amount of Rs.2,05,83,566/- was disallowed u/s 40(1)(i) of the Act. The AO has also disallowed an amount of Rs.77,19,643/- pertaining to provision created for school support payment u/s 40(a)(ia) of the Act.

4. Against the draft order the assessee has filed objections before the Dispute Resolution Panel. The DRP has rejected the objection filed by the assessee and held that the schools have provided services to the assessee by facilitating sales of books to the school students. However, the DRP has accepted alternative plea of the assessee and restricted the disallowance to 30% of Rs.2,05,83,566/- and 30% of Rs.1,77,19,643/- u/s 40(a)(ia) of the Act. Thereafter, the Assessing officer has passed the final order u/s 143(3) r.w.s 144C(13) of the Act on 22.04.2022 and restricting the disallowance to the extent of Rs.84,90,963/- u/s 40(a)(ia) being 30% of the amount of commission payment.

5. During the course of appellate proceedings before us at the outset the ld. D.R relied on the order of lower authorities.

The ld. Counsel contended that identical issue on similar fact has been adjudicated in the preceding assessment year 2016-17 in the case of the assessee itself by the ITAT, Mumbai, vide ITA No. 2186/Mum/2021 on 13.12.2022.

6. With the assistance of ld. Representative we have gone through the above referred decision of ITAT. The relevant operating part of the decision of ITAT is reproduced as under:

*“9. Having extensively heard both the parties, we have no hesitation in drawing the following conclusions:-*

- (a) *The assessee had made payment of School support services to various schools / societies for the services rendered by them to the assessee by way of referring the students to the booksellers to purchase the textbooks published by the assessee.*
- (b) *But for the reference made by the schools to the students, it would not be possible for the booksellers to sell the textbooks published by the assessee. Hence but for this reference from the schools, the assessee's profitability could not have been enhanced. Hence we hold that the payment of school support services is an expenditure wholly and exclusively incurred for the purpose of business of the assessee.*
- (c) *The substance of the transaction is to be given more importance than its form.*
- (d) *The Character of payment is to be analysed. On analyzing the same, the only logical conclusion that could be drawn is that the payments made by the assessee squarely falls under the ambit of 'commission or brokerage' in terms of section 194H of the Act.*
- (e) *The case law relied upon by the ld. AR on the decision of Hon'ble Gujarat High Court in the case of CIT vs Intas Pharmaceuticals Ltd reported in 439 ITR 692 (Guj) is factually distinguishable and does not advance the case of the assessee herein.*
- (f) *Hence it could be safely concluded that the assessee is bound to deduct tax at source, failure of which, would be invited with disallowance u/s 40(a)(ia) of the Act. However, we find lot of force in the alternative argument advanced by the ld.AR before us that in view of second proviso to section 40(a)(ia) of the Act, since the payees / recipients had disclosed the said receipts in their returns of income, no disallowance should be made in the hands of the assessee payer. In view of this second proviso, we direct the ld. AO to make factual verification as to whether the recipients had duly disclosed the subject mentioned receipts in their returns of income. The assessee is directed to furnish the necessary details in this regard in the prescribed form. If on verification, it is found that the recipients had disclosed the receipts from the assessee in their returns of income, even if the entire income of the recipients is exempt under the provisions of the Act in their hands, still the assessee cannot be treated as an 'assessee in default' and consequentially the disallowance u/s 40(a)(ia) of the Act made in the hands of the assessee payer would have to be deleted. Accordingly, the revised grounds raised by the assessee are disposed off in the abovementioned manner."*

7. Vide the aforesaid order the A.O was directed to make factual verification as to whether recipients had duly disclosed the amount in the in form of school support payment received from the assessee in their return of income. The assessee was also directed to furnish the necessary details in this regard in the prescribed form and if on verification it is

found that the recipients had disclosed the amount received from the assessee in their return of income, even if the entire income of the residents is exempt under the provision of the Act in their hands, still the assessee cannot be treated as an assessee in a default and consequently disallowance u/s 40(ia) of the Act made in the hands of the assessee payer would have to be deleted. Accordingly, we direct the AO to make factual verification as directed above by the ITAT and the assessee has to furnish necessary details in this regard before the A.O as directed by the ITAT. Therefore, the appeal of the assessee is allowed for statistical purposes.

8. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 30.01.2023

Sd/-

(Aby T Varkey)  
Judicial Member

Sd/-

(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 30.01.2023

Rohit: PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,  
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//  
आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण/ ITAT, Bench,**  
**Mumbai.**