* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on :19th December, 2011.
% **Date of Decision** January 30, 2012.

\+ **ITA NO.1925/2010**
\+ **ITA NO.313/2011**

COMISSIONER OF INCOME TAX .... Appellant
Through Ms. Rashmi Chopra, sr. standing counsel

VERSUS

MOTHER DAIRY INDIA LTD. …..Respondent
Through Mr. C S Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

\+ **ITA NO.310/2011**
\+ **ITA NO.319/2011**
\+ **ITA NO.312/2011**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Rashmi Chopra, sr. standing counsel

versus

MOTHER DAIRY FOOD PROCESSING LTD. .... Respondent
Through Mr. C.S.Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

These are five appeals filed by the Revenue under Section 260A of the Income Tax, hereinafter referred to as the "Act". ITA Nos.1925/2010 and 313/2011 relate to the assessee M/s Mother Dairy India Ltd. for the assessment years 2004-05 and 2005-06. ITA Nos.310/2011, 319/2011, 312/2011 have been filed by the Revenue in the case of connected assessee namely Mother Dairy Food Processing Ltd. for the assessment years 2004-05 and 2005-06. The issue in all the five appeals is the same and we shall refer to it in the succeeding paragraphs.

2. We may first take up the case of M/s Mother Dairy India Ltd. for the assessment year 2004-05. This company hereinafter referred to as 'Dairy', was incorporated on 1.4.2003 as wholly owned subsidiary of another company by name Mother Dairy Fruit and Vegetable Ltd. The main objects of the assessee are to act as selling agents, sale organizers and advisors and to undertake activities in connection with procurement, processing, storage and marketing including retail, sale of milk and other products. On 9.12.2004 there was a survey under Section 133A of the Act

in the business premises of Ms/ Mother Dairy Food Processing Ltd., which is the other assessee in the appeals before us, at Parparganj, Delhi. In the course of the survey it was found that tax was not being deducted at source on the payment of commission to agents/concessionaires, who sold milk and other products of the assessee from the booths owned by the assessee. According to the revenue, the assessee ought to have deducted tax under Section 194H of the Act from the payments made to the concessionaires, on the footing that the payment represented commission within the meaning of Explanation (i) below the Section. According to the Explanation commission 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 case of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities. Accordingly, the assessee was called upon to explain why orders cannot be passed under Section 201(1)/201(1A) treating the assessee in default and charging interest for the period of the default in not deducting the taxes.

3. The assessee explained in writing that it sold the products to the concessionaires on a principal to principal basis, that the concessionaires buy the products at a given price after making full payment for the purchases on delivery, that the milk and other products once sold to the concessionaires became their property and cannot be taken back from

them, that any loss on account of damage, pilferage and wastage is to the account of the concessionaires and that in these circumstances the payment made to the concessionaires cannot be treated as "commission" for services rendered and consequently there was no liability on the part of the assessee to deduct tax.

4. The above explanation was submitted by the assessee on 17.1.2005. Another letter was written on 28.3.2008 reiterating the earlier submissions. It was further stated in this letter that the word 'commission', which was said to have been used by the assessee in two circulars issued by it, which were found during the survey was used in the generic and popular sense and that it cannot be taken as a admission of the assessee that what was paid to the concessionaires represented commission requiring deduction of tax under Section 194H.

5. The Assessing Officer considered the submissions of the assessee. He noted that the booths were constructed by the assessee on its own and they were allotted to the concessionaires at its discretion. The milk and other products were sold from these booths by concessionaires during fixed hours of the day. An agreement was entered into between the assessee and the concessionaires. Clause 43 of the agreement provided that the assessee will sell milk and other products to the concessionaires at the sale price fixed by the Dairy from time to time. The concessionaires cannot sell the milk to consumers for any other sale price and if he is found to be indulging in this, the agreement was liable to be terminated.

As per Clause 13, the concessionaire did not have any right, title or interest over the booth or the machinery, equipment, furniture etc. which were all to be provided by the Dairy. This Clause also provided that the possession and control of the shop was with the assessee and the looks were also to be provided by the assessee only. The concessionaire will only be given the duplicate keys. According to Clause 17, the concessionaire was required to record the quantity of unsold milk in the prescribed register within 15 minutes of the close of the scheduled vending timings or before the supply of milk is taken by the concessionaire from the Dairy, whichever is earlier. It was not open to the concessionaire to make additions or alterations to the balance, quantity and milk recorded by the concessionaire except with the prior permission to the Dairy. Such permission, if required and given, has to be recorded in the register.

6. After taking into consideration the assessee's submissions and the above clauses in the agreement, the Assessing Officer came to the conclusion that the relationship that existed between the assessee and the concessionaires was not that of principal-to-principal, but it was a relationship of a principal and an agent, the assessee being the principal and the concessionaire being the agent. In coming to this conclusion, the Assessing Officer highlighted the following facts :

(a) That the booths are owned by the assessee;

(b) The assessee had a right to check at any time the milk or other products stored in the booth even after they were sold to the concessionaires; and

(c) The assessee itself has referred to the payment made to the concessionaire as "commission" in two circulars issued by it.

In view of the above findings, the Assessing Officer treated the difference between the bill value and the MRP fixed by the assessee as commission paid to the assessee's agent on which the assessee ought to have deducted tax under Section 194H. Since no tax was deducted, the provisions or Section 201(1)/201(1A) of the Act were attracted. He accordingly treated the assessee as a defaulter in not deducting the tax and charged tax of Rs.74,83,395 /- and also charged interest of Rs.40,40,982/- for the assessment year 2004-05 (FY 2003-04) by order dated 31st March, 2008, resulting in the aggregate demand of Rs.1,15,26,135/-.

7. The facts for the assessment year 2005-06 (FY 2004-05) are identical. The tax due amounted to Rs.42,07,449 /- and the interest amounted to Rs.22,98,666 /-.

8. The assessee contested the correctness of the orders of the Assessing Officer in appeals filed before the CIT(Appeals). In respect of the Financial Year 2003-04, for which the relevant assessing year was 2004-05, the CIT(Appeals) passed an order on 31.7.2008 affirming the order passed by the Assessing Officer. A similar view was taken by him

in the appeal order passed for the assessment year 2005-06 (FY 2004-05) on 3.10.2009. The CIT(Appeals) for this year followed his earlier order for the assessment year 2004-05.

9. Against the order passed by the CIT(Appeals) for the assessment year 2004-05 (FY 2003-04), the assessee filed a further appeal before the Tribunal in ITA No.2975 (Del.) of 2008. The appeal was accepted by the tribunal by order dated 12.12.2008. On a perusal of the agreement entered into between the assessee and the concessionaires and the other relevant facts of the case, the Tribunal held that the relationship between the assessee and the concessionaires was that of principal and principal and not that of principal and agent in order to attract 194H. The concessionaires under the agreement, had to purchase tokens from the assessee for the sale of milk at the booths and the milk can be sold only on the basis of the tokens. The concessionaires had to pay the consideration to the assessee as per the delivery invoices at the time of delivery of the milk. Any unsold quantity of milk is to be recorded within 15 minutes of the close the scheduled vending time or before the supply of the milk is taken by the concessionaires from the assessee, whichever is earlier. The Tribunal, further noted that under the agreement the assessee will not take back any portion of the unsold milk in any condition whatsoever. From these terms of the agreement the Tribunal held that there was an actual sale of the milk by the assessee to the concessionaires on delivery. These terms in the agreement, according to the Tribunal, militated against the

contention of the Revenue that the relationship was that of principal and agent. The other conditions imposed on the concessionaires by the assessee such as the right to inspect the booths at any time, right to check the registers etc. and also whether the equipment, furniture, machinery etc. were properly used by the concessionaires did not affect in any manner the relationship of principal to principal between the assessee and the concessionaires. Such terms, according to the tribunal, were included in the agreement only to safeguard the booths, the equipment, furniture etc. which were owned by the assessee. The real test according to the tribunal was whether the property in the milk and the products passed to the concessionaires at the time of delivery. This condition was satisfied. In this view of the matter the tribunal came to the conclusion that the difference between the price at which the assessee sold the milk and other products to the concessionaires and the MRP at which the concessionaires were to sell them to consumers was not liable to be treated as commission within the meaning of Section 194H. Accordingly, the tribunal set aside the orders passed by the Assessing Officer under Section 201(1)/(1A) of the Act.

10. In the course of the arguments before the Tribunal, the Revenue had relied upon the judgment of this Court in ***Delhi Milk Scheme v. CIT*** (2008) 301 ITR 373. In that case, the Tribunal had held in its order dated 20th January, 2006 that the sums paid by DMS to its agents, who were rendering services for selling products represented commission and not

discount and consequently the provisions of Section 194H were attracted. This order of the tribunal was upheld by this Court in the judgment cited above. The present assessee had submitted before the Tribunal that this judgment did not apply to its case because in the cited case there was a finding recorded by the departmental authorities as well as the Tribunal that the agreements, which were found in the course of survey of the premises of DMS were found to have been re-drafted and those redrafted agreements had been produced before the CIT(Appeals) and the Tribunal. The Tribunal, after comparing the two sets of the agreements had opined that the agreements produced before itself and the CIT(Appeals) were an afterthought. The assessee thus submitted that the judgment of this Court in the case of DMS (supra) was clearly distinguishable on facts. The assessee's submission was accepted by the Tribunal in the present case in its order dated 12.12.2008. In paragraphs 7 and 8 of the impugned order, the Tribunal has extracted the relevant portions from the earlier order dated 20.1.2006 of the Tribunal in the case of DMS in which a finding that DMS had filed the redrafted agreements before the CIT(Appeals), which were different in crucial aspects from the agreements found during the survey, was recorded. The tribunal in the present case, after noticing the earlier order of the tribunal held that in the present case there was no redrafting of the agreements and the agreements placed before it were the same as were found in the course of the survey and the terms of the agreement entered into in 1993 and in 2003 were identical and therefore, the judgment of this Court in the case of DMS (supra) upholding the order

of the tribunal dated 20th January, 2006 would have no application to the assessee's case inasmuch as facts as the agreement are different in crucial aspects. Thus, the judgment of this Court in the case of DMS (supra) was held not applicable to the present case.

11. In respect of the financial year 2004-05, relevant for the assessment year 2005-06, the tribunal took the same view in its order dated 19.4.2010 in ITA No.4926(Del.) of 2009. There is no independent reasoning given in its order and it follows the view already taken by the tribunal in respect of the assessment year 2004-05 (FY 2003-04).

12. The Revenue challenges the aforesaid orders of the tribunal relying upon Section 194H of the Act. It is not in dispute before us in the present case that there has been no redrafting of the agreements and that the copies of the agreements found during the survey on 9.12.2004 and the agreements produced before the Assessing Officer in the course of the proceedings which have given rise to the present appeals were the same. There is no reference in the orders passed by the Assessing Officer under 201(1)/(1A) to any change in the terms between the agreements found during the survey and those produced before them in the course of the proceedings under Section 201(1)/(1A). We have to therefore, proceed on the basis of the terms of the agreement as they have been discussed in the orders of the Income Tax Authorities as well as the orders of the tribunal. The principal question that falls for consideration is whether the agreements between the assessee and the concessionaires

gave rise to a relationship of principal to principal or relationship of principal to agent. On a fair reading of all the clauses of the agreement as have been referred to in the orders of the Tribunal as well as those of the income tax authorities, we are unable to say that the view taken by the Tribunal is erroneous. 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. The concessionaire purchases the milk from the Dairy. The Dairy raises a bill on the concessionaire and the amount is paid for. The Dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that is to the account of the concessionaire and the Dairy is not responsible for the same. These clauses have all been noticed by the Tribunal. The fact that the booth and the equipment installed therein were owned by the Dairy is of no relevance in deciding the nature of relationship between the assessee and the concessionaire. Further, the fact that the Dairy can inspect the booths and check the records maintained by the concessionaire is also not decisive. As rightly pointed out by the tribunal the Dairy having given

space, machinery and equipment to the concessionaire would naturally like to incorporate clauses in the agreement to ensure that its property is properly maintained by the concessionaire, particularly because milk and the other products are consumed in large quantities by the general public and any defect in the storage facilities which remains unattended can cause serious health hazards. These are only terms included in the agreement to ensure that the system operates safely and smoothly. From the mere existence of these clauses it cannot be said that the relationship between the assessee and the concessionaire is that of a principal and an agent. That question must be decided, as has been rightly decided by the Tribunal, on the basis of the fact as to when and at what point of time the property in the goods passed to the concessionaire. In the cases before us, the concessionaire becomes the owner of the milk and the products on taking delivery of the same from the Dairy. He thus purchased the milk and the products from the Dairy and sold them at the MRP. The difference between the MRP and the price which he pays to the Dairy is his income from business. It cannot be categorized as commission. The loss and gain is of the concessionaire. The Dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship. The supervision and control required in case of agency is missing.

13. It is irrelevant that the concessionaires were operating from the booths owned by the Dairy and were also using the equipment and furniture provided by the Dairy. That fact is not determinative of the relationship between the Dairy and the concessionaires with regard to the sale of the milk and other products. They were licencees of the premises and were permitted the use of the equipment and furniture for the purpose of selling the milk and other products. But so far as the milk and the other products are concerned, these items became their property the moment they took delivery of them. They were selling the milk and the other products in their own right as owners. These are two separate legal relationships. The income-tax authorities were not justified or correct in law in mixing up the two distinct relationships or telescoping one into the other to hold that because the concessionaires were selling the milk and other products from the booths owned by the Diary and were using the equipment and furniture in the course of the sale of the milk and other products, they were carrying on the business only as agents of the Diary.

14. We may refer to the judgment of this Court in the case of ***Delhi Milk Scheme vs CIT (Supra.)*** In that case the facts were different. Under the terms of agreement entered into between DMS and its concessionaires, the milk and other products did not become the property of the concessionaires on delivery. The unsold milk was taken back by the DMS from the concessionaires . The ownership of the milk and other products did not pass from DMS to the concessionaires inasmuch as there

was no sale of the milk or milk products to them. Further the unsold milk was to be taken back by the DMS from the concessionaires. The agreement also provided that the daily cash collection of the concessionaires was to be handed over to DMS. On these facts, it was held by the Tribunal that the concessionaires only rendered a service to DMS for selling milk to the customers and, therefore, the relationship between DMS and the concessionaires was that of a principal and an agent. This attracted the provisions of Section 194H. This is apart from the fact, as noticed earlier, that the DMS redrafted the agreements and filed them before the CIT(A) and the Tribunal and such redrafted agreements were found to be different from the agreements found during the survey under Section 133A. This Court, on the above facts held that Section 194H was attracted. As already pointed out, the terms of the agreement entered into between the present assessees and their concessionaires are different in crucial aspects. Therefore, the judgment of this Court in the case of DMS(Supra) is not applicable to the present cases.

15. We are, therefore, of the view that no substantial question of law arises from the order of the Tribunal. The appeals of the revenue in ITA No.1925 and 313/2011 are accordingly dismissed with no order as to costs.

16. In ITA Nos. 310, 319 & 312/2011 in the case of Mother Dairy Food Processing Ltd., the facts are identical. The agreements have

similar/identical clauses as the concessionaire agreement entered into by the Dairy. The Tribunal has followed its order in the case of Mother Dairy Ltd. Since the facts are the same as in that case, the appeals of the revenue are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

January 30, 2012
vld/Bisht