

Sum paid to non-executive director for giving suggestion for better performance of Co. won't be treated as commission

Summary – The Pune ITAT in a recent case of Kirloskar Oil Engine Ltd., (the Assessee) held that Payment made by assessee-company to its non-executive directors for giving suggestions for better performance of company, did not amount to 'commission or brokerages' requiring deduction of tax at source under section 194H

Facts

- The assessee-company was engaged in the business of manufacturing and sale of generating sets bimetal strips and bearings, engine valves, castings etc. During relevant year, assessee made payments to non-executive directors.
- The Assessing Officer opined that payments made to the non-executive Directors fell within the definition of 'commission or brokerage' as defined in *Explanation* (i) to section 194H and, thus the assessee should have deducted tax at source while making said payments.
- Since assessee failed to deduct tax at source while making payments in question, the Assessing Officer treated assessee to be assessee in default in terms of section 201(1) and 201(1A).
- The Commissioner (Appeals) by placing reliance on the decision of Pune Bench of the Tribunal in the case of *Bharat Forge Ltd. v. Addl. CIT* [\[2013\] 36 taxmann.com 574/144 ITD 455](#) accepted the appeal of the assessee and directed the Assessing Officer not to treat the assessee as assessee-in-default.
- On revenue's appeal:

Held

- Under the provisions of section 194H tax is to be deducted at source on the payments made to a resident by way of commission (not being insurance commission referred to in section 194D) or brokerage. A bare perusal of the definition would show that it is an inclusive definition which includes payments made directly or indirectly for services rendered in the course of buying or selling goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.
- The services rendered do not include professional services. The non-executive Directors appointed on the Board of Directors of the company do not render any of the services referred to in the definition of 'commission or brokerage'. A role of non-executive Director is to provide constructive suggestion for the better performance of the company and to protect the interest of the organization/shareholders by whom he has been nominated on the Board.
- Thus, by no stretch of imagination the payments made to the non-executive Director fall within the ambit of term 'commission or brokerage' as defined under section 194H of the Act.

- The provisions relating to deduction of tax at source on payment of fee for professional or technical services are contained in section 194J. The provisions of section 194J have been amended by the Finance Act, 2012 with effect from 1-7-2012 *vide* which clause (ba) has been inserted in sub-section (1) of section 194J.
- The provisions of newly inserted clauses are enforceable with effect from 1-7-2012, therefore, it will have no application in the assessment years under appeal.
- The Co-ordinate Bench of the Tribunal in the case of *Bharat Forge Ltd. (supra)* had occasion to deal with this issue. The Tribunal held that no tax at source was required to be deducted under section 194J from the payments made towards the Director's sitting fees prior to 1-7-2012.
- The revenue has not been able to distinguish the findings of the Tribunal in the case of *Bharat Forge Ltd. (supra)*. Thus following the same, the findings of Commissioner (Appeals) on this issue are affirmed.
- In the result, the appeal of the revenue is dismissed.