IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 5170/Mum/2012
Assessment Year: 2009-10

DCIT-22(2) Vashi Railway Station Bldg. Complex, Vashi Navi Mumbai	Vs.	Shri Harnamsingh Kulbirsingh Maker, 7, Green Apartment, Acharya Nagar, W.T. Patil Marg, Govandi, Mumbai- 400 088 **PAN:AACPM 6759 Q**
(Appellant)		(Respondent)

C.O. No. 206/Mum/2014
(Arising from ITA No. 5170/Mum/2012) AY: 2009-10

Shri Harnamsingh Kulbirsingh Maker, 7, Green Apartment, Acharya Nagar, W.T. Patil Marg, Govandi, Mumbai- 400 088 **PAN:AACPM 6759 Q**	Vs.	DCIT-22(2) Vashi Railway Station Bldg. Complex, Vashi Navi Mumbai
(Appellant)		(Respondent)

Assessee by : Shri Jayant R. Bhatt
Revenue by : Shri Vivek A Perampurna

Date of hearing : 01.10.2014
Date of Pronouncement : 10.10.2014

O R D E R

PER N.K. BILLAIYA, AM:

This Appeal filed by the Revenue and Cross Objection by the Assessee are preferred against the order of the Ld.CIT(A) -33, Mumbai dated 18.05.2012. The sum and substance of the grievances of the Revenue is that the Ld.CIT(A) erred in holding that discount on Hundi is not covered by the definition of interest and therefore, not liable for deduction of tax at source u/s 194 of the Act, and accordingly cannot be disallowed u/s 40(a)(ia).

2. Assessee is a proprietor of M/s. Shri Sawant Enterprise, a builder and developer. The assessee has also shown income from salaries from M/s. Shree

Sawant Builder and Developer P. Ltd. and income from other sources. During the course of the scrutiny the assessment proceedings the AO noticed that under the Head 'Finance Expenses' the assessee has debited an amount of Rs.91,30,250/- on account of discount on Hundi. The assessee was asked whether tax has been deducted at source u/s 194A of the Act. The assessee replied that provision of section 194A are not attracted as the said expenses are only discount and not interest and are covered by Circular No. 647 dated 22.03.1993 of the CBDT, and therefore, provisions of section 40(a)(ia) are also not applicable.

3. This explanation did not find favour with the AO. Drawing support from the decision of the Tribunal Delhi Bench in the case of Kanha Vanaspati Ltd. 17 SOT 160 the AO was of the firm belief that discounting charges claimed by the assessee amount to interest as defined in section 2(28)A of the Act. The AO proceeded by disallowing Rs.91,30,250/- u/s 40(a)(ia) of the Act.

4. The assessee carried the matter before the Ld.CIT(A) and reiterated his claim that Hundi discount charges are not interest and therefore not subject to TDS and consequently disallowance u/s 40(a)(ia) of the Act is not correct. In support the assessee relied upon the CBDT Circular No. 647 and on the decision of Cargil Global Trading India Pvt. Ltd. 126 TTJ 516.

5. After considering the facts and the submissions and CBDT circular and the decision relied upon by the assessee the Ld.CIT(A) was convinced that the decision relied upon by the AO in the case of Kanha Vanaspati Ltd. do not apply on the facts of the case. The Ld.CIT(A) concluded by deleting the addition of Rs.91,30,250/-. Aggrieved by this the revenue is before us.

6. The Ld. DR strongly supported the findings of the AO, it is the say of the DR that Hundi discounting charges are covered by the definition of interest given u/s 2(28)A of the Act. Per contra counsel for the assessee reiterated what has been submitted before the lower authorities.

7. Having heard rival submissions, we have carefully perused the orders of the authorities below. Let us first understand the definition of interest given u/s 2(28A) of the Act.

> *"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and included any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized;"*

It is clear from the definition that the expenditure would be held as in the nature of interest if it is payable in respect of:-

(a) Money borrowed or

(b) Debt incurred

In the impugned transaction both these elements are missing as there is no borrower- lender relationship which is an essential characteristic/feature of all borrowings/lending as the Hundi cannot be treated either as the loan or borrowing, the discounting charges paid thereon is not subject to TDS under the provisions of the Act. The Hon'ble Delhi High Court in the case of *Cargil Global Trading India Pvt. Ltd. in ITA No. 331 of 2011 with ITA No. 204 of 2011* considered the following observations of the Tribunal:-

