

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN  
AND  
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**ITTA.Nos.633, 647 and 666 of 2015**

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**COMMON JUDGMENT:** (per Hon'ble Sri Justice Ramesh Ranganathan)

These appeals, under Section 260-A of the Income Tax Act, 1961 (for short "the Act"), are preferred by the Revenue against the common order passed by the Income Tax Appellate Tribunal in I.T.A. Nos.103, 104 and 105/Vizag/2014 dated 10.08.2015 for the assessment years 2008-09, 2009-10 and 2010-11.

The respondent-assessee is engaged in the manufacture and sale of beer to the Andhra Pradesh Beverages Corporation Limited (APBCL). After a TDS survey was conducted in the premises of the assessee on 25.03.2010, an assessment order was passed. The assessing officer held that the assessee had committed default in terms of Section 201(1) of the Act, and levied interest under Section 201(1A) of the Act in respect of the amounts paid under the trade schemes and discounts. The assessee contended that, under Section 194H of the Act, tax was required to be deducted at source at the time of payment of commission/brokerage; trade discount was a rebate given by the company to its dealer, which did not partake the character of commission; and Section 194H of the Act was not applicable. The assessing authority, however, held that discount is generally allowed as reduction in the price, and would be reflected in the invoice itself; in the assessee's case discounts were not reflected in the invoices; whatever be the nomenclature, payments were made for the services rendered to the tax deductor in the course of sale of goods; and Section 194H of the Act was applicable.

In the appeal preferred thereagainst, the Commissioner of Income Tax (Appeals) held that the relationship of principal and agent was not mandatory; payments were made by the assessee to their

del-credere agents, and they would be the payees and not the retail dealers; the relationship of principal and agent was established; the del-credere agents had rendered the service of promoting the brands/products manufactured by the assessee, inducing the retail dealers to place orders with APBCL for which the subject payments were made; and the conditions prescribed in Section 194H of the Act were satisfied requiring deduction of tax at source. Aggrieved thereby, the respondent-assessee carried the matter in appeal to the Tribunal.

In the order under appeal the Tribunal, after extracting Section 194H of the Act, held that the definition of “commission or brokerage” made it clear that the payment received by a person for acting on behalf of another for services rendered or for any services in the course of buying or selling of goods etc fell under the category of “commission or brokerage”; provision of service, by a person acting on behalf of another person, signified the principal- agent relationship between the payer and payee, since the agent acts on behalf of the principal; it cannot be said to be a service provided by one person on behalf of another person, and the said payment cannot fall under the definition of “commission”; in the case on hand, the assessee supplied beer to APBCL, a Government of Andhra Pradesh undertaking, which, in turn, sold beer to various retail dealers; in effect there was no direct relationship between the assessee and the retail dealers; however, since the turnover of the assessee would depend upon the sales effected with the retail dealers, the assessee had promoted a sales promotion scheme under which incentives were given to retail dealers upon achievement of certain targets in sales; by this scheme retail dealers were motivated to purchase more quantity of beer manufactured by the assessee, which in turn would increase the turnover of the assessee; in order to market the trade discount scheme, and also in order to promote sales of its products, the assessee had appointed del-credere agents; there was no dispute that payment made to del-credere agents, for the services provided by them to the

assessee, was treated as commission by the assessee; TDS had been deducted, under Section 194H of the Act, from them; the incentives payable under the trade discount scheme was disbursed by the assessee to the retail dealers through del-credere agents who had opened separate bank accounts for the said purpose; and the del-credere agents had only acted as a conduit for transferring incentives to the retail dealers.

Placing reliance on the judgment of the Supreme Court in ***Bhopal Sugar Industries Ltd. vs. STO***<sup>[1]</sup>, the Tribunal held that the essence of a “Contract of Agency” was that the agent did not sell the goods as his own, but sold the same as the property of the principal under his instructions and directions; an agent always acts on behalf of his principal, and the benefits of the activities of the agent would be reaped by the principal; since the agent was not the owner of the goods, the loss, if any, suffered by the agent was to be borne by the principal, and the agent was required to be indemnified by the principal; and the payment received by the agent for the services rendered to the principal is understood as “Commission”.

After referring to the judgment of the Gujarat High Court in the case of ***Ahmedabad Stamp Vendors Association vs. Union of India***<sup>[2]</sup>, the Tribunal held that the “element of agency” was an essential requirement in order to characterise a payment made for services provided as “commission”. The Tribunal relied on the judgment of the Bombay High Court in ***Harihar Cotton Processing Factory vs. CIT***<sup>[3]</sup> and held that commission was in the nature of recompense or reward for the services rendered, and expressed its inability to agree with the view of the Commissioner of Income Tax (Appeals) that the discount should be shown as a reduction in the selling price.

The Tribunal also relied on the order of the Visakhapatnam Bench of the Tribunal in ***Additional Commissioner of Income Tax***

**vs. Pearl Bottling (P) Ltd.**<sup>[4]</sup> wherein discounts offered to retailers, and also promotional discount, were held not to be “commission” as the relationship between the assessee therein and its distributor was on a principal to principal basis. The Tribunal held that, since the assessee had sold the goods to APBCL and the retail dealers had purchased the goods from APBCL, the sale between the assessee and APBCL, and the sale between APBCL and retail dealers, was on a principal to principal basis; the retail dealers had not provided any services to the assessee, since there was no direct connection between the assessee and retail dealers; the trade discount scheme was announced by the assessee in order to promote its sales; under the said scheme, the assessee had disbursed the eligible amount of incentive or rebate or discount to the retail dealers through its del-credere agents; payment was actually made to the retail dealers; and, as such, the payment constituted sales promotion expenses and did not fall within the category of “commission” attracting Section 194H of the Act.

Before us Sri K. Raji Reddy, learned Senior Standing Counsel for Income Tax, would reiterate the very same submissions as were urged by the Revenue before the Tribunal. As has been noted by the Tribunal, in the order under appeal, the Explanation to Section 194H of the Act defines “commission or brokerage” to include any payment received directly or indirectly by a person acting on behalf of another person for services rendered, or for any services in the course of buying or selling of goods, or in relation to any transaction relating to any asset, valuable articles or thing, not being securities. Payment received by a person from another, for services rendered, constitutes “commission” under the Explanation to Section 194H of the Act.

From the facts noted by the Tribunal, in the order under appeal, it is evident that beer was sold by the respondent-assessee to APBCL, and APBCL had, in turn, sold the beer, purchased by them from the respondent-assessee, to retail dealers. Both these transactions were

independent of each other, and were on a principal to principal basis. No services were rendered by the retail dealer to the respondent-assessee, and the incentive given by the respondent-assessee, to the retailers as trade discount, was only to promote their sales. The Tribunal rightly held that in the absence of relationship of a principal and agent, and as there was no direct relationship between the respondent-assessee and the retailer, the discount offered by the respondent-asessee to the retailers could only be treated as sales promotion expenses, and not as commission, as no services were rendered by the retailers to the respondent-assessee.

An appeal under Section 260-A of the Act would lie only on a substantial question of law. Save perversity, or a finding based on no evidence, the findings of fact recorded by the Tribunal would not give rise to a substantial question of law. The findings of the fact recorded by the Tribunal cannot be said to suffer from any such infirmity. The order of the Tribunal does not also suffer from any error of law necessitating interference in proceedings under Section 260-A of the Act. We see no reason, therefore, to interfere with the order of the Tribunal in the exercise of our jurisdiction under Section 260A of the Act.

The appeals fail and are, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

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**RAMESH RANGANATHAN, J**

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**M. SATYANARAYANA MURTHY, J**

Date: 16.06.2016

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[\[1\]](#) AIR 1977 SC 1275  
[\[2\]](#) 257 ITR 201 (Guj.)  
[\[3\]](#) 1960(39)ITR 594  
[\[4\]](#) 46 SOT 133