

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI**

**BEFORE
SHRI N.K. SAINI, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 4935/Del/2015
Assessment Year: 2012-13**

**ACIT,
Circle-76(1),
Room No. 604,
Aayakar Bhawan,
Laxmi Nagar,
New Delhi.
(Appellant)**

**vs The Indian Hotels Company Ltd.,
(Taj Palace-Delhi),
Sardar Patel Marg,
Diplomatic Enclave,
New Delhi.
(PAN: DELR05164F)
(Respondent)**

**Department by : Shri Amti Katoch, Sr. DR
Assessee by : Shri Shashank Sharma, Adv.**

**Date of hearing: 12.02.2019
Date of pronouncement: 13.02.2019**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal is preferred by the department against the order passed by the Ld. CIT (Appeals)-41, New Delhi vide dated 12.5.2015 for assessment year 2012-13 relevant to Financial Year 2011-12 and challenges the action of the Ld. Commissioner of Income Tax (Appeals) in holding that the assessee was not liable to deduct tax at source on merchant discount/collection charges paid on account of credit card transactions.

2.0 Brief facts of the case are that the assessee is engaged in the business of running a hotel in the name of 'Taj Palace'. Proceedings u/s 201 of the Income Tax Act, 1961 (hereinafter called 'the Act') were initiated by way of notice u/s 201 r/w 201(1A) of the Act and the assessee was asked to furnish details of commission allowed to the various banks on credit card transactions during the year under consideration. It was the submission of the assessee that credit card commission was out of the realm of section 194H of the Act since there was no principal-agent relationship between the merchant establishment and the bank and, therefore, the provisions relating to tax deduction at source were not attracted in assessee's case. The assessee also relied on Notification No. 56 dated 31.12.2012 issued by the CBDT wherein it had been clarified that credit card commission was exempt from TDS. However, the Assessing Officer was of the opinion that there was an implied agency relationship between the assessee and the banker and, thereafter, relying upon Circular no. 619 dated 4.12.1991, the Assessing Officer proceeded to hold that the assessee was liable to deduct tax at source from the payments received on account of

credit card payments. This resulted in creation of a demand of Rs. 28,31,225/-.

2.1 On appeal by the assessee, the Ld. Commissioner of Income Tax (Appeals) held that in case of credit card payment, there was no liability to deduct tax u/s 194H and further in cases where under *bona fide* belief there was no requirement to deduct tax, the assessee cannot be saddled with the liability to pay interest u/s 201(1A) of the Act. The Ld. Commissioner of Income Tax (Appeals) allowed the assessee's appeal and now the department is before the ITAT and has raised the following grounds of appeal:-

“1. Whether on the facts and circumstances of the case the CIT (A) was justified in holding that the banks through whose Credit cards payments were realized by M/s The Indian Hotels Company Limited had not rendered any service to M/s The Indian Hotels Limited irrespective of the fact that such Banks have realized service charges/ commission in lieu thereof M/s The Indian Hotels Company Limited and paid service tax on such services.

2. Whether on the facts and circumstances of the case the CIT (A) was justified in holding that there was no “Principal and Agent “relationship between M/s The Indian Hotels Company Limited and the Banks particularly when such Banks, after getting their credit card swapped on the machines installed at the premises of M/s The Indian Hotels Company Limited, are bound to make payments of sale consideration to M/s The Indian Hotels Company Limited and collect the same

from Credit Card Holders on behalf of M/s The Indian Hotels Company Limited.

3. Whether on the facts and circumstances of the case the CIT (A) was justified in holding that the banks, after getting their Credit Cards swapped on the machines installed at the premises of M/s The Indian Hotels Company Limited, have provided gateway for payments to M/s The Indian Hotels Company Limited particularly when payments made through Debit Cards/ ATM Cards are different than those made through Credit Cards as in the case of Payments made through Debit Cards/ ATM Cards the Banks are not required to collect the sale consideration from Debit Card Holders on behalf of M/s The Indian Hotels Company Limited.

4. Whether on the facts and circumstances of the case the CIT (A) was justified in law in holding that the sum retained by the Banks as credit commission did not fall in the purview of section 194H of the I.T Act, 1961 particularly when the CBDT notification no. 56/2012 dated 31.12.2012 was not effective for the relevant year.

5. Whether on the facts and circumstances of the case the CIT (A) was right in law in taking a decision on the merits of the demand aggregating to Rs. 28,31,225/- u/s 201(1) and 201(1A) of the I.T. Act, 1961 in respect of commission payment/ retained to/by the Banks.”

3.0 The Ld. AR appearing on behalf of the assessee/respondent submitted that the assessee's case was covered by the judgment of the Hon'ble Delhi High Court in the case of C.I.T. vs. JDS Apparels Pvt. Ltd. reported in (2015) 330 ITR 454 (Del). It was also submitted that this judgment of the Hon'ble Delhi High Court was followed by the ITAT Mumbai Bench in assessee's sister concern in the case of ITO(TDS)(OSD) vs The Indian Hotels

Company Ltd. in ITA No. 5419/Mumbai/2014 vide order dated 13.04.2016 for assessment year 2011-12. A copy of the said order was placed on record. The Ld. AR also placed reliance on another order of the ITAT Mumbai Bench in the case of assessee's sister concern for assessment year 2010-11 in ITO(TDS)(OSD) vs. M/s Indian Hotels Company Ltd. in ITA No. 2474/Mumbai/2014 wherein, vide order dated 23.06.2017, it has been held that there was no principal agent relationship between the bank and the assessee and that the assessee was not liable to deduct tax at source u/s 194H on discount/commission charges retained by the banks from the customers who had made purchases through the credit cards. Reliance was also placed on the order of the ITAT Delhi in the case of DCIT vs. P.C. Jeweller Ltd. in ITA No. 4942/Del/2015 wherein, under identical facts, the ITAT had upheld the order of the Ld. Commissioner of Income Tax (Appeals) in holding that the assessee was not liable to deduct tax at source on payments received through debit cards and credit cards as the bank was not acting on behalf of the assessee but was rather acting on behalf of the customers while processing payments through debit cards and credit cards.

4.0 The Ld. Sr. DR supported the order of the Assessing Officer.

5.0 We have heard the rival submissions and perused the material available on record. We agree with the averment of the Ld. AR that the issue is squarely covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of C.I.T. vs. JDS Apparels Pvt. Ltd. (supra) wherein it has been held that since the bank was making the payment to the assessee after deduction of bank charges, there was no occasion for the assessee to deduct tax at source and further the bank was not acting on behalf of the assessee but on the other hand was acting on behalf of the customers while processing payment through debit cards and credit cards. The relevant observations of the Hon'ble Delhi High Court in C.I.T. vs. JDS Apparels Pvt. Ltd. (supra) are contained in Para 17 and 18 and the same are being reproduced hereunder for a ready reference:-

“17. Another reason why we feel Section 40(a)(ia) of the Act should not have been invoked in the present case is the principle of doubtful penalization which requires strict construction of penal provisions. The said principle applies not only to criminal statutes but also to provisions which create a deterrence and results in punitive penalty. Section 40(a)(ia) is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the assessee's property and other economic interests. It operates and inflicts

hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalization would come into play. The detriment in the present case, as is noticeable, would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer in the present case. The aforesaid principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred. In Maxwell's The Interpretation of Statutes, 12th edition (1969) it has been observed:-

"The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

18. The aforesaid principles and interpretations can apply to taxing statutes. In the present case we further feel the said principle should be applied as HDFC would necessarily have acted as per law and it is not the case of the Revenue that the bank had not paid taxes on their income. It is not a case of loss of revenue as such or a case where the recipient did not pay their taxes."

5.1 Accordingly, respectfully following the ratio of the judgment as laid down by the Hon'ble Delhi High Court, we find no reason to interfere with the findings of the Ld. Commissioner of Income

Tax (Appeals) in this regard and we dismiss the grounds raised by the department.

6.0 In the result, the appeal of the department stands dismissed.

Order pronounced in the open court on 13.02.2019.

Sd/-

Sd/-

(N.K. SAINI)
VICE PRESIDENT

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 13th FEBRUARY, 2019
'GS'

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

By Order

ASSTT. REGISTRAR