AFR

Chief Justice's Court

Case :- INCOME TAX APPEAL No. - 61 of 2014

Appellant :- Commissioner Of Income Tax -Ii
Respondent :- M/S Tandon & Mahendra
Counsel for Appellant :- Shambhu Chopra, Sr.S.C.

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Dilip Gupta,J.

The appeal by the revenue under Section 260-A of the Income Tax Act, 1961 arises from a decision of the Income Tax Appellate Tribunal dated 24 October 2013. The Assessment Year to which the appeal relates is AY-2007-08.

The Revenue has raised the following questions of law:-

> 1. Whether in the facts and circumstances of the case, the ITAT was justified in law in holding that commission of Rs.51,27,815/- paid by the assessee firm to Tapasya Projects Ltd. was outside the ambit of section 194H of the Income Tax Act and
>
> 2. Whether on the facts and circumstances of the case, the ITAT was justified in law in allowing expenses of Rs.51,27,815/- paid by the assessee firm, as above, without deducting tax at source, ignoring the provisions of section 40(a)(ia).

The assessee is a firm of Chartered Accountants. It had commission receipts amounting to Rs.73,28,868/-. To earn the said commission, the assessee paid an amount of Rs.51,27,815/- to Tapasya Projects Ltd. ('TPL'). While paying the commission, the assessee did not deduct tax at source under Section 194H. The assessee submitted, on a query, a reply together

with details of the payment and a copy of the agreement with TPL. The JCIT, Range-5, Kanpur called for the assessment records and passed an order under Section 144-A on 23 December 2009 directing a dis-allowance of Rs.51,27,815/-, which was the commission paid to TPL, and ordered that it should be added back to the income of the assessee under Section 40(a)(ia). The Assessing Officer thereupon, added back the amount to the income of the assessee.

The case of the assessee before the Commissioner of Income Tax (Appeals) was that it had received from Mutual Fund Houses an amount of Rs.73,28,869/- and had paid in pursuance of an agreement dated 1 April 2006 an amount of Rs.51,27,815/- to TPL on account of brokerage for rendering such services as were necessary for procuring the business for the Fund Houses by mobilizing investments. Under the agreement, TPL canvased and marketed various Mutual Fund Schemes to potential investors after collecting details from the assessee.

The CIT(A) held, while allowing the appeal and setting aside the dis-allowance, that under Explanation (i) to Section 194H, commission or brokerage includes any payment received or receivable by a person who acts on behalf of another person for any services in relation to any transaction relating to an asset, valuable article or thing, not being securities. The CIT (A) noted that the Assessing Officer had not doubted the genuineness of the payment made by the assessee nor was it contended that the payment was made for any other purpose. TPL was admittedly a commission agent to the assessee. In view of Explanation (i) to Section 194-H, it was held that the

services rendered could also be in relation to any transaction relating to an asset, valuable article or thing, not being securities. Hence, services rendered relating to securities would get excluded from the express definition of 'brokerage or commission' which was the case here, since the renumeration paid by the assessee to TPL was admittedly for canvasing, inducing or for motivation of investors. It was held to be a commission paid in relation to a transaction relating to securities and was, hence excluded from the purview of Section 194-H by the terms of the Explanation.

The Tribunal has confirmed the view of the CIT(A) *inter alia* following the decision of its Mumbai Bench in the case of **ACIT-2(3), Mumbai Vs. M/s. S.J. Investment Agencies Pvt. Ltd.,** dated 23 February 2011. The Tribunal has also followed the decisions respectively dated 7 December 2012 and 30 April 2013 of its Delhi Benches in **Income Tax Officer, Ward-36(2), New Delhi Vs. Mittal Investment & Co; Income Tax Officer Vs. KJH Financial Services (P) Ltd.**

While assailing the view of the Tribunal, learned counsel appearing on behalf of the Revenue submits that:

(i) The expression 'securities' is not defined in Section 194-H. Section 2(h) of the Securities Contracts (Regulation) Act, 1956 stipulates an inclusive definition of the expression 'securities' which reads as follows:-

> "(h) "securities" include-
>
> (i) Shares, scripts, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

(ic) security receipt as defined in clause (zg) or section 2 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(id) units or any other such instrument issued to the investors under any Mutual fund scheme;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) Rights or interest in securities;"

Consequently, in view of the broad and inclusive definition of the expression 'securities', it is apprehended that many transactions relating to securities would fall outside the scope of Section 194-H, if the decisions of the Tribunal were to be followed;

(ii) TPL did not directly receive the commission or brokerage from Mutual Fund Houses. The assessee received commission or brokerage from Mutual Fund Houses on which tax was not liable to be deducted at source under Section 194-H. However, when the assessee paid over commission to TPL, that part of the transaction would not fall within the exception that is carved out by the latter part of Explanation (i) to Section 194-H.

Section 40 stipulates those amounts which shall not be deducted in computing income chargeable under the head “profit and gains of business or profession”. Clause (ia) covers any interest, commission or brokerage on which tax is deductible at source under Chapter XVII-B and which has not been deducted or, which after deduction, has not been paid on or before the due date specified in Section 139(1). The Assessing Officer disallowed the commission which was paid by the assessee to TPL under Clause (ia) of Section 40(a) on the ground that tax was liable to be deducted at source under Section 194-H, but had not been deducted.

Section 194-H, in so far as is material, provides as follows:-

> “**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:”

Explanation (i) defines the expression 'commission or brokerage' for the purposes of the section in the following terms:-

> “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."

The substantive part of Section 194-H requires a deduction of tax at the rate of ten per cent by any person, not being an individual or a Hindu undivided family, who is responsible for paying any income by way of commission or brokerage. What constitutes commission or brokerage is defined by the first Explanation. The expression 'commission or brokerage' is defined in an inclusive manner by Explanation (i). Commission or brokerage includes the payment which is received or receivable by a person acting on behalf of another person. The payment may be received or receivable directly or indirectly. Apart from this, the Explanation stipulates that the payment must be (i) for services rendered other than for professional services; or (ii) for any services in the course of buying or selling goods; or (iii) for services in relation to any transaction relating to any asset, valuable article or thing, not being securities. The last part of the Explanation uses the expression " in relation to any transaction" and once again "relating to any asset, valuable article or thing, not being securities". The use of the expression 'in relation to' and 'relating to' emphasises the legislative intent of broadening the ambit and width of the expression.

What is material is whether services are rendered in relation to any transaction relating to an asset, valuable article or thing, not being securities. It cannot be even questioned that mutual funds constitute securities. They are expressly brought within the purview of the expression 'securities' by

Section 2(h)(id) of the Securities Contracts (Regulation) Act, 1956. Consequently, when services are rendered in relation to any transaction relating to securities, it would fall outside the purview of Explanation (i) to Section 194-H.

Now, it is in this background that it would be necessary to advert to the basis on which the JCIT had exercised jurisdiction under Section 144-A while issuing a direction to the Assessing Officer. The JCIT held that TPL through its employee had actually motivated potential investors to invest in various schemes of Mutual Funds through the assessee. Consequently, the element of rendering services by TPL was held to be proved on which the debit of brokerage had been made by the assessee. The debit of brokerage was found to be genuine.

The relevant observations in that regard are as follows:-

> "From the above deposition it is proved that M/s Tapasya Projects Ltd., through its employee Sri Shyam Gupta, has actually motivated Potential Investors to invest in various schemes of different Mutual Fund Registrars through the assessee firm namely M/s Tandon & Mahendra. Thus the element of rendering of services by M/s Tapasya Projects Ltd. is proved on which debit of brokerage has been made by the assessee firm and debit of brokerage is found to be genuine."

The JCIT, however, fell in error in holding that while TPL had motivated investors to subscribe to Mutual Fund Schemes, it had no connection whatsoever with 'securities' as defined in Explanation (i) and (iii)

of Section 194-H. Explanation (iii) to Section 194-H specifically states that the expression 'securities' will have the meaning assigned to it in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

Once it is an admitted position that TPL had motivated potential investors to invest through the assessee in Mutual Fund Schemes, it has to be held that these services which were rendered in relation to a transaction in 'securities' stood excluded from the definition of “brokerage or commission” under Section 194-H. The CIT(A) was, in our view, justified in coming to the conclusion that the services which were rendered by TPL were in relation to 'securities'. No other services had been rendered. Consequently, the dis-allowance under Section 40(a)(ia) was not warranted.

We cannot accept the submission of the revenue that we should adopt a restrictive interpretation because unless this were done, the expression 'securities' having been defined in an inclusive sense in Section 2(h) of the Securities Contracts (Regulation) Act, 1956, would exclude a large number of transactions from the ambit of Section 194-H where 'commission or brokerage' is paid to a person acting on behalf of another person for service rendered in relation to any transaction relating to securities. This is a matter of legislative policy. The duty of the Court is to adopt the plain & natural meaning of the words used, particularly in a taxing statute. Once Parliament has legislated by specifically incorporating that the expression 'securities' would have the same meaning as in Section 2(h) of the Securities Contracts (Regulation) Act, 1956, the plain effect cannot be diluted by the Court by reading down the statutory provision. The duty of the Court is to interpret a

taxing statute on its plain and literal meaning. As regards the second submission, we have already held that the expression 'in relation to' and 'relating to any asset, valuable article or thing, not being securities', are expressions of width and amplitude.

Thus, considering the matter from any perspective, we find no reason to hold that the Tribunal was in error. The appeal by the revenue will not hence, give rise to a substantial question of law.

The appeal is, accordingly, dismissed.

Order Date :- 13.3.2014
NSC

(Dr. D.Y. Chandrachud,C.J.)

(Dilip Gupta, J.)