IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.628 OF 2018

The Commissioner of
Income Tax (TDS)-1 .... Appellant

versus

Jet Airways (India) Ltd. ... Respondent

.....

- Mr.A.R. Malhotra, Advocate for Appellant.
- Mr.Percy Pardiwalla, Senior Counsel, a/w Mr.Atul Jasani, Advocate for Respondent.

CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 23rd APRIL, 2019.

P.C. :

1. This Appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. Following questions are presented for our consideration;

> *"(a) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in upholding the order of the CIT (A) and holding that the amount retained by a bank/credit card*

agency out of the sale consideration of the tickets booked through credit cards is not covered under the definition of "commission or brokerage" given in the Explanation (i) to section 194H of the Act and the assessee was not liable to deduct tax at source under section 194H in respect of this amount?

(b) *Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding that the use of lounge premises paid by the assessee were payments for contract of work under section 194C of the I.T. Act and not in the nature of rent as per section 194I of the I.T. Act?*

2. Learned Counsel for the parties pointed out that question (a) is concluded by a judgment by this Court dated 18/12/2018 in Income Tax Appeal No.847/16. In this respect, while dismissing the Appeal, the Court made following observations;

"2. The RespondentAssessee is a Company, engaged in the business of setting up of and operating of Deluxe Hotels. While scrutinizing the Assessee's return of income for the Assessment Year 200910, the Assessing Officer noticed that

the Assessee had not deducted tax at source in terms of Section 194H of the Income Tax Act, 1961 (for short "the Act"), in relation to commission paid to the banks on processing of Credit Card Transactions. The Assessing Officer disallowed the corresponding expenditure of Rs.1,96,68,165/ by invoking to Section 40(a)(ia) of the Act. In Appeal, the Commissioner of Income Tax [Appeals] (for short "CIT[A]), deleted disallowance, upon which the Revenue approached the Tribunal. The Tribunal by the impugned Judgment, dismissed the Revenue's Appeal, relying upon its Judgment in case of the Assessee for the earlier Assessment Year. In such Judgment, the Tribunal had relied upon the decision of the Delhi High Court in the case of ***CIT v/s. JDS Apparels P. Ltd.,*** *reported in* ***370 ITR 454****. The Tribunal held that, in the present case, the bank did not act as an agent of the Assessee while processing the credit card payments and, therefore, the charge collected by the Bank for such service, does not amount to commission within the meaning of Section 194H of the Act.*

3. The decision of the Delhi High Court in the case of JDS Apparels P. Ltd., (supra) was also rendered in the background of the Revenue's contention of breach of Section 194H of the Act in connection with the credit card charges. The Court, after analyzing the provisions contained in Section 194H of the Act, held and observed as under:

"15: *Applying the above cited case law to the factual matrix of the present case, we feel that section 194H of the Act would not be attracted. HDFC was not acting as an agent of the respondent assessee. Once the payment was made by HDFC, it was received and credited to the account of the respondentassessee. In the process, a small fee was deducted by the acquiring bank, i.e. the bank whose swiping machine was used. On swiping the credit card on the swiping machine, the customer whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realization of payment. Subsequently, the acquiring bank realized and recovered the payment from the bank which had issued the credit card. HDFC had not undertaken any act on "behalf" of the respondentassessee. The relationship between HDFC and the respondentassessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. It is noticeable that the bank in question or their employees were not present at the spot and were not associated with buying or selling of goods as such. Upon swiping the card, the bank made payment of the bill amount to the respondent-assessee. Thus, the respondentassessee received the sale consideration. In turn, the bank in question had to collect the amount from the bankers of the credit card holder. The bank had taken the risk and also remained out of pocket for sometime as there would be a time gap between the date of payment and recovery of the amount paid.*

16: *The amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. The intention of the Legislature is to include and treat commission or brokerage paid when a third person interacts between the seller and the buyer as an agent and thereby renders services in the course of buying and/or selling of goods. This happens when there is a middleman or an agent who interacts on behalf of one of the parties, helps the buyer/seller to meet, or participates in the negotiations or transactions resulting in the contract for buying and selling of goods. Thus, the requirement of an agent and principal relationship. This is the exact purport and the rationable behind the provision. The bank in question is not concerned with buying or selling of goods or even with the reason and cause as to why the card was swiped. It is not bothered or concerned with the quality, price, nature, quantum etc., of goods bought/ sold. The bank merely provides banking services in the form of payment and, subsequently, collects the payment. The amount punched in the swiping machine is credited to the account of the retailer by the acquiring bank, i.e. HDFC in this case, after retaining a small portion of the same as their charges. The banking services cannot be covered and treated as services rendered by an agent for the principal during the course of buying or selling of goods as the banker does not render any service in the nature of agency."*

4 *In view of the decision of the Delhi High Court in JDS Apparels P. Ltd., (supra), we do not find that Tribunal has committed any error. No question of law arises.*

5 *In order dated 4th December, 2018 in Income Tax Appeal No.769 of 2016, in somewhat similar circumstances, following observations were made:*

> *" Learned counsel for the Revenue stated that the Revenue had filed an appeal against the judgment of the Tribunal in case of Kotak Securities Ltd., but that the appeal was withdrawn on the ground of low tax effect. He has, however, made available a copy of the judgment of the Tribunal in the said case which contains a detail discussion on the issue at hand. In the said judgment, the Tribunal referred to Section 194H of the Act which requires an assessee responsible for paying any income by way of commission or brokerage to deduct tax at source. The Tribunal was of the opinion that the words "commission or brokerage" must make colour from each other. The Tribunal was of the opinion that the payment in question, though categorized as "bank guarantee commission" is not strictly speaking payment of commission since there is no principal to agent relationship between the payer and the payee. The Tribunal, therefore, held that the requirement of deducting tax at source emanating from Section 194H of the Act in the present case does not arise.*

> *We are broadly in agreement with the view of the Tribunal. The so called bank guarantee commission is not in the nature of commission paid to an agent but it is in the nature of bank charges for providing one of the banking service. The requirement of Section 194H of the Act, therefore, would not arise. No question of law arises. The Income Tax Appeal is dismissed."*

3. Question (b) arises in following background; Respondent-Assessee is an Airlines Company. As part of its Airlines business, the assessee would provide lounge service to its selected customers at various airports. In a typical case, a lounge would be rented out by an agency, in the nature of an intermediary from the Airport Authority. The assessee Airlines Company and other Airlines as well as in some cases, credit card companies would provide the lounge facility to its premier class customers. As is well known a lounge is an exclusive secluded hall or a place at the Airport site, where a comfortable sitting arrangement and washrooms are provided to the flying customers. Most of these lounges would have basic refreshners for which no separate charge would be levied. According to the assessee, the assessee would pay to the agency for use of such lounge space by its customers as per pre-agreed terms. While

making such payment, the assessee used to deduct tax at source in terms of section 194C of the Income Tax Act, 1961 ('the Act' for short) treating it as a payment to a contract for performance of a worker. The revenue contends that the assessee had paid rent to the agency and therefore while paying such rental charges tax at source under section 194I of the Act should have been deducted.

4. The Tribunal by the impugned judgment referred to and relied upon a decision of the coordinate Bench in case of ***ACIT Vs. Qantas Airways Ltd., reported in (2015) 152 ITD 434*** and held that the department was not right in insisting deduction of tax at source under section 194I of the Act.

5. Having heard learned Counsel for the parties and having perused documents on record, we notice that the Assessing Officer in the present case, had placed reliance on a decision of Delhi High Court in case of ***Japan Airlines Ltd., reported in (2009) 325 ITR 298 and United Airlines (2006) 287 ITR 281.***

We may however note that the Supreme Court in case of ***Japan Airlines Company limited reported in (2015) 377 ITR 372*** has overrulled such decision of Delhi High Court. Supreme Court approved the view of Madras High Court in case of ***CIT Vs Singapore Airlines Ltd. reported in (2013) 358 ITR 237***. The issue before the Supreme Court was regarding nature of payments made by the international Airlines to the Airport Authority of India for availing the services for the purpose of landing and take off of the Aircrafts. The revenue was of the opinion that the charges paid for such purposes were in the nature of rent for use of land, a view which was accepted by the Delhi High Court in the above noted judgment. The Supreme Court in the judgment in case of Japan Airlines (supra) held that the charges paid by the international Airlines for landing and take off services as also for parking of Aircrafts are in substance not for use of the land but for various other facilities such as providing of Air traffic services, ground safety services aeronautical communication facilities etc. The Court therefore held that the payment of such charges did not invite section 194I of the Act.

6. We are conscious that this decision of the Supreme Court does not automatically answer the question at hand. Reference to this decision was made for two purposes. Firstly, to record that the reliance placed by the Assessing Officer on the decision of Delhi High Court is no longer valid. Secondly, for the purpose of drawing an analogy that the payment for certain services, need not be seen in isolation. The real character of the service provided and for which the payment is made, would have to be judged.

7. In the present case, as noted the assessee would enter into an agreement with the agency which has rented out the lounge space at the Airport from the Airport Authority. Under such agreement, the assessee would pay committed charges be it on lumpsum basis or on the basis of customer flow to such agency. This in turn would enable the passengers of the Airlines to utilize the lounge facilities while in transit.

8. We accept the suggestion of Mr.A.R. Malhotra appearing for the revenue that service of providing beverages

and refreshments was not the dominant part of service. It may only be incidental to providing quiet, comfortable and clean place for customers to spend some spare time. However, we do not descreen element of rent being paid by the assessee to the agency. The assessee did not rent out the premises. The assessee did not have exclusive use to the lounge for its customers. The customers of the Airlines along with customers of other Airlines of specified categories, would be allowed to use all such facilities. Section 194I of the Act governs the situation where a person is responsible for paying any rent. In such a situation deduction of tax at source while making such payment is obligated. We do not find that the revenue is correct in invoking section 194I of the Act.

9. In the result Appeal is dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**