

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.411/Del/2023
Assessment Year: 2020-21

With

S.A. No.119/Del/2023
[Arising out of ITA No.411/Del/2023]
Assessment Year: 2020-21

AXA France Vie, 5 th Floor, Officer Tower, District Centre, Saket, Select City Walk, Plot No. A-3, Delhi	Vs.	Assistant Commissioner of Income tax, Circle – Intl. Taxation-1(1)(1), Delhi
PAN :AAPCA9799J		
(Appellant)		(Respondent)

Appellant by	Mr. Gaurav Jain, Advocate
Respondent by	Sh. Mrinal Kumar Das, Sr. DR

Date of hearing	17.03.2023
Date of pronouncement	17.03.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee challenging the final assessment order dated 24.01.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. When the stay application was called out for hearing, learned counsel appearing for the assessee submitted that the issue in dispute in the corresponding appeal is squarely covered by the decision of the Tribunal in assessee's own case. Thus, he submitted, the appeal itself can be taken up for hearing and disposed of. Learned Departmental Representative did not oppose assessee's submission. Thus, with the consent of both the parties, the appeal was taken up for hearing. The only issue in dispute in the present appeal is with regard to disallowance made of Rs.11,04,48,260/- under section 40(a)(ia) of the Act towards alleged non-deduction of tax at source under section 194D of the Act on payment of ceding commission.

3. Briefly the facts are, the assessee is a non-resident corporate entity, incorporated under the laws of France and is engaged in the business of providing insurance and reinsurance. In the year under consideration, the assessee paid an amount of Rs.36,81,60,867/- towards ceding commission in respect of reinsurance business and debited it as expenditure in its profit and loss account. While examining assessee's claim in course of assessment proceeding, the Assessing Officer was of the view that

the ceding commission paid to insurance companies is liable for deduction of tax under section 194D of the Act at the rate of 30%. Alleging that the assessee has violated the condition of section 194D by not deducting tax at source, the Assessing Officer disallowed the disputed amount under section 40(a)(ia) of the Act. Though, the assessee contested the aforesaid disallowance by filing objections before learned DRP, however, the disallowance was upheld.

4. Before us, it is a common point between the parties that the issue is squarely covered by the decision of the Coordinate Bench in assessee's own case in assessment year 2018-19.

5. Having considered rival submissions and perused the materials on record, we find, while deciding identical issued in assessee's own case in assessment year 2018-19, the Tribunal in ITA No.439/Del/2022, dated 13.05.2022, deleted the disallowance made under section 40(a)(ia) of the Act with the following observations:

"11. Before proceeding further we may gainfully refer to the provisions of section 194D and provisions of section 40(a)(ia) of the Act, which reads as under:-

Provisions of section 194D

Any person responsible for paying to a register any income by way of for soliciting or procuring insurance business (including

business relating to the continuance, renewal or revival of policies of insurance) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates of force:

Provided that no deduction shall be made under this section from any such income credited or paid before the 1st day of June, 1973:]

[Provided further that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed [Fifteen thousand rupees.]"

Provisions of section Section 40(a)(ia) (ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the 38[resident] payee referred to in the said proviso."

12. As emanating from the facts of the case, the assessee company is in the business of reinsurance ceded from the insurance companies in India. The term reinsurance ceded means the portion of one or more risk that the cedant transfers to the reinsurer with the object of reducing the cedant's liability by sharing with reinsurer the insurance liability, premiums, and losses from the reinsured business in that proportion. The reinsurance company also bears a proportionate cost of cedant in this connection which is termed as

cedant commission. During the year under consideration, from the gross premium payable by the insurance company to the assessee, a sum of Rs.40,45,81,243/- was deducted on account of reimbursement of expenses for the share of assessee in the nature of manpower cost, third party administration cost, administration cost, etc. which are termed as cedant commission. The Assessing Officer was of the opinion that a reading of provisions of section 194D provides that TDS has to be deducted where any sum is paid for soliciting or procuring insurance business. But as per the facts of the present case, the cedant commission paid by the assessee to the insurance company is actually the share of assessee in the nature of manpower cost, third party administration cost, administration cost, etc. which are actually reimbursement of expenses in relation to the gross premium which the assessee company has received in this regard, so cedant commission cannot be considered to be paid for soliciting or procuring insurance business. Identical issue was considered by the Hon'ble Madras High Court in the case of M/s Royal Sundaram Alliance Insurance Company Limited (supra) wherein it was held as under:-

“4. Commission for receipt of reinsurance: 11. The assessee had succeeded on this issue before the CIT(A) and the finding has been affirmed by the Tribunal. The CIT(A) took note of the decision taken in the assessee's own case for the assessment year 2009-2010 in which the assessment for the year 2008-2009 was followed and the assessee succeeded before the CIT(A) for the assessment year 2008-2009, wherein the CIT(A) noted that as a matter of industrial practice it was termed as "commission on reinsurance premium received", however, in substance it is discount on re-insurance premium received by an Insurance Company from an other Insurance Company. We find that the Tribunal rightly decided the issue in favour of the assessee and the revenue has not brought out any ground to interfere with the said finding. Accordingly, the appeals filed by the revenue on this ground are dismissed and consequently, the substantial question of law is answered against the revenue.”

13. The said decision was followed by the another Bench of the Hon'ble Madras High Court in the case of CIT vs United India Insurance Co. [2019] 111 taxmann.com 217(Madras). The relevant extract reads as under:-

“10. So far as the second, third and fourth substantial questions of law are concerned, a Division Bench of this Court in the case of CIT v. Royal Sundaram Alliance Insurance Co. Ltd. [T.C. (A) Nos. 41 of 2019, dated 18-1-2019], considered these three substantial questions of law by judgment dated

18.01.2019 and the substantial questions of law were decided against the Revenue.”

