IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI A BENCH, MUMBAI

Before Shri D Manmohan Vice President
and Shri Pramod Kumar Accountant Member

ITA No. 6657/Mum/11
Assessment year: 2004-05

Kotak Securities Limited ***……..Appellant***
1st floor, Bakhtawar
229, Nariman Point, Mumbai 400 021
PAN : AAACK3436F

Vs.

Dy. Commissioner of Income Tax
TDS Circle 2(1), Mumbai ***…….……Respondent***

Appearances:
F V Irani, alongwith Chetan Kakka, *for the appellant*
O A Mao, *for the respondent*

Date of hearing : January 17, 2012
Date of pronouncement : February 3 , 2012

O R D E R

Per Pramod Kumar :

1. By way of this appeal, the assessee appellant has called into question correctness of order dated 26th August 2011, passed by the learned Commissioner (Appeals), in the matter of tax withholding demand under section 201(1) r.w.s. 194 H of the Income Tax Act, 1961, on the following grounds:

Ground No. I

1. The Commissioner of Income Tax (Appeals) -14, Mumbai [hereinafter referred to as "CIT(A)"] erred in confirming the order of the Assessing Officer treating the assessee in default under section 201 of the Income Tax Act and thereby charging tax

amounting to Rs 5,57,929 for not deducting TDS on bank guarantee commission of Rs 83,25,990 under section 194 H.

2. He failed to appreciate that he ought to have held that :

a) The Bank Guarantee Commission is not liable to TDS under any of the provisions of the Income Tax Act,1961, including Section 194H;
b) The Bank Guarantee is provided by Bank on principal to principal basis and there is no agency relationship between the bank and the appellant in bank guarantee transaction.

3. The appellant prays that it be held that bank guarantee commission fees are not liable to TDS under section 194H and AO be directed to delete the tax demand of Rs 4,57,929 under section 201.

Ground No. II

1. The CIT(A) erred in confirming the order of the Assessing Officer charging interest under section 201(1A) amounting to Rs 3,97,164 on TDS of Rs 4,57,929.

2. The appellant prays that the appellant is not liable to deduct TDS on bank guarantee commission fees and, therefore, not liable to interest under section 201(1A) and AO be directed to delete the interest under section 201(1A) of Rs 3,97,164.

2. To adjudicate on this appeal, only a few material facts need to be taken note of. The assesse is a company engaged in stock broking business and is a Member of the Bombay Stock Exchange and National Stock Exchange. During the course of business carried on by the assessee, assessee furnishes bank guarantees, mainly in lieu of margin deposits, to various agencies, such as BSE and NSE. In consideration for issuance of such bank guarantees, banks charge the fees, which is termed as, 'bank guarantee commission'. On 16th November 2006, the assessee was subjected to a survey under section 133A. During the course of this survey, it was noticed that the assessee was not deducting any tax at source from the payments made by the assessee to the banks in respect of

'bank guarantee commission'. In response to the Assessing Officer's requisition to show cause as to why action not be taken against the assessee for non-deduction of tax at source from bank guarantee commission payments, it was *inter alia* submitted by the assessee that a plain reading of Explanation to Section 194 H, which deals with deduction of tax source from commission or brokerage payments, indicates that the element of agency is essential in case of all the services or the transactions contemplated by Explanation to Section 194 H, and that the transactions or services, which are on principal to principal basis, would not be governed by the said provision requiring tax deduction at source. The assessee also referred to various judicial precedents, including by Hon'ble Gujarat High Court in the case of Ahmedabad Stamp Vendors Association Vs Union of India (257 ITR 202), and by co ordinate benches of this Tribunal in the cases of Baidynath Ayurved Bhawan Ltd Vs JCIT (83 TTJ 409) and ACIT Vs The Samaj (71 TTJ783). None of these submissions, however, impressed the Assessing Officer. He was of the view that, in terms of the provision of Explanation to Section 194 H, 'commission or brokerage" covers any payment, received or receivable – directly or indirectly, for any services in relation to any transaction relating to any asset, valuable or thing. He rejected the assessee's submission regarding principal agent relationship being *sine qua non* for invoking the tax deduction at source requirements as "totally incorrect and devoid of any merits" and observed that "the Explanation to Section 194 H is very wide and covers any payments in the nature of any commission or brokerage for any services in relation to any transaction relating to any asset". He further noted that the assessee has taken bank guarantees from various banks and these bank guarantees protect the stock exchanges from any default by the assessee and acts as security for due performance and fulfillment of obligations by the assessee. The bank guarantee commission paid by the assessee for these bank guarantees, according to the Assessing Officer, was liable for deduction at source under section 194 H. The assessee's failure to deduct the tax source was, accordingly, visited

with demands raised under section 201(1) r.w.s. 194H, to make good the shortfall in tax deduction at source, and under section 201(1A) r.w.s. 194 H, to compensate interest for delay in realizing the tax deduction at source revenues. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) held that the definition of 'commission or brokerage', as given in Explanation to Section 194 H, is not exhaustive but only inclusive, which, in effect, implies that any payment for commission or brokerage, as understood in common parlance, will also be covered by the said provision. He *inter alia* observed that "it is evident that the Explanation seeks to include even those payments (besides normal commission or brokerage) which otherwise may not be called 'commission or brokerage' and which are in the nature of payment for services rendered (except for professional services which are covered u/s 194J) by an agent of a principal". "This", learned CIT(A) reasoned, "obviously does not mean that normal commission or brokerage payments are excluded from the purview of Section 194 H". Learned CIT(A) thus upheld , and infact fortified, the stand of the Assessing Officer, and thus confirmed the impugned demands raised under section 201(1)r.w.s. 194 H and under section 201(1A) r.w.s. 194 H. The assessee is aggrieved and is in further appeal before us.

3. We have heard the rival contentions, perused the material on record and duly considered factual matrix of this case as also the applicable legal position.

4. Let us first take a look at Section 194 H, which is reproduced as follows:

Commission or brokerage

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 ten 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 five 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 the monetary limits specified under clause (a) or clause (b) of section 44AB 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.***

5. A plain reading of the above provision indicates that tax withholding requirements under section 194H apply in respect of 'commission or brokerage', which, in turn, is defined by Explanation to Section 194 H. No doubt, this definition is inclusive but the fundamental question that we really need to consider in the first place is as to what are the connotations of expression 'commission or brokerage' in common parlance, and then proceed to deal with the inclusions thereto by the virtue of specific provision of law.

6. We find that the expression 'commission' and 'brokerage' have been used together in the statute. It is well settled, as noted by *Maxwell in Interpretation of Statutes* and while elaborating on the principle of *noscitur a sociis*, that when two or more words which are susceptible to analogous meaning are used together they are deemed to be used in their cognate sense. They take, as it were, their colours from each other, the meaning of more general being restricted to a sense analogous to that of less general. Explaining this principle in general terms, Hon'ble Shri M.K. Chaturvedi, the then Vice President (MZ) has, in *Interpretation of Taxing Statutes* (AIFTP Journal : Vol. 4, No. 7, July, 2002, at p. 7), in his inimitable words observed:

> **Law is not a brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism. Similarly, the rules relating to interpretation are also based on common-sense approach. Suppose a man tells his wife to go out and buy bread, milk or anything else she needs, he will not normally be understood to include in the terms 'anything else she needs' a new car or an item of jewellery. The dictum of *ejusdem generis* refers to similar situation. It means of**

the same kind, class or nature. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of same kind as specified. *Noscitur a sociis* is a broader version of the maxim *ejusdem generis*. A man may be known by the company he keeps and a word may be interpreted with reference to be accompanying words. Words derive colour from the surrounding words.

7. *Broom's Legal Maxims* (10th Edn.) observes that "It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu* the coupling of words together shows that they are to be understood in the same sense."

8. Let us now deal with legal connotations of these two expressions, namely 'commission' and 'brokerage'. The *Law Lexicon* (Edited by Justice Y.V. Chandrachud; 1997 Edn.) observes that "in commercial law, commission is a compensation to a factor or other agent for services to be rendered in making a sale or otherwise; a sum allowed as compensation to a servant, factor or agent who manages the affairs of others, in recompense for his services." According to the given definition, "It is an allowance, recompense or reward made to agents, factors and brokers and others for effecting sales and carrying out business transactions. It is generally calculated as a certain percentage on the amount of the transactions on the profits to the principal." The expression 'brokerage' is defined as 'fees or commission given to or charged by a broker'. In turn a broker is defined as "a middleman or agent who, for a commission on the value of transaction, negotiates for others the purchase or sale of books, bonds or commodities, or property of any kind, or who attends to the doing of something for another".

9. In the light of the above discussions, and when we look at the connotations of expression 'commission or brokerage' in its cognate sense, as in the light of the principle of *noscitur a sociis* as we are obliged to, in our considered view, scope of expression 'commission', for this

purpose, will 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. Even when an expression is statutorily defined under section 2, it still has to meet the test of contextual relevance as section 2 itself starts with the words "In this Act *(i.e. Income Tax Act),* unless context otherwise requires…", and, therefore, contextual meaning assumes significance. Every definition in the Income Tax Act must depend on the context in which the expression in set out, and the context in which expression 'commission' appears in section 194 H, i.e. alongwith the expression 'brokerage', significantly restricts its connotations. The common parlance meaning of the expression 'commission' thus does not extend to a payment which is in the nature of fees for a product or service; it must remain restricted to , as has been elaborated above, a payment in the nature of reward for effecting sales or business transactions etc. The inclusive definition of the expression 'commission or brokerage' in Explanation to Section 194 H is quite in harmony with this approach as it only provides that "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" is includible in the scope of meaning of 'commission or brokerage'. Therefore, what the inclusive definition really contains is nothing but normal meaning of the expression 'commission or brokerage'. In the case of South Gujarat Roofing Tiles Manufacturers Association Vs State of Gujarat [(1976) 4 SCC 601], Hon'ble Supreme Court were *in seisin* of a situation in which an expression, namely 'processing', was given an inclusive definition, but Their Lordships were of the view that "there could be no other meaning of 'processing' besides what is stated

as included in that expression" and that "Though 'include' is generally used in interpretation clause as a word of enlargement, in some cases context might suggest a different intention'. Their Lordships then concluded that though the expression used in the definition clause is 'includes', "it seems to us that the word 'includes' has been used here in the same sense of 'means'; this is the only construction that the word can bear in this context". In other words, an inclusive definition, as Their Lordships noted, does not necessarily always extend the meaning of an expression. When inclusive definition contains ordinary normal connotations of an expression, in our considered view, even an inclusive definition has to be treated as exhaustive. That is the situation in the case before us as well. Even as definition of expression 'commission or brokerage', in Explanation to Section 194 H, is stated to be exclusive, it does not really mean anything other than what has been specifically stated in the said definition. Therefore, as held by the coordinate benches in a number of cases including SRL Ranbaxy Ltd vs ACIT (ITA No. 434/Del/11; order dated 16.12.2011), Fosters India Ltd Vs ITO (117 TTJ 346), and Ajmer Zila Dugdh Utpadak Sangh Ltd Vs ITO (34 SOT 216), principal agent relationship is a *sine qua non* for invoking the provisions of Section 194 H. In the case before us, there is no principal agent relationship between the bank issuing the bank guarantee and the assessee. When 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 to, on demand, the beneficiary, and it is in consideration of this commitment, the bank charges a fees which is customarily termed as 'bank guarantee commission' . While it is termed as 'guarantee commission', it is not in the nature of 'commission' as it is understood in common business parlance and in the context of the section 194H. This transaction, in our considered view, is not a transaction between principal and agent so as to attract the tax deduction requirements under section 194H. We are, therefore, of the considered view that the CIT(A) indeed erred in holding that the assessee was indeed under an obligation

to deduct tax at source under section 194 H from payments made by the assessee to various banks. As we have held that the assessee was not required to deduct tax at source under section 194 H, the question of levy of interest under section 201(1A) cannot arise.

10. In view of the above discussions, we quash the impugned demands under section 201(1) and 201(1A) r.w.s. 194 H . We, therefore, also see no need to deal with other peripheral legal issues raised by the assessee.

11. In the result, the appeal is allowed. Pronounced in the open court today on 3rd day of February 2012.

Sd/- sd/-

(D Manmohan) **(Pramod Kumar)**
Vice President Accountant Member
Mumbai; 3rd day of ***February*** *,* ***2012****.*

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