

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI**

**BEFORE SHRI M. BALAGANESH (ACCOUNTANT MEMBER)
AND
SMT KAVITHA RAJAGOPAL (JUDICIAL MEMBER)**

I.T.A No.2186/Mum/2021 - A.Y. 2016-17

Ox ford University Press Unit No.4B 30 33, 4th Floor, Phoenix Paragon Plaza, CTS No 124B, 15, LBS Marg, Kurla West, Mumbai-400 070 PAN : AAACO3278K	VS	DCIT, International Taxation, Circle-3(2)(2), Mumbai 16th Floor, Air India Building, Nariman Point, Mumbai-400 021
APPELLANT		RESPONDENT

Assessee represented by	Shri Rishabh Malhotra
Department represented by	Mr. Soumendu Kumar Dash, Sr. AR

Date of hearing	17/11/2022
Date of pronouncement	13/12/2022

O R D E R

Per: M. Balaganesh(AM):

This appeal in ITA No.2186/Mum/2021 is directed against the order of Ld.Dispute Resolution Panel-2, Mumbai (Ld.DRP, in short) dated 22/03/2021 for assessment year 2016-17 which, in turn passed against the assessment order dated 23/-4/2021 passed by the Deputy Commissioner of Income Tax, Int. Tax Circle 3(2)(2), Mumbai (in short, Ld.AO) under section 143(3) r.w.s. 144C(13) for the assessment year 2016-17.

2. The only issue to be decided in this appeal is as to whether the Id. AO was justified in concluding whether the payments made by the assessee towards school support services would fall within the ambit of 'commission or

brokerage' so as to warrant deduction of tax at source in terms of section 194H of the Act in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record. Oxford University Press India Branch is a branch of Oxford University Press, United Kingdom. Assessee is a non-resident company. Assessee is a department of Oxford University, UK (which has the full legal name of The Chancellor, Masters and Scholars of the University of Oxford). University of Oxford is a civil corporation established under common law which was formally incorporated by the Oxford and Cambridge Act, 1571. The assessee company established its presence in India for the purpose of furthering the objective of excellence in research, scholarship and education of the University of Oxford by publishing worldwide. The assessee is in the business of publishing and selling educational books . Oxford University Press started its operations in India by opening a branch office in Mumbai in 1912. After Mumbai, offices were quickly established in Chennai and Kolkata and an office at Delhi opened in 1972 and the branch obtained the approval from Reserve Bank of India in 1977. The four regional offices located at New Delhi, Kolkata, Chennai and Mumbai serve as a nodal point where the books to be sold are distributed to the dealers. The assessee furnished a copy of the Tax Residency Certificate (TRC) duly issued by the HM, Revenue & Customs , UK. The assessee submitted that it being a resident of UK, shall therefore be entitled to be taxed in accordance with the provisions of India –UK Double Taxation Avoidance Agreement (DTAA). The assessee filed its return of income for the A.Y. 2016-17 on 30/11/2016 declaring total income of Rs 23,69,96,370/-. We find that the assessee is a non-resident foreign company, also having a Branch Permanent Establishment in India and hence would be governed in that status as per the provisions of the Indian Income Tax Act and also India-UK DTAA. Consequently the assessee will be taxed

on its income from business @ 40% plus applicable surcharge and education cess.

4. The assessee is in the business of publishing and selling educational books . The assessee's textbooks are prescribed by a large number of schools in India. In certain cases, the assessee may consider providing a School Support Payment to a school for specified educational purposes. In the return of income, the assessee claimed a deduction of Rs 1,11,75,926/- of School Support Payments made to various schools as per the provisions of the Act. Further the assessee claimed deduction on account of provision created for School Support Payments amounting to Rs 1,01,92,977/-. This expenditure of School Support Payments was classified by the assessee as Sales promotion expenditure and the same was subject matter of enquiry by the Id. AO wherein the Id. AO concluded that the assessee would be required to withhold tax at source u/s 194H of the Act as they are in the nature of 'commission or brokerage' . Accordingly, a show cause notice was issued to the assessee. The assessee responded before the Id. AO that its textbooks are prescribed by a large number of schools in India. The books published by assessee are purchased by the students through the booksellers. However, to expand assessee's business in India, the assessee made payments for incentivizing schools as School Support payments. The amount of such expenditure is computed on the basis of number of books purchased by the students of such schools. The assessee submitted the mechanics of the arrangement with these schools as under:-

a) The payment is made to private schools or those societies / trusts that own a group of private schools.

b) The payment is made by cheque and directly to the concerned society / school and not to any official of these institutions.

- c) The consideration payable is computed at a certain percentage on the basis of the quantum of books sold to the students of a given school. The intent behind using this yardstick is solely to achieve uniformity in the payments to be made to the schools and avoid any ambiguity in this regard.
- d) The basis intent of making payments to schools is for the purpose of promoting the business of the assessee to enhance its profitability and hence is for business expediency.
- e) The payments made to various schools are in the nature of an expenditure incurred wholly and exclusively for the purpose of carrying out the business.
- f) These payments are not in the nature of commission since there is neither principal –agent relationship between the payer and the recipient nor the recipient has rendered any services to the payer.
- g) The payments made are not in the nature of donation since the assessee has not made gratuitous payments to these schools.
- h) These payments to schools do not fall within any provisions under which the assessee is required to deduct tax at source.

Therefore, it was pleaded that the provisions of section 40(a)(ia) of the Act would not be applicable in the instant case. The Id. AO however did not heed to the contentions of the assessee and concluded - that the payments were made by the assessee to the schools only for schools making reference to its students to make them buy the textbooks published by the assessee; that the schools would give the list of authorized booksellers in this regard to the students ; that the students would directly approach the concerned booksellers and buy the textbooks published by the assessee from the booksellers ; that the quantum of payments to be made by the assessee to schools is based on certain percentage of sales based on the number of books sold by the concerned booksellers to the students referred by each school.

Hence the Id. AO concluded that this is nothing but the sales commission payments made by the assessee warranting deduction of tax at source in terms of section 194H of the Act. Since tax was not deducted at source, the Id.AO proceeded to disallow 30% of the said expenditure u/s 40(a)(ia) of the Act.

5. The disallowance made by the Id. AO in the draft assessment order was confirmed by the Hon'ble Dispute Resolution Panel (Id. DRP in short) with minor relief granted to the assessee. For the purpose of working out the disallowance u/s 40(a)(ia) of the Act, the Id. AO observed that the payments were made by the assessee to the following persons:-

S.No	Party Name	Nature of expenditure	Amount	DRP directions	Addition as per Final order
	SALES PROMOTION EXPENSES:				
1	ALL SAINTS SR.SEC.SCHOOL	Sales promotion expenses	90,403	Disallowance made by AO is confirmed	27121
2	ANAND ISHER SR. SEC. PUBL,IC SCHOOL	Sales promotion expenses	81,088	Disallowance made by AO is confirmed	24326
3	ANDHRA EDUCATION SOCIETY	Sales promotion expenses	52,539	Disallowance made by AO is confirmed	15762
4	BABUBHAI KNAKIA FOUNDATION	Sales	114236	Disallowance made	34271
5	BELIEVERS CHURCH INDIA	Sales promotion expenses	97,797	Disallowance made by AO is confirmed	29339
6	BHAGALPUTR PREFECTURE ASSOCIATION	Sales promotion expenses	97,797	Disallowance made by AO is confirmed	29339
7	BHAGWAN BUDDHA BANBHATTA CULTURAL WELFARE & CHARITBLE TRUST	Sales promotion expenses	59,758	Disallowance made by AO is confirmed	34053
8	EXCELLENT EDUCATIONAL AND CULTURAL SOCIETY	Sales promotion expenses	113510	Disallowance made by AO is confirmed	34053
9	FCM TRAVEL SOUTIONS (INDIA) PVT Ltd.	Sales promotion expenses	81,276	Disallowance made by AO is confirmed	24383
10	BHARTIYA VIDYA BHAVAN'S PUBLIC SCHOOL	Sales promotion expenses	76,044	Disallowance made by AO is confirmed	22813
11	CATHOLIC DICESE OF	Sales	499019	Disallowance	149706

	BIJNORE	promotion expenses		made by AO is confirmed	
12	CCMT-CHINMAYA VIDYALAYA	Sales promotion expenses	186266	Disallowance made by AO is confirmed	55880
13	IDEAL ASSOCIATION FOR MINORITY EDUCATION	Sales promotion expenses	681506	Disallowance made by AO is confirmed	204452
14	DOON INTERNATIONAL SCHOOL	Sales promotion expenses	56,160	Disallowance made by AO is confirmed	16848
15	DPS/ALL SAINTS/RAO PAHLAD SINGH SCHOOL	Sales promotion expenses	469627	Disallowance made by AO is confirmed	140888
16	DR.K.M.CHERIAN EDUCATIONAL SOCIETY	Sales promotion expenses	52,349	Disallowance made by AO is confirmed	15705
17	HI PLUS CREATIONS PVT LTD	Sales promotion expenses	623250	Disallowance made by AO is confirmed	186975
18	INGRAM MICRO INDIA PVT. LTD	Sales promotion expenses	6969997	Is a capital expenditure and hence to be disallowed 200% and capitalised	6969997
19	HILLWOODS INDIA SOCIETY	Sales promotion expenses	623250	Only 32000/- paid and not Rs.6,23,250/-	0
	TOTAL				8044801

5.1. The Id. AO also observed that the assessee had debited the provision for sales promotion amounting to Rs 1,01,92,977/- under the same nature of expenditure for which no deduction of tax at source was done and accordingly proceeded to disallow 30% of the said provision u/s 40(a)(ia) of the Act in the final assessment order. In effect, the Id. AO made the disallowance u/s 40(a)(ia) of the Act in respect of sales promotion expenditure as under:-

Actual payments made – 30% of Rs 35,82,679	-	10,74,804
Payments made to Ingram Micro India Pvt Ltd		
Treated as capital expenditure by Id. DRP but eligible		
For depreciation	-	69,69,997
Provision made – 30% of Rs 1,01,92,977	-	30,57,893
	- - - - -	

Total disallowance u/s 40(a)(ia) towards sales promotion 1,11,02,694

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However, the Id. AO had granted depreciation @ 60% on Rs 69,69,997/- as it was treated as capital expenditure.

6. Aggrieved, the assessee is in appeal before us.

7. The Id. AR before us drew our attention to the provisions of section 194H of the Act together with its Explanation and submitted that the schools had not acted on behalf of the assessee. The schools just suggest the textbooks published by the assessee and directs the students to buy the same from the concerned authorized booksellers, if the students so desire. Hence the schools merely refer the students to the booksellers. There is no agreement entered into between assessee and the schools. Since schools are not acting on behalf of the assessee, there is no principal-agent relationship established. The purchasing of these textbooks of assessee are not forced upon the students by the schools. The schools merely suggest that the textbooks of assessee are also additionally available in the market and if the students desire to enrich their knowledge, they could do so by buying the textbooks from the authorized booksellers. Hence it cannot be said that the schools are acting on behalf of assessee while rendering these referral services. It was argued that the schools are not subject to any control or supervision of the assessee and they operate independently without any instructions from the assessee. Accordingly, it was argued that the provisions of section 194H of the Act itself would not come into operation in these facts. On without prejudice basis, it was argued by the Id. AR that as per the second proviso to section 40(a)(ia) of the Act, if the recipients (i.e the schools / societies / trusts) had disclosed the receipts from the assessee as its income and filed their income tax returns, then no disallowance u/s 40(a)(ia) of the Act could be made in the hands of the assessee payer.

8. Per contra, the Id. DR argued that the schools had referred the textbooks of the assessee to the students. But for the reference of the schools to the students, the textbooks of the assessee could not have been sold. Eventhough there is no formal agreement between schools and the assessee, still commission is being determined and paid as a percentage of total sale of textbooks made by the authorized booksellers to the students of a particular school. Moreover, the schools had enabled the sale of textbooks through the booksellers and hence the payment of school support services made by the assessee to schools would also fall within the ambit of 'brokerage' as per provisions of section 194H of the Act read with its Explanation.

9. Having extensively heard both the parties, we have no hesitation in drawing the following conclusions:-

a) The assessee had made payment of School support services to various schools / societies for the services rendered by them to the assessee by way of referring the students to the booksellers to purchase the textbooks published by the assessee.

b) But for the reference made by the schools to the students, it would not be possible for the booksellers to sell the textbooks published by the assessee. Hence but for this reference from the schools, the assessee's profitability could not have been enhanced. Hence we hold that the payment of school support services is an expenditure wholly and exclusively incurred for the purpose of business of the assessee.

c) The substance of the transaction is to be given more importance than its form.

d) The Character of payment is to be analysed. On analyzing the same, the only logical conclusion that could be drawn is that the payments made by the

assessee squarely falls under the ambit of 'commission or brokerage' in terms of section 194H of the Act.

e) The case law relied upon by the Id. AR on the decision of Hon'ble Gujarat High Court in the case of CIT vs Intas Pharmaceuticals Ltd reported in 439 ITR 692 (Guj) is factually distinguishable and does not advance the case of the assessee herein.

f) Hence it could be safely concluded that the assessee is bound to deduct tax at source, failure of which, would be invited with disallowance u/s 40(a)(ia) of the Act. However, we find lot of force in the alternative argument advanced by the Id.AR before us that in view of second proviso to section 40(a)(ia) of the Act, since the payees / recipients had disclosed the said receipts in their returns of income, no disallowance should be made in the hands of the assessee payer. In view of this second proviso, we direct the Id. AO to make factual verification as to whether the recipients had duly disclosed the subject mentioned receipts in their returns of income. The assessee is directed to furnish the necessary details in this regard in the prescribed form. If on verification, it is found that the recipients had disclosed the receipts from the assessee in their returns of income, even if the entire income of the recipients is exempt under the provisions of the Act in their hands, still the assessee cannot be treated as an 'assessee in default' and consequentially the disallowance u/s 40(a)(ia) of the Act made in the hands of the assessee payer would have to be deleted. Accordingly, the revised grounds raised by the assessee are disposed off in the abovementioned manner.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 13/12/2022.

Sd/-

(SMT. KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Mumbai, Dt : 13th December, 2022

Pavanan / Dragon

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. /The Appellant ,
2. /The Respondent.
3. (/) The CIT(A)-
4. CIT
5. , ., /DR, ITAT,
Mumbai
6. /Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai