IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.99 OF 2009

The Commissioner of Income Tax (TDS),
9th floor, K.G. Mittal Ayurvedic Hospital Bldg.,
Charni road (W),
Mumbai 400 002. ...Appellant.

Vs.

Qutar Airways,
M.K. Marg, Mumbai-400 020. ...Respondent.

Mr. Parag Vyas with Mr.P.S.Sahadevan for the Appellant.

Mr. Nanshad Thakkar i/by Mulla & Mulla & C.R & C. for the Respondent.

CORAM: F.I. REBELLO & R.S. MOHITE, JJ.

DATE: 26th March, 2009

PC:

1. The question of law as raised in this appeal is as under.

Whether on the facts and in the circumstances of the case and in law, the difference in amount between commercial price and published price is special commission in the nature of commission or brokerage within the meaning of explanation (1) of Sec.194 H of the I.T.Act 1961?

2. It is not in dispute that the airlines have a discretion to reduce its published price to its tickets. In the present case, the airlines had an agreement with their agents to sell their tickets at a minimum fixed commercial price which was lower than the published price but was of a variable nature and could be increased by the agent, at this discretion, to the extent upto the published price. It is not in dispute that under rules of IATA, the commission payable to the agent was 9% of the published price. it is an admitted position that the TDS has been deducted while payment of this commission of 9%. It is the contention of the revenue that the difference between the published price and the minimum fixed commercial price amounts to an additional special commission and therefore, TDS is deductible on this amount under Section 194H of the Income Tax Act.

3. On perusal of the order of the ITAT, we find that it proceeded on the basis of its earlier decision in the case of Korean Air Vs. DCIT in which, in similar circumstances, it was held that TDS was not deductible. We find that though an appeal was preferred against the aforesaid decision the same has been rejected by this court for non removal of the office objections under Rule 986. Be that as it may, for Section 194-H 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 air lines 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 air lines 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. Appeal is therefore, dismissed in limini.

(R.S. Mohite, J.) (F.I.Rebello, J.)