***** **THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on : 13.04.2009

ITA Nos. 306/2005 & 123/2006,

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

SINGAPORE AIRLINES LTD ..... Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate

ITA Nos. 121/2006 & 432/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

KLM ROYAL DUTCH AIRLINES ..... Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate

ITA No. 124/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

PAKISTAN INTERNATIONAL AIRLINES CORP. ..... Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate

ITA No. 116/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

KUWAIT AIRWAYS CORPORATION ..... Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate

ITA Nos. 952/2008 & 964/2008

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Lata Bansal & Ms Anshul Sharma, Advocates

versus

AIR FRANCE ..... Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate.

ITA Nos. 51/2006, 119/2006 & 120/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Lata Bansal & Ms Anshul Sharma, Advocates in ITA No. 51/2006
Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel in ITA No. 119/2006 & 120/2006

versus

THAI AIRWAYS INTERNATIONAL
PUBLIC CO. LTD. ..... Respondent

Through: Mr M.S. Syali, Sr. Advocate with Ms Mahua C. Kalram, Mr Saubhagya Aggarwal & Mr Aseem Mowar, Advocates.

ITA Nos. 256/2006, 969/2008 & 897/2008

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Lata Bansal & Ms Anshul Sharma, Advocates

versus

BRITISH AIRWAYS PLC ..... Respondent

Through: Mr M.S. Syali, Sr. Advocate with Ms Mahua C. Kalra, Mr Saubhagya Aggarwal & Mr Aseem Mowar, Advocates.

ITA No. 1501/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Lata Bansal & Ms Anshul Sharma, Advocates

versus

M/S AIR INDIA LTD ..... Respondent

Through: Mr Sandeep Sethi, Sr. Advocate with Ms Padma Priya, Advocate.

ITA No. 1269/2007

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Rashmi Chopra, Advocate

versus

LUFTHANSA GERMAN AIRLINES ..... Respondent

Through: Mr P.H. Parekh, Sr. Advocate with Mr D.P. Mohanty, Advocate

ITA No. 1139/2005

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Lata Bansal& Ms Anshul Sharma, Advocates

versus

AIR FRANCE ..... Respondent

Through: Mr O.P. Sapra, Mr Sandeep Sapra & Mr Kalyan Abraham, Advocates

ITA No. 108/2007

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

KUWAIT AIRWAYS CORPORATION ..... Respondent

Through: Mr Satyen Sethi & Mr Johnson Bara, Advocates

ITA Nos. 105/2008 & 336/2008

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Ms Prem Pram Lata Bansal& Ms Anshul Sharma, Advocates

versus

BELAIR TRAVELS & CARGO P. LTD ..... Respondent

Through: Mr Kuldeep Singh, Advocate

ITA Nos. 117/2006 & 118/2006

COMMISSIONER OF INCOME TAX
NEW DELHI ..... Appellant

Through: Mr R.D. Jolly, Sr. Standing Counsel with Mr Paras Chaudhary, Jr. Standing Counsel.

versus

UNITED AIRLINES ..... Respondent
Through: Mr Ajay Vohra & Ms Kavita Jha, Advocates

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. In these batch of appeals, which have been preferred by the Revenue, there are three issues which require consideration of this Court.

(i) In the first batch of appeals; the issue which arises is whether supplementary commission received by travel agents of assessee-airlines is a 'commission' within the meaning of Section 194H of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). If that be so, the failure on the part of the assessee-airlines would render them liable for consequences under Section 201(1) and 201(1A) of the Act.

(ii) In the second set of appeals, the issue for consideration is whether certificates issued by the Assessing Officer to the assessee-airlines

under Section 197 of the Act permitting the assessee-airlines to deduct tax at source at a lower rate or even 'nil' rate would also cover the supplementary commission.

(iii) The third set of appeals raise the issue as to whether tickets issued by assessee-airlines to its travel agents at a concessional price would result in bringing the transaction within the ambit of Section 194H of the Act. If that be so, would the assessee-airlines be liable for the ensuing consequences under Sections 201(1) and 201(1A) of the Act.

2. The lead case in these batch of appeals is ITA No. 306/2005 entitled "CIT vs Singapore Airlines". The judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 19.10.2004 passed in TDSA No. 58/Del/302 pertains to assessment year 2001-02. It is a common ground that all other appeals have been disposed of based on the aforesaid judgment of the Tribunal. The counsel for the assessees-airlines who have appeared before us have submitted that the facts, in issue, are common. Therefore, except for a few submissions the submissions are more or less common. Wherever counsel have laid stress on a particular point or made a submission different from one already made - we shall refer to the same as we go along with the narration of the facts and submissions in our judgment.

3. Therefore, in order to decide these appeals, it would suffice except for the eventuality articulated hereinabove, if we were to note the facts set out and submissions made in the records of the authorities below in

ITA No. 306/2005. Keeping this ground rule in mind, let us examine the issues at hand.

4. The provision which is the subject matter of the debate, that is Section 194H, was first brought on to the statute book by the Finance (2) Act, 1991 w.e.f. 01.10.1991. The Section was amended by the Finance Act, 1992 w.e.f. 01.06.1992. The Section was omitted from the statute book by the Finance Act, 1999 w.e.f. 01.04.2000. The said Section 194H was reintroduced in the statute book in its present *avatar* by the Finance Act, 2001 w.e.f. 01.06.2001. We are concerned with the provisions of Section 194H as it stood after its introduction by virtue of the Finance Act, 2001. Therefore, the period in issue during which the assessee(s)-airline(s) received what the Revenue terms as supplementary commission is: 01.06.2001 to 15.02.2002. It is the Revenue's case that the assessee-airline received by way of supplementary commission during the period in issue a sum of Rs 29,34,97,709/- on which it failed to deduct tax at source equivalent to Rs 2,93,49,770/-. The department was thus deprived of not only the said short-deducted tax at source but also of surcharge.

5. It is the Revenue's case that immediately after the reintroduction of Section 194H on the statute book, the Department wrote letters to the airlines to adhere to the provisions of the newly introduced Section. As a matter of fact, the Central Board of Direct Taxes (hereinafter referred to as the 'CBDT') issued a Circular No. 619 dated 04.12.1991 wherein

it clarified that any retention of commission by a consignee or an agent would amount to constructive payment by the principal and hence Tax Deduction at Source (in short 'TDS') was required to be deducted under the provisions of Section 194H of the Act. The Revenue has stated that despite such instructions and communication the assessee(s)-airline(s) did not pay heed to the directives of the Department. The Department having been left with no choice conducted a survey under the provisions of Section 133A of the Act. The survey was conducted on 18.02.2002. During the course of survey, it came to light that the assessee(s)-airline(s) would supply blank tickets to the travel agent. The travel agent, after sale, would send the details to an organization by the name of Billing Settlement Plan (hereinafter referred to as 'BSP'); which is an organization approved by the International Air Transport Association (hereinafter referred to as the 'IATA'). The travel agent would send sale details to BSP every two weeks. Based on this information, the BSP would send a billing analysis to the assessee(s)-airline(s). The billing analysis conducted by the BSP would invariably refer to the transaction value, the tax amount, the standard IATA approved commission, which to begin with, was 9% and was reduced to 7% w.e.f. 01.01.2002, and lastly, if the transaction pertained to what was termed as a 'deal' ticket, it would also indicate the supplementary commission. Thus the billing analysis would show the net amount payable, after deductions had been made from the transaction value, on account of,

commission and supplementary commission wherever paid. The billing analysis statement prepared by BSP invariably in most cases referred to the deal code wherever there was reference to supplementary commission.

5.1 In view of this information having come to light, the Assessing Officer issued summons under Section 131 to the assessee-airline. The assessee-airline on 22.02.2000 filed its reply to the queries raised by the Assessing Officer. In short the assessee-airline submitted that the provisions of Section 194H were not applicable to it as what was retained by the travel agent was in the nature of discount and not commission as contemplated under the said provision. Reliance was placed on the judgment of the Kerala High Court in the case of ***M.S. Hameed & Ors. vs Director of State Lottories; (2001) 249 ITR 186***.

6. On the other hand, the Department's case was that a survey was conducted on 07.03.2002 with respect to certain travel agents. As a matter of fact, a reference has been made in the order of the Assessing Officer of two such travel agents viz. Ashok Travel and Tours and Balmer and Lawrie & Co. Ltd. Both the travel agents confirmed that even though they received special commission from the airline, the same was not passed on to the customers. Balmer and Lawrie & Co. Ltd which is an approved travel agent for public sector undertakings, however, adverted to the fact that they had obtained exemption from the Income Tax authority vide communication dated 29.05.2001 and hence

tax at source had not been deducted on commission received by them. It, however, informed the Department that in the said sector incentive/commission which it received was retained and not passed on to any agency or any of their clients. As regards concessional/free tickets Balmer and Lawrie & Co. Ltd informed the Department that they were being utilized for the in-house travel and by the officers of the company who are required to travel for official work by air as per their entitlement.

7. The Assessing Officer after examining the stand came to the conclusion that the provisions of Section 194H of the Act were attracted in the instant case. The brief reasons which impelled the Assessing Officer to come to the said conclusion were as follows:-

(i) the assessee-airline supply blank tickets to the travel agent in bulk. These tickets are the property of the assessee-airline and hence at no stage form the stock-in-trade of the travel agent, as there is no out-right purchase of the tickets by the travel agent;

(ii) the relationship between the assessee-airline and the travel agent was that of a principal and agent. The assessee-airline did not bring any evidence on record to show that the supplementary commission retained by the travel agent was passed on to the customers;

(iii) there is no difference between the standard commission paid (as approved by IATA) by the assessee-airline to the travel agent on which the tax at source is deducted and the supplementary commission. The

mode of accounting both for standard commission and the supplementary commission is the same;

(iv) the Bureau of Airlines Representatives Association as well as the Travel Agent Association of India had approached the Department whereupon a circular dated 13.11.2002 was issued which clarified the position that supplementary commission was commission within the meaning of Section 194H;

(v) the word 'indirectly' used in Section 194H of the Act was wide enough to bring within its ambit even the retention of monies in the form of supplementary commission by the travel agent; and

(vi) lastly, the transaction between the assessee-airline and the travel agent was of the nature of a principal and agent whereby the agent was selling tickets of a fixed amount on commission either in the form of standard commission (as approved by IATA) or special/supplementary commission.

7.1 On the aspect of issuance of a certificate under Section 197 of the Act permitting the deduction of tax at a lower rate or even 'nil' rate, the Assessing Officer came to the conclusion that these certificates had been obtained based on applications wherein travel agents had made a mention only with respect to the standard commission. There was no mention of special/supplementary commission. The Assessing Officer was, therefore, of the view that the Section 197 certificate issued by the Department would not extend to exemption from TDS on

special/supplementary commission. The supplementary commission could not be categorized as discount since there was no obligation on the travel agent to pass on the special/supplementary commission to the customer. The BSP billing analysis has classified the commission in issue as supplementary commission. Most of the airlines in their books of account have divided the commission into two parts, the first is the standard commission and the other is the supplementary commission. The standard commission is calculated at the rate of 9% or 7% (w.e.f. 01.01.2002) on which tax at source is deducted. In the assessee-airline's books of account the supplementary commission is either shown by using the same nomenclature or is shown under the head deals/incentives. Lastly, w.e.f. 01.04.2002 the entire procedure has undergone a change in as much as all airlines have started selling their tickets at net value. This according to the Assessing Officer proved the stand of the Department as being correct.

7.2 Based on the aforesaid the Assessing Officer while holding the assessee-airline as assessee in default directed calculation of interest under Section 201(1A) of the Act to the extent of Rs 21,13,224/-. The Assessing Officer of other airlines and Commissioner of Income Tax, Delhi passed orders under Section 201(1) and 201(1A) of the Act in the case of other airlines.

8. Aggrieved by the same, 12 airlines preferred appeals to the Commissioner of Income Tax (Appeals) – XXX, New Delhi

[hereinafter referred to as the 'CIT(A)']. A reference to the airlines which preferred appeal to the CIT(A) is made in paragraph 2 of his order. The CIT(A) in his order also notes the fact that the Pakistan Airlines has not contested the issue of treatment of supplementary commission being in th nature of commission as held by the Assesing Officer. He notes that the main ground taken by the Pakistan Airlines is that the tax ought to be recovered from the payee and not from the payer.

8.1 The CIT(A) after hearing the submissions of both sides summed up his conclusion in para 16 & 17 of the impugned judgment. The conclusions being relevant are extracted hereinbelow:-

> *"i. The relationship between the airlines and travel agents is of principal and agent only.*
> *ii. The amount of supplementary commission mentioned in the billing analysis or BSP is in the nature of commission and supplementary commission.*
> *iii. There are sufficient reasons to hold that all airlines were knowing the stand of the Income Tax Department on interpretation of provisions of Section 194H that these were applicable to supplementary commission also. In fact in the remand report one AO has mentioned that some airlines were already applying these provisions to supplementary commission.*
> *iv. The certificates u/s 197 were issued by AOs to some agents in respect of commission only and there was no distinction made by AOs between standard IATA commission and supplementary commission. Accordingly the credit for such certificates will have to be given while calculating short deduction of tax.*
> *v. The recovery of tax not deducted has to be made from the airlines only.*
> *vi. Levy of interest u/s 201(1A) is absolute and there is no relief in this respect.*

vii. The transaction prior to 1.6.01 will be excluded for applying section 194H to the supplementary commission.

17. The main ground relating to applicability of provisions of Section 194H to supplementary commission (or incentive or discount) fails. However, appellants would get relief in respect of certificates u/s 197 given to some agents and transaction prior to 1.6.2001."

9. The assessee-airline, being aggrieved, preferred an appeal to the Tribunal. The Tribunal reversed the decision of the CIT(A) and held that the provisions of Section 194H were not attracted in the instant case. Briefly, the Tribunal came to this conclusion by holding that the assessee-airline only receives the net fare. The assessee-airline does not have any means of knowing the price at which the travel agent has ultimately sold the ticket to the customer. The travel agent is required to pay the net fare to the assessee-airline even though he may end up selling the ticket at a price which is less than the net fare. The price which the travel agent obtains over and above the net fare is due to the travel agent's own efforts in respect of which it does not render any service to the assessee-company. It is entirely open to the travel agent to make endeavours to obtain and realize the best price. The price that the travel agent obtains over and above the net fare does not emanate from the assessee-airline . The excess fare that is the price over the net fare which the travel agent earns may have been earned by virtue of the agency with the assessee-airline. The excess remuneration earned, however, could not be regarded as one which the travel agent realized

on account of any services rendered by the travel agent to the assessee-airline. The fact that the assessee-airline comes to know the price at which the travel agent ultimately sold the ticket by referring to the BSP billing analysis statement is of no consequences in view of the fact that the assessee-airline comes to know of this state of affairs only when the statement is received from BSP and not at the time when the tickets are sold and the price is realized by the travel agent.

9.1 The Tribunal also rejected the submissions made on behalf of the Revenue that, what is retained by way of difference between the published fare and the net fare was a constructive payment on the ground that what the assessee-airline was entitled to was the net fare and not published fare even if the travel agent were to sell the ticket at the published fare. The Tribunal noted that since assessee-airline had no right to receive any amount received by the travel agent over and above the net fare then based on the theory of constructive payment, it cannot be assumed that the assessee-airline received excess payment from the agent which was paid back by the assessee-airline to the travel agent. The Tribunal noted that there was no material on record to show that the travel agent was required to disclose at the time of sale of ticket the price at which the ticket was actually sold.

9.2 The above findings were summarized by the Tribunal by holding that: (a) the amount realized by the travel agent in excess of net fare could not be considered as commission; (b) the assessee-airline cannot

be said to be a person responsible for paying commission to the travel agent; (c) the difference between the net fair and the published fair was not credited to the account of the travel agent in the assessee's books; and (d) lastly, there was no payment of such excess amount by the assessee-airline to the travel agent in cash or cheque or by any other mode. In these circumstances, the Tribunal set aside the order of the Assessing Officer treating the assessee-airline as assessee in default under Section 201(1) of the Act and also the order passed under Section 201(1A) of the Act levying interest in the sum of Rs 21,13,224/-. It is important to note that the Tribunal did not decide the issue of jurisdiction raised by the assessee-airline on the ground that this was within the domain of the CBDT. In view of the fact that the Tribunal had quashed the order of the Assessing Officer under Section 201(1) of the Act the other issue with respect to the issuance of certificate under Section 197 of the Act and the deductibility of the tax with respect to transaction prior to 01.06.2001, one which was decided by the CIT(A), was not considered by the Tribunal.

