

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and B.R.BASKARAN, AM

I.T.A Nos. 373-376/Coch/2011
Assessment Years : 2006-07 to 2009-10

The Assistant Commissioner of Income-tax(TDS), Kozhikode.	Vs.	Al Hind Tours & Travels Pvt. Ltd., Marcus Complex, Mavoor Road, Calicut. [TAN No. : CHNA01921D]
(Revenue-Appellant)		(Assessee -Respondent)

I.T.A Nos. 377-380/Coch/2011
Assessment Years : 2006-07 to 2009-10

Al Hind Tours & Travels Pvt. Ltd., Marcus Complex, Mavoor Road, Calicut. [TAN No. : CHNA01921D]	Vs.	The Deputy Commissioner of Income-tax(TDS) & Circle-2(1), Kozhikode.
(Assessee -Appellant)		(Revenue -Respondent)

Revenue by	Smt. Susan George Varghese, Sr.DR
Assessee by	Shri C.B.M. Warriar, FCA

Date of hearing	13/09/2012
Date of pronouncement	14/12/2012

ORDER

Per B.R.BASKARAN, Accountant Member:

These cross appeals are directed against the orders passed by Ld CIT(A)-III. Kochi and they relate to the financial years relevant to the assessment years 2006-07 to 2009-10. Since identical issues are urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee herein was treated as an assessee in default in terms of sec. 201(1) of the Act for non deduction of tax at source u/s 194H of the Act on the amount paid as "Commission" to various persons. Accordingly, the Deputy Commissioner of Income tax (TDS) raised demand u/s 201(1) of the Act upon the assessee of an amount equal to the amount of tax deductible u/s 194H of the Act for the assessment years 2006-07 to 2009-10. Interest u/s 201(1A) of the Act was also levied for the assessment years 2006-07 to 2008-09. The assessee challenged the said orders by filing appeal before Ld CIT(A), who allowed the appeals in part. Still aggrieved, the assessee is in appeal before us for all the four years. Aggrieved by the relief granted by Ld CIT(A), the revenue is in appeal before us for all the four years.

3. The facts which are relevant to the issue under consideration are set out in brief. The assessee herein is an IATA approved agent and is engaged in the business of booking air travel tickets for various airline companies. The Deputy Commissioner of Income tax (TDS) (hereinafter "TDS officer") noticed that the assessee has been paying commission to various persons without deducting tax at source as required under sec. 194H of the Act. The year wise details of commission paid; tax deductible u/s 194H, interest charged u/s 201(1A), as stated by the TDS officer, are tabulated below:-

Asst. year	Commission paid	TDS deductible	Interest u/s 201(1A)
2006-07	4,37,11,778	22,29,301	7,80,255
2007-08	10,40,85,910	53,08,381	12,20,910
2008-09	13,88,02,925	1,31,05,309	14,41,583
2009-10	1,03,32,865	10,64,286	---

As stated earlier, the demand u/s 201(1) equal to the amount of "TDS deductible", stated supra was raised upon the assessee by the TDS officer in all the four years stated above. The interest u/s 201(1A) was also raised in the first three assessment years.

4. In the appellate proceedings, the Ld CIT(A) examined the details of payments of commission made by the assessee and grouped the payments in three categories, viz., (a) payments made to the retail customers, (b) payments made to group passengers

like Haj Pilgrims and (c) payments made to the small time travel agents (non-IATA agents). By placing reliance on the following decisions, the Ld CIT(A) held that the discounts given to the retail customers and group persons cannot be considered as "Commission" payments.

(a) Kerala Stamp Vendors Association Vs. Office of Accountant general and ors. (282 ITR 7)(Ker)

(b) Ahmedabad Stamp Vendors Association Vs. Union of India (257 ITR 202)(Guj)

The Ld CIT(A) held that the discounts/commission paid to the small time agents (Non-IATA agents) are liable for TDS u/s 194H of the Act. Accordingly, the Ld CIT(A) directed the TDS officer to re-work the liability u/s 201(1) and interest u/s 201(1A) of the Act. Accordingly, the appeals filed by the assessee were partly allowed. Hence both the parties are in appeal before us.

5. In all the years, the revenue has urged that the Ld CIT(A) has violated Rule 46A(1) of the Income tax Rules by accepting new evidences during the course of appellate proceedings. However, on a careful perusal of the orders passed by Ld CIT(A), we notice that the Ld CIT(A)

(a) has categorised the commission payments into three categories, as stated earlier, on the basis of information available in the books of accounts maintained by the assessee.

(b) has sought remand report from the Assessing officer with regard to the contentions of the assessee with respect to the categorisation stated in point (a) supra.

Further, we notice that the Deputy Commissioner of Income tax (TDS) was present during the course of appeal hearing and his opinion was sought on the various contentions raised by the assessee. Thus, we notice that the Ld CIT(A) did not entertain any new evidence, as alleged by the revenue. The categorisation of commission payments has also been put to the Assessing officer. Accordingly, in our view, there is no violation of Rule 46A of the Income tax Rules on the part of Ld CIT(A). Accordingly, the grounds raised by the revenue on this issue are dismissed.

6. The department is aggrieved by the decision of Ld CIT(A) in holding that the payments made to the retail customers and group customers are in the nature of discount and hence TDS need not be deducted there from. We notice that the Ld CIT(A) was persuaded by the following contentions raised by the assessee before him in this regard.

“5. Vide letter dated 08.01.2011 the assessee filed following submissions in support of its contentions:

“1. The appellant is a travel agent recognized under IATA Rules and doing business representing various Air Lines. The various Air Line companies are providing air tickets to them after prescribing the minimum and maximum fare as per the standard fares informed to the Director General of Commercial Aviation which are called Published Fares. The appellant is receiving commission as a percentage of the fares in respect of which tax is deducted at source by the Air Lines u/s. 194H.

2. The appellant in turn are selling air tickets to the individual customers on a fare between the maximum and minimum fare fixed **at competitive rates** in relation to the rates at which the tickets are sold by other travel agents doing business with IATA recognition.

Discounts are given in the bill issued to the customer as an incentive and the benefit of the discount is received by the customer traveller. In the case of group bookings etc. larger discounts are given for attracting more business. When the tickets are sold directly to the customer the discount given and reduced from the sale bill is not a ‘COMMISSION’ within the meaning of Sec. 194H of the Act.

3. In the Appellant’s case in all the assessment years such discount given to the customers are termed as ‘COMMISSION’ and assessed in the order. It is fact that the expression or the terminology of ‘COMMISSION’ is mistakenly used in several places but in substance the deduction given in the sale bill is only a discount and not commission as treated in the assessment order. In the statement of accounts and elsewhere this TRADE DISCOUNT is termed as ‘COMMISSION’ by mistake which may be condoned since Substance is important than the form and expression”.

7. There is no dispute with regard to the fact that the assessee herein is a IATA agent and it is authorised to sell air tickets at a price range that are usually fixed by the airline companies. It is also a fact that the competition between different airline

companies has increased due to presence of a number of airline companies and the same has resulted in fixation of ticket rates at different levels at different points of time. Accordingly, it appears that the IATA agents are given option to fix the ticket rates within the maximum and minimum range that are fixed by the airline companies. Similarly, there is competition among various IATA agents and they are prepared to cede a part of their commission income, in the form of discounts, in order to increase their turnover. Accordingly, the IATA agents reduce the price of flight tickets by ceding a part of their commission income by way of discounts. Though the assessee has accounted the discounts to given under the head "Commission payments", in effect, they are only discounts offered by the assessee to its customers.

8. The question that arises is whether such discount payments would fall in the definition of "Commission or brokerage" as given in sec. 194H of the Act. The term "Commission or brokerage" covered by sec. 194H is defined as under in the Explanation to sec. 194H:-

"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"

Though the above said definition is an inclusive one, yet the key points are

- (a) A person should act on behalf of another person and he should render services to another person or
 - (b) A person should render 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, not being securities.
9. The retail customers or group customers are not providing any service to the assessee herein. They only get flight tickets at a concession from the assessee herein. Under this scenario, in our view, the retail customers and the group customers cannot be considered as the "agent" of the assessee herein and hence, in our view, the amount of commission ceded by the assessee herein partakes the character of "Discount" only. Hence, in our view, the Ld CIT(A) was right in law in holding that the

payments made to retail customers and group customers cannot be termed as "Commission payments". Accordingly, such payments are not liable for deduction of tax at source u/s 194H of the Act and the orders passed by Ld CIT(A) on these category of payments are upheld.

10. The Ld CIT(A) has held that the payments made to the small time agents/non-IATA agents are in the nature of "Commission payments", which are liable for deduction of tax at source u/s 194H of the Act. The contentions made by the assessee before Ld CIT(A) with regard to this category of payment are extracted below:-

" 4. SUB-AGENT

In the business of travel agency there are 2 categories of travel agents. The first is the travel agent who is having the agency agreement with the Air Lines under IATA Rules. Those travel agents are provided with blank tickets with the freedom for the travel agents to sell the air tickets at the rates at their discretion within the minimum and maximum rates prescribed by the airlines. They represent the Air Lines in issuing tickets and they are responsible for their acts as agents under various rules and regulation and provisions of various statutes. The appellant is doing business as a travel agent in this category.

There are several small time-business may be proprietary, partnership or limited company doing the business of travel agency. These self-styled travel agents who are up country dealers of air tickets, train tickets and bus tickets are buying tickets and giving to the travelling public with the charge for their services. The appellant has not appointed any person as SUB-AGENT to act on its behalf and delegated the responsibilities of business to be carried on by any other person. This category of travel agent is free lancers and on demand for an air ticket they will be contacting and bargaining with the main travel agents with IATA recognition for minimum rates for the benefit of their customer. They are not empowered or authorized to issue tickets by themselves and they are acting as agents for and on behalf of the travelling public for bargaining and buying the ticket from the main travel agent the category in which the appellant belong.

In the assessment order and elsewhere this category of self-styled travel agents are termed as SUB-AGENTS of the appellant. But this treatment in accounting and taxation is totally erroneous. They are the buyers of ticket from the appellant acting for and on behalf of the traveller. They buy air tickets, train tickets or bus tickets in the same fashion for the travelling public and they are in fact agents of the travellers fro whom they receive service charges.

5. To the category 2 travel agent the tickets are sold by the appellant and bills are made in the name of the traveller and the name of the contact person or

organization will be mentioned in the top of the bill. Trade Discount is given in these type of sale bill which goes to the benefit of the traveller. This trade discount is given to make the sales competitive with the other travel agents with IATA recognition. This trade discount is not a 'COMMISSION' given to the category 2 travel agent. There is no contract or understanding between the appellant and this category of travel agents and this category 2 travel agents are having business with all or any of the category 1 travel agents for buying tickets on bargaining for the lowest rates at their discretion.

6. Air tickets are sold sometimes on credit to individual customers or to the category 2 travel agents and in both the cases the net amount is debited to their accounts and when the amounts are realized their accounts are credited. They are the DEBTORS consequent to sale and no question of agency or commission is arising in the transaction.

7. M/s. S.D.Pharmacy Pvt. Ltd. M.O. Ward, Alleppey vs. Dy. Commissioner of Income Tax Circle-1(1), Alleppey in I.T.A. No. 948/Coch/2008 Asstt. Year – 2005-06 order dated 05.05.2009 The Honourable ITAT, Cochin bench examined a case where Products are billed at its gross price and thereafter trade discount is debited there from and the balance is shown as net price and sales tax is collected on that net amount and goods are delivered. In this case it was held that such trade discounts allowed does not amount to commission payment and there is no requirement for deduction of tax under sec. 194H.

8. COMMISSIONER OF INCOME TAX Vs. SINGAPORE AIRLINES LTD. & ORS. – HIGH COURT OF DELHI – (2009) 224 CTR (Del) 168.

The concessional air tickets sold by the travel agents to other persons are on a principal to principal basis does not involve payment of commission u/s. 194H, 201(1) and 201(1A) of the Act – Page-172.

9. (a) KERALA STAMP VENDORS ASSOCIATION Vs. OFFICE OF THE ACCOUNTANT GENERAL AND ORS., 285 ITR 7 (Ker.)

(b) AHMEDABAD STAMP VENDORS ASSOCIATION Vs. UNION OF INDIA (2002) 176 CTR (Guj.) 193. (2002) 257 ITR 202 (Guj.). It is held that licensed stamp vendors are required to purchase the stamp papers from Government on payment of price less discount on principal to principal basis and there being no contract of agency at any point of time, discount allowed to such licensed stamp vendors under Gujarat Stamps Supply & Sales Rules, 1987, does not fall within the expression "commission" or "brokerage". Kerala High Court concurred with this decision in Kerala Stamp Vendors Association & Ors. Vs. Office of the Accountant General & Ors.

(c) M.S. HAMEED AHMED vs. DIRECTOR OF STATE LOTTERIES & ORS. 249 ITR 186

When the lottery tickets are sold no commission is paid or credited to the account of the person who purchased the ticket. The purchaser gets the benefit of the trade discount due to less price for the tickets. Sec. 194H is not applicable.

10. THE COMMISSIONER OF INCOME TAX (TDS), MUMBAI Vs. QATAR AIRWAYS in the High Court of Judicature at Bombay – Income Tax Appeal No. 99 of 2009.

The Air Lines tickets sold at lower price will not be termed as 'COMMISSION OR BROKERAGE' u/s. 194H.

The ratio in the decision of the Honourable Bombay High Court is directly applicable in appellant's case. In this case, assessee is an airlines company, engaged in passenger transportation who enters into agreement with travel agents. Assessee collected only the net fare against the published fare of tickets. Revenue's stand was that TDS is applicable on the special commission given to travel agents who retain the difference between the published fare and the net fare paid to airlines. On appeal Tribunal allows assessee's appeal. On Revenue's appeal, the Court held that the airlines had no information about the exact rate at which the tickets were ultimately sold by the agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price. The Court was of the view that if the airlines had discretion to sell the tickets at a price lower than the p to sell it at a lower rate than the published price, then the permission granted to the agent to sell it at a lower price could neither amount to commission or brokerage in the hands of the agent. Thus, the Bombay High Court held that no TDS was deductible u/s. 194H in respect of such discount over the published fares by airlines to travel agents".

11. Before us also, the Ld A.R reiterated the contentions made before Ld CIT(A). The Ld. A.R pointed out that the assessee herein has not appointed any sub-agents for canvassing clients for the assessee. The said small time agents are independent persons, who have got the right to purchase tickets from any of the IATA agents. The Ld A.R submitted that the modus operandi of these small time agents is that they, on being approached by a customer for a ticket, will make enquiries about the rate of flight tickets with various IATA agents. On ascertaining the flight rates offered by the IATA agents, they would identify the lowest rates and accordingly place orders. Accordingly,

the Ld A.R contended that the relationship between the assessee and the small time agents is on "Principal to Principal" basis only and in reality, they act as the agent of their respective customers only. Hence, the discount offered by the assessee to such small time agents cannot be treated as commission payments.

12. On the other hand, the Ld D.R, by placing reliance on the decision of jurisdictional Kerala High Court in the case of Vodafone Essar Cellular Ltd Vs. DCIT (2010)(7 Taxmann.com 43), contended that the discounts given to the small time agents would partake the character of "Commission" and hence the provisions of sec. 194H shall apply to such payments.

13. On a careful consideration of rival submissions and also the definition of "Commission or brokerage" given in section 194H of the Act, we find force in the contentions advanced by Ld A.R. First of all, it cannot be said that these small time travel agents are providing any service to the assessee herein either by acting on its behalf or during the course of sale of flight tickets. On the contrary, they act on behalf of the travelling public or their respective customers. Thus, they provide service only to their customers by identifying the best available rates for the flight tickets ordered by their respective customers. Accordingly, in our view, the commission income ceded by the assessee herein in respect of the tickets purchased by the small time travel agents on behalf of their respective customers, would partake the character of "Discount" only. Accordingly, in our view, such discount payments will not be attracted by the provisions of sec. 194H of the Act.

14. With regard to the decision rendered by the Hon'ble jurisdictional High Court in the case of Vodafone Essar Cellular Ltd, the assessee has distinguished the same in the following lines:-

"In the case of Vodafone Essar Cellular Ltd, the Honourable High Court of Kerala held that the discount given by the Vodafone Cell Ltd to its distributors are in the nature of commission for which sec. 194H is applicable. In the above connection we may submit that the relation between Vodafone Essar Cellular Ltd and the distributors are similar to the relation between the Airline Company and the IATA

Travel agents. The various Air line Companies are giving, the IATA Travel Agents like our organisation, the commission for the sale of tickets and tax is deducted at source under section 194H of the Act.”

The Ld CIT(A) agreed with the contentions of the assessee and accordingly held that the decision rendered in the case of Vodafone Essar Cellular Ltd shall not apply to the payments made by the assessee to the small time agents. We also find force in the submissions, cited supra. The small time agents have not been appointed by the Airline companies. These small time agents have also not been appointed by the assessee herein also. Hence the ratio of the decision rendered in the case of Vodafone Essar Cellular Ltd shall not apply to the facts of the instant case.

15. In view of the foregoing discussions, we set aside the orders of Ld CIT(A) in respect of this category of payments, i.e., discount paid to the small time travel agents and direct the TDS officer to delete the demand raised u/s 201(1) and 201(1A) of the Act in respect of the above said category also.

16. In the result, the appeals filed by the assessee are allowed and the appeals of the revenue are dismissed.

Pronounced accordingly on 14-12-2012.

sd/-
(N.R.S.GANESAN)
JUDICIAL MEMBER

sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 14th December, 2012

GJ

Copy to:

1. Al Hind Tours & Travels Pvt. Ltd., Marcus Complex, Mavoor Road, Calicut.
2. The Assistant Commissioner of Income-tax(TDS), Kozhikode.
3. The Deputy Commissioner of Income-tax(TDS) & Circle-2(1), Kozhikode.
4. The Commissioner of Income-tax (Appeals)-III, Kochi.
5. The Commissioner of Income-tax, Calicut.

6. D.R., I.T.A.T., Cochin Bench, Cochin.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, COCHIN