REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6964-6965 OF 2015

Singapore Airlines Ltd. ..... Appellant

VERSUS

C.I.T., Delhi ..... Respondent

WITH

CIVIL APPEAL NO. 6966-6967 OF 2015

KLM Royal Dutch Airlines ..... Appellant

VERSUS

C.I.T. New Delhi ..... Respondent

WITH

CIVIL APPEAL NO. 6968 OF 2015

British Airways PLC ..... Appellant

VERSUS

Commissioner of Income Tax (TDS) Delhi ..... Respondent

JUDGEMENT

Surya Kant, J:

1. The question that arises for our consideration pertains to the interpretation of Section 194H of the Income Tax Act, 1961 ("IT Act") as introduced by the Finance Act, 2001, with effect from 01.04.2000. The provision requires deduction of tax at source ("TDS") at 10% plus surcharge from payments falling under the definition of "Commission" or "Brokerage" under the Section.

A. THE AIRLINE INDUSTRY

2. Within the aviation industry during the relevant period, the base fare[1] for air tickets was set by the International Air Transport Association ("IATA") with discretion provided to airlines to sell their tickets for a net fare lower than the Base Fare, but not higher.[2] In essence, the IATA set the ceiling price for how much airlines may charge their customers. This formed part of

1 "Base Fare"
2 "Net Fare"

the IATA's overall responsibility of overseeing the functioning of the industry.

3. The air carriers were also required to provide a fare list to the Director General of Civil Aviation ("DGCA") for approval. The prices that were rubber stamped by the DGCA may be equivalent to or lower than the Base Fare set by the IATA. Alongside setting the standard pecuniary amount for tickets, the IATA would provide blank tickets to the travel agents acting on behalf of the airlines to market and sell the travel documents. The arrangement between the airlines and the travel agents would be governed by Passenger Sales Agency Agreements ("PSA"). The draft templates for these contracts are drawn up by the IATA and entered into by various travel agents operating in the sector, with the IATA which signs on behalf of the air carriers. The PSAs set the conditions under which the travel agents carry out the aforementioned sale of flight tickets, along with other ancillary services, and the remuneration they are entitled to for these activities.

4. Once these tickets were sold, a 7% commission designated by the IATA would, be paid to the travel agent for its services as

"Standard Commission" based on the price bar set by the IATA.[3] This would be independent of the Net Fare quoted by the air carriers themselves. The 7% commission on the Base Fare consequently triggered a requirement on the part of the airline to deduct TDS under Section 194H at 10% plus surcharge. The details of the amounts at which the tickets were sold would be transmitted by the travel agents to an organization known as the Billing and Settlement Plan ("BSP"). The BSP functions under the aegis of the IATA and manages *inter alia* logistics vis-à-vis payments and acts as a forum for the agents and airlines to examine details pertaining to the sale of flight tickets.

5. The BSP stores a plethora of financial information including the net amount payable to the aviation companies, discounts, and commission payable to the agents. The system consolidated the amounts owed by each agent to various airlines following the sale of the tickets by the former. The aggregate amount accumulated in the BSP would then be transmitted to each air carrier by the IATA in a single financial transaction to smoothen the process and prevent the need to make multiple payments over time.

3 Prior to 01.01.2002, the Standard Commission was paid at the rate of 9%.

6. Within this framework, the airlines would have no control over the Actual Fare at which the travel agents would sell the tickets.[4] While the ceiling price could not be breached, as mentioned earlier, the agents would be at liberty to set a price lower than the Base Fare pegged by the IATA, but still higher than the Net Fare demanded by the airline itself. Hence, the additional amount that the travel agents charged over and above the Net Fare that was quoted by the airline would be retained by the agent as its own income.

7. An illustration of how such a transaction would be carried out and the monetary gains made by the respective parties is shown below:

Base Fare for Singapore-Delhi (Set by the IATA)	**Net Fare (Set by the Airline)**	**Actual Fare (Set by the Travel Agent)**	**Standard Commission (7% of the Base Fare)**	**Supplementary Commission (Actual Fare – Net Fare)**
Rs. 1 Lakh	Rs. 60,000	Rs. 80,000	7% of Rs. 1 Lakh = Rs. 7,000	Rs. 80,000-60,000 = Rs. 20,000
Ceiling Price	***Income of the Assessee***	***Rs. 20,000 left after payment of Net***	***Income of the travel agent***	***Additional Income of the travel agent***

4 "Actual Fare"

		Fare to the Assessee		

8. This auxiliary amount charged on top of the Net Fare was portrayed on the BSP as a "Supplementary Commission" in the hands of the travel agent. Thus, the heart of the dispute between the Assessee airlines and the Revenue in this case lies in the characterization of the income earned by the agent besides the Standard Commission of 7% and whether this additional portion would be subject to TDS requirements under Section 194H.

B. FACTUAL BACKGROUND

9. This batch of Civil Appeals arises from a judgement passed on 13.04.2009 by the High Court of Delhi whereby the High Court allowed the appeal by the Respondents/Revenue and held that Appellants/Assessees were required to deduct TDS under Section 194H of the Income Tax Act, 1961 ("IT Act"), on the Supplementary Commission accrued to travel agents entrusted

by the Appellants to sell airline tickets. As a consequence of the Assessees' failure to carry out the subtraction of the requisite amount of TDS, they were declared "assessees in default" under Section 201 and would accordingly be subject to payment of interest and penalties under Sections 201(1A) and 271C of the IT Act.

10. The relevant Assessment Year is 2001-02. Spurred by the reintroduction of Section 194H in the IT Act by the Finance Act, 2001[5], the Revenue sent out notices to the air carriers operating in the country to adhere to the requirements for deduction of TDS. Upon suspecting deficiencies on the part of certain airlines in their compliance with statutory requirements under the IT Act, the Revenue carried out surveys under Section 133A of the IT Act.[6] Following the investigation, the Assessee airlines were

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5 **73. Insertion of a new provision for deduction of tax at source from payments in the nature of commission or brokerage**
73.1 An effective method of widening the tax base is to enlarge the scope of deduction of income tax at source. Apart from bringing in more persons in the tax net, it also helps in the reporting of correct income. An item of income which needs to be covered within the scope of deduction of income tax at source is the income by way of commission (not being insurance commission referred to in section 194D) and brokerage. The Act has, therefore, inserted a new section 194H relating to deduction of tax at source from income by way of commission (not being insurance commission referred to in section 194D) and brokerage.

6 **[133A. Power of survey.—**
(1) Notwithstanding anything contained in any other provision of this Act, an income-tax authority may enter—
(a) any place within the limits of the area assigned to him, or
(b) any place occupied by any person in respect of whom he exercises jurisdiction, [or]
[(c) any place in respect of which he is authorised for the purposes of this section by such income-tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place,]

allegedly found to have paid their respective travel agents certain amounts as Supplementary Commission on which the purported TDS that the carriers had failed to deduct was as follows:

Assessee	**Supplementary Commission**	**Short Fall in Deduction of TDS**
Singapore Airlines	Rs. 29,34,97,709	Rs. 2,93,49,770 (Not including surcharge)
KLM Royal Dutch Airlines	Rs. 179,00,49,410	Rs. 18,25,85,040 (Including surcharge)
British Airways	Rs. 46,24,28,310	Rs. 4,71,67,688 (Including surcharge)

11. The Revenue contended that the travel agents operating on behalf of the Appellants during AY 2001-02 had accrued the aforementioned amounts to themselves as Supplementary Commission on which, as per Section 194H read with Circular No. 619 of 04.12.1991 issued by the Central Board of Direct Taxes ("CBDT"), TDS was to be deducted by the Assessee airlines. Show Cause notices for the recovery of the short fall in TDS were sent to each of the air carriers. Subsequently, successive Assessment Orders were passed holding that the airlines were

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[at which a business or profession or an activity for charitable purpose is carried on, whether such place be the principal place or not of such business or profession or of such activity for charitable purpose, and require any proprietor, trustee, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession or such activity for charitable purpose—]...

assessees in default under Section 201 of the IT Act[7] for their failure to deduct TDS from the Supplementary Commission, and the demands raised by the Revenue in respect of each of them were confirmed.

12. Following addition of surcharge, and interest under Section 201(1A), the aggregate amount calculated as being owed to the Revenue was:

Assessee (Liability)	**Surcharge + Interest**	**Aggregate Amount**
Singapore Airlines (Rs. 2,93,49,770)	Rs. 58,700 + Rs. 21,13,224	Rs. 3,19,21,694
KLM Royal Dutch Airlines (Rs. 18,25,85,040)	Rs. 2,24,26,580 (Interest Only)	Rs. 20,50,11,620
British Airways (Rs. 4,71,67,688)	Rs. 60,08,391 (Interest Only)	Rs. 5,31,76,079

13. Penalty proceedings were directed to be initiated against all the Assessees under Section 271C of the IT Act. The Assessees proceeded to file their respective appeals before the Commissioner of Income Tax (Appeals) against the Assessment

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7 **201. Consequences of failure to deduct or pay.—**
[(1) Where any person, including the principal officer of a company,—
(a) who is required to deduct any sum in accordance with the provisions of this Act; or
(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act,
then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax...

Orders. The Commissioner (Appeals) passed a common order, rejecting the appeals on merits but directing that any transactions dated prior to 01.06.2001, the date on which Section 194H came into effect, would be excluded from the demand for TDS.

14. The Assessees subsequently approached the Income Tax Appellate Tribunal, Delhi ("ITAT"). In CA No. 6964-6965 of 2015 concerning Singapore Airlines, the ITAT accepted the contentions of the Assessee and set aside the Assessment Order passed against it, while holding that:-

(i) The amount realized by the travel agent over and above the Net Fare owed to the air carrier is income in its own hands and is payable by the customer purchasing the ticket rather than the airline;

(ii) The "Supplementary Commission", therefore, was income earned via proceeds from the sale of the tickets, and not a commission received from the Assessee airline;

(iii) The airline itself would have no way of knowing the price at which the travel agent eventually sold the flight tickets;

(iv) Section 194H referred to "service rendered" as the guiding principle for determining whether a payment fell within the ambit of a "Commission". In this case, the amounts earned

by the agent in addition to the Net Fare are not connected to any service rendered to the Assessee;

(v) The Revenue had erroneously and baselessly assumed that the travel agent had, in every dealing, realized the entire difference between the Net Fare and the IATA Base Fare and characterized the entire differential as a Supplementary Commission. Section 194H could not be pressed into operation on the basis of such surmises and without actual figures being proved.

15. The ITAT followed the same reasoning and allowed the appeals by the Assessees in the remaining Civil Appeals. Aggrieved by the quashing of the Assessment Orders, the Revenue brought separate appeals before the Delhi High Court. A Division Bench of the High Court clubbed together various Income Tax Appeals all of which concerned tax liability for the airline industry. In the context of the applicability of Section 194H of the IT Act, the Division Bench reversed the findings of the ITAT and restored the Assessment Orders. The relevant part of the High Court judgement may be summerised as follows:-

(i) The principles to be kept in mind when interpreting the application of Section 194H of the IT Act are:

a. The existence of a principal-agent relationship between the Assessee airlines and the travel agents;
b. Payments made to the travel agents in the nature of a commission;
c. The payments must be in the course of services provided for sale or purchase of goods;
d. The income received by the travel agent from the Assessees may be direct or indirect, given expansive wording of Section 194H;
e. The stage at which TDS is to be deducted is when the amounts are rendered to the accounts of the travel agents;

(ii) All the Assessees had accepted that a principal-agent relationship subsisted between them and the travel agents. The terms of the PSAs also indicated that the actions of the agents in procuring customers was done on behalf of the airlines and not independently;

(iii) Hence, the additional income garnered by the agents was inextricably linked with the overall principal-agent relationship and the responsibilities that they were entrusted with by the Assessees;

(iv) There was no transfer in terms of title in the tickets and they remained the property of the airline companies throughout the transaction;

(v) The Assessees were only required to make the deductions under Section 194H of the IT Act when the total amounts were accumulated by the BSA.

16. The High Court reimposed the tag of "assessee in default" under Section 201 and the levy of interest on short fall of TDS under Section 201(1A) on the Assessees.[8] The aggrieved Assessees are now before this Court in this batch of appeals.

C. SUBMISSIONS

17. Mr. C.S. Agarwal, learned Senior Counsel, appearing for the Assessees in CA Nos. 6964-6965 of 2015, and Nos. 6966-6967 of 2015, has vehemently urged us to appreciate the incorrectness of the impugned judgment, on the following grounds:-

(i) After the tickets are provided to the travel agent to sell, the Assessees no longer have any control over the price at which the agent finally sells them. Thus, the Supplementary Commission that accrues to the travel

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8 **201. Consequences of failure to deduct or pay.—**
[(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—
(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and
(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,
and such interest shall be paid before furnishing the statement in accordance with the provisions of subsection (3) of section 200…

agent is due to dealings between the agent and the customer. The airline is not involved in this leg of the transaction;

(ii) There are two separate transactions via two distinct legal relationships that are spawned during the process of selling the tickets. The first is between the air carrier and the travel agent for which the Standard Commission is paid. The second relationship is between the agent and the customer in course of which the agent attempts to sell the ticket for the highest price possible to maximize its income;

(iii) The airline is oblivious to the final price at which the agent sells the travel documents to the customer. The portion in addition to the Net Fare which the agent retains is not paid by the airline at all but is a payment to the agent directly by the purchaser of the ticket. Hence, the question of deducting TDS cannot feasibly arise as there is no payment by the Assessee to begin with. Reliance was placed on a decision of the Bombay High Court in ***CIT v. Qatar Airways***.[9]

(iv) The High Court has made various factual errors in terms of how the industry functions:-

9 2009 SCC OnLine Bom 2179

a. The PSA is signed by the IATA on behalf of the airlines and not by the airline itself, as stated by the Division Bench;

b. The High Court opined that the Assessees would have access to information regarding the price at which the travel agent sells the tickets via the BSP. However, the High Court failed to note that the BSP is under the control of the IATA which aggregates the amounts and sends the final bill to the airline at fixed times, rather than after each transaction between the agent and the customer;

c. The High Court has failed to consider the PSA which clearly does not govern the dealings between the agent and the customer. Section 211 of the Contract Act, 1872, requires agents to act in accordance with their duties and obligations under the relevant agreement.[10] However, if the PSA itself does not address certain aspects of the agent's functioning, these facets cannot

10 **211. Agent's duty in conducting principal's business.—**
An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.

fall under the ambit of the principal-agent relationship, as defined under Section 182 of the Contract Act;

(v) Section 194H of the IT Act refers to a "Commission" as being payment in the course of "services rendered". In the second segment of the transaction, there is evidently no service being provided by the agent to the Assessee;

(vi) The usage of the "Supplementary Commission" nomenclature by the BSP when aggregating the amounts involved in the transaction is of no legal consequence as this terminology is employed purely for convenience. This does not cloak the amount earned by the agent from the customer as a "Commission" within the meaning of Section 194H;

(vii) The actions undertaken by the agents are of their own accord and do not fall under the terms of the PSA. Such a scenario is most appropriately characterized as an agent acting on his own account without the knowledge of the principal under Section 216 of the Contract Act.

(viii) The travel agents had already filed tax returns which were inclusive of the amounts earned by them from the sale of tickets over and above the Net Fare. Hence, income tax had already been imposed on this additional portion of income

and the matter was revenue neutral. Consequently, no TDS was liable to be deducted at this stage as it would be akin to taxing the same amount twice. A judgement of this Court in ***Hindustan Coca Cola Beverages Pvt. Ltd. v. Commissioner of Income Tax***[11] was cited in this regard.

Learned Counsel appearing for the Assessee in CA No. 6968 of 2015 broadly adopted the submissions made by learned Senior Counsel, Mr. Agarwal, in full.

18. On the Revenue's side, we have benefitted from the able assistance of Mr. Vikramjit Banerjee, learned Additional Solicitor General, as well as learned Counsel, Mr. Rupesh Kumar. They rebuffed the contentions of the Assessees in the following terms:

(i) The distinction that the Assessees have attempted to draw between the two purported legs of the ticket selling process is artificial and irrelevant. The overall relationship that exists between the airline and the travel agents is that of principal-agent, and having admitted this position before the High Court, no contrary stands were possible at this stage;

11 (2007) 8 SCC 463

(ii) The PSAs between the Assessees and the travel agents clearly showed that every activity carried out by the latter in terms of selling the tickets was on behalf of the air carrier, further cementing the principal-agent equation;

(iii) At no point did title in the tickets pass from the airline to the agents to transform the relationship into one between two principals. The distinction between a principal-agent relationship, and that between two principals, in the context of Section 194H was expounded upon by the Gujarat High Court in ***Ahmedabad Stamp Vendors Ass. v. Union of India***[12] and was later affirmed by this Court[13];

(iv) The Assessees would have access to the data maintained by the BSP to delineate the Supplementary Commission amount from the Standard Commission. Moreover, there was no requirement for TDS to be deducted after every transaction. It was completely practical and permissible for the airlines to assemble the amounts together and make a comprehensive TDS deduction at the end of the month;

(v) The language of Section 194H is inclusive and covers any "direct or indirect" payments to the agent. Hence, there was no need for the payment to be made directly by the

12 2002 SCC OnLine Guj 135
13 (2014) 16 SCC 114

Assessees to the travel agents in order for it to fall under the ambit of "Commission" and be subject to TDS. Reliance was placed on a decision of this Court in ***Director, Prasar Bharati v. CIT***[14];

(vi) The taxing of the auxiliary amounts in the hands of the travel agents as income, did not cure the default by the airlines in deduction of TDS.

We will now proceed to examine the rival submissions.

D. ANALYSIS

D.1 INTERPRETATION OF SECTION 194H OF THE IT ACT

19. The central point for our consideration lies in the interpretation of what amounts to a "Commission" under Section 194H of the IT Act. The Assessees and the Revenue emphasized upon the nature of the relationship between an airline and a travel agent under the framework of the PSA that governs their arrangement. Before analysing the competing interpretations placed before us, the relevant part of Section 194H requires examined and reads as follows:

14 (2018) 7 SCC 800

> ***194H. Commission or brokerage.***
>
> ***Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five per cent:***
>
> ***Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed fifteen thousand rupees:***
>
> ***...***
>
> ***Explanation.—For the purposes of this section,—***
>
> ***(i) "commission or brokerage" includes 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 relating to any asset, valuable article or thing, not being securities;***

20. Explanation (i) of Section 194H highlights the nature of the legal relationship that exists between two entities for payments between them to qualify as a "commission". Consequently, our endeavour must be to determine whether the travel agents were "acting on behalf of" the airlines during the process of selling flight tickets. As elaborated upon earlier, the Assessees do not dispute that a principal-agent relationship existed during the

payment of the Standard Commission. The point on which the air carriers differ from the Revenue is the purported second part of the transaction i.e. when the tickets were sold to the customer and for which the travel agents earned certain amounts over and above the Net Fare set by the Assessees.

21. The definition of a "principal" and an "agent" is provided under Section 182 of the Contract Act. The provision states:

> ***182. "Agent" and "principal" defined.—An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".***

22. Due to the interlinked nature of Section 194H of the IT Act and Section 182 of the Contract Act, our examination will axiomatically focus upon both provisions. The ambit of a contract of agency has been elaborated upon lucidly by this Court on various occasions. In ***Lakshminarayan Ram Gopal and Sons Ltd. vs. The Government of Hyderabad***[15] several treatises in English Law on the ambit of a contract of agency and its distinction from a relationship of servant and master, were listed:

> ***"10. The distinction between a servant and an agent is thus indicated in Powell's Law of Agency, at page 16 :-***

15 (1955) 1 SCR 393

(a) Generally a master can tell his servant what to do and how to do it.

(b) Generally a principal cannot tell his agent how to carry out his instructions.

(c) A servant is under more complete control than an agent,

and also at page 20 :-

(a) Generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions. An agent receives his principal's instructions but is generally free to carry out those instructions according to his own discretion.

(b) Generally, a servant, qua servant, has no authority to make contracts on behalf of his master. Generally, the purpose of employing an agent is to authorise him to make contracts on behalf of his principal.

(c) Generally, an agent is paid by commission upon effecting the result which he has been instructed by his principal to achieve. Generally, a servant is paid by wages or salary.

11. The statement of the law contained in Halsbury's Laws of England - Hailsham Edition - Volume 22, page 113, paragraph 192 may be referred to in this connection :-

"The difference between the relations of master and servant and of principal and agent may be said to be this : a principal has the right to direct what work the agent agent has to do : but a master has the further right to direct how the work is to be done."

The position is further clarified in Halsbury's Laws of England - Hailsham Edition - Volume 1, at page 193, article 345 where the positions of an agent, a servant and independent contractor are thus distinguished :-

" An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is

> ***entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."***

23. This Court in ***Gordon Woodroffe & Co. v. Sheikh M.A. Majid & Co.***[16] also drew the distinction between a 'contract of agency' and a 'contract of sale', on the following basis:

> ***"The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as agent for the proceeds of the sale. On the other hand, the essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and who is therefore liable to account for the proceeds."***

24. To understand whether or not such transfer of title had taken place, this Court in ***Khedut Sahakari Ginning and Pressing Society v. State of Gujarat***[17] had placed emphasis on the need to closely scrutinize the contract between the parties and opined that:

16 1966 Supp SCR 1
17 (1971) 3 SCC 480

> ***"5. Whether a particular agreement is an agency agreement or an agreement of sale depends upon the terms of the agreement. For deciding that question, the terms of the agreement have got to be examined. The true nature of a transaction evidenced by a written agreement has to be ascertained from the covenants and not merely from what the parties choose to call it. The terms of the agreement must be carefully scrutinised in the light of the surrounding circumstances."***

25. This was reiterated in ***Bhopal Sugar Industries Ltd. v. STO, Bhopal***[18] by a 3-judge bench which held:

> ***"5...Thus the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire by including a transaction within the fold of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e. g., fixation of price, submission of accounts, selling in a particular area or territory and so on. These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incidents of a sale. A contract of agency, however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the***

18 (1977) 3 SCC 147

principal. This is yet another dominant factor which distinguishes an agent from a buyer-pure and simple."

26. From the catena of cases elaborating on the characteristics of a contract of agency, the following indicators can be used to determine whether there is some merit in the Assessees' contentions on the bifurcation of the transaction into two parts: *Firstly*, whether title in the tickets, at any point, passed from the Assessees to the travel agents; *Secondly*, whether the sale of the flight documents by the latter was done under the pretext of them being the property of the agents themselves, or of the airlines; *Thirdly*, whether the airline or the travel agent was liable for any breaches of the terms and conditions in the tickets, and for failure to fulfil the contractual rights that accrued to the consumer who purchased them.

27. Our examination of the nature of the arrangement between the parties will be premised on a reading of the PSA. Learned Senior Counsel for the Assessees has gone to great lengths to show us that there isn't even a whisper in the PSA regarding the transaction between the travel agents and the customer. According to him, this shows that the second part of the

transaction falls outside the ambit of the principal-agent relationship.

28. On the contrary, Mr. Kumar, learned Counsel for the Revenue, has emphasized on the point that at no stage does the PSA indicate that title in the goods i.e. the tickets, transfers from the air carrier to the agent. Clause 6.1 of the PSA states in clear terms that the travel documents "***...are and remain the sole property of the Carrier...until duly issued and delivered pursuant to a transaction under this Agreement.***" No rebuttal on this averment was forthcoming from learned Senior Counsel for the Assessees, and hence, we have no hesitation in agreeing with Mr. Kumar's submission that the tickets remained the property of the airline. No contract of sale between two principals was ever in existence between the Assessees and the travel agent as per the criteria laid down in ***Bhopal Sugar Industries (Supra)*** and ***Gordon Woodroffe & Co. (Supra)***.

29. When we take a closer look at the PSA, there are numerous portions which crystallize the intentions of the parties when entering into the agreement. The recitals of the PSA state:

Each IATA Member (hereinafter called "Carrier") which appoints the Agent, represented by the Director General of IATA acting for and on behalf of such IATA Member.

30. In the same vein, Clauses 3, 9 & 15 also indicate that:

3.1 The Agent is authorized to sell air passenger transportation on the services of the Carrier and on the services of other are carriers as authorized by the Carrier. The sale of air passenger transportation means all activities necessary to provide a passenger with a valid contract of carriage including but not limited to the issuance of a valid Traffic Documents and the collection of monies therefore. The Agent is also authorized to sell such ancillary and other services us the Carrier may authorize;

3.2 All services sold pursuant to this Agreement shall be sold on behalf of Carrier and in compliance with Carrier's tariffs, conditions of carriage and the written instructions of the Carrier as provided to the Agent. The Agent shall not in any way vary or modify the terms and conditions set forth in any Traffic Document used for services provided by the Carrier, and the Agent shall complete these documents in the manner prescribed by the Carrier.

x*----------x*----------**

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9. Remuneration

For the sale of air transportation and ancillary services by the Agent under this Agreement the Carrier shall remunerate the Agent in a manner and amount as may be stated from time to time and communicated to the Agent by the Carrier. Such remuneration shall constitute full compensation for the services rendered to the Carrier.

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x

15. Indemnities and Waiver

15.1 The Carrier agrees to indemnify and hold harmless the Agent, its officers and employees from and against liability for any loss, injury, or damage, whether direct, indirect or consequential, arising in the course of transportation or other ancillary services provided by the Carrier pursuant to a sale made ty the Agent hereunder or arising from the failure of the Carrier to provide such transportation or services, except to the extent that such less, injury, or damage is caused or

contributed to by the Agent, its officers, employees or any other person acting on the Agent's behalf.

31. Several elements of a contract of agency are satisfied by these clauses, and the recitals. Every action taken by the travel agents is on behalf of the air carriers and the services they provide is with express prior authorization. The airline also indemnifies the travel agent for any shortcoming in the actual services of transportation, and any connected ancillary services, as it is the former that actually retains title over the travel documents and is responsible for the actual services provided to the final customer. Furthermore, the airline has the responsibility to provide full and final compensation to the travel agent for the acts it carries out under the PSA.

32. The irresistible conclusion is that the contract is one of agency that does not distinguish in terms of stages of the transaction involved in selling flight tickets. While Assessees had readily accepted the existence of the principal-agent relationship, their consternation had been directed at the so-called second limb of the deal that is exclusively between the agent and the customer. However, the submissions advanced in this regard are clearly not supported by the bare wording of the PSA itself. The

High Court in the impugned judgment is correct in its holding that the arrangement between the agent and the purchaser is not a separate and distinct arrangement but is merely part of the package of activities undertaken pursuant to the PSA.

33. Regardless, learned Senior Counsel, Mr. Agarwal, remained resolute in his submission that the principal-agent relationship does not cover the Supplementary Commission on the basis of arguments that are independent of the PSA. We shall now turn to a discussion of those. Primarily, he contended that Supplementary Commission goes from the hands of the consumer and into the pockets of the travel agents without any intervention from the Assessees. Hence, the prerequisite of a payment on which TDS can be deducted in the first place is not fulfilled.

34. Section 194H of the IT Act, as noted earlier, does not distinguish between direct and indirect payments. Both fall under Explanation (i) to the provision in classifying what may be called a "Commission". As submitted by learned Additional Solicitor General, Mr. Banerjee, this Court in ***Prasar Bharati***

(Supra) had expounded on the ambit of Section 194H by ruling that:

> ***"28. The Explanation appended to Section 194H defines the expression "commission or brokerage". It is an inclusive definition and includes therein 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 relating to assets, valuable Article or thing not being securities. Clause (ii) defines professional services; Clause (iii) defines securities; and Clause (iv) provides a deeming fiction for treating any income so as to attract the rigor of the Section for ensuring its compliance.***
>
> ***.....***
>
> ***31... lastly, the definition of expression "commission" in the Explanation appended to Section 194H being an inclusive definition giving wide meaning to the expression "commission", the transaction in question did fall under the definition of expression "commission" for the purpose of attracting rigor of Section194H of the Act."***

35. Therefore, if we view the ambit of Section 194H in an expansive manner, the factum of the exact source of the payment would be of no consequence to the requirement of deducting TDS. Even on an indirect payment stemming from the consumer, the Assessees would remain liable under the IT Act. Consequently, the contention of the airlines regarding the point of origination for the amounts does not impair the applicability of Section 194H of the IT Act.

36. The next point raised was regarding the practicality and feasibility of making the deductions, regardless of whether Section 194H may, in principle, cover the indirect payment to the travel agent. The Assessees have pointed out that the travel agent acts on its own volition in setting the Actual Fare for which the flight tickets are sold, and as a symptom of this, the airline itself has no knowledge whatsoever regarding how much Supplementary Commission it has drawn for itself.

37. Before delving into this aspect of the matter, it would be remiss of us to not mention that this issue has seen contradictory stands taken among different High Courts. Learned Senior Counsel for the Assessees brought to our notice a decision by the Bombay High Court in ***Qatar Airways (Supra)*** during the course of his submissions. The Division Bench in that case held:

> ***3...For Section 194H to be attracted, the income being paid out by the Assessee must be in the nature of commission or brokerage. Counsel for the Revenue contended that it was not the case of the Revenue that this difference between the principal price of the tickets and the minimum fixed commercial price amounted to payment of brokerage. We find however, that in order to deduct tax at source the income being paid out must necessarily be ascertainable in the hands of the Assessee. In the facts of the present case, it is seen that the airlines would have no information about the exact rate at which the tickets were ultimately sold by their agents since the agents had***

> ***been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price and it would be impracticable and unreasonable to expect the Assessee to get a feed back from their numerous agents in respect of each ticket sold. Further, if the airlines have discretion to sell the tickets at the price lower than the published price then the permission granted to the agent to sell it at a lower price, according to us, can neither amount to commission nor brokerage at the hands of the agent. We hasten to add any amount which the agent may earn over and above the fixed minimum commercial price would naturally be income in the hands of the agent and will be taxable as such in his hands. In this view of the matter, according to us, there is no error in the impugned order and the question of law as framed does not arise. The appeal is therefore, dismissed in limini.***

38. As may be evident, there is significant similarity between the conclusions reached by the Bombay High Court and the arguments raised by the Assessees. Learned counsel for the Revenue, on the other hand, urged that the Delhi High Court's stand in the impugned judgment is the correct position, both in terms of the law under Section 194H and a practical understanding of how the airline industry operates. It is prudent for our analysis to extract the following relevant part of the impugned judgment which supports the Revenue's case:

> ***26. Insofar as the first submission is concerned that there is no evidence of receipt of money by the travel agent over and above the net fare is answered really by the second submission of the assessee-airline which is that they become aware of the monies received by the***

> ***travel agent only when the billing analysis is placed on record by the BSP. Therefore, to say that the revenue is seeking to cast the liability on the assessee-airline to deduct tax when there is no evidence of income received by the travel agent is factually an incorrect submission. It should be remembered that what is relevant is whether the Section 194H casts an obligation on the assessee to deduct tax at source. Once an obligation is cast it is for the assessee-airline to retrieve the necessary information from the travel agent who works under its supervision and put itself in a position to deduct tax on the actual income received by the travel agent on sale of each of such traffic documents/air tickets sold on behalf of the assessee-airline. Since the best evidence in respect of the sale of Traffic Documents/Air Tickets is available with the assessee-airline or its agents it cannot in our view take up the stand that the machinery for deduction of tax has failed. The very fact that this information is made available by the billing analysis made by BSP would show that it is possible to retrieve the information by the assessee-airline, therefore, we do not accept the view of the Tribunal that there is no evidence of monies having been received by the travel agent over and above the net fare or that the said information is not available at the relevant point in time and, therefore, the assessee-airline cannot be held to be an assessee-in-default.***

39. For completeness, there is another decision of the Madras High Court as well which takes the same stance as the Delhi High Court in the impugned judgment *(Supra)*. In ***Around the World Travel and Tours P. Ltd. v. Union of India***[19] the Assessee was a travel agent that had filed a Writ Petition before the High Court seeking a declaration that TDS under Section

19 2003 SCC OnLine Mad 1027

194H would be deducted only for the Standard Commission amount actually paid to it by the airlines it was operating for. The stay had initially been granted by the High Court but then subsequently vacated, against which the Assessee had filed an appeal. The Madras High Court held:

> ***8. The injunction sought by the appellants to restrain the airlines from deducting tax is not an injunction that can be granted. The liability for payment of tax arises, in terms of the statute and the perception of the appellants cannot determine the true content of the statutory provision and cannot afford a sound basis for the court injuncting the person, who may otherwise be liable to deduct tax, from deducting tax on payment made to the agents.***
>
> ***9. We must also notice that the appellants have not placed before the court the scheme under which the payments are made or accounted. It is the definite stand of the caveator airline that what is made available to the agents is supplementary commission, which amount the agents are free to deal with in any manner they like. The agents, according to the airlines, can pass on the entire amount of supplementary commission to the passengers or may retain a part of it and pass on only a portion of that commission.***

40. The striking aspect of the dispute in ***Around the World Travels (Supra)*** was the insistence by the airline that the amount retained by the Assessee agent was Supplementary Commission. This contributed to the conclusion reached by the High Court that the amount earned by the agent appeared to be

susceptible to TDS deduction under Section 194H. In this background, the landscape in regard to Section 194H and its applicability to the auxiliary amounts earned by a travel agent on top of the Net Fare demonstrates a lack of uniformity among High Courts.

41. The contrary opinions by the High Courts necessitates a definitive ruling from us to bring clarity on this point. We may now return to the specific argument by learned Senior Counsel for the Assessees on the issue of the airline's lack of knowledge regarding the Actual Fare and resultant impracticality of expecting it to deduct TDS on amounts that it isn't even aware of.

42. Learned Counsel for the Revenue has rebutted this by highlighting the manner of operation of the BSP where financial data regarding the sale of tickets is stored. According to him, the BSP agglomerates the data from multiple transactions and transmits it twice a month, or bimonthly. The expectation from the Revenue is not that the Assessees make TDS deductions in real time as the sale of tickets by the agents is recorded on the BSP. Rather, a more reasonable approach is taken whereby the air carriers must simply calculate the accumulated amount of

TDS, at the end of each month after having received the requisite date from the IATA and the BSP and make a single comprehensive deduction. It was submitted that the Assessee cannot be absolved from its statutory duties under Section 194H, irrespective of the viability of operating in this manner.

43. Having analysed the rival contentions and keeping in mind the principal-agent relationship between the parties, we find significant merit in the arguments by the Revenue. The mechanics of how the airlines may utilize the BSP to discern the amounts earned as Supplementary Commission and deduct TDS accordingly is an internal mechanism that facilitates the implementation of Section 194H of the IT Act. The specifics of this system were seemingly not placed before the Bombay High Court in ***Qatar Airways (Supra)***.

44. Further, the lack of control that the airlines have over the Actual Fare charged by the travel agents over and above the Net Fare, cannot form the legal basis for the Assessees to avoid their liability. As averted to in ***Lakshminarayan Ram Gopal & Son Ltd. (Supra)*** a contract of agency does not entail control over the minutiae of the agent's actions. Such a level of oversight would

more closely resemble a master-servant relationship. In a principal-agent relationship, it is sufficient for the latter to be informed of the responsibilities and duties under the contract and certain guidelines on how to satisfy them. An agent undoubtedly retains a sizeable level of discretion on how to achieve the desired results. This characteristic of a contract of agency was cemented by this Court in ***Qamar Shaffi Tyabji v. The Commissioner, Excess Profits Tax, Hyderabad***[20] in the following manner:

> ***"7...An agent has to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given in the course of his work. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. Indeed, learned counsel for the appellant accepts as correct the distinction made above and also accepts that the true relation between the Mills and the Trustees was that of principal and agent; but he contends that as between the Trustees and the appellant the relation was one of master and servant. We consider that this contention is wholly unsound. We have examined the original agreement between the Mills and the Trustees dated April 12, 1934. Clause 9 of that agreement said that "the agents may regulate and conduct their proceedings in such manner as they may from time to time determine and may delegate all or any of their powers, authorities and discretions as secretaries,***

20 (1960) 3 SCR 546

> ***treasurers and agents of the company to such person or persons and on such terms and conditions as they may think fit, subject to the approval of the Board of Directors of the company." The delegation in favour of the appellant was made under this clause. The position was therefore this: the Trustees as agents had express authority to name another person to act for the principal in the business of the agency, and they named the appellant with the approval of the Board of Directors. Therefore, the appellant, was neither a servant nor a mere sub-agent. He was an agent of the principal for such part of the business of the agency as was entrusted to him."***

45. The fact that the travel agent has discretion to set an Actual Fare which is above the Net Fare has no effect on the nature of the relationship between the parties. A contract of agency permits an agent to carry out acts on its own volition provided it does not contravene the purpose of the agency contract and the interests of the principal. The accretion of the Supplementary Commission to the travel agents is an accessory to the actual principal-agent relationship under the PSA. In such a commercial arrangement, the benefit gained by an agent is incidental to and has a reasonably close nexus with the responsibilities that were entrusted to it by the principal air carrier. Such incidental benefits or actions must come under the ambit of the relationship, subject to any express limitations articulated in the contract itself or under the Contract Act.

46. Apart from this, Clause 7.2 of the PSA sets out that any payments collected by an agent pursuant to sale of air transportation and ancillary services are held in a fiduciary capacity for the Carrier until a proper accounting is made. The Clause in question is reproduced below:

> *7.2 All monies collected by the Agent for transportation and ancillary services sold under this Agreement, including applicable remuneration which the Agent is entitled to claim hereunder, are the property of the Carrier and must be held by the Agent in trust for the Carrier or on behalf of the Carrier until satisfactorily accounted for to the Carrier and settlement made.*

47. Notwithstanding the lack of control over the Actual Fare, the contract definitively states that "all monies" received by the agent are held as the property of the air carrier until they have been recorded on the BSP and properly gauged. As already mentioned by learned Counsel for the Revenue, and accepted by learned Senior Counsel for the airlines, the BSP demarcates "Supplementary Commission" under a separate heading. Hence, once the IATA makes the payment of the accumulated amounts shown on the BSP, it would be feasible for the Assessees to deduct TDS on this additional income earned by the agent, and whatever remains after the subtraction under Section 194H would count as income for the agents themselves. It is at this

point that settlement is made fully and finally, in line with Clause 7.2 of the PSA.

48. The only remaining objection from the Assessees concerns Section 216 of the Contract Act. To appropriately appreciate the scope of the provision, a combined reading of both Sections 215 & 216 is necessary. Both these provisions are reproduced below for ease of reference:

> ***215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.—***
>
> ***If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.***
>
> ***x----------x----------x***
>
> ***216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—***
>
> ***If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.***

49. In the facts before us, we find that Sections 215 and 216 of the Contract Act are of no assistance. We have already ascertained that the PSA does not explicitly address the issue of

Supplementary Commission at all. Further, an agent acting of its own account does not, in principle, alter the nature of a contract of agency and only gives rise to the consequences mentioned under Sections 215 and 216 of the Contract Act if the conditions contained within them exist. We do not consider it helpful to dwell on this point.

50. In any case, given that information regarding the Supplementary Commission was available to the airlines, we have no doubt that the airlines could not have absolved themselves of liabilities under the IT Act attached to the accrual of that additional portion of income by the agent. These amounts were incidental to the transaction by which the flight tickets were sold on behalf of the air carriers and was for their benefit. The old adage that a party to a contract cannot "both approbate and reprobate" is apt for this factual scenario.[21]

51. From the exposition of law on the ambit of a contract of agency and its resultant effect on the classification of the difference between the Actual Fare and Net Fare as being a "Commission" liable to deduction of TDS, we are left unmoved by the submissions of the Assessees. The interpretation of the PSA,

21 ***Nagubai Ammal & Ors. v. B. Shama Rao & Ors.***, [1956] 1 SCR 451.

through the prism of Section 182 of the Contract Act and Section 194H of the IT Act, provided by the Revenue appears to be the correct position. Thus, we affirm the conclusion reached by the Delhi High Court in the impugned judgment on the nature of the relationship between the airlines and the travel agents, and the liability that is attached to deduction of TDS on the Supplementary Commission. As a consequence of our analysis, the view taken by the Bombay High Court in ***Qatar Airways (Supra)*** stands overruled.

D.2 REVENUE NEUTRAL

52. Having held in favour of the Revenue in connection with the applicability of Section 194H of the IT Act, the remaining issue for us to address is whether the matter has been rendered revenue neutral. Learned Counsels on both sides have agreed that the travel agents who received the Supplementary Commission for AY 2001-02, have already shown these amounts as their income. Subsequently, they have paid income tax on these sums.

53. Learned Senior Counsel for the Assessees, Mr. Agarwal, has contended that there has been no loss to the Revenue on this

count. Learned Counsel for the Revenue, Mr. Kumar, admitted the payment of income tax by the travel agents but has argued that this does not absolve the airlines of their infraction in terms of the mandate under Section 194H of the IT Act.

54. This Court in ***Hindustan Coca Cola Beverage Pvt. Ltd. v. Commissioner of Income Tax (Supra)*** was confronted with a similar situation where the recipient of income on which the Assessee had failed to deduct TDS under Section 194C of the IT Act, had already paid income taxes on that amount. The Court held:

> ***"6. The Tribunal upon rehearing the appeal held that though the appellant-assessee was rightly held to be an 'assessee in default', there could be no recovery of the tax alleged to be in default once again from the appellant considering that Pradeep Oil Corporation had already paid taxes on the amount received from the appellant. It is required to note that the department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the tax department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (dedicator- assessee) since the tax has already been paid by the recipient of income.***
>
> ***....***

> ***9. Be that as it may, the circular No. 275/201/95- IT(B) dated 29.1.1997 issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under Section 201(1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deducted-assessee. However, this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deducted-assessee or the liability for penalty under Section 271C of the Income-tax Act."***

55. A similar principle was also advanced in the context of Section 192 of the IT Act in ***Commissioner of Income Tax v. Eli Lilly & Co. (India)***[22]:

> ***"98...In our view, therefore, the tax-deductor- assessee (respondent(s)) were duty bound to deduct tax at source under Section 192(1) from the Home Salary/special allowance(s) paid abroad by the foreign company, particularly when no work stood performed for the foreign company and the total remuneration stood paid only on account of services rendered in India during the period in question.***
>
> ***99. As stated above, in this matter, we have before us 104 civil appeals. We are directing the AO to examine each case to ascertain whether the employee-assessee (recipient) has paid the tax due on the Home Salary/special allowance(s) received from the foreign company. In case taxes due on Home Salary/special allowance(s) stands paid off then the AO shall not proceed under Section 201(1). In cases where the tax has not been paid, the AO shall proceed under Section 201(1) to recover the shortfall in the payment of tax.***
>
> ***100. Similarly, in each of the 104 appeals, the AO shall examine and find out whether interest has been paid/recovered for the period between the date on***

22 (2009) 15 SCC 1

> ***which tax was deductible till the date on which the tax was actually paid. If, in any case, interest accrues for the aforestated period and if it is not paid then the Adjudicating Authority shall take steps to recover interest for the aforestated period under Section 201(1A).”***

56. It appears to us that if the recipient of income on which TDS has not been deducted, even though it was liable to such deduction under the IT Act, has already included that amount in its income and paid taxes on the same, the Assessee can no longer be proceeded against for recovery of the short fall in TDS. However, it would be open to the Revenue to seek payment of interest under Section 201(1A) for the period between the date of default in deduction of TDS and the date on which the recipient actually paid income tax on the amount for which there had been a shortfall in such deduction.

57. As noted earlier, learned Counsels for the parties were *ad idem* on the fact that the travel agents had already paid taxes on the amounts earned by them. The Revenue had contended that the default in payment of TDS could not be excused purely on this ground. However, the decisions in ***Hindustan Coca Cola (Supra)*** and ***Eli Lilly & Co. (Supra)*** clearly bar their ability to

pursue the Assessee airlines for recovery of the shortfall in TDS and restricts them to imposing interest for the default.

58. In this context, the Assessees have not provided us with the specifics of when the travel agents paid their taxes on the Supplementary Commission. Furthermore, the CBDT Circular of 29.01.1997[23], invoked in ***Hindustan Coca Cola (Supra)*** has not been placed before us either. It will be necessary to fill in these missing details and determine the amount of interest that the Assessees are liable to pay before this matter can be closed. Thus, we deem it appropriate to remand the matter back to the Assessing Officer to flesh out these points in terms of the interest payments due for the period from the date of default to the date of payment of taxes by the agents.

59. The denouement of our examination of these issues concerns the levy of penalties under Section 271C of the IT Act. The Assessing Officer had initially directed that penalty proceedings be commenced against the Assessees for the default in subtraction of TDS but we are informed that this process was put in cold storage while the airlines and the revenue were contesting the primary issue of the applicability of Section 194H

23 Circular No. 275/201/95- IT(B)

before various appellate forums. Section 271C provides for imposition of penalties for failure to adhere to any of the provisions in Chapter XVII-B, which includes Section 194H. This provision must be read with Section 273B which excuses an otherwise defaulting Assessee from levy of penalties under certain circumstances. The twin provisions read as follows:

> ***Section 271C: Penalty for Failure to Deduct Tax at Source:***
>
> ***(1) If any person fails to -***
>
> ***(a) Deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or***
>
> ***(b) Pay the whole or any part of the tax as required by or under, -***
>
> ***(i) Sub-section (2) of Section 115O; or***
>
> ***(ii) Second proviso to Section 194B,***
>
> ***then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.***
>
> ***(2) Any penalty imposable under Sub-section (1) shall be imposed by the Joint Commissioner.***
>
> ***x----------x----------x***
>
> ***Section 273B: Penalty not to be imposed in Certain Cases:***
>
> ***Notwithstanding anything contained in the provisions of clause (b) of Sub-section (1) of Section 271, Section 271A, Section 271AA, Section 271B, Section 271BA, Section 271BB, Section 271C, Section 271CA, Section 271D, Section 271E, Section 271F, Section 271FA, Section 271FB, Section 271G, clause (c) or clause (d) of Sub-section (1) or Sub-section (2) of Section 272A, Sub-section (1) of Section 272AA, or Sub-section (1) of Section 272BB or Sub-section (1A) of Section 272BB or Sub-section (1) of Section 272BBB or clause (b) of Sub-***

> ***section (1) or clause (b) or clause (c) of Sub-section (2) of Section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.***

60. The ambit of "reasonable cause" under Section 273B requires our scrutiny before we reach the conclusion that the Assessing Officer is required to also calculate potential penalties to be levied against the Assessees. This Court in ***Eli Lilly & Co. (Supra)*** had elaborated, in the passage extracted below, on the context in which Section 273B may be utilized:

> ***94...Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason._***
>
> ***95. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue... The tax-deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the***

> ***view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source.***

61. We find some parallels between the facts of the present case and the situation in ***Eli Lilly & Co. (Supra)***. The liability of an airline to deduct TDS on Supplementary Commission had admittedly not been adjudicated upon by this Court when the controversy first arose in AY 2001-02. While learned Counsel for the Revenue, Mr. Kumar, has notified us that various airlines were deducting TDS under Section 194H at that time, this does not necessarily mean that the position of law was settled. Rather, it appears to us that while one set of air carriers acted under the assumption that the Supplementary Commission would come within the ambit of the provisions of the IT Act, another set held the opposite view. The Assessees before us belong to the latter category. Furthermore, as we have highlighted earlier, there were contradictory pronouncements by different High Courts in the ensuing years which clearly highlights the genuine and bona fide legal conundrum that was raised by the prospect of Section 194H being applied to the Supplementary Commission.

62. Hence, there is nothing on record to show that the Assessees have not fulfilled the criteria under Section 273B of the IT Act. Though we are not inclined to accept their contentions, there was clearly an arguable and "nascent" legal issue that required resolution by this Court and, hence, there was "reasonable cause" for the air carriers to have not deducted TDS at the relevant period. The logical deduction from this reasoning is that penalty proceedings against the airlines under Section 271C of the IT Act stand quashed.

E. CONCLUSION

63. Our conclusion in terms of the application of Section 194H of the IT Act to the Supplementary Commission amounts earned by the travel agent is unequivocally in favour of the Revenue. Section 194H is to be read with Section 182 of the Contract Act. If a relationship between two parties as culled out from their intentions as manifested in the terms of the contract between them indicate the existence of a principal-agent relationship as defined under Section 182 of the Contract Act, then the definition of "Commission" under Section 194H of the IT Act stands attracted and the requirement to deduct TDS arises. The realities

of how the airline industry functioned during the period in question bolsters our conclusion that it was practical and feasible for the Assessees to utilize the information provided by the BSP and the payment machinery employed by the IATA to make a consolidated deduction of TDS from the Supplementary Commission to satisfy their mandatory duties under Chapter XVII-B of the IT Act.

64. Having said this, in light of the consensus between the parties that the travel agents have already paid income tax on the Supplementary Commission, there can be no further recovery of the shortfall in TDS owed by the Assessees. However, interest may be levied under Section 201(1A) of the IT Act. As an epilogue to this aspect of the matter, the Assessing Officer is directed to compute the interest payable by the Assessees for the period from the date of default by them in terms of failure to deduct TDS, till the date of payment of income tax by the travel agents. It will be open to the Assessing Officer to look into any details that are necessary for completion of this exercise, including verification of whether tax was actually paid at all by the agents on the amounts from which TDS was supposed to be subtracted. Given

that no documentary evidence was placed before us, we are conscious that there may be certain anomalies which the Assessing Officer is best positioned to iron out.

65. In the eventuality that any of the agents have not yet paid taxes on the Supplementary Commission, the Revenue will be at liberty to proceed in accordance with law under the IT Act for recover of shortfall in TDS from the airlines. However, we limit the ability to levy penalties against the Assessees in light of Section 273B of the IT Act.

66. Having concluded so, we hope that closure has been brought to a legal controversy that has persisted for two decades. While we reject the arguments of the Assessees on merits in terms of their liability under Section 194H of the IT Act, we hold in their favour on the count of the matter having been rendered revenue neutral due to the apparent payment of income taxes on the amounts in question by the travel agents. The Assessing Officer is directed to expeditiously complete the assignment of determining the interest payable in accordance with the guidelines laid down above, so as to bring a quietus to the litigation.

67. In summation, we allow the appeals in part.

68. Pending applications, if any, consequently stand disposed of.

.....J.
(SURYA KANT)

.....J.
(M.M. SUNDRESH)

New Delhi:
November 14, 2022