Submissions of counsel: Revenue

10. The Revenue was represented by Ms Prem Lata Bansal, learned Sr. Standing Counsel and Mr R.D. Jolly, learned Sr. Standing Counsel. The assessees were represented by Mr C.S. Aggarwal, Sr. Advocate assisted by Mr Prakash Kumar, Mr Aseem Mowar, Advocate, Mr

Mukesh Kumar, Advocate, Mr Sandeep Sethi, Sr. Advocate assisted by Ms Padma Priya; Mr Ajay Vohra, Advocate assisted by Ms Kavita Jha, Advocate; Mr P.H. Parekh, Sr. Advocate assisted by Mr D.P. Mohanty.

The submissions made on behalf of the Revenue were as follows:-

(i) the relationship between the assessee-airline and the travel agent was that of a principal and agent and not one of principal to principal. At this point we must point out that except for Thai Airways and Belair Travel & Cargo Ltd all other airlines have accepted this position;

(ii) the supplementary commission retained by the travel agent was not a discount as claimed by the assessee-airline since it was paid for services rendered by the travel agent in the course of buying and selling of tickets;

(iii) the submission of the assessee-airline that they had a dual/hybrid relationship with their agent, that is, in so far as the transaction which involved payment of standard commission was that of agency, while that which involved the retention of supplementary commission by the travel agent, that is, price obtained over and above the net fare, was a result of a principal to principal relationship ought to be rejected, for the reason that no evidence whatsoever was placed by the assessee-airline to establish that there was such a dual relationship between the parties. The Standard Format Agreement (as approved by IATA), that is, the Passenger Sales Agency (PSA) Agreement executed by the assessee-

airline was silent as regards any such dual relationship to which the assessee-airline had adverted to;

(iv) a perusal of the billing analysis statement prepared by the BSP undoubtedly revealed that the assessee-airline received the balance amount that is the net fare after deductions made, from the gross fare of standard commission and supplementary commission. The assessee-airline would deduct tax at source from the standard commission but did not deduct the same from supplementary commission. The billing analysis statement clearly indicated that wherever extra commission in the form of special/supplementary commission was paid to the travel agent there was a reference to a deal code. The supplementary commission was nothing but commission within the meaning of Section 194H read with the explanation which envisaged a payment received or receivable ***"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. It was the contention of the learned counsel that the retention of supplementary commission was covered within the extended meaning of the commission as provided in the explanation as this was an indirect payment by the assessee-airline to the travel agent. To buttress her submission that the nature of the relationship between the assessee-airline and the travel agent was that of a principal and agent, reference was made to the clauses of PSA Agreement, in particular, the clauses 3.1, 3.2, 3.3, 3.5, 6.1, 6.2, 7.2, 7.4, 9. 10, 11.2,

11.3, 13 and 15. The attempt was to show that the travel agent could not do anything of his own, that is, without the leave of the assessee-airline;

(v) the main provision of Section 194-H included within its ambit payment by cash, cheque, draft or by ***'any other mode'***. Thus retention of money by the travel agent was covered by the main provisions of Section 194H. It was also contended that it was not the case of the assessee-airline either before the Assessing Officer or the CIT(A) that the travel agent was required to only remit the net fare to the airlines. It was submitted that this was not even a condition in the PSA Agreement. It was, however, submitted that the very fact that the standard commission had to be computed on gross fare and not on the net fare revealed that this was an after-thought. The Tribunal in proceeding on the lines it did had changed parameters of the case as set out before the Assessing Officer and the CIT(A). It was contended that the net fare was actually arrived at by deducting from the gross fare; tax, standard commission and supplementary commission. While standard commission was fixed by IATA the supplementary commission was variable as it was dependent on the policies of the airline vis-à-vis their agents. If net fare was the basis for the entire transaction then there was no necessity of intervention of BSP to carry out a billing analysis as then the amount payable by the travel agent to the assessee-airline could

easily be calculated by taking into account the product of the number of tickets sold and the net fare; and

(vi) lastly, it was contended that the amount of supplementary commission which had to be paid on each transaction was embedded in the deal code which was known only to the three concerned parties, that is, the assessee-airline, the travel agent and BSP. Since the assessee-airline was the person responsible for payment of supplementary commission to the travel agent the tax could have been deducted as and when the billing analysis statement were handed over by the BSP to the airline. It was thus contended that the supplementary commission fell within the ambit of the explanation to Section 194H and hence assessee-airline was an ***'assessee in default'*** within the meaning of the provisions of Section 201(1) of the Act and was thus liable for payment of interest under Section 201(1A) of the Act.

10.1 As regards the issue arising in the second set of appeals with respect to the certificate issued under Section 197 of the Act was concerned, the learned counsel for the Revenue submitted that since the certificate was based on applications which made a reference to only standard commission, supplementary commission was not covered under the said certificate.

10.2 In so far as the issue raised in the third set of appeals pertaining to issuance of concessional tickets to travel agents is concerned, the learned counsel submitted that since the very basis of issuing discounted

tickets to travel agent was on account of principal agent relationship, the concession constituted commission as the concessional tickets were issued for services rendered by the travel agent to the assessee-airline. In other words the difference between the normal fare and the concessional fare was nothing but additional commission paid by the assessee-airline to the travel agent, within the meaning of provisions of Section 194H. Therefore, the provisions of Sections 201(1) and 201(1A) were attracted even to this case.

ASSESSEE(S):

11. On behalf of assessee-airlines the counsels appearing in ITA No 306/2005 submitted briefly as follows:-

(i) supplementary commission was only a nomenclature which finds mention in the billing analysis statement of BSP. The said supplementary commission denotes a notional figure which is the difference between the published fare less standard IATA commission (9% or 7%). The net fare is the amount received by the assessee from its travel agents. In other words the contention is that the supplementary commission is not a 'commission' within the meaning of Section 194H of the Act;

(ii) supplementary commission can only be brought within the ambit of section 194H of the Act, if it fulfills the following criteria as prescribed under the said provision -

a. the sum received must be in the nature of income,
b. such income must denote any payment received or receivable directly or indirectly by the payee from the payer, that is, the assessee, and
c. the recipient should be a person acting on behalf of that another person, and that, the sum received or receivable whether directly or indirectly should be for services rendered in the course of buying and selling of goods, that is, tickets in the present case.

(iii) the Department has not been able to produce any evidence to show that the difference between the published fare and the net fare (is the fare the assessee received from the travel agents) was realized by the travel agents. The difference as reduced by standard commission and taxes which is referred to as supplementary commission is only a notional figure and this cannot be termed as a 'commission' within the meaning of section 194H of the Act. It is contended that what the assessee is entitled to receive is only the net fare. There is no right in the assessee-airline to receive the published fare from the travel agent on sale of tickets. Reference in this regard was made to clauses 7.1, 7.2 and 3.2 of the PSA Agreement;

(iv) thus the notional figure of supplementary commission as appearing in the billing analysis statement of the BSP is neither income

nor can it be construed as payment received or receivable, directly or indirectly by the travel agents in its capacity as the agent of the assessee-airline for any services rendered to the assessee-airline. In this context it was submitted that the billing analysis statement of BSP is not a statement of account as contended by the Revenue;

(v) since there was no evidence to suggest that the difference between published fare and the net fare was actually received by the travel agent, there was no obligation on the part of the assessee-airline to deduct tax at source on such notional commission which had not been realized and hence it could not be held to be an assessee in default under Section 201(1) or liable for interest under Section 201(1A) of the Act;

(vi) in these circumstances the provisions of Section 194H of the Act were unworkable. Reliance in respect of this submission was placed on the judgments of the Supreme Court in ***CIT, Bangalore vs B.C. Sriniwasa Shetty; (1981) 128 ITR 294***; and

(vii) lastly, it was contended that it is not disputed that the travel agents had paid tax on the said supplementary commission and hence the Revenue was precluded from raising demands on the assessee-airline. Reliance in this regard was placed on the following judgments:

a) ***Hindustan Coca Beverages (P) Ltd vs CIT; (2007) 293 ITR 326 (SC)***
b) ***CIT vs Adidas India Marketing (P) Ltd; (2007) 288 ITR 379 (Del)***
c) ***CIT vs Select Holiday Resorts (P) Ltd; (2007) 207 CTR 239 (Del)***

d) ***CIT vs Majestic Hotel Ltd.; (2007) 293 ITR 185 (Del)***
e) ***CIT vs Taj Quebecor Printing Ltd; (2006) 281 ITR 170(Del)***

(vii) (a) In this context it was submitted that at the most the assessee-airline would be liable for interest under Section 201(1A) of the Act which can be levied only up to the date of payment of tax by the travel agents.

11.2 The submissions on behalf of Belair Travels & Cargo Ltd in ITA Nos 105/2008 & 366/2008 by the learned counsel were more or less similar except as noted hereinabove it was contended on its behalf that the relationship between assessee-airline and its travel agents was ***not*** that of principal and agent but that of one principal dealing with another. Furthermore, it was contended that a mere book entry cannot be the basis for imposition of tax when income does not actually accrue or is earned or is received. The counsel submitted that the tickets in issue which were sold were concessional tickets which were sold at a discounted price. The difference between the maximum price and the concessional rate cannot be construed as profit of the travel agent much less profit of the sub-agent. The trade discount is only a book entry and affects nobody.

11.3 Similarly, counsel for the Thai Airways has contended that the relationship between them and their travel agent was ***not*** that of principal and agent. Reliance in this regard was placed on ***Shri T.V.T.&***

B. Firm vs CTO; AIR 1968 SC 784. The remaining submissions were more or less similar.

11.4 In Appeal Nos. 117 & 118 of 2006 the learned counsel reiterated the submission that the supplementary commission was in the nature of discount which is provided as and when any deal or scheme is announced by the assessee-airline, the travel agents are required to pass on the supplementary commission to ultimate customers/passengers and the fact that it had not been passed, by taking advantage of the lack of knowledge of the passengers, cannot convert what is in the nature of discount into commission within the meaning of provisions of Section 194H of the Act. The supplementary commission is not given in the normal course and is not in relation to services rendered to the assessee-airline by the travel agents. The travel agents do not render any additional or extra services in lieu of supplementary commission. The learned counsel placed reliance on the judgment of the Kerala High Court in the case of ***M.S. Hameed Ahmed vs Director of State Lotteries & Ors. (2001) 249 ITR 186*** and ***Ahmedabad Stamp Vendors Association vs Union of India; (2002) 257 ITR 202 (Guj.)***.

11.5 In ITA Nos 121/2006 & 123/2006 the learned counsel in addition made a submission which is, that since the Tribunal had dismissed the appeal of the Revenue by holding that the supplementary commission did not fall within the ambit of the provisions of Section 194H the issue with respect to the effect of the certificates issued by the Assessing

Officer under Section 197(1) of the Act was not decided and hence in case this court was to hold otherwise, the appeal be remitted to the Tribunal for decision on this aspect of the matter.

11.6 In ITA Nos 113/2005 & 260/2006 the learned counsel Mr O.P. Sapra apart from the submissions made by other counsel has basically relied upon the observations of the Tribunal in the impugned judgment. It was submitted that since the money realized by the travel agent over and above the net fare paid to the assessee-airline is wholly and solely on account of the efforts of the travel agent the same cannot be considered as commission within the meaning of Section 194H of the Act. The assessee-airline is not the source of money received by the travel agents over and above the net fare coupled with the fact that neither the difference between the published and the net fare is credited to the travel agents account in assessee's books, nor is the payment of the difference between the two paid by the assessee-airline to its travel agents in cash or cheque or by any other mode. In these circumstances it is contended that the supplementary commission cannot be construed as commission and brought within the ambit of Section 194H of the Act.

OUR ANALYSIS

12. In order to come to a definite conclusion whether Section 194H of the Act would be applicable to the assessee-airline in respect of the transaction, in issue, we propose to first look at the scope and ambit of section 194H of the Act and then analyse the transaction as to whether it

falls within the purview of the said Section. In this context, it would be necessary to extract the relevant portions of Section 194H of the Act. The said provision reads as under:-

> *"194H. 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 of by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten percent:*
> *Provided xxxx*
> *Provided xxxx*
> *Provided xxxx*
> *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;*
> *(ii) xxxx*
> *(iii) xxxx*
> *(iv) xxxx"*

13. The extracted portion of Section 194H suggests that except for a situation which is encompassed by the second proviso, it applies to all persons other than an individual or an HUF who is responsible for paying on or after 01.06.2001 to a resident any income by way of commission to deduct tax at source at the time of credit of such income to the account of the payee, that is, the recipient or at the time of

payment of such income in cash or by issue of cheque or draft or ***by any other mode***.

13.1 In other words where a person pays to a resident income which is of the nature of commission then that person is obliged to deduct tax at source at any of the said stages, that is, either at the time of credit of such income/commission or at the time of payment which may take the form of cash, cheque, draft or by any other mode.

13.2 Commission under Explanation (i) to Section 194H of the Act is defined in an inclusive manner. Commission under the definition includes 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 service 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). It takes into account a situation where a person renders services to another person for which the person rendering service either receives or is entitled to receive, directly or indirectly, payment from that another person to whom the service is rendered.

14. It is clear that the transaction, in issue, would fall within the provisions of Section 194H only if there is:

(i) a principle-agent relationship between the assessee-airline and the travel agent;

(ii) the payments made by assessee-airline to the travel agent, who is a resident is an income by way of commission;

(iii) the income by way of commission should be paid by the assessee-airline to the travel agent for services rendered by the travel agent or for any services in the course of buying or selling of goods;

(iv) the income by way of commission may be received or be receivable by the travel agent from the assessee-airline either directly or indirectly; and

(v) lastly, the point in time at which obligation to deduct tax at source of the assessee-airline will arise only when credit of such income by way of commission is made to the account of the travel agent or when payment of income by way of commission is made by way of ***cash, cheque*** or ***draft*** or ***by any other mode, whichever is earlier.***

15. Therefore, the first question that needs to be answered is whether there is a principal-agent relationship between the assessee-airline and the travel agent? As indicated in our discussion above, except for Thai Airways and Belair airways all other airlines have accepted that the relationship between the assessee-airline and the travel agent is that of principal and agent. Since two airlines have taken a contrary stand, let us examine as to whether the stand that there is a principal to principal relationship between the assessee-airline and the travel agent is tenable. For this purpose it would be profitable to look to the definition of an

agent in Section 182 of the Contract Act. Section 182 of the Contract Act reads as follows:-

> *"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 said act is done, or who is so represented, is called the principal."*

16. It is clear from the definition that an agency comes into existence where one person is vested with the authority or capacity to create a legal relationship between person referred to as a principal and an outside third party. Therefore, the basic and essential requisites of an agency ordinarily would be that:

(i) The agent makes the principal answerable to third persons whereby the principal can sue third parties directly and renders himself, that is, the principal, liable to be sued directly by the third parties. (See ***Varsha Engineering Pvt Ltd vs Vijay Traders & Ors AIR 1983 Guj 166 at pages 168-169, para 5)***.

(ii) The person who purports to enter into a transaction on behalf of the principal would have the power to create, modify or terminate contractual relationship between his principal, that is, the person whom he represents, and the third parties. (See ***P. Krishna Bhatta & Ors. vs Mundila Ganapathi Bhatta (died) & Ors AIR 1955 Mad 648 at page 651, para 36***).

(iii) An agent, though bound by instructions given to him by the principal does not work under the direct control and supervision of the

principal. The agent thus uses his own discretion to act on behalf of the principal subject to the limits to his authority prescribed by the principal. (See ***Lakshminarayan Ram Gopal & Son Ltd vs The Government of Hyderabad AIR 1954 SC 364 at page 367, paragraphs 11 & 12.*** This cited with the approval in ***Qamar Shaffi Tyabji vs The Commissioner, Excess Profit Tax, Hydrabad (1960) 39 ITR 