

Brokerage in respect of securities transactions is outside the ambit of sec. 194H TDS

Summary – The High Court of Bombay in a recent case of SHCIL Services Ltd., (the Assessee) held that brokerage paid in respect of transaction in securities is specifically excluded from purview of section 194H; no TDS was to be deducted.

Facts

- The petitioner company was an wholly owned subsidiary of SHCIL and was engaged in the business of stock brokerage. The petitioner in his return claimed expenditure of Rs. 26.20 crores, paid to its holding company towards sub brokerage at the rate of 75 per cent on total brokerage earned.
- The Assessing Officer disallowed the entire amount on the ground that same was excessive under section 40A(2)(b) and also for failure to deduct tax at source under section 194J on brokerage paid. Accordingly, demand of tax Rs. 12 crores was made by the Assessing Officer.
- On appeal, the Commissioner (Appeals) while pending the petitioner appeal stayed the demand of tax of Rs. 12 crores on payment of Rs. 3 crores.
- The petitioner deposited the said amount and on expiry of stay period, sought further extension of stay with the Assistant Commissioner but same was rejected. On further application, the Commissioner granted conditional stay of demand on further payment of Rs. 3 crores. At this stage, the Assessing Officer was seeking to make coercive recovery on the ground of non-compliance of above conditional stay order.
- On writ :

Held

- At the out set considerable substance is found in the submissions made by the petitioner that both the Assistant Commissioner and the Commissioner have ignored the parameters laid down by this Court in *KEC International Ltd. v. B.R. Balkrishnan* [\[2001\] 251 ITR 158](#) for disposing a stay application.
- It is apparent that neither the Assistant Commissioner nor the Commissioner has referred to the petitioner's case nor has given some short *prima facie* reasons for requiring the petitioner to deposit 50 per cent of the tax liability. *Prima facie*, there appears to be substance in the petitioner's contention that in view of specific provision for deduction of tax on account of brokerage being provided in section 194H, the occasion to apply section 194J of the Act would not arise. Besides, at this stage, the petitioner's alternative submission that if sub brokerage paid by the petitioner to its holding company is considered excessive or unreasonable, then in that event, as in the earlier years the sub-brokerage paid at the rate of 50 per cent be allowed as an admissible expenditure. On that basis, the petitioner would not be liable to pay anything more than about Rs.60 lakhs based on the detailed calculations given by the petitioner.

- In view of the above discussion, accepting the statement made by the petitioner to deposit a sum of Rs. 60,67,101 within four weeks. This petition is allow and set aside the impugned orders of Assistant Commissioner and Commissioner and grant interim stay on recovery during pendency of the appeal before Commissioner (Appeals).
- Since the hearing of the appeal has already commenced, the Commissioner (Appeals) shall not wait for deposit of the aforesaid amount. The stay granted by this order shall further continue to operate for a period of four weeks from the date on which the order in original passed by Commissioner (Appeals) is communicated to the petitioner and if the said decision is adverse to the petitioner.