> *"9.The word "interest" is differently defined under Interest-tax Act. As per Section 2(7) of Interest-tax Act, "interest" means interest on loans and advances made in India and includes-(a) commitment charges on unutilized portion of any credit sanctioned for being availed of in India and (b) discount on promissory notes and bill of exchange drawn or made in India. Thus where the legislature was conscious of the fact that even the discount of bill of exchange is to be included within the definition of interest, the same was basically so provided for. However, under the scheme of IT Act, the word "interest" defined under Section 2(28A) does not include the discounting charges on discounting of bill of exchange. Though the Circular No. 65 was rendered in relation to deduction of tax under Section 194A, in respect of payment to a resident, the same will be relevant even for the purpose of considering whether the discount should be treated as interest or not. The CBOT has opined that where the supplier of goods makes over the usance bill/hundi to his bank which discounts the same and credits the net amount to the supplier's account straightaway without waiting for realization of the bill on due date, the property in the usance bill/hundi passes on to the bank and the eventual collection on due date is a receipt by the bank on its own behalf and not on behalf of the supplier. For such cases of immediate discounting the net payment made by the bank to the supplier is in the nature of a price paid for the bill. Such payment cannot technically be held as including any interest and therefore, no tax need be deducted at source from such payment by the bank. The decision relied by the AO in the case of Vijay Ship Breaking Corpn. (supra) has been reversed by the Hon'ble Supreme Court as reported in the case of Vijay Ship Breaking Corpn. v. CIT (2008) 219 CTR 639 (SC):*

(2008) 14 OTR (SC) 74. The Hon'ble Supreme Court held that usance interest payable outside India by an undertaking engaged in the business of ship breaking is
exempt from payment of income-tax by virtue of Expln. 2 added to Section 10(15)(iv)(c) with retrospective effect from 1st April, 1962 and hence the assessee was not liable to deduct tax at source under Section 195 of the Act, The discounting charges are not in the nature of interest paid by the assessee. Rather after deducting discount the assessee received net amount of the bill of exchange accepted by the purchaser. CFSA, not having any PE in India, is not liable to tax in respect of such discount earned and hence the assessee is not under obligation to
deduct tax at source under Section 195 of the Act. Accordingly, the same amount cannot be disallowed by invoking Section 40(a)(i) of the Act."

And held as under:-

"We are in agreement with the aforesaid discussion on the legal aspect. It may be pointed out that the CBDT has issued one Circular No.65 way back on 02.09.1971 clarifying the position in respect of income by way of interest under Section 194 read with section 197(1) and (2) of the Act as under:

"1..... Where the supplier of goods makes over the usance bill/undi to his bank which discounts the same and credits et amount to the supplier's account straightaway without waiting for realization of the bill on due date, the property in the usance bill/hundi passes on to the bank and - eventual collection on due date is a receipt by the bank - own behalf and not on behalf of the supplier. For such cases of immediate discounting the net payment made by the bank to the supplier is in the nature of a price paid for the bill. Such a payment cannot technically be held as including interest and therefore no tax need be deducted at source from such payments by the bank. Further, the buyer need not deduct any tax from the payment made by him on due date to the bank in respect of such discounted bill inasmuch as these payments are to or a banking Co-operative Society, conforming to the exemption granted by section 194A(3)(iii)(a) of the Income-tax Act, 1961.

On the other hand where there is no immediate discounting and the bank merely acting as agent receives on the expiry of the period the payment for the bill from the buyer on behalf of the supplier and credits it to him accordingly, the bank receives interest on behalf of the supplier and the instructions contained, in Board's above mentioned Circular 7th November, 1970, would apply and buyer will have to deduct the tax from the interest."

12. There is another Circular No. 647 dated 22.03.1993 the point as it relates to TDS on interest other than securities". In this Circular, the Board has clarified the issue in the following manner:

"3. A question has been recently raised as to whether the difference between the issue price and face value of these instruments should be treated as 'interest' in which case it would be liable to deduction of tax at source under section 194A of the Income-tax Act, 1961, or, it should be treated as 'discount' which is not liable to deduction & at source.

4. It is clarified for the information of all concerned the difference between the issue price and the face value of the Commercial Papers and the Certificates of Deposits is to be treated as 'discount allowed' and not as 'interest; paid'. Hence, the provisions of the Income-tax Act relating to deduction of tax at source are not applicable in the case of transactions in these two instruments."

13. Having regard to the aforesaid, we are of the opinion that no substantial question of law arises, as the matter stands settled by the dicta of the Supreme Court as well as clarification by CBDT itself."

Considering the facts in the light of the above judicial decisions, we do not find any error or infirmity in the findings of the Ld.CIT(A).

8. In the result, the appeal filed by the **Revenue is dismissed.**

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9. Cross Objection by the assessee is filed late by 372 days. There is no request for the condonation of the delay nor any affidavit is filed by the assessee explaining the facts causing the delay in filing of the cross objection. Cross Objection filed by the assessee are therefore not admitted being barred by the period of limitation.

CO. No. 206/Mum/2014 is dismissed.

Order pronounced in the open court on this 10th day of October, 2014.

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(N.K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 10.10.2014
*Srivastava

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR "H" Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.