14. Similarly, the ITAT, Mumbai Bench in the case of General Insurance Corp. Of India [2009] 28 SOT 453 on identical subject has held under:- (head note only)

“HELD Section 194D provides for an obligation upon any person responsible for paying to a resident any income by way of remuneration or reward, whether by way of commission or otherwise, for soliciting or procuring insurance business (including business relating to the continuance, renewal or revival of policies of insurance) to deduct income-tax at the rates in force. The section became applicable from 1-6-1973 and did not apply to payments not exceeding Rs. 5,000 per annum. [Para 13]

As is evident from the language of section 194D, it applies to all persons, whether individual, HUF company, etc. The deduction is to be made from the income, which is in the nature of remuneration or reward (whether it is called commission or otherwise) for soliciting or procuring insurance business. So, section 194D does not apply to each and every payment made by any person by way of commission or otherwise; but it applies to remuneration or reward paid for soliciting or procuring insurance business. The language of section 194D makes it abundantly clear that if the commission or other payments are made by any assessee not for soliciting or procuring insurance business by way of remuneration or reward, section 194D would not apply. [Para 14]

In order to attract section 194D, the commission or any other payment covered under the section should be a remuneration or reward for soliciting or procuring the insurance business. The insurance companies did not procure business for the assessee-company nor did the assessee-company pay any commission or other payment for soliciting the business from the insurance companies. The language of section 194D clearly indicates that ordinarily there would be three parties involved in the payment of commission or other payments as remuneration or reward for soliciting or procuring the insurance business. Firstly, there would be an insurance company and the second would be insured. If the insurance company gets business directly from the insured, no payment would be required to be made by the insurance company to the insured by way of commission or otherwise for soliciting or procuring the business for the assessee. If any discount is allowed by the insurance company to the insured, that will not

fall within the definition of brokerage or commission paid for soliciting or procuring insurance business. That payment would fall within the category of a discount offered to the insured for giving the business to the insurance company. Even otherwise the payment or deduction would neither be a reward nor remuneration for any service like soliciting or procuring insurance business for the assessee. The assessee-company might be said to have solicited business from the insurance companies in certain cases but the commission credited/paid is not by way of remuneration or reward for soliciting or procuring of insurance business. Remuneration or reward would be related to services rendered in connection with soliciting or procuring business. In the instant case, the payment or discount was made to insurance companies but the payee companies had not solicited or procured insurance business for the assessee. For the sake of arguments it might be accepted that the assessee-company had solicited or procured insurance business from the insurance companies but the payment was not made to the solicitor or procurer of insurance business but to those from whom business had been solicited or procured. In the instant case payer would be a solicitor or procurer of insurance business but not the payee-companies. For attracting section 194D, the payment has to be made by way of remuneration or reward not for giving business to the assessee but for soliciting or procuring the insurance business. [Para 32] Considering the nature of the payment or deduction made by the assessee-company to the insurance companies by way of commission it could be said that the same did not fall within the category of the payments by way of remuneration or reward for soliciting or procuring insurance business from the insurance companies. Therefore, it was a deduction allowed by the assessee-company to the insurance companies from the original gross rate in order to compensate the insurance companies for the brokerage and other costs incurred in procuring the business by the ceding company. However, the cost incurred by the insurance companies by way of brokerage to them would fall within the ambit of section 194D in their hands, but the reimbursement of expenses by the assessee-company to the insurance companies would not fall within the same category. [Para 33]

Therefore, in the facts and circumstances of the instant case it was to be held that the commission paid or allowed as deduction from gross rate to the insurance companies did not fall within the category of remuneration or reward for soliciting or procuring insurance business. [Para 34].”

15. *The aforesaid decision was duly followed by the ITAT Mumbai Bench in the case of Tata AIG General Insurance Co. Ltd. [2011] 43 SOT 215(Mum.) and the decision was duly confirmed by the Hon'ble Bombay High Court in the case of PCIT vs Tata AIG General Insurance Co. Ltd. [2019] 111 taxmann.com 92 (Bombay). Thus, from the above, it is amply evident that on identical issue there are decisions of Hon'ble Madras High Court and Hon'ble Bombay High Court which have held that on the above ceding commission, no TDS is required to be deducted. In our considered opinion, the Ld. DRP has erred in not following the aforesaid Hon'ble High Court's decisions. It is to be remembered that there are no contrary High Court's decisions available in this regard much less from Hon'ble jurisdictional High Court. The decision of the ITAT Chennai referred by the Ld. DRP cannot overrule the decision of the Hon'ble Madras High Court. Moreover, as pointed above by the ld. counsel for the assessee, the same is on different facts.*

16. *The other limb of ld. counsel for the assessee's submission is that no TDS is required in as much as it is reimbursement of expenses and on the touch stone to the decision of the Hon'ble Supreme Court in the case of of DIT(IT)-1 vs Moller Maersk (TS-70-SC-2017), no TDS was required to be deducted. Another plea was that on the basis of proviso to section 201(1) of the Act, since the payees have offered the income to pay tax, no TDS was required to be deducted. We note that since, we have already held that the facts are identical and the issue stands covered in favour of the assessee by the decision of the Hon'ble Madras High Court and Hon'ble Bombay High Court as above, adjudication, on these aspect are only of academic interest, hence we are not engaging into the same.*

17. *In the result, the appeal of the assessee stands allowed."*

6. There being no difference in factual position in the impugned assessment year, respectfully following the decision of the Coordinate Bench in assessee's own case, as discussed above, we delete the disallowance made under section 40(a)(ia) of the Act.

7. In view of our decision above, the stay application having become infructuous is dismissed.

8. In the result, the appeal is allowed and stay application is dismissed.

Order pronounced in the open court on 17th March, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 17th March, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi