

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1616 OF 2011

The Commissioner of Income Tax – I Pune.

Vs.

Intervet India Pvt.Ltd.

.. Appellant.

.. Respondent.

Mr.Vimal Gupta, Sr. Advocate with Mr.Vipul Bajpayee, for the Appellant.

Mr.P.J.Pardiwala, Sr.Advocate with Mr.A.K.Jasani, for the Respondent.

CORAM : **S.C.DHARMADHIKARI &
G.S.KULKARNI, JJ.**

RESERVED ON : **18th MARCH, 2014.**

PRONOUNCED ON : **1st APRIL, 2014.**

JUDGMENT : (PER G.S.KULKARNI, J.)

1. Heard learned Counsel for the parties.

2. This appeal is preferred by the Revenue against the decision of Income Tax Appellate Tribunal, Pune Bench dated 13.5.2010 by which the appeal of Revenue against the order of the CIT (Appeals) has been rejected.

The Assessment year is 2005-06.

3. The facts in nutshell are:-

(i) The Respondent – assessee is engaged in the business of manufacturing and trade of biological vaccines and animal health care pharmaceutical products. The assessee sells its products either through consignment, commission agents or directly through the distributors / stockists. For the purpose of selling its products the assessee had appointed consignment agents in various territories. The stock of its products are transferred to the consignment agents who in turn sale the products under its own name to the distributors / dealers / stockists in their respective territories.

(ii) During the said assessment year, the assessee had introduced sales promotion scheme to boost the sale viz. 'Product discount scheme' and 'Product campaign.' The said schemes as described by the assessee are as under:-

1. Product Discount Scheme:- The product discount scheme (PDS) is a part of the product pricing strategy of the company. The PDS is circulated in advance in the market on monthly basis. Discounts are offered on the basis of value of the purchases by the distributors/ stockists, who are the customers for the company. (e.g. If a customer buys 10 quantity, he gets 2% discount vis a vis if he buys 100 quantity, he gets discount of 10%.) The PDS is account for as a net of sales in the books of intervet. The PDS is based on the sales quantum. It is common for all the distributors / stockists and no agreement in this regard has been entered into between Intervet and the distributors / stockists.

2. Product Campaign:- The product campaign is also a part of product pricing strategy of the company. The product campaign discount is seasonal for the promotion of specific product. The product campaign discount is for a specific period (say for 3 to 6 months). The product campaign discounts are offered on the basis of the quantum of the sales

during the campaign period. The product campaign credit notes are accounted for through value credit notes. Some times gifts e.g. Trophy, Shirt and Towel, are given to the distributors / stockists as a part of product campaign scheme. The objection of the product campaign is “ to promote the product sale and viability in competitor's market.”

(iii) In implementation of the aforesaid sales promotion schemes, the assessee passed on the incentives to the distributors / dealers / stockists through the consignment agent by way of sale credit notes.

(iv) The assessee filed its returns of income on 29.10.2005 declaring total income of Rs.6,33,78,696/-. The return was accompanied with audit report in form 3CA and 3CD under Section 44 AB of the Income Tax Act,1961, balance-sheet, profit and loss account, challans for payment of taxes. The case of assessee was selected for scrutiny and accordingly notice under Section 143(2) was issued to the assessee on 28.8.2006. In pursuance to the said notice, the assessee appeared before the Assessing Officer. The assessee produced all books of accounts, bills, vouchers, challans etc. The Assessing officer also called upon the assessee to submit the details of TDS deducted. From the details submitted by the assessee, it was revealed that the assessee had incurred sales promotion expenditure captioned under the head of “advertisement expenses” in respect of which the assessee was asked to further explain the said expenditure. Accordingly, the assessee had submitted details in support of its claim viz. Sales promotion expenditure bifurcated under the aforesaid two schemes viz. (i) the product discount scheme and (ii) the product

campaign. The assessee contended that the expenditure under the said claims are only for promotion of sales and hence had no relation to payment of any commission on sales. The assessee contended that therefore tax at source is not required to be deducted as the said expenditure did not fall within the ambit of Section 40(a)(ia) of the Income Tax Act.

(v) The Assessing Officer taking into consideration the details submitted by the assessee, passed an Assessment Order dated 20.12.2007 whereby the claim of the assessee in regard to non applicability of TDS on the aforesaid sales expenditure was rejected. The Assessing Officer observed that the assessee's case fell under Explanation (i) to Section 194H of the Income Tax Act which defined "commission or brokerage" to include 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 related to any asset, valuable article or things (not being securities). Applying the said definition, the Assessing Officer held that as the assessee was paying the dealers/ stockist/ agent for the services rendered by them for buying and selling of goods, on the basis of quantum of sale made by them, such expenditure cannot be considered as sales promotion expenditure and was required to be considered as commission payment. The Assessing officer held that as the Assessee had not deducted TDS on the said payment, the said expenses were liable to be disallowed under Section 40(a)(ia) of the Income

Tax Act. An amount of Rs.70,67,089/- was disallowed on this count for non deduction of TDS as commission payment under Section 40(a)(ia).

(vi) The Assessee being aggrieved by the assessment order passed by the Assessing Officer disallowing the amount of Rs.70,67,089/- for non deduction of TDS, filed an appeal before the Commissioner of Income Tax (Appeals). The Assessee inter alia contended that the Assessee had incurred sales promotional expenditure under the aforesaid sales promotion scheme introduced during the relevant assessment year to boost its sales. It was contended that the Assessing Officer had erred in disallowing the expenditure under Section 40(a)(ia) of the Act considering the sales promotion expenditure incurred by the Assessee in the nature of commission and for not deducting tax at source under section 194H of the Act. It was contended that the Assessing Officer ought to have held the sales promotion expenditure as expenditure for promotion of sales and not in the nature of commission as defined under Section 194H of the Income Tax Act, and hence tax was non deductible at source on the said expenditure. The Commissioner of Income Tax (Appeals) by a detailed order dated 5.8.2008 allowed the appeal of the Assessee on this ground and held that the distributors / stockists were not acting on behalf of the Assessee and that most of the credit was by way of goods received on meeting sales target and hence, it was observed that it cannot be said to be a payment received as 'commission' within the meaning of explanation (i) of Section 194H of the Income Tax Act. Accordingly, the addition of Rs.70,67,089/- was deleted.

(vii) The Revenue being aggrieved by the order passed by the Commissioner of Income Tax (Appeals) approached the Tribunal in an appeal under Section 253 of the Act. The Tribunal after considering the order of the Assessing Officer and the order passed by the Commissioner of Income Tax (Appeals) by its impugned decision has dismissed the appeal filed by the Revenue thereby confirming the order of CIT (Appeals) holding that the disallowance of the said sales promotion expenditure by the Assessing Officer was not correct. The Revenue being aggrieved by these concurrent findings of the CIT (Appeals) and the Tribunal has preferred this appeal under Section 260A of the Income Tax Act.

4. Learned Counsel appearing on behalf of the appellant submits that the appeal gives rise to the substantial questions of law as formulated in paragraph 5 of the Memo of appeal which read as under:-

“(1) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition of Rs.70,67,089/- made by the Assessing Officer on account of disallowance u/s.40(a) (ia) read with 194H of the Income Tax Act,1961 ?

(2) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal did not err in not following the explanations attached to Sec.194H of the Income Tax Act,1961 defining the work “Commission” ?

(3) Whether on the facts and in the circumstances of the case and in law, the Hon'bel Tribunal did not err in not considering the fact that the assessee was rendering services during the course of buying and selling of the

goods and payment for such services was 'commission' to the Distributors and stockiest and the assessee was therefore liable to deduct tax at source on such payments and the failure to do so attracted the provision of section 40(a)(ia) read with section 194H of the Income Tax Act,1961 ?”

6. On the other hand, learned Counsel appearing for the Assessee submitted that the concurrent findings of fact as recorded in the orders passed by CIT (Appeals) and the Tribunal do not call for any interference and no substantial questions of law arise in the present case. It was contended that the sales promotion expenditure as incurred on behalf of the Assessee under the Sales Promotion Schemes do not amount to payment of commission as falling under Section 194H of the Act.

7. We have perused the concurrent orders with the assistance of the learned Counsel for both the parties. The Assessee had undertaken sales promotional scheme viz. Product discount scheme and Product campaign as discussed hereinabove under which the Assessee had offered an incentive on case to case basis to its stockists / dealers / agents. An amount of Rs.70,67,089/- was claimed as a deduction towards expenditure incurred under the said sales promotional scheme. The relationship between the Assessee and the distributor / stockists was that of principal to principal and in fact the distributors were the customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributor / stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the

product distribution scheme or product campaign scheme to buy the assessee's product. The distributors / stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be a commission payment within the meaning of explanation (i) to Section 194H of the Income Tax Act, 1961. The contention of the Revenue in regard to the application of Explanation (i) below Section 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Explanation (i) below Section 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case. We are satisfied that in the facts of the present case that as regards sales promotional expenditure in question, the provisions of Explanation (i) below Section 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers / stockists of the Assessee is appropriately held to be not a payment of any commission in the concurrent findings as recorded by the CIT (Appeals) and the Tribunal.

7. Having considered the findings recorded by the CIT (Appeals) and the Tribunal and taking into consideration the provisions of Explanation (i) to Section 194H of the Act, we do not find that the appeal gives rise to any substantial question of law. It is accordingly dismissed.

(G.S.KULKARNI, J.)

(S.C.DHARMADHIKARI, J.)