आयकर अपीलीय अधिकरण
कोलकाता 'ए' पीठ, कोलकाता में

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA

श्री प्रदीप कुमार चौबे, न्यायिक सदस्य
एवं
श्री राकेश मिश्रा, लेखा सदस्य
के समक्ष

Before

SRI PRADIP KUMAR CHOUBEY, JUDICIAL MEMBER
&
SRI RAKESH MISHRA, ACCOUNTANT MEMBER

I.T.A. No.: 1925/KOL/2024
Assessment Year: 2015-16

N C Shaw and Co Beverages Private Limited	Vs.	Income Tax Officer, TDS Circle-2(2), Kolkata
(Appellant)		***(Respondent)***
PAN: AABCN8699N		

I.T.A. No.: 1947/KOL/2024
Assessment Year: 2015-16

N C Shaw and Co Beverages Private Limited	Vs.	Addl. Commissioner of Income Tax (TDS), Range-2, Kolkata
(Appellant)		***(Respondent)***
PAN: AABCN8699N		

Appearances:

Assessee represented by :Khirendra Mohan Gupta, AR & Vaarun Jain, AR.

Department represented by : Pradip Kumar Biswas, Add. CIT.

Date of concluding the hearing : November 12th, 2024
Date of pronouncing the order : December 27th, 2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

Both the appeals filed by the assessee pertaining to the Assessment Year (in short 'AY') 2015-16 are directed against separate orders passed u/s 250 of the Income Tax Act, 1961 (in short, 'the Act') by the Commissioner of Income Tax (Appeals)-27, Kolkata [hereinafter referred to as 'the ld. CIT(A)'] dated 23.08.2024 & 24.08.2024 respectively. Since the issues raised in both these appeals are common and the facts are identical, therefore, as agreed by both the parties, they were heard together and are being disposed of vide this common order for the sake of convenience and brevity.

2.1. The assessee has taken the following grounds of appeal:

I. ITA No. 1925/KOL/2024:

"1. On the facts and circumstances of the case and in law, the order passed by Commissioner of Income Tax (Appeals) ('Ld. CIT(A)') under section 250 of the Income Tax Act, 1961 ('the Act') is bad in law.

2. On the facts and circumstances of the case and in law, the Ld. TDS officer grossly erred in not issuing any show cause notice before concluding that the Appellant was an "assessee-in-default" for the purposes of section 201 of the Act, thereby violating principles of natural justice.

3. On the facts and circumstances of the case & in law, the Ld. CIT(A) erred in holding the Appellant as an 'assessee in default' under section 201(1) of the Act for non-deduction of tax at source on INR 10,26,18,968/- being the amount credited to distributors as post-sale trade discounts and thereby erroneously created demand of INR 1,02,61,897/- under section 201 of the Act.

3.1. That the Ld. CIT(A) grossly erred in alleging that the trade discount were in the nature of commission and thereby subject to TDS under section 194H of the Act without appreciating that the Appellant was engaged in selling liquor to its distributors, on a principal-to-principal basis, and the trade discount under various schemes aggregating to INR 10,26,18,968/- cannot partake the character of "commission" or "brokerage" for the purposes of section 194H of the Act.

3.2. That the Ld. CIT(A) has grossly erred in applying the provisions of section 28(iv) and clause (iv) of Explanation to section 194H of the Act, without appreciating that in the absence of principal-agent relationship in respect of payments in question, the same cannot be held as "Commission" or "Brokerage" within the meaning of Section 194H of the Act.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the levy of interest under section 201(1A) of the Act aggregating to INR 95,43,563/-.

5. Without prejudice to the above grounds, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has not considered the fact that there is no loss of revenue to the Government if the recipients have filed their return of income and any further recovery would lead to unjust enrichment which is against the basic principle of natural justice."

The above grounds and sub-grounds rooms are without prejudice to each other.

The Appellant craves leave to alter, amend or withdraw all or any objections herein or add any further grounds as may be considered necessary, either before or during the hearing."

<u>II. ITA No. 1947/KOL/2024:</u>

"1. That on the facts and circumstances of the case and in law, the order passed by Commissioner of Income Tax (Appeals) (Ld. CIT(A)') under section 250 of the Income Tax Act, 1961 ('the Act') is bad in law.

2. That on the facts and circumstances of the case and in law, the Ld. Assessing Officer ('Ld. AO') erred in issuing order under section 271C of the Act dated August 08, 2022, without quoting a valid authenticated DIN as mandated by the CBDT Circular read along with ITD FAQ's. Thus, the impugned order is invalid, bad in law and liable to be quashed.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order passed by the Ld. AO for levy of penalty under section 271C of the Act for non-deduction of tax at source on INR 10,26,18,968/- being the amount paid/credited to distributors as trade discounts.

4. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/AO erred in not appreciating that the aforesaid payments are in nature of trade discount which cannot be termed as "Commission" or "Brokerage" under Section 194H of the Act, hench the issue is debatable for which penalty under Section 271C of the Act cannot be levied.

5. That on the facts and circumstances of the case and in law, the Ld. CIT(A)/AO erred in not appreciating the aforesaid payments/credit of trade discounts are in the nature of benefits/perquisites in connection with the sales made on principal-to-principal basis, accordingly not being subject to deduction under Section 194H of the Act and thus a legal issue for which penalty cannot be levied.

6. Without prejudice to the above grounds, that on the facts and circumstances of the case and in law, the Ld. CIT(A) / AO failed to appreciate that in the present case no penalty can be levied under Section 271C of the Act as appellant has a bona fide belief and a reasonable cause that such payments are not liable to deduction of tax at source, thus in view of provisions of Section 273B of the Act, no penalty can be levied."

The above grounds and sub-grounds rooms are without prejudice to each other.

The Appellant craves leave to alter, amend or withdraw all or any objections herein or add any further grounds as may be considered necessary, either before or during the hearing."

2.2. Rival contentions were heard and the submissions made have been examined. We will first take up the appeal in ITA No. 1925/KOL/2024.

I. <u>ITA No. 1925/KOL/2024:</u>

3. Ground no. 1 being general in nature does not require any separate adjudication.

3.1. Ground nos. 2 & 3 relate to holding the 'assessee in default' u/s 201(1) of the Act for non-deduction of tax at source on Rs.10,26,18,968/- being the amount credited to distributors as post-sale trade discounts and thereby erroneously creating demand u/s 201 of the Act which is disputed in ground no. 3.1 that the Ld. CIT(A) grossly erred in alleging that the trade discounts were in the nature of commission and thereby subject to TDS u/s 194H of the Act without appreciating that the appellant was engaged in selling liquor to its distributors on a principal-to-principal basis, and the trade discount under various schemes aggregating to INR 10,26,18,968/- could not partake the character of 'commission' or 'brokerage' for the purpose of Section 194H of the Act and Ground No. 3.2 is that he has grossly erred in applying the provisions of Section 28(iv) and clause (iv) of Explanation to Section 194H of the Act, without appreciating that in the absence of a principal-agent relationship in respect of payments in question, hence the same cannot be held as Commission or Brokerage within the meaning of Section 194H of the Act.

3.2. Brief facts of the case are that a survey u/s 133A(2A) of the Act was conducted in the business premises of the assessee on 25.02.2020 and subsequently, a notice u/s 201(1) of the Act was issued to the assessee for the F.Y. 2014-15 relevant to the A.Y. 2015-16 due to default in deduction of tax or failing to deduct tax towards credit of income to its buyers or purchasers of products/ goods against the sale which was covered under Clause (iv) to the Explanation of Section 194H of Act in the opinion of the Ld. AO. The assessee furnished details from time to time and also explained the credits/incomes made by the assessee in the books of account with reference to other parties to whom products or goods had been sold during the relevant period and which were duly debited in its profit & loss account. The Assessing Officer (hereinafter referred to as 'the ld. AO'), after going through the financial statement for the year ended on 31.03.2015 furnished by the assessee, was of the view that the assessee had failed to deduct tax under Chapter-XVIIB, for debiting a consolidated expense of Rs.10,26,38,557/- on account of issuance of credit notes and other modes of incentives to its buyers/purchasers of own products/goods for achieving sales or business target set by the assessee from time to time during the year being a manufacturer/producer for such buyer or purchaser. The said amount of Rs. 10,26,38,557/- comprised of (i) Primary Schemes (Non-Kind)- Rs.6,68,495/- ii) Schemes (Service Paid to Distributors)- Rs.56,68,304/- iii) Scheme Special Discount-Rs. 19,589/- iv) Scheme Tie up - Rs.4,56,716/- v) Secondary Scheme (Kind 5212) - Rs. 1,44,01,732/- vi) Secondary Scheme (Non-Kind 5212)- Rs.8,14,23,721/- which had been reaffirmed by the assessee vide its written submission made on 31.03.2022 before the Ld. AO along with the copies of all Credit Notes issued to its customers additionally and

apart from the Sales account for achieving the targets, the copy of ledger accounts in respect of Selling Expenses was also appended thereof. The Ld. AO was of the view that the entire amount of Rs. 10,26,18,968/- (except Scheme Special Discount-Rs. 19,589/-) was nothing but only an incentive out of the above mentioned amount of Rs. 10,26,38,557/- and was squarely covered by the provisions of Clause (iv) of the Explanation to Section 194H of the Act. The assessee's contention that the same did not amount to commission or brokerage was not accepted and the Ld. AO was of the view that the assessee fulfilled the conditions as laid down in Clause (iv) to Section 28 of the Act for the purpose of deduction of tax @10% u/s 194H of the Act and , accordingly, it was treated as an assessee in default u/s 201(1) of the Act and interest u/s 201(1A) of the Act was also levied. Aggrieved with the order of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A) who has reproduced an extract of the order of the Ld. AO, the submissions of the assessee and has upheld the demand of Rs. 1,98,05,460/- raised against the assessee. The relevant extract from the order of the Ld. CIT(A) is as under:

"6.2.1. I have gone through the assessment order as well as the submission of the assessee. On examining the same, it is noticed that the assessee had incurred consolidated expenses of Rs.10,26,38,557/- on account of issuance of credit notes and other mode of incentives to its buyers/purchaser of its products/goods for achieving sales or business target set by the assessee from time to time. The said expenses were paid to the said existing customers in the following different schemes:

Particulars	***Amount (in Rs.)***
Primary Schemes - Non Kind	*6,68,495/-*
Schemes —Service Paid to Distributors	*56,68,304/-*
Schemes —Tie-Up	*4,56,716/-*
Secondary Scheme-Kind 5212	*1,44,01,732/-*
Secondary Scheme-Non Kind 5212	*8,14,23,721/-*
Total	*10,26,18,968/-*

6.2.2. It is also observed that the assessee during the TDS assessment proceedings, had affirmed the issue that the alleged Credit Notes were issued

to its customers were additionally and apart from the Sales account for achieving the targets under the head "Selling Expenses". The assessee had explained the same issue by informing that it had sold liquor to its Distributors/retailers directly and in order to boost its sales, it provides incentives to such Distributors/retailers, which are nothing but post-sales trade discounts. Such trade discounts are disbursed once a particular Distributor/Retailer achieve an intended target of purchase from the Appellant. Hence, it had contended that, there can be no liability on the Appellant to deduct tax under section 194H of the Act on disbursement of such incentives to Distributors/retailers on a principal-to-principal basis.

6.2.3. However, as per the provisions laid down in section 28(iv) of the Act, the following income shall be chargeable to income-tax under the head "Profits and gains of business or profession."

> *"[(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;]"*

6.2.4. In view of the above, as the amount paid by the assessee in the heads mentioned in the above table in a disguised nomenclature i.e., 'Incentive' partakes the nature of income under the head 'Profits and gains of business or profession' in the hands of the payee i.e., the customers/purchasers as a commission income received for rendering service to the assessee for boosting its sales, the same is squarely covered by the provisions of Clause (iv) to the Explanation of Section 194H of I.T. Act, 1961. This clause states that any income credited to any account, whether called suspense account or other income, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee. It is relevant to mention that, the assessee had paid such income to customers through various schemes for boosting its sales, which are deemed to be credit of such income to the account of those customers as they arise in consequence of or incidental to the business.

6.2.5. Further, it is not out of place to mention that the contention of the assessee that in order to boost its sales, it provides incentives to such Distributors/retailers, which are nothing but post sales trade discounts and such trade discounts are disbursed once a particular Distributor/Retailer achieve an intended target of purchase from the Appellant, is not at all acceptable. The reason is, the assessee had failed to provide any details or corroborative documents to ascertain the 'intended target' imposed on such customers, completing of the same, such trade discounts in the form of incentive was provided to them by the assessee. It is pertinent mention that both in the assessment proceedings as well as in the appellate proceedings, the assessee was remained silent in respect of the following required details viz.

a) Purchase targets assigned to each of such customers.

b) Veracity of fulfilment of such targets by the same customers.

c) Rates of such incentives with the ratio of purchase by such customers.

d) The rate of such incentive in the earlier years.

e) Confirmations from such customers to whom relevant credit notes were issued by the assessee in respect of the fact that whether the said payments were in the nature of 'Incentives' or 'Commission'.

6.2.6. Hence, under the facts and circumstances stated above, it is of the view that the assessee had fulfilled the conditions as laid down in Clause (iv) of Explanation of Section 194H read with the Clause (iv) of Section 28 of the Act for the purpose of deduction of tax @10% and accordingly the assessee ought to make TDS at the said rate u/s 194H from crediting income of its various buyers and debiting own profit and loss account under the head "selling expenses" through credit notes amounting to Rs. 10,26,18,968/-. Accordingly, the assessee was rightly treated as assessee in default u/s 201 (1) of the Act 1961 for failing to deduct the tax, as required u/s 194H of the Act. Thus, the assessee is also liable to pay interest u/s 201(1A) of the Act. It is also observed that the failure of non-deduction of due TDS on the aforesaid payments was intentional on the part of the assessee, as it had put a premeditated nomenclature of 'Incentive' on such payments which were used by the assessee for boosting its sales which are in the nature of commission and also very much incidental to its business as per section 28(iv) of the Act. Hence, the said failure corresponds to a deliberate attempt on the part of the assessee. Therefore, the AO had rightly initiated a penalty u/s 271C of the Act as the assessee had failed to make TDS in accordance with the provisions of Section 194H of the Act. Accordingly, the addition of Rs. 1,98,05,460/- is upheld. Consequently, these grounds of appeal raised by the assessee are dismissed."

3.3. Aggrieved with the order of the Ld. CIT(A), the assessee is in appeal before the Tribunal. Before us, the ld. Counsel for the assessee submitted that the Ld. AO had misconstrued the provisions of the Act. The assessee is a manufacturer of beverages which it sells to the distributors. TCS on gross sales of different brands was made, wherever required. The assessee manufactures liquor and sells to the distributors who, in turn, supply to the retailers and various schemes were floated for giving incentives in cash and kind. The Ld. AO has not appreciated the provisions of Clause (iv) of the Explanation to Section 194H of the Act. There are primary and secondary schemes for giving incentive. While the primary scheme was related to actual distribution, the secondary scheme related to the consumption of various brands which were registered with the West Bengal authorities. It was stated that the price was not mentioned on the product and for the purpose of TCS, the

assessee considered the basis price + excise duty + other duties. The sale price was fixed by the Government. Our attention was drawn to page 30 of the paper book which contains 'details of TCS on alcoholic and scrap' and shows turnover of Rs. 3,58,17,40,410/- as amount paid for the purpose of TCS on alcoholic product and scrap and total TCS of Rs. 2,58,97,337/- at the appropriate rate concerned was made. Our attention was also drawn to page 164 of the paper book which gives the details of sales made, discounts/incentives given and TCS collected for the AY 2015-16 in which turnover of Rs. 4,95,88,289/- under the Primary Scheme for Non-Kind, 0.53% discount was made and TCS of Rs.4,90,973/- was also collected. Similarly, various other discounts in cash and kind are mentioned therein on which TCS had been collected, wherever required and there was no liability of TDS. It was stated that if the distributor was a big distributor showing greater sales, a larger discount was given but the relationship between the assessee and the distributor was of principal to principal and not of principal to agent and Section 194H of the Act was, therefore, not applicable. It was stated that the Ld. AO had misconstrued the provisions of Clause (iv) of Section 194H of the Act which relates to income being credited to any account which are called 'suspense account' or by any other name. It was further stated that the term 'commission or brokerage' is defined in Clause (i) of the Explanation to Section 194H of the Act which requires that the relationship of principal and agent should be there between the assessee and the agent for the applicability of Section 194H of the Act. As regards TDS on sales made, it was stated that Section 194R relating to TDS on any benefit or perquisite to a resident has been brought into the statute with effect from 01.07.2022 by the Finance Act, 2022 and in response to question no. 4 in the CBDT Circular No. 12/2022 dated

16.06.2022, it is stated that no tax is required to be deducted under section 194R of the Act on sales discount, cash discount and rebates allowed to customers. Thus, section 194R is not applicable to trade discounts given by the assessee nor is it applicable for AY 2015-16. The copy of the circular was annexed at page 44-45 of the case laws and circulars compendium and question no. 4 appears at page 46 thereof. Similarly, section 194Q of the Act relating to TDS on purchase of any goods of the value or aggregate of value exceeding Rs. 50,00,000/- in any previous year was brought into the statute with effect from 01/07/2021 and was not applicable for the year under consideration. A copy of the Circular No. 13/2021 dated 30.06.2021 was also annexed. The Ld. DR relied upon the order of the Ld. CIT(A).

3.4. The ld. AR for the assessee further relied upon the written submission as well, the relevant extracts from which are as under:

> *A. Background*
> *1. N C Shaw and Co Beverages Private Limited (hereinafter referred to as the 'Appellant') is a private limited company engaged in the business of manufacture and sale of alcoholic beverages in the state of West Bengal and canteen stores department, Bagdogra for West Bengal, Sikkim and Bhutan.*
> *2. The Appellant sells liquor to its distributors/retailers directly and in order to boost sales the Appellant offers trade discount to them in the form of various schemes. The details of the various schemes provided during the year are as follows:*

Particulars	*Amount in Rupees*
Primary Schemes - Non Kind	*6,68,495*
Schemes -Service Paid to Dist	*56,68,304*
Schemes -Tie-Up	*4,56,716*
Secondary Scheme-Kind 5212	*1,44,01,732*
Secondary Scheme-Non Kind 5212	*8,14,23,721*
Grand Total	*10,26,18,968*

> *3. The above schemes are floated in the market and the incentives being offered to distributors/retailers depends upon the volume of sales made by them. The mechanism followed by the Appellant in respect to distributing the incentive is that the Appellant settles the above discount/incentives on recurring basis by issuing the credit notes in favour of distributors/retailers from time-to-time.*

Please refer page 106 to 163 of the paper book for the sample copies of credit note issued to distributors/retailers.
For the sake of greater clarity, the entire process /movement of incentive has been briefed as under:-
Step 1: The distributors being entitled for discount/incentives on the volume of liquor purchased from the Appellant which ranges around 1% to 2% depending upon the brand of liquor purchased by such distributors.
Step 2: The opposite claim of volume discount/incentives was raised by the distributors based upon the volume of liquor sold to the retailers.
Step 3: The discount/incentives given to distributors was settled in running account of such distributors based upon the credit notes issued by the Appellant.
4. The details of sales made during the year and subsequent incentive offered by the Appellant to the distributors/retailers has been given at page 164 to 167 of the paper book.
5. It is also pertinent to add that the sale of liquor is subject to collection of tax at source ('TCS') at the time when sales is made to distributors @ 1% or less than 1% (in case lower withholding certificate is issued to such distributors by the income tax authorities). The list of TCS collected on such sales is given at page 30 of the paper book.
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C. Appeal before Hon'ble Commissioner of Income Tax (Appeals)

10. The above view of the Ld. AO was also upheld by CIT(A) wherein it has been held as follows:

> *"6.2.3. However, as per the provisions laid down in section 28(iv) of the Act, the following income shall be chargeable to income-tax under the head "Profits and gains of business or profession."*
>
> *"[(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;]"*
>
> *6.2.4. In view of the above, as the amount paid by the assessee in the heads mentioned in the above table in a disguised nomenclature i.e., 'Incentive' partakes the nature of income under the head 'Profits and gains of business or profession' in the hands of the payee i.e., the customers/purchasers as a commission income received for rendering service to the assessee for boosting its sales, the same is squarely covered by the provisions of Clause (iv) to the Explanation of Section 194H of I.T. Act, 1961. This clause states that any income credited to any account, whether called suspense account or other income, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee. It is relevant to mention that, the assessee had paid such income to customers through various schemes for boosting its sales, which are denied to be credit of such income to the account of those customers as they arise in consequence of or incidental to the business.*
>
> *6.2.6. Hence, under the facts and circumstances stated above, it is of the view that the assessee had fulfilled the conditions as laid down in Clause (iv) of Explanation of Section 194H read with the Clause (iv) of Section 28 of the Act*

for the purpose of deduction of tax @10% and accordingly the assessee ought to make TDS at the said rate u/s 194H from crediting income of its various buyers and debiting own profit and loss account under the head "selling expenses" through credit notes amounting to Rs.10,26,18,968/-. Accordingly, the assessee was rightly treated as assessee in default u/s 201(1) of the Act 1961 for failing to deduct the tax, as required u/s 194H of the Act. Thus, the assessee is also liable to pay interest u/s 2O1(1A) of the Act..."

11. In view of the above, the contention of Ld. AO and CIT(A) treating the Appellant as assessee is in default under section 201(1) of the Act is as under:

a. The discount/incentives provided by the Appellant is in the nature of commission and is covered within the meaning of section 194H of the Act.

b. On a co-joint reading of section 194H and section 28 (iv) of the Act, Appellant was liable to withhold tax.

c. Further, on failure to withhold tax on incentive paid to distributors/retailers in the absence of any judgement by jurisdictional High Court in favour of the Appellant, the Appellant has been treated as assessee in default.

12. Being aggrieved with the impugned order, the present appeal has been filed by the Appellant before the Hon'ble Tribunal.

D. Appellant's Contention

Discount/incentives not to be treated as commission

13. The moot point which arise for determination is whether the incentives which have been given to distributors/retailers can be covered by the provisions of section 194H of the Act.

14. The word 'commission' is defined by way of an explanation to section 194H of the Act, reproduced as under:

"Explanation.—For the purposes of this section,—

(i) '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;"

15. Now, in order to satisfy the requirements of principal-agent relationship, certain conditions laid down in the Explanation (i) to section 194H are required to be fulfilled. These are as follows:

15.1. Payment should have been received or receivable directly or indirectly.

15.2. It should be received or receivable by a person acting on or behalf of another person.

15.3. The payment should be received or receivable for:

15.3.1. any services in the course of buying or selling of goods, or

15.3.2. in relation to any transaction relating to any asset, valuable article or thing not being securities.

*16. For evaluating the nature of payments made by the Appellant to the distributors, the basic relationship between the parties to the agreement has to be the deciding factor. It is pertinent to mention that during the year under consideration, the Appellant has made the entire sales to the distributors and has duly collected tax at source on such sale consideration (inclusive of excise duty and sales tax). The distributors have further made the sale to retailers. It is important to note that.. the Appellant is not privy to the transactions between distributors and the retailers. (**The details of sales made to the distributors and the TCS collected thereupon has been enclosed at Pg. 30 of the Paperbook**).*

17. It may be noted that the expression 'commission or brokerage' as defined above is a payment received by a person acting on behalf of another person for services rendered or any services in the course of buying or selling. Therefore, section 194H of the Act, basically aims to rope in the payments made by a principal to its agent.

18. The element of agency being precondition for invocation of provisions of section 194H of the Act has been upheld by various courts including the Hon'ble Supreme Court in India. The Appellant seeks to place reliance on the following case laws:

*18.1 **Bharti Cellular Ltd. vs ACIT ([2024] 160 taxmann.com 12 (SC))**, the relevant portion of the judgement of Hon'ble Supreme Court is reproduced below:*

"5. The services rendered by the agent to the principal, according to the latter portion of Explanation (i) to Section 194-H of the Act, should not be in the nature of professional services. Further, Explanation (i) to Section 194-H of the Act restricts application of Section 194-H of the Act to the services rendered by the agent to the principal in the course of buying and selling of goods, or in relation to any transaction relating to any asset, valuable article, or thing, not being securities. The latter portion of the Explanation (i) to Section 194-H of the Act is a requirement and a pre-condition. It should not be read as diminishing or derogating the requirement of the principal and agent relationship between the payer and the recipient/payee.

It is settled by a series of judgments of this Court that the expression 'acting on behalf of another person' postulates the existence of a legal relationship of principal and agent, between the payer and the recipient/payee. The law of agency is technical. Whether in law the relationship between the parties is that of principal agent is answered by applying section 182 of the Contract Act, 1872. Therefore, the obligation to deduct tax at source in terms of section 194-H arises when the legal relationship of principal-agent is established. It is necessary to clarify this position, as in day-to-day life, the expression 'agency' is used to include a vast number of relationships, which are strictly, not relationships between a principal and agent."

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20. In this regard, reliance is placed on the decision of Hon'ble Telangana High Court in case of Commissioner of Income-tax (TDS) v. United Breweries Ltd. [2016] 387 ITR 150 (Andhra Pradesh and Telangana) wherein it was held that the incentive given to retail dealers would not fall under the category of commission and accordingly the provisions of section 194H of the Act are not applicable. It may not be out of place that the Assessee in the present case was in similar business as the Appellant. The relevant extract of the decision is as under:

> *"17. In the instant case, the assessee apparently paid incentives under its sales promotion scheme to the retail dealers. We have already noticed that the assessee has sold goods to APBCL and the retail dealers have purchased goods from APBCL. There should not be any dispute that the sale between the assessee and APBCL and the sale between APBCL and retail dealers was on "Principal to Principal" basis, since the property and risk attached with the goods got transferred from seller to buyer under both occasions. Further, it cannot also be said that retail dealers have provided any service to the assessee herein, since there is no direct connection between the assessee and retail dealers. The trade discount scheme was announced by the assessee in order to promote its sales and hence it is a sales promotion scheme only.* ***Under the scheme, the assessee has disbursed the eligible amount of incentive or rebate or discount to the retail dealers through its del-credere agents. Hence the del-credere agents cannot be considered to "Payees" in these transactions as interpreted by Ld CIT(A), since they have acted only as conduits. The payment is actually made to the retail dealers. Accordingly, we are of the view that the payment made by the assessee under such scheme would constitute sales promotion expenses and it would not fall under the category of commission falling within the scope of section 194 H of the Act.***
>
> *18. In view of above, we set aside the order of the Id CIT(A) on this issue and direct the AO to delete the demand raised in respect of this issue under section 201(1) and 2O1(1A) of the Act in respect of all the three assessment years under consideration."*

Emphasis Supplied

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22. The issue of non-applicability of withholding tax provisions on discount/ incentives given to distributors/ retailers has already been decided by the Gujarat High Court in the case of Ahmedabad Stamp Vendors Assn v. Union of India [2002] 257 ITR 202 (Guj) and subsequently upheld by the Supreme Court (2012) in civil appeal no 10270 of 2003, wherein the Hon'ble High Court held that the definition of 'commission or brokerage' as contained in the Explanation to section 194H of the Act is not so wide that it would include any payment received or receivable, directly or indirectly, for services in course of buying or selling of goods. In order to fall in the aforesaid explanation, the payment received or

receivable, directly or indirectly, is by a person acting on behalf of another person. The element of agency has to be there in case of all services or transactions contemplated by Explanation (i) to section 194H of the Act.

23. The High Court further observed that there is a distinction between a contract of sale and a contract of agency by which the agent is authorized to sell or buy on behalf of the principal. The essence of the contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds.

24. Further, the Bombay High Court in the case of CIT vs. Intervet India (P.) Ltd [2014] 49 taxmann.com 14 (Bombay) held that as regards sales promotional expenditure in question, the provisions of Expln. (i) of section 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers/ stockists of the assessee is appropriately held to be not a payment of any commission in the concurrent findings as recorded by the CIT(A) and the Tribunal. The relevant extract of the judgement is reproduced as under:

> *"The assessee had undertaken sales promotional scheme viz., product discount scheme and product campaign as discussed hereinabove under which the assessee had offered an incentive on case to case basis to its stockists/ dealers/ agents. An amount of Rs. 70,67,089 was claimed as a deduction towards expenditure Incurred under the said sales promotional scheme. The relationship between the assessee and the distributors/ stockists was that of principal to principal and in fact the distributors customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributors/ stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee's product. The distributors/ stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be commission payment within the meaning of Expln. (i) to s. 194H of the II Act, 1961. The contention of the Revenue in regard to the application of Expln. (i) below s. 194H being applicable to all categories of sales expenditure cannot be accepted…* ***We are satisfied that in the facts of the present case that as regards sales promotional expenditure in question, the provisions of Expln. (i) below s, 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers/stockists of the assessee is appropriately held to he not a payment of any commission in the concurrent findings as recorded by the CIT(A) and the Tribunal."***

Emphasis Supplied

25. Reliance is further placed on the following judicial precedents wherein the Hon'ble Courts/ Tribunals has held that where there is relationship of

principal to principal and the assessee offers discounts to its distributors/retailers, the assessee is not liable to deduct TDS on such payments.

- *All India Radio Commercial Broadcasting Service Prasar Bharti Broadcasting Corporation of India Akashvani Bhawan, Sansad Marg, New Delhi V. Income-tax officer [2006] 8 SOT 513 (Delhi ITAT)*
- *Bharti Airtel Limited vs DCIT [2015] 372 ITR 33 (Karnataka)*
- *Additional Commissioner of Income-tax V. Pearl Bottling (P.) Ltd. ([2011] 10 taxmann.com 47 (Visakhapatnam ITAT)*
- *Government Milk Scheme V. Assistant Commissioner of Income-tax [2006] 98 ITD 306 (Pune ITAT),*
- *Mother Dairy India Ltd. V. Income-tax Officer [2009] 28 SOT 42 (Delhi ITAT)*
- *Fosters India Pvt. Ltd. vs. ITO [2008] 117 TTJ 346 (ITAT, Pune)*
- *Income tax officer v. Moving Picture Co. [2008] 20 SOT 120 (Delhi ITAT)*

3.4. It was further stated that reliance placed by the Ld. AO/CIT(A) on clause (iv) under explanation to Section 194H of the Act is incorrect and the submission in this regard is as under:

26. At this juncture, it is pertinent to mention that the Ld.AO/CIT(A) have placed reliance on the clause (iv) under the explanation to section 194H and held that the Appellant was required to withheld taxes. They both have mentioned that clause (iv) covers income credited to any account whether called suspense account or other income in the books of the Appellant and it has paid the said income (incentives/discounts) to its customers through various schemes. The relevant extract of clause iv is stated below

(iv) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]"

Further, the Ld. AO/CIT(A) has placed reliance on the section 28(iv) of the Act to derive the meaning of income. The relevant extract of the section is stated below:

"the value of any benefit or perquisite arising from business or the exercise of a profession, whether—
(a) convertible into money or not; or
(b) in cash or in kind or partly in cash and partly in kind;]"

Placing reliance on the definition of income as per section 28(iv) of the Act they have held that incentive/discounts partakes the character of income under the head profits and gains of business and profession in the hands of recipient and

accordingly gets covered under the purview of clause (iv) under the explanation to section 194H of the Act.

It is humbly submitted that the purpose of clause (iv) was to cover the cases where the Assessee credits any amount to a suspense account or any other account instead to the account of recipient to bring itself out of the purview of section 194H of the Act. The legislature had no intention to bring every income stated under the section 28(iv) of the Act under the purview of section 194H of Act.

27. Further, the Appellant has provided the discount/incentives to the distributors/retailers and the same is duly credited to the account of the parties. Since the incentives/ discount paid has been duly credited to name of the respective parties instead of any suspense account the said incentives/ discount given to parties cannot be held to be liable to TDS by invoking the provision of explanation (iv) of section 194H of the Act.

28. Moreover, please note that since the relationship between the Appellant and retailers/distributers is principal to principal, the basic provision of section 194H of the Act does not apply to the Appellant and applicability of the explanation on incentive/discounts paid to retailers/distributers will be out of place.

3.5. It has been reiterated that there was no provision under the Act to mandate withholding taxes on discounts/incentives u/s 194R of the Act incorporated on 01.07.2021. It was also stated that the TDS provisions were not applicable if TCS has already been collected on the same amount. Further, reliance was placed on the decision of the Hon'ble Apex Court in case of *Hindustan Coca Cola Beverage (P.) Ltd. v. Commissioner of Income-tax [2007] 163 Taxman 355 (SC)* and in the case of *Commissioner of Income-tax v. Rishikesh Apartments Co-op. Housing Society Ltd. [2001] 119 Taxman 239 (Gujarat)* in support of the claim that *"since the recipient of income has duly paid taxes on it there cannot be once again a recovery of the tax alleged to be in default from the Assessee."*

3.6. In view of the submission made, the assessee prayed as under:

"• that the relationship between the Appellant and retailers/distributers is principal to principal, thus, the basic provisions of section 194H of the Act are not applicable and incentive paid to them should not be treated as commission. Also, the applicability of the clause (iv) to explanation under

section 194H of the Act on incentive paid to retailers/ distributers will be out of place.

• that there were not provisions to deduct tax at source on discount/ incentives under Act under the captioned year and the provisions of section 194R were much later incorporated under Act wherein it was duly clarified that the said provisions are not applicable on discount/ incentives.

• that deducting TDS under section 194H of the Act on the same set of income oh which TCS has been collected will lead to double collection of tax on the same set of income which is not the purpose of the provisions of the Act.

• that the Appellant should not be treated as assessee-in-default under section 201(1) of the Act since there is no liability on the Appellant to deduct tax on the incentives offered to distributors/ retailers.

• that the Appellant has been made sales to the parties which are regular taxpayers and have already paid the taxes due on its income received from the Appellant. Accordingly, no further tax can be recovered from Appellant on the said income by treating the Appellant to be assessee-in-default. Also, the interest levied by the Ld. AO on the tax computed in the proceedings is incorrect as no tax is recoverable from the Appellant."

3.7. We have gone through the submissions made and also considered the various case laws cited. The provision of Section 194H of the Act are reproduced as under:

"194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of 92[two] per cent :

Provided 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:

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed one crore rupees in case of business or fifty lakh rupees in case of profession during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.

Explanation.—For the purposes of this section,—

(i) ***"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****;*

(ii) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) ;

(iv) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly." *{****emphasis supplied****}*

3.8. As has been rightly stated by the assessee, these provisions are applicable in case there is a relationship of principal and agent and any income by way of commission or brokerage is paid. As regards the term 'commission' or 'brokerage', the same is defined as per Clause (i) of the Explanation to Section 194H of the Act which is as under:

"Explanation.—For the purposes of this section,—

*(i) "****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;"*

3.9. The Ld. AO has relied upon Clause (iv) of the Explanation to Section 194H of the Act. However, the same relates to a case where any

income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. **However, the provisions are applicable if the payment is in the nature of commission or brokerage and 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.** Thus, the discount in cash/kind was a normal sales discount which was made to reduce the sale price and there was a relationship of principal to principal between the assessee and the buyers. Neither the Ld. AO nor the Ld. CIT(A) had made out the case that the relationship of principal and agent subsisted between the assessee and the buyers so as to attract the provisions of Section 194H of the Act.

4. Hence, in view of the judicial pronouncements relied upon by the assessee *(supra)* the provisions of section 194H of the Act are held to be not applicable to the discount on sales which was in the nature of trade discount and not commission or brokerage. Hence, the assessee could not be treated as an assessee in default for the purpose of Section 201 of the Act nor any interest u/s 201(1A) of the Act was leviable. Hence, ground nos. 2, 3, 3.1, 3.2 & 4 are allowed.

4.1. Ground no. 5 remains of academic interest since it is held that the assessee was not liable for deduction of TDS on the discounts made to the buyers of liquor. Hence, this ground is not being adjudicated.

5. In the result, the appeal filed by the assessee is allowed.

ITA No. 1947/KOL/2024:

6. This appeal is against the penalty u/s 271C of the Act and is in consequence to the order u/s 201(1) of the Act wherein the assessee has been held to be an assessee in default. Since in ITA No. 1925/KOL/2024 we have held that the assessee is not to be treated as an assessee in default, therefore, no penalty u/s 271C of the Act is liable to be imposed as there was no default and the penalty is hereby deleted and the appeal is allowed.

7. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open Court on 27th December, 2024.

Sd/-	*Sd/-*
[**PRADIP KUMAR CHOUBEY**]	[**Rakesh Mishra**]
Judicial Member	Accountant Member

Dated: 27.12.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***N C Shaw and Co Beverages Private Limited, P 45 Goragacha Road, Kolkata, West Bengal, 700053.***
2. ***Income Tax Officer, TDS Circle-2(2), Kolkata.***
3. ***Addl. Commissioner of Income Tax (TDS), Range-2, Kolkata.***
4. CIT(A)-27, Kolkata.
5. CIT-
6. CIT(DR), Kolkata Benches, Kolkata.
7. Guard File.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata