आयकर अपीलीय अधिकरण, अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, AHMEDABAD
(THROUGH VIRTUAL COURT)
BEFORESHRI RAJPAL YADAV, VICE PRESIDENT
And SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No(s)	ITA No(s)	Asset. Year(s)	Appeal(s) by Appellant vs. Respondent	
			Appellant	Respondent
1.	1269/Ahd/2017	2011-12	Intas Pharmaceuticals Ltd. 203, Chinubhai Centre, Off. Nehru Bridge, Ashram Road, Ahmedabad- 38006 **PAN No. AAACI5120L**	ACIT TDS Circle, Ahmedabad
2.	1270/Ahd/2017	2012-13	Intas Pharmaceuticals Ltd. 203, Chinubhai Centre, Off. Nehru Bridge, Ashram Road, Ahmedabad- 38006 **PAN No. AAACI5120L**	ACIT TDS Circle, Ahmedabad
3.	1271/Ahd/2017	2013-14	Intas Pharmaceuticals Ltd. 203, Chinubhai Centre, Off. Nehru Bridge, Ashram Road, Ahmedabad- 38006 **PAN No. AAACI5120L**	ACIT TDS Circle, Ahmedabad
4.	1184/Ahd/2017	2011-12	The ACIT, TDS Circle Ahmedabad	M/s. Intas Pharmaceuticals Ltd. 203, Chinubhai Centre, Off: Nehru Bridge, Ashram Road, Ahmedabad- 380009 **PAN No. AAACI5120L**
5.	1185/Ahd/2017	2012-13	The ACIT, TDS Circle, Ahmedabad	M/s. Intas Pharmaceuticals Ltd. 203, Chinubhai Centre, Off: Nehru Bridge, Ashram Road, Ahmedabad- 380009 **PAN No. AAACI5120L**
6.	1197/Ahd/2017	2013-14	The ACIT, TDS Circle, Ahmedabad	M/s. Intas Pharmaceuticals Ltd. 203, Chinubhai Centre,

				Off: Nehru Bridge, Ashram Road, Ahmedabad- 380009 **PAN No. AHMI00350A**

Assessee by :	Shri Vartik Chokshi, AR
Revenue by :	Shri Virendra Ojha CIT DR

सुनवाई की तारीख/Date of Hearing : 02.09.2020
घोषणा की तारीख /Date of Pronouncement : 26.11.2020

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

In this bunch of appeals three appeals have been filed by the Assessee and three appeals have been filed by the Revenue for A.Ys. 2011-12 to 2013-14 which are arising from the separate orders of the ld. CIT(A)-7& 8, Ahmedabad dated 14.03.2017, 20.03.2017, 24.03.2017, in the assessment proceedings under section 201(1)/201(1A) of the Income Tax Act, 1961 (in short "the Act").

First we take up ITA No. 1269/Ahd/2017 A.Y. 2011-12(Assessee's Appeal):-

2. The assessee has raised the following grounds of appeal:

> *"1. That on the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that the impugned order u/s. 201(1) / 201(1A) is passed beyond the time limit stipulated under section 201 (3) of the Act; it is time barred and needs to be quashed.*
>
> *Assuming but not accepting and without prejudice to the above, the learned CIT(A) further erred in not appreciating that even on the basis of logic given by the Assistant Commissioner of Income Tax, TDS Circle, Ahmedabad, that time limit is to be decided based on the financial year in which the statement is filed, is accepted, only for the statement relating to fourth quarter of F.Y. 2010-11, which was filed in May 2011 (in F.Y. 2011-12), the A.O can pass order u/s 201 of the Act up to 31.03.2014 i.e. within two years from end of F.Y. 2011-12.*

2. *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the order passed by the Assistant Commissioner of Income Tax, TDS Circle, Ahmedabad, wherein the Appellant company was held as "assesse-in-default" for not deducting tax at source u/s. 194H of the Act in relation to certain payments in the nature of Selling and Marketing expense by treating the same as commission paid to the doctors.*

3. *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the re-characterization of the payments towards Selling and Marketing expense as commission in the hands of the doctors, in order to drag them within the provisions of Chapter - XVIIB, ignoring the primary purpose of such payments.*

4. *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the payments for expenses in the nature of Selling and Marketing, incurred for the benefits of the doctors, directly or indirectly, shall be treated as the commission in the hands of doctors, based on the following incorrect understanding / interpretation of facts:*

- *That these doctors were acting as agents of the appellant company since this expenditure was being incurred on them in expectation of certain returns from these doctors in the form of prescribing of the company's medicines leading to increased business.*

- *That incentives given to doctors by way of grants, reimbursement of their travel expense, bearing their cost of participation in conferences, etc. goes beyond the pale of mere sales promotion and marketing and takes the color of commission.*

- *That for the applicability of provisions of section 194H, the relationship between the payer and payee need not be necessarily of principal-agent.*

- *That the commission would include any payment, received or receivable, whether directly or indirectly, by the doctors.*

5. *Without prejudice to ground no. 2 to 4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing officer to segregate the payments made to / for doctors, directly or indirectly, in respect of reimbursement of expenses on Regional Conferences and Scientific Conferences and treat the same as commission liable to IDS u/s. 194H of the Act.*

6. *Without prejudice to ground no. 2 to 4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing officer to treat the entire expenditure for Field participation (debited under the head Sales Promotion Expenses and Marketing*

Development and Promotional Expenses) as commission liable to IDS under the provisions of section 194H of the Act.

7. *Without prejudice to ground no. 2 to 4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing officer to treat entire expenditure incurred on meeting and travelling (debited under the head Marketing Development and Promotional Expenses) as commission liable to IDS under the provisions of section 194H of the Act, without appreciating the fact that the said expenditure have been incurred by the Appellant mainly on various kind of field meetings organized for product promotion and travelling relating to said meetings.*

8. *Without prejudice to ground no. 2 to 4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing officer to treat 20% of Product Promotion expenditure as commission liable for TDS under section 194H, being expenditure relating to doctors.*

9. *Without prejudice to ground no. 2 to 4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing the Assessing officer to treat 20% of MR expenses as liable for TDS under provisions of section 194H of the Act on the ground the said expenses are relating to doctors.*

10. *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in dismissing the grounds relating to interest u/s. 234A/234B/234C/234D of the Act and initiation of penalty u/s. 271(1)(c) of the Act, which were not even raised by the Appellant in its appeal and thereby further erred in ignoring the actual grounds relating to interest u/s. 201(1A) of the Act and initiation of penalty u/s. 271C of the Act, which were actually raised by the Appellant.*

11. *The appellant craves leave to add, amend and/or alter the grounds or grounds of appeal either before or at the time of hearing of the appeal."*

3. First, we take up the issue raised by the assessee in Ground Nos. 2 to 9 in the memo of appeal. The interconnected issue raised is that the Ld. CIT-A erred in holding that the expenses incurred under the head Sales Promotion, Marketing development, promotional expenses and MR expenses are subject to tax deduction at source under section 194H of the Act.

4. Brief facts of the case are that the assessee in the present case is a limited company and engaged in the business of manufacturing &trading of pharmaceuticals. The assessee in the year under consideration has incurred expenses under various head as detailed under:

Sales promotion expenses incurred for doctors and others by Intas Pharmaceuticals Ltd.		
S. No.	***Ledger head***	***F.Y. 2010-11 (in lacs of Rs.)***
1.	*Regional Conference*	*455.4*
2.	*Scientific Conference*	*1832.2*
3.	*Sales Promotion Exps*	*2281.3*
4.	*Marketing Development & Promotional Exps*	*6097.0*
5.	*Product Promotional Exps*	*4000.8*
6.	*Camp Exps*	*54,4*
7.	*Academic Workshops*	*27.9*
8.	*M R Exps*	*5020.5*
9.	*Travelling Exps*	-
Total		*19769.5*

5. There was a survey action under section 133A of the Act dated 10thOctober 2013 carried out at premises of the assessee. During the course of survey and after survey proceeding, it was discovered by the AO that the expenses as listed above were incurred for the following purposes:

i. To provide the accommodation/ travel facility to the doctors for participation in various conference/ workshop/ camps etc.

ii. Distribution of various articles/ gifts/ other facilities to the stockiest/ field staff/ distributors and doctors.

6. During survey, various email correspondence and vouchers were found which were also evidencing that the aforesaid expenses were representing the facilities/ services such as travel/ accommodation/ equipment provided to the

stockiest/ field staff/ distributors and doctors. This fact was also admitted by Shri Jayesh Shah, General Manager Finance and Accounts and Shri Rajnikant Patel General Manager Marketing in the statements furnished under Section 133A and under Section 131(1) of the Act dated 10.10.2013 and 06.12.2013 respectively.

7. The reasoning by the assessee for the aforesaid expenses was submitted that the doctors, stockiest /distributors and field staff provide extra business to it (assessee) or help in getting larger customer base.

8. However, the AO was of the view that these expenses are in the nature of commission and liable to tax deduction @ 10 % under Section 194H of the Act but the assessee has failed to do so. Accordingly, the AO issuedthe show cause notice dated 5.3.2014 proposing the assessee as assessee in default under Section 200(1)/201(1A) of the Act for non-deduction of TDS under section 194H of the Act.

9. The assessee in response to show cause notice vide letter dated 13.3.2014 submitted that none of the payment mentioned in show cause arein the nature of commission as envisaged under Section 194H of the Act. The assessee further made submission with respect to each item of expenses covered in the show cause notice which is as follows:

1. ***Regional and Scientific conference:***

   Under this head, there were two types of the expenses. First one was the payment towards contribution to the various medical association for conducting the conference wherein the assessee used to advertise

its products. These payment were made directly to the medical association after deducting tax @2% under section 194C of the Act.

Other type of expense included under this head was towards the hotel accommodation, conveyance and traveling facility provided to the individuals participating in the conference who are the staff of various branches and the head office of the assessee company. The assessee claimed that these expenses were in nature of reimbursement. Hence the same is not liable for deduction of tax under chapter XVII-B of the Act.

2. *Sales Promotion Expenses*

The assessee submitted that sales promotion expenses include payment:

i. Towards market research assignments for new medicine launched by the assessee. These payments were made to medical experts for providing the expert opinion related to production of particular medicine.

ii. Payment towards staff meeting and participation in seminar & educational program,staff performance award ceremony, tour package for stockiest, discount on bulk purchase of medicine to Apollo hospital.

The assessee further submitted that the payment toward research assignment was made after deducting tax @ 10% whereas the taxwas deducted @ 2 % on the payments made to travel partner for staff meeting, award ceremony, stockiest tour etc. Further there was no tax deducted on discount

provided to Apollo and export cc account as these expenses were not subject to the chapter XVII-B of the Act.

3. *Marketing Development and Promotional expense:*

The assessee submitted that the marketing development expenses include the payments:

(i) Towards work assignment to medical experts for their expert opinion with respect to its own medicine available in market.

(ii) For participation in various health awareness conferences organized by the various medical association.

(iii) Toward traveling and meeting expenses of marketing executives, field person, PMT and HO executive.

(iv) Towards gift and articles given to carry forwarding agencies (CFA), Stockiest, Distributors, field staff, purchase of medicals books and journals.

The assessee further submitted that the payment toward work assignment was made after deducting tax @ 10% whereas the tax was deducted @ 2% on the payments made to conference organizer and travel partner for staff meeting. But there was no TDS liability on payment made for the distribution of books & journals and gift & articles etc. to stockiest, distributer, CFA and filed staff.

4. *Product promotion expenses:*

The assessee submitted that expenditure incurred under this head includes for the distribution of some articles like surgical equipment, momentum etc. which were given to medical fraternity member by the field staff while meeting for the promotion of new pharmaceuticals products.

Accordingly the assessee claimed that the payment of this nature does not attract the provision of tax deduction under chapter XVII-B of the Act.

5. *Camp expenses:*

The assessee submitted that it organized medical camps for public and payment under this head includes payment for laboratory charges and reimbursement to field staff for camp organization related expenses. The assessee claimed that the payment made to laboratory was paid after deducting taxes @ 2% under section 194C of the Act.

6. *Academic work shop:*

The assessee submitted that it organized CME for medical fraternity where some doctors deliver lectures about particular medicine or disease. These workshop held at local hotel followed by lunch or dinner etc. The assessee claimed that the nature of payment under the head does not require deduction of tax under the provision of the Act.

7. *MR Expenses:*

The assessee submitted that under the head MR expenses, the TA/DA of the field staff has been debited. Hence the same does not attract the provision of tax deduction under chapter XVII-B of the Act.

8. *Tour and travel:*

The assessee submitted that the payment to travel agencies including car hiring was made after deducting taxes @ 2% under section 194C of the Act.

In view of the above submission, the assessee contended that the sales promotion expenses are not in nature of commission and similarly the payment made to doctors or facility provided to doctors are part of it business promotion expenses. The assessee claimed that the provision of section 194H of the Act i.e. TDS on commission expenses arise where payment is made to intermediaries or facilitator for buying and selling of goods/services in monetary term and such payment become the income of the recipient. A payment to be called in the nature of commission must have contractual obligation and having relationship of principle and agent whereas in the present case, there no such obligation on doctor or on assessee. Furthermore the payment were made in kinds and not in monetary terms which never became the income of the recipient.

9. However, the AO after considering the submission of the assessee observed that the expenses as discussed above has been incurred by the assessee on the doctors and other stakeholders such as stockiest, dealers and field staff as evident from the emails between the marketing manager and other staff of the company. This fact was also admitted by the assessee in the statement recorded dated 10.10.2013 and 06.12.2013 as well in the submissions dated 10.12.2013 and 12.03.2014.Accordingly, it is transpired that there was the relationship of principal- agent between the assessee and the stakeholder i.e. doctors, dealers, stockiest and the field staff. As such the particular drugs were prescribed by the doctors at the instance of the assessee which resulted increase in sales of the company. Thus, such expenses were incurred for the services rendered by the doctors by prescribing the particular drugs.

Accordingly, such expenses as discussed above partake the character of the commission and therefore the same are subject to TDS under section 194H of the Act.

11. The AO, while invoking the provisions of Section 194H of the Act on the expenses as discussed above to facilitate the doctor and other stakeholders also made the reference to following rules and regulations, having bearing on the profession of the Doctors:

i. The Medical Council of India guidelines on industry – physician relationship: braking the conspiracy of silence.
ii. India medical Council (professional conduct, etiquette and ethics) regulation 2009.
iii. Code of pharmaceutical marketing practices 2007 prescribed by the Organization of pharmaceutical producers of India.
iv. International Federation of pharmaceutical Manufacturers Association code of pharmaceutical marketing practices (IFPMA 2000).

12. The crux of the above is that the gifts to the doctors was discouraged in the aforesaid rules and regulations as it is an unethical practice for both the pharmaceutical industries as well as the doctors.

13. In view of the above, the AO held the assessee as assessee in default under Section 201(1)/201(1A) of the Act for not deducting TDS under the provisions of Section 194Hof the Act by observing as under:

"7.7 the assessee has stated that the gift articles enlisted in the "sales promotion expenses" have been provided to doctors, as well as other stake holders in the company such as stockiest, field staff etc. The Principal Officer of the company was asked to describe the procedure of arriving at the names to which articles to such stockiests and field staff are to be distributed and the names of recipients of such gift articles in statement dated 10.10.2013 and 06.12.2103. The assessee could not furnish any reply in this regard. Even, if such articles have been provided to other stakeholders in the company such as field staff or stockiest etc, then the same form part of cither salary or, commission of the said persons (as the same is believed to have been distributed to the said person in lieu of his contribution towards increase in the sales of the company) liable for deduction of TDS u/s 394H (or 192) of the Act.

7.8 On the basis of the facts of the case, legal provisions of the Act, the assessee's reply, material placed on record and discussion in the preceding paragraphs, it is held that:

The assessee company has incurred expenses as mentioned in the show cause notice dated on doctors.

The said expenses have been incurred on doctors for providing gifts/articles/travel/accommodation/registration in conferences etc.

The doctors have provided services in return to the company by prescribing the drugs manufactured by the assessee company. One step further, the future outcome in terms of quantity and amount/value of drugs to be prescribed by the doctors (in consequence to the gifts/services provided to the doctor by the assessee company) is projected.

There is proper quantification of the gift/service provided by the assessee company to the doctor and the sales of the pharmaceutical preparations of the assessee company as a result of service rendered by the doctor (prescribing drugs of the assessee company).

The gifts/services have been provided to the doctors in lieu of the services of prescribing the drugs manufactured by the assessee company.

The relationship between the assessee company and the doctor is that of "Principal and agent".

Various studies have suggested that gifting to doctors influence their prescription habits in favour of the pharmaceutical company providing gifts.

The services rendered by the doctor and payment thereof falls within the definition of "commission" as suggested by the Act and various case laws.

The rationale given by the assessee for justifying the expenses as essential for brand building is considered unfortunate in the wake of "unethical" tag attached to such activity by both the Medical Council of India (Doctor's fraternity) and code of ethics laid down by the various pharmaceutical associations/organizations and is unacceptable.

8. Hence, the assessee was liable for deducting TDS @ 10% u/s 194H of the Act w.r.t. the below mentioned expenses but has failed to do so.

S.No.	*Ledger head*	*F.Y.2010-11 (in lacs of Rs.)*
1	*Regional Conference*	*455.4*
2	*Scientific Conference*	*1832.2*
3	*Sales Promotion Exps*	*2281 .3*
4	*Marketing Development & Promotional Exps*	*6097.0*
5	*Product Promotional Exps*	*4000.8*
6	*Camp Exps*	*54.4*
7	*Academic Workshops*	*27.9*
8	*M R Exps*	*5020.5*
9	*Travelling Exps*	*-*
	TOTAL	***19769.5***

Therefore, the assessee is treated as "assessee in default" u/s 201(1) /201(1A) of the Act for not deducting TDS u/s 194H of the Act over expenses in the nature of commission amounting to Rs. 19769.5 lakhs.

Commission expenditure amount (in INR)	*TDS u/s 201(1) r.w.s. 194H @ 10% (in INR)*	*Interest u/s 201(1A) (in INR) @ 1% * 48*
19769.5 lakhs	*19,76,95,000*	*9,48,93,600*

9. Accordingly, the assesse company is liable to pay demand of Rs. 29,25,88,600/- (rounded off) u/s. 201(1)/201(1A) of the Income Tax Act, 1961. The assessee is also liable for penalty u/s. 271C of the Act. Penalty proceedings are being initiated separately.

Issue demand notice and challans accordingly."

14. Aggrieved by the order of the AO the assessee preferred an appeal before the Learned CIT-(A).

15. The assessee before Learned CIT(A) besides reiterating the submission made before the AO claimed that the emails correspondence or other documents on which the AO is relied or referred in his/her order pertain to F.Y. 2013-14. Accordingly, the conclusion drawn on the basis such document which are related to different period is void. Moreover, the expenses incurred as per the alleged document were not paid directly to doctors. As such the amounts were paid to organizer of conference/meetings/education program after deducting the due taxes under Chapter XVII-B of the Act.

The assessee also submitted that the AO without considering and examining the contention and detail submitted by it (the assessee) held that the entire promotional expenses as discussed above are in the nature of commission which is wrong and baseless.

16. The assessee also claimed that the AO has not even considered the direction of the Learned Additional CIT for the deduction of tax at source provided in an order passed under section 144A of the Act. It was directed under section 144A of the Act that the above expenses incurred cannot be held as commission without detailed verification. Accordingly the AO was directed to examine the nature of expenses and decide the matter after verification of details.

17. The assessee further submitted that it has been engaged in the business of pharmaceuticals for more than 30 years and now operating through 30

regional offices in India and also selling its product in USA, European Countries, Africa and Australia Oceania. Being a pharmaceutical company and to get large amount of market share it has to set up an extensive network of selling, distributing and product promotion. To achieve the same it has incurred various expenses in order to develop relationship and large network. Hence, in such circumstances the rejection of its contention and explanations without having proper consideration and making huge demand is unreasonable.

18. The assessee also claimed that the AO does not poses the power to re-classify or re-characterize the nature of payment under Chapter XVIB of the Act.

19. The Learned CIT(A) after considering assessment order and submission made by the assessee observed as under:

> *"6.2.6 A perusal of the order shows that after being confronted with the content of the email correspondences between the MD and CFO of the appellant company and medical representatives and their statements recorded during the survey proceedings, it has been acknowledged by the appellant that **various** sales promotion expenses were also **incurred on** doctors in the form of gifts and facilities and were debited under various heads, in the order; the AO has cited various email correspondences between the field executives of the appellant company and senior officers of the company to bring forth instances to show that various expenses were incurred by the appellant on doctors by way of payments made for taxies, hotel accommodation, air-tickets, registration of doctors at conferences, etc. It was very clear that these doctors were acting as "agents" of the appellant company since this expenditure was being incurred on them **in** expectation of certain returns from these doctors in the form of prescribing of the company's medicines leading to increased business. Thus, In my view, since 'commission' is a payment made for something received in return, and is a form of incentive, in this case, payments incurred on doctors in exchange of increased business for the appellant would definitely fell under the category of commission, and provisions of Section 194H would be attracted. In this regard, it would be pertinent to mention that the contention of the appellant that the statement of the MD and CFOdoes not reflect the view of the*

appellant company cannot be accepted since Shri Jayeshbhai, the CFO and Shri Raj nikant Patel, the MD had in their statements u/s. 131 of the Act mentioned their job profiles and also the fact that they were responsible to decide various gifts under the heads "sales promotion".

Perusal of all the evidences mentioned by the AO in his order, the discussion by the AO and the submission made by the appellant that the conditions required fora payment to be considered as commission were definitely present in the payment made by the appellant"

20. In view of the above the Learned CIT(A) for each head of expense held as under:

1. Regional and scientific conference:

The Learned CIT (A) held that the participation charges or contribution made for conferences were not paid only for participation. Butsuch payment was made for getting increased business form the doctors which is evident from the emails, voucher and statement of MD & CFO. Accordingly, the Ld. CIT-A directed the AO to segregate the payment made to doctors or on behalf of the doctors separately and treat the same as commission for the purpose of Section 194H of Act but give the credit of 2% of TDS deducted by the assessee.

With respect to reimbursement expenses, the Learned CIT-A directed to find whether the reimbursements made to doctor, if yes, then treat the same as commission under Section 194H of the Act. Thus, the CIT(A) provided relief for the payment made to the parties other than doctors.

2. Sales promotion expenses:

With respect to various expenses under this head the learned CIT (A) held as under:

(i) Payment made for work assignment in order to obtain expert opinion are wholly and exclusively for its business and that too after deduction of taxes. Thus contention of assessee was allowed.

(ii) Payment made for meeting of assessee staff, organization of functions or tour for stockiest,award function for staff and expenses made for export which are not in the nature of commission.

(iii) Participation expenses paid to or for doctors are in the nature of commission and therefore liable for TDS under section 194H of the Act but after providing the credit for 2% of taxes already deducted by the assessee.

3. Marketing development and promotion expenses

With respect to various expenses under this head the Learned CIT(A) held as under:

(i) Payment toward work assignment was made after deducting taxes. Hence no further deduction is required.

(ii) Payment toward meeting and traveling, gift to CFA, gift to staff/stockiest, medical books & journals, export center cost are not in the nature of commission. Hence there is no requirement for the deduction of TDS.

(iii) Participation expenses are incurred for or on behalf of the doctors, hence the same are in nature of commission. Therefore the demand raised by the AO for the same was confirmed but after providing credit for 2% of taxes already deducted by the assessee.

4. Product promotion expenses:

With respect to various expenses under this head the Learned CIT(A) held that the reason and nature of gift and to whom it was given was not verifiable. Furthermore, it was quite possible that gift were given to doctors. Accordingly, the Ld. CIT-A restricted the demand raised under this head to the extent of 20%, treating the same as commission under section 194H of the Act.

5. Camp expenses, Academic workshop:

The Ld. CIT-A held that the expenditures under this head were incurred wholly and exclusively for the business purpose and therefore there was no payment in the nature of commission expenses.

6. MR expenses:

It was noted by the AO that expenses under this head includes payment made directly or indirectly to doctors. But at the same time considering large work force of the assessee throughout the country it was held by the Ld. CIT-A that the entire expenses cannot be classified as commission. Therefore, demand under this head was restricted up-to 20% of expenses of Rs. 5020.5 lakh only. Thus the ld. CIT-A allowed the appeal of the assessee in part.

21. Aggrieved by the order of the Learned CIT(A) both the assessee and Revenue are in appeal before us. The assessee is in appeal against the confirmation of the order of the AO by the Ld. CIT-A with respect to the payments towards selling and marketing, regional and scientific conferences, product promotion and MR Expenses. On the contrary, the Revenue is in appeal for the relief extended by the Ld. CIT-A with respect to the items of the expenses as discussed above.

22. The Learned AR before us filed a Paper Book running from pages 1 to 7 and submitted that there is no relationship of principle and agent between the assessee and the stakeholders i.e. doctors/stockiest/dealers and field staff which is mandatory to attract the provisions of Section 194H of the Act. The Learned AR in support of his contention relied on the judgment of Hon'ble Gujarat High Court in the case of PCIT vs. Gujarat Narmada Valley Fertilizer and Chemicals Limited reported in 108 Taxman.com 541 wherein it was held as under:

> *"14. On a perusal of the aforesaid provision of section 194H, it is clear that any person, not being an individual or Hindu undivided family, who is responsible for paying by way of commission 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 whichever is earlier, is liable to deduct tax. Explanation (1) to section 194H defines "Commission or Brokerage" which 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 and selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities. On the facts of the present case, as per the tripartite agreement entered into between the assessee and the dealer, there is no service provided by the dealer to the assessee in the course of buying or selling goods, inasmuch as, the assessee directly sells goods to the dealer and the dealer makes the payment after collecting it from the consumers and, therefore, it is a transaction on principal to principal basis and, therefore, the payment made by the dealer is not liable for any deduction of tax by the assessee company. Therefore, in the facts of the case, the provisions of section 40(a)(ia) of the Act cannot be applied as the dealer cannot be said to be a commission agent of the assessee company."*

The ld. AR further contended that there was no element of income in the expenses incurred by the assessee for the stakeholders as alleged by the AO. As such the allegation of the AO in the order is that the expenses as discussed above have been incurred by the assessee to extend the benefit to the stakeholders. Even, if the allegation of the AO is assumed true, then also the provisions of Section 194H of the Act cannot be applied as there was no element of income in the hand of stakeholders.

23. In none of the case, the account of the stakeholders has been credited in the books of accounts of the assessee. Likewise there was also no arrangement that the assessee has given cash to the stakeholders by booking the expenses in its books of accounts.

24. The assessee was supplying the goods directly to the stockiest and not to the doctors. Furthermore, there was no arrangement of any type between the doctors and the stockiest.

25. The circulars referred by the AO in his order may be relevant to make the disallowance of the expenses under the provisions of Section 37 of the Act but the same can be done in the assessment proceedings under Section 143(3)/147/ 263 of the Act. As such, the question whether such expenses are allowable as deduction under Section 37 of the Act cannot be raised in the TDS proceedings under Chapter XVII of the Act.

26. The Learned AR also contended that the provisions of TDS presupposes that income should be credited in the account of the payee but in the case on hand the stakeholders as alleged by the AO were not the payee.

27. The assessee with respect to many expenses as discussed in the order of the AO has deducted the TDS and the benefit of the TDS was availed by the respective parties under the provisions of Section 199 of the Act and not by the stakeholders. Therefore, there is no question of TDS on the expenses as discussed above. The Learned AR in support of his contention relied on the

order of Mumbai Tribunal in the case of Industrial Development Bank of India vs. ITO reported in 107 ITD 45 where it was held as under:

> *"The liability of tax deduction at source is in the nature of a vicarious or substitutionary liability, which presupposes existence of a principal or primary liability. Chapter XVII-B is titled 'Collection and recovery of tax - deduction of tax at source'. This title also indicates that the nature of tax deduction at source obligation is obligation for collection and recovery of tax. Under the Act, tax is on the income and it is in the hands of the person who receives such income, except in the case of dividend distribution tax which is levied under section 115-O, a section outside the Chapter providing for collection and recovery mechanism and set out under a separate chapter 'Determination of tax in certain special cases - special provision relating to tax on distributed profits of domestic companies'. A plain reading of section 190 and section 191, which are first two sections under the Chapter XVII, and of sections 199, 202 and 203(1), would show this underlying feature of the tax deduction at source mechanism. Section 190 makes it clear that the scheme of tax deduction at source is one of the methods of recovering the tax due from a person and it is notwithstanding the fact that the tax liability may only arise in a later assessment year. The tax liability is obviously in the hands of the person who earns the income, and tax deduction at source mechanism provides for method to recover such tax liability. Therefore, this tax deduction at source liability is a sort of substitutionary liability. Section 191 further makes this position clear when it lays down that in a situation TDS mechanism is not provided for a particular type of income or when the taxes have not been deducted at source in accordance with the provisions of Chapter XVII, income-tax shall be payable by the assessee directly. This provision, thus, shows that tax deduction liability is a vicarious liability and the principal liability is of the person who is taxable in respect of such income. Section 199 makes it even more clear by laying down that the credit for taxes deducted at source can only be given to the person from whose income the taxes are so deducted. Therefore, when tax deductor cannot ascertain beneficiaries of a credit, the tax deduction mechanism cannot be put into service. Section 202 lays down that tax deduction at source provisions are without any prejudice to any other mode of recovery from the assessee, which again points out to the tax deduction liability being vicarious liability in nature. Section 203(1) then lays down that for all tax deductions at source, the tax deductor has to 'furnish to the person to whose account such credit is given or to whom such payment is made or the cheque or warrant is issued' which presupposes that at the stage of tax deduction the tax deductor knows the name of person to whom the credit is to be given, though whether by way of credit to the account of such person or by way of credit to some other account. This again shows that tax deduction at source liability is a vicarious liability to pay tax on behalf of the person who is to be beneficiary of the payment or credit, with a corresponding right to recover such tax payable from the person to whom credit is afforded or payment is made. Thus, the whole scheme of tax deduction at source proceeds on the assumption that the person whose liability is to pay an income knows the identity of the beneficiary or the recipient of the income. It is a sine qua non for a vicarious tax deduction liability that there has*

to be a principal tax liability in respect of the relevant income first, and a principal tax liability can come into existence when it can be ascertained as to who will receive or earn that income because the tax is on the income and in the hands of the person who earns that income. Therefore, tax deduction at source mechanism cannot be put into practice until identity of the person in whose hands it is includible as income can be ascertained. [Para17]"

It was also contended that there was no one-to-one identification between the expenses incurred and the benefit availed by the doctors/other stakeholders out of such expenses. Therefore it cannot be said that the expenses were incurred by the assessee to extend the benefit to the doctors and other stakeholders.

28. On the other hand, the Learned DR submitted that the AO in his order has given a clear-cut finding that there was the relationship of principle and agent between the assessee and the stakeholders. As per the Learned DR the whole of the business of the assessee was based on the prescription of the doctors for the particular drugs and therefore the assessee has incurred such expenses to extend the benefit to the stakeholders. The Learned DR before us vehemently supported the stand of the authorities below by reiterating the findings contained in the respective orders which we have already adverted to in the preceding paragraph. Therefore, we are not repeating the same for the sake of brevity.

29. Both the Learned AR and the DR vehemently supported the order of the respective authorities below to the extent favorable to them.

30. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the Learned CIT(A) and the

Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. From the preceding discussion, we note that the AO has alleged that the expenses, as discussed aforesaid, has been incurred by the assessee to extend the benefit directly or indirectly to the persons associated with it (the assessee). Such persons are the doctors, dealers, stockiest and field staff. Accordingly the AO was of the view that such expenses partake the character of the commission and therefore the same are liable for the provisions of TDS under Section 194H of the Act. However, the Learned CIT(A) partly confirmed the order of the AO by holding that the expenditures incurred by the assessee to extend the benefit to the doctors are subject to the deduction of TDS under the Section 194H of the Act. As such, the Learned CIT(A) deleted the demand of TDS raised by the AO on the expenses incurred by the assessee pertaining to the other stakeholders i.e. dealers, stockiest and the field staff and exports cost center etc.

31. Before, coming to the specific issue we note that the following conditions must be satisfied for the applicability of the provisions of Section 194H of the Act:

- Payment is paid/credited on or after 1-6-2001.
- The payer must be a person specified.
- The payment must be in the nature of 'commission or brokerage' as explained subsequently.
- The payee must be any resident.
- The quantum of payment during the financial year must exceed the specified monetary limits.

32. The next question arises what is 'commission or brokerage'. Under Explanation (i)to Section 194H of the Act, the expression '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 service in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, other than securities.

33. The definition of 'commission or brokerage' as contained in the above Explanation to Section 194H of the Act cannot be interpreted so widely as to include any payment receivable, directly or indirectly, for services in the course of buying or selling of goods. To fall within the Explanation, the payment received or receivable, directly or indirectly, is by a person acting on behalf of another person,

(i) for services rendered (not being professional services), or
(ii) for any services in the course of buying or selling of goods, or
(iii) In relation to any transaction relating to any asset, valuable article or thing.

34. The element of agency has to be there in the case of all services or transactions contemplated by the said Explanation as held by the Hon'ble Gujarat High Court in the case of PCIT vs. Gujarat Narmada Valley Fertilizer and Chemicals Limited (supra) and also held in case of Ahmedabad Stamp Vendors Association v. Union of India [2002] 124 Taxman 628 (Guj.) which was affirmed by the Hon'ble Supreme court, wherein it was held as under:

> *"It was also not possible to accept the contention of the revenue that the definition of 'commission or brokerage' as contained in Explanation to section 194H is so wide that it would include any payment receivable, directly or indirectly, for services in the course of buying or selling of goods and that, therefore, the discount availed of by the stamp vendors constitutes commission or brokerage within the meaning of section 194H. To fall within the Explanation, the payment received or receivable, directly or indirectly, is by a person acting on behalf of another person (i) for services rendered (not being professional services), or (ii) for any services in the course of buying or selling of goods, or (iii) in relation to any transaction relating to any asset, valuable article or thing. The element of agency is to be there*

in case of all services or transactions contemplated by Explanation (i) to section 194H."

In view of the above, the case laws referred by the Learned CIT(A) of the Bombay Tribunal in the case of SKOL Breweries Ltd vs. ACIT reported in 29 taxman.com 111 cannot be applied in the case on hand wherein it was held that there was no necessity for having the principal and agent relationship.

35. Thus, in order to attract deduction of tax at source under Section 194H of the Act, a commission payment must have been received by a person who is acting on behalf of another. In other words, he must be acting as an agent of another person. Where a distributorship/dealership arrangement is on principal-to-principal basis and not principal-to-agent basis, any incentive given under sales promotion schemes (called by different names like discount, bonus, premium, etc.) cannot be treated as commission and subjected to deduction of tax at source under the provisions of Section 194H of the Act.

36. In holding so, we also draw support and guidance from the judgment of Hon'ble Delhi High Court in the case of CIT v. Mother Dairy India Ltd. [2012] 18 taxmann.com 49/206 Taxman 157 (Delhi) wherein it was held as under:

"It is a well-settled proposition that if the property in the goods is transferred and gets vested in the concessionaire at the time of the delivery, then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent of the Dairy. The clauses of the agreements show that there is an actual sale, and not mere delivery of the milk and the other products to the concessionaire."

We also find that there being no relationship of a principal and agent between assessee and retailers, trade incentives paid by assessee to retailers

through del credere agentsin order to boost its sale could not be treated as commission for purpose of Section 194H of the Act as held by Hon'ble Andhra Pradesh and Telangana High Courts in case of CIT v. United Breweries Ltd. [2016] 387 ITR 150 (T& AP). The relevant extract reads as under:

> *"Transactions of sale of beer by assessee to APBCL and sale of beer by APBCL to retail traders were independent of each other, and were on a principal to principal basis. No services were rendered by the retail dealers to the assessee, and the incentive given by the assessee, to the retailers as trade discount, were only to promote their sales. In the absence of relationship of a principal and agent, as there was no direct relationship between the assessee and the retailer, the discount offered by the assessee to the retailers could only be treated as sale promotion expenses, and not as commission, as no services were rendered by the retailers to the assessee. Section 194H was not applicable in such case."*

Indeed, in the given facts and circumstances, there is no dispute to the fact that the assessee has incurred the expenses as discussed above to extend the benefit its stakeholders in order to achieve high amount of turnover. But the debate rigmaroles whether such benefit is in the nature of commission or brokerage as envisaged under the provisions of Section 194H of the Act. To resolve the controversy, we have to see whether there exist any agency relationship between the assessee and the stakeholders such as doctors/stockiest/distributors and the field staff.

37. Regarding the benefit extended to the doctors, we note that the doctor was not bound to prescribe the medicine as suggested by the assessee. It is because there was no legal compulsion on the part of the doctor to prescribe the particular medicine as suggested by the assessee. As such the doctor was not acting as an agent of the assessee. The principal-agent relationship is a relationship that arises from situations in which one entity (the principal) has power over another (the agent). The agent is acting in the place of the principal

for specific or general purposes. In doing so, the agent is expected to carry out the principal's wishes. The principal is the party who authorizes the other to act in their place, and the agent is the person who has the authority to act on behalf of the principal.

38. It is also pertinent to note that the assessment proceedings are different with the proceedings under the Chapter XVII relating to the deduction of tax at source of the Act. Therefore the question whether it was the unethical practice adopted by the assessee to extend the benefit to the doctors in order to achieve high turnover of its products is not relevant. Here, the issue is limited to the extent whether the assessee is liable subject to the provisions of TDS on the commission as specified under Section 194Hof the Act. As we have already held that, the existence of the agency relationship between the assessee and the doctor is missing in the present case which is compulsory to invoke the provisions of Section 194H of the Act, therefore, in our considered view the provisions of Section 194H of the Act cannot be applied.

39. Regarding the benefit extended to the other stakeholders i.e. stockiest, dealers and field staff, we note that the AO has not brought anything on record suggesting that there existed any agency relationship between the assessee and the other stakeholders. Thus, in the absence of such evidence, we hold that the provisions of Section 194H of the Act cannot be applied. It is also pertinent to note that in normal business practice business organizes various functions and tour and extend gift etc. for their distributor, retailer and marketing personal in order to encourage them for better performance which help the business in achieving larger turnover and brand value. These expenses are incurred exclusively for purposes of business and product promotion. By no means

these can be classified as commission as envisaged under Section 194H of the Act.

40. In addition to the above, we also note that tax under Section 194H of the Act is to be deducted at source,—

> "(a) either at the time of credit of such income to the account of the payee, or
>
> (b) at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier."

Under Explanation (iv) to Section 194H of the Act requires that where any income is credited to any account, whether called 'suspense account' or by any other name, in the books of account of the payer, such crediting shall be deemed to be credit of such income to the account of the payee for purposes of deduction of tax at source. The controversy arises in the given facts and circumstances whether the stakeholders are the payees as contemplated under Explanation (iv) to Section 194H of the Act. The answer stands in negative. Undisputedly, the payees in the present facts and circumstances are not the stakeholders but the other parties.Thus, we are of the view that, there cannot be any question of deducting the TDS under the provisions of Section 194H Act of the Act in the present facts and circumstances. In holding so we draw support and guidance from the order of Mumbai tribunal in the case of Industrial Development Bank of India *(supra)* which has been reproduced somewhere in the preceding paragraph. Thus, in view of the above detailed discussion and after considering the facts in totality, the grounds of appeal of the assessee are allowed whereas the grounds of appeal of the revenue are dismissed.

41. The assessee in Ground No. 1 has challenged the validity of the order framed under Section 201(1)/201(1A) of the Act on the ground that it is barred by time.

42. At the outset, we note that the assessee has succeeded on the ground raised by it on merit as discussed above, therefore, we do not find any reason to adjudicate the issue raised by the assessee challenging the validity of the assessment order. Hence, we dismiss the same as infructuous.

43. The issues raised by the assessee in Ground Nos. 10 and 11 are either consequential or general in nature, therefore no separate adjudication is required. Hence, we dismissed the same as infructuous.

44. In the result, the appeal of the assessee is partly allowed.

Coming to the ITA No. 1184/AHD/2017(A.Y.2011-12) Revenue's Appeal:-

45. The issue raised by the Revenue has already been disposed of by us along with the appeal filed by the assessee bearing ITA No. 1269 to 1271/AHD/2017 vide paragraph number 44 of this order. As such, the ground of appeal of the Revenue has already been dismissed. For the detailed discussion, please refer the relevant paragraph. Hence, the ground of appeal of the Revenue is dismissed.

46. In the result, the appeal of the Revenue is dismissed.

ITA Nos. 1270&1271/Ahd/2017(Assessee's Appeal) AND 1185&1197/Ahd/2017 (Revenue's Appeal):-

47. The grounds of appeal raised by the assessee and the Revenue are identical to that of the ground which have already been dealt by us in ITA No.

1269/Ahd/2017 for A.Y. 2011-12 and in the absence of any changed in the circumstances the same shall apply *mutatis mutandis.* Hence, the appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

48. In the combined result, the appeals filed by the assessee are partly allowed whereas the appeals filed by the Revenue are dismissed.

Order pronounced in the Court on the 26/11/2020 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 26/11/2020
TANMAY, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad