$~**S-45, 46 & 48**

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

\+ **ITA 482/2022**

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr.Zoheb Hossain, Sr.Standing Counsel with Mr.Vipul Agrawal and Mr.Parth Semwal, Jr.Standing Counsel.

versus

M/S SPICE JET LTD. ..... Respondent

Through: Mr.Mayank Nagi, Advocate with Mr.Tarun Singh, Advocate.

\+ **ITA 483/2022**

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr.Zoheb Hossain, Sr.Standing Counsel with Mr.Vipul Agrawal and Mr.Parth Semwal, Jr.Standing Counsel.

versus

SPICE JET LTD ..... Respondent

Through: Mr.Mayank Nagi, Advocate with Mr.Tarun Singh, Advocate.

\+ **ITA 485/2022**

PR. COMMISSIONER OF INCOME TAX (CENTRAL) ..... Appellant

Through: Mr.Zoheb Hossain, Sr.Standing Counsel with Mr.Vipul Agrawal and Mr.Parth Semwal, Jr.Standing Counsel.

versus

SPICE JET LTD ..... Respondent

Through: Mr.Mayank Nagi, Advocate with Mr.Tarun Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

O R D E R

% 24.11.2022

CM APPL.50602/2022 in ITA 482/2022
CM APPL.50603/2022 in ITA 483/2022
CM APPL.50605/2022 in ITA 485/2022

Keeping in view the averments in the applications, the delay in re-filing the appeals is condoned.

Accordingly, the applications stand disposed of.

ITA 482/2022
ITA 483/2022
ITA 485/2022

Present Income Tax Appeals have been filed challenging the Order dated 22nd April, 2019 passed in ITA No. 4226/Del/2014 for the Assessment Year 2011-12, Order dated 28th February, 2019 passed in ITA No. 6103/Del/2015 for the Assessment Year 2012-13 and Order dated 23rd July, 2019 in ITA No.1496/Del/2017 for the Assessment Year 2013-14.

Learned counsel for the appellant states that the ITAT has erred in holding that the amount retained by the banks/credit card agencies for rendering credit card processing service would not amount to commission within the ambit of Section 194H of the Income Tax Act, 1961 ('the Act'). He states that the ITAT has erred in holding that assessee was not required

to deduct TDS on charges retained by the Banks/credit card agencies out of sale consideration of tickets booked through credit /debit cards.

He further states that the ITAT has erred in deleting the addition on the ground that the amounts retained by various banks for Credit card commission do not attract the provisions of Section 194H of the Act whilst ignoring the fact that the CBDT Notification No.561/2010 dated 31st December, 2012 exempting deduction of tax from credit card commission came into force w.e.f. 01st January, 2013, and therefore, the deduction of tax at source was required to be made for the period prior to 01st January, 2013.

The ITAT in the present case has held that the issues involved in the present appeals are covered by the judgment of this Court in ***CIT vs. JDS Apparels (P.) Ltd. [2015] 53 taxmann.com 139 (Delhi).*** The relevant portion of the judgment of this Court in ***JDS Apparels (P.) Ltd.*** (supra) is reproduced hereinbelow:-

> *"15. Applying the above cited case law to the factual matrix of the present case,* ***we feel that Section 194H of the Act would not be attracted. HDFC was not acting as an agent of the respondent-assessee. Once the payment was made by HDFC, it was received and credited to the account of the respondent-assessee. In the process, a small fee was deducted by the acquiring bank, i.e. the bank whose swiping machine was used. On swiping the credit card on the swiping machine, 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 realised and recovered the payment from the bank which had issued the credit card.*** *HDFC had not undertaken any act on "behalf" of the respondent-assessee. The relationship between HDFC and the respondent-assessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. It is noticeable that the bank in question or their employees were not present at the spot and were not associated with buying or selling of goods as such. Upon swiping the card, the bank made payment of the bill amount to the respondent-assessee.*

Thus, the respondent assessee received the sale consideration. In turn, the bank in question had to collect the amount from the bankers of the credit card holder. The Bank had taken the risk and also remained out of pocket for sometime as there would be a time gap between the date of payment and recovery of the amount paid.

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.

17. Another reason why we feel Section 40(a)(ia) of the Act should not have been invoked in the present case is the principle of doubtful penalization which requires strict construction of penal provisions. The said principle applies not only to criminal statutes but also to provisions which create a deterrence and results in punitive penalty. Section 40(a)(ia) is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the assessee's property and other economic interests. It operates and inflicts hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalization would come into play. The detriment in the present case, as is noticeable, would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer in the present case. The aforesaid principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred.

In Maxwell's The Interpretation of Statutes, 12th edition (1969) it has been observed:—

> *"The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."*

18. The aforesaid principles and interpretations can apply to taxing statutes. In the present case we further feel the said principle should be applied as HDFC would necessarily have acted as per law and it is not the case of the Revenue that the bank had not paid taxes on their income. It is not a case of loss of revenue as such or a case where the recipient did not pay their taxes."

Consequently, the issues raised in the present appeals are covered by the judgment passed by this Court in ***JDS Apparels (P.) Ltd.*** (supra). Accordingly, no substantial question of law arises for consideration in the present appeals and the same are dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 24, 2022
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