

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'G' BENCH  
BEFORE SHRI A.D. JAIN, JM & SHRI A.N. PAHUJA, AM

ITA no.4552/Del/2011 Assessment year:2008-09		
D.C.I.T., Circle 9(1),Room no.163, CR Building,IP Estate, New Delhi	V/s.	Shri Surendra Mohan Mukhija, J-3/19, DLF, Qutab Enclave Phase-II, Gurgaon
[PAN : AAJPM 6225 G]		
(Appellant)		(Respondent)

Assessee by	S/Shri M.P. Rastogi & K.G. Sharma,ARs
Revenue by	Smt. Veena Joshi,DR

Date of hearing	31-05-2012
Date of pronouncement	01-06-2012

**ORDER**

**A.N.Pahuja:-** This appeal filed on 12.10.2011 by the Revenue against an order dated 28.06.2011 of the Id. CIT(A)-XII, New Delhi, raises the following grounds:-

- 1. "The Id. CIT(A) erred in law and on facts and circumstances of the case, in deleting the addition of ₹51,37,584/- made by the Assessing Officer by holding that it was not commission.*
- 2. The Id. CIT(A) erred in law and on facts and circumstances of the case, in holding that the buyer did not provide any services to the assessee.*
- 3. The appellant craves to amend, modify, alter, add or forgo any ground of appeal at any time before or during the hearing of this appeal."*

2. Facts, in brief, as per relevant orders are that return declaring income of ₹1,11,16,550/-/- filed on 30.09.2008 by the assessee, director of M/s Surendra Buildtech Pvt. Ltd., after being processed u/s 143(1) of the Income-tax Act, 1961 (hereinafter referred to as the Act), was selected for scrutiny with the service of a notice u/s 143(2) of the Act issued on 29.09.2009. During the course of assessment proceedings, the Assessing Officer (A.O. in short) noticed that the assessee received commission of ₹3,13,23,388/- in the year under consideration and claimed an amount of ₹51,37,584/- under the head 'Marketing Expenses' including 'Incentive and Discount'. To a query by the AO, seeking evidence establishing that the expenditure was incurred wholly and exclusively for the purpose of business, the assessee replied that there were number of brokers, who offered discount to persons, who booked pre-launch booking with them. Since the assessee was in the competitive market, he had given incentives/discount to persons, who had booked order through him. The payment for discount was made through account payee cheques only and they received commission only when the person concerned paid the full amount to the builder. The assessee also enclosed details and photocopies of confirmation. However, the AO did not accept the submissions of the assessee on the ground that the payments made by the assessee were actually in the nature of commission for which tax was not deducted at source. Inter alia, the AO observed that the assessee failed to substantiate that the amount debited under the had marketing expenses was actually passed on to various persons who booked/purchased the property in question. While holding that the amount was not in the nature of discount and was commission only, the AO disallowed the amount of ₹51,37,584/- u/s 40a(ia) of the Act, tax having not been deducted at source u/s 194H of the Act.

3. On appeal, the Id. CIT(A) allowed the claim of the assessee as under:-

*“4.4 The submission given by the appellant has been perused. I find that the discount had been given by the appellant to persons who had booked the flat/building through the appellant and*

*the commission which the assessee received from the builder, is passed on as a part of such commission to the original persons who booked the flat. The Assessing Officer has also stated that such commissions were passed on to persons other than the original persons who made the booking but in the assessment order he has not cited a single instance where the discount has been given to persons other than those who had made the original booking. In order that any amount is subject TDS on account of commission, it is necessary that:*

- i) services are rendered by the recipient.*
- ii) That the payments should have been given in lieu of such services.*
- iii) There should be a principal/agent relationship.*

*While analyzing the nature of discount or payments made by the appellant to the persons who had originally booked the flats, I find that the recipients in this case have not rendered any service to the appellant. In fact, on the contrary, it is the appellant who helped the persons to book a flat. As the persons who made the original booking has not rendered any service to the assessee hence the discount offered by him cannot be treated as payment of commission. Further there is no principal-agent relationship between the assessee and the persons who had done the original booking. As such the provisions of section 194H are not attracted in this case. Thus, the disallowance of ₹51,37,584/- made on account of non deduction of TDS is hereby deleted."*

4. The Revenue is now in appeal before us against the aforesaid findings of the Id. CIT(A). The Id. DR supported the order of the AO .On the other hand, the Id. AR on behalf of the assessee supported the findings of the Id. CIT(A) while relying upon decision dated 17<sup>th</sup> May, 2012 of the Hon'ble High Court in the case of CIT Vs. Surendra Buildtech Pvt. Ltd. in I.T.A. no. 141/2012 , upholding the decision dated 27th May, 2011 of the ITAT in I.T.A. no.4854/Del./2010 for the AY 2007-08.

5.We have heard both the parties and gone through the facts of the case as also the aforesaid decisions relied upon. Indisputably, the payment of ₹`51,37,584/- was made to persons by a/c payee cheques as per details placed on page 9 to 33 of the paper book, who booked flats in various projects of different builders. The Id. CIT(A) found that these persons did not render any service to the assessee and therefore, discount offered by the assessee could not be treated

as commission nor was there any principal-agent relationship between the assessee and these persons . In these circumstances , the Id. CIT(A) concluded that the provisions of section 194H could not be invoked. The Id. AR pointed out that in similar circumstances, a co-ordinate Bench in their the decision dated 27th May, 2011 in the case of Surendra Buildtech Pvt. Ltd in I.T.A. no.4854/Del./2010 for the AY 2007-08 concluded as under:

*“6. The expression “commission or brokerage” has been explained in the explanation appended to this section. According to the meaning provided in the explanation, the commission would be considered, if any person received it directly or indirectly on behalf of another person for the services rendered, and such services should not be professional services. In the present case, admittedly the person to whom discount was granted by the assessee were not acting as an agent for the assessee, rather they are the purchaser of the property. They have not provided any type of services to the assessee. They have just booked the flat through the assessee. In fact, assessee is an agent between the builder and the ultimate purchaser of the flats. The assessee has parted with some part of the commission received from the builder from alluring the purchaser so that it can earn more commission. It is just providing a discount to the purchaser and not paying any commission for any services taken from such customers. It appears that learned Assessing Officer was influenced by the nomenclature of the receipt in the hands of the assessee. He failed to distinguish what character such receipt would attain when it will be offered to the customer. The relationship between the assessee and the purchaser of the flat is of buyer and seller. The learned First Appellate Authority has appreciated the controversy in right perspective and we do not see any person to interfere in his order.”*

5.1 On appeal by the Revenue, the Hon'ble High Court upheld the findings of the ITAT in the following terms:-

*“10. We do not think that the aforesaid findings are perverse or require any interference in exercise of our jurisdiction u/s 260A of the Act. The factual finding as recorded by the first appellate authority and the Tribunal is that the payments were made by the purchasers who had booked plots/flats. While making payment, discounted price was paid by the buyers. In these circumstances, we do not think that section 194H of the Act can be invoked. Therefore, no substantial question of law arises on the first aspect.”*

5.2 In the instant case before us also, the assessee parted with a portion of his commission received from the builder for helping the intending buyers of flats. In other words, the purchasers received discount in the purchase price. There is nothing to suggest that the purchasers of flats rendered any service to the assessee rather the assessee rendered services to the intending purchasers. In the light of view taken by the Hon'ble Apex Court in their aforesaid decision in Surendra Buildtech Pvt. Ltd(supra), especially when the Revenue have not placed before us any material, controverting the aforesaid findings of the Id. CIT(A) so as to enable us to take a different view in the matter, we are not inclined to interfere with the findings of the Id. CIT(A), holding that the provisions of section 194H are not attracted while making payments to the aforesaid intending purchasers of flats. Consequently, provisions of sec. 40a(ia) of the Act are not applicable and therefore, ground nos. 1 & 2 in the appeal are dismissed.

6. No additional ground having been raised before us in terms of residuary ground no.3 in the appeal, accordingly, this ground is dismissed.

7. No other plea or argument was made before us.

8.. In result, the appeal is dismissed.

*Order pronounced in open Court*

Sd/-  
(A.D. JAIN)  
(Judicial Member)

Sd/-  
(A.N. PAHUJA)  
(Accountant Member)

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Copy of the Order forwarded to:-

1. Assessee
2. D.C.I.T., Circle 9(1), Room no.163, CR Building, New Delhi
3. CIT concerned.

4. CIT(A)-XII, New Delhi
5. DR, ITAT, 'G' Bench, New Delhi
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar  
ITAT, Delhi