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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ITA 136/2019**

THE PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through: Mr Vibhooti Malhotra, Mr Tapesh Sankhla, Advocates.

versus

MAKE MY TRIP INDIA PVT. LTD. ..... Respondent
Through: Mr Mayank Nagi, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

O R D E R

% 25.03.2019

Dr. S. Muralidhar, J.:

1. This appeal by the Revenue under Section 260-A of the Income Tax Act, 1961 ('Act') is directed against an order dated 26th September, 2017, passed by the Income Tax Appellate Tribunal, ('ITAT') New Delhi in ITA No. 4721/Del/2014 for assessment year ('AY') 2009-10.

2. The question of law sought to be urged by the Revenue reads as under:

> "Whether the ITAT erred in deleting the addition of Rs. 12,52,49,946/- made by the Assessing officer under Section 40(a)(ia) of the Income Tax Act,1961 being non deduction of TDS on account of payment gateway charges?"

3. The facts in brief are that the Assessee is engaged in the business of selling its travel products to the customers through the website

makemytrip.com. A customer can log on to the Assessee's website, choose from its various travel products displayed there. Once the customer enters into a transaction, payment therefor is made by using the facility of an Internet Payment Gateway, which automatically opens. The payment gateway, which is provided in this case by four banks viz., HDFC, ICICI, Citibank and American Express, electronically transfers the customer data to the credit card issuer through VISA / Master Card, for the approval of the issuer and consequently the amount is debited by the issuer to the card-holder. Instantly the payment gateway website confirms approval to the merchant/e-Commerce website and the transaction gets concluded. The net price after deduction of facility charges by the payment gateway is automatically credited to the bank account of the merchant. The amount retained by the payment gateway facility provider includes the charges for the facility of secured payment gateway and the charges of VISA/Mastercard.

4. The Assessing Officer (AO) disallowed the payment of Rs. 12,52,49,946/- made by the Assessee to the above Banks towards charges for providing the payment gateway facility for the AY in question under Section 40(a)(ia) of the Act since according to the AO the said payment was in the nature of commission paid to the Banks from which TDS under Section 194 H of the Act ought to have been deducted.

5. The appeal filed by the Assessee on this issue was partly allowed by the Commissioner of Income Tax (Appeals) by order dated 13th June 2014 by reducing the disallowance to Rs. 8,38,85,784/-. The CIT (A) noted that

before the AO, the Assessee had produced the 'Nil' withholding tax certificate under Section 195 (3) of the Act with respect to payments received by American Express and Citi Bank by virtue of which the said Banks could receive payments of the charges for payment gateway facility provided by them without deduction of TDS. The CIT (A) accepted the Assessee's submission that the payment gateway charges in the sums of Rs.1,39,75,886/- paid to American Express Bank Ltd. and Rs.7,84,06,562/- to Citi Bank were not subject to TDS and therefore Section 40 (a) (ia) of the Act was not applicable to such payments. However, the CIT (A) treated the sums paid to HDFC and ICICI towards payment gateway charges as commission and concurred with the AO that from the said sums TDS was required to be deducted by the Assessee under Section 194 H of the Act while making payment. The Assessee's appeal was thus allowed in part.

6. Aggrieved by the above order of the CIT (A) to the extent it affirmed in part the AO's assessment order on this issue, the Assessee filed ITA No. 4721/Del/2014 before the ITAT. The Revenue however accepted the order of the CIT (A) to the extent it partly allowed the appeal of the Assessee and did not file any cross-objection before the ITAT.

7. The ITAT has in the impugned order allowed the Assessee's appeal on this issue and held that the payment gateway charges were in nature of fees for banking services and not 'commission' or 'brokerage' and thus no TDS was deductible from the said charges under Section 194 H of the Act. In coming to the said conclusion, the ITAT relied on the judgment of this Court in ***Commissioner of Income Tax v JDS Apparels (P) Ltd. (2015) 370 ITR***

454 (Del).

8. Ms. Vibhooti Malhotra, learned counsel for the Revenue, sought to distinguish the said judgment in ***Commissioner of Income Tax v JDS Apparels (P) Ltd.*** (*supra*) by pointing out that the Bank in question in that case had provided a swiping machine. When a credit card was swiped on it, the customer, whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, the acquiring bank realized and recovered payment from the bank which had issued the credit card. It is submitted that in the present case the transaction is virtual and the products are sold through a website operated by the Assessee. The customer logs on to the website which uses the various products displayed at the website and once he makes a transaction, payment is made using the facility of 'internet payment gateway'. The customer is directed to a secure gateway of the bank which provides the facility. In effect, the payment gateway authenticates the transaction for which payment is made by using a credit card. Thus, it provides a facility of secure fund settlements without manual intervention. It is sought to be contended by the Revenue that the amount deducted by the Bank in this process is actually a commission earned by the payment gateway and, therefore, would attract Section 194-H of the Act requiring deduction of tax at source.

9. The decision in ***Commissioner of Income Tax v. JDS Apparels (P) Ltd.*** (*supra*) holds that in a similar kind of transaction, the amount retained by the bank is a fee charged for having rendered banking services and "cannot be treated as a commission or brokerage paid in course of use of any services

by a person acting on behalf of another for buying or selling of goods." The ITAT has, in view of this Court rightly, held that the services provided by the payment gateway is such that the charges collected by it has to be necessarily treated as fees and not as a commission. The payment in fact is made by one principal to another and it is only being facilitated by the payment gateway by providing a service. The following observation of this Court in ***JDS Apparels (P) Ltd.*** (*supra*) equally applies to the case on hand:

> "16. The amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. The intention of the legislature is to include and treat commission or brokerage paid when a third person interacts between the seller and the buyer as an agent and thereby renders services in the course of buying and/or selling of goods. This happens when there is a middleman or an agent who interacts on behalf of one of the parties, helps the buyer/seller to meet, or participates in the negotiations or transactions resulting in the contract for buying and selling of goods. Thus, the requirement of an agent and principal relationship. This is the exact purport and the rationale behind the provision. The bank in question is not concerned with buying or selling of goods or even with the reason and cause as to why the card was swiped. It is not bothered or concerned with the quality, price, nature, quantum etc. of the goods bought/sold. The bank merely provides banking services in the form of payment and subsequently collects the payment. The amount punched in the swiping machine is credited to the account of the retailer by the acquiring bank, i.e. HDFC in this case, after retaining a small portion of the same as their charges. The banking services cannot be covered and treated as services rendered by an agent for the principal during the course of buying or selling of goods as the banker does not render any service in the nature of agency. "

10. Further, the Central Government, by notification dated 31st December, 2012 has notified that no TDS shall be made on the following payments to the banks listed in the Second Schedule to the Reserve Bank of India Act:

(i) bank guarantee commission;

(ii) cash management service charges;

(iii) depository charges on maintenance of DEMAT accounts;

(iv) charges for warehousing services for commodities;

(v) underwriting service charges;

(vi) clearing charges (MiCR charges);

(vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

11. The above notification was referred to in the order of the CIT (A) but not discussed. The assessee is right in contending that by virtue of the above notification no TDS is deductible from payments made towards "credit card or debit card commission for transaction between the merchant establishment and the acquirer bank". This applies to the charges paid to the Banks for providing payment gateway in the case on hand.

12. In that view of the matter, this Court finds that the ITAT has not committed any error in deleting the addition of Rs. 12,52,49,946/- made by the Assessing officer under section 40(a)(ia) of the Act [(as further educed by the CIT (A)] on account of non-deduction of TDS from the payment gateway charges paid to the Banks.

13. For all of the aforementioned reasons, no substantial question of law as urged by the revenue arises from the impugned order of the ITAT that requires consideration by this Court. The appeal is accordingly dismissed.

CMs 6349/2019 (delay in filing) and 6350/2019 (delay in re-filing)

14. For the reasons explained in the applications, the delay in filing and re-filing the appeal is condoned and the applications are allowed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 25, 2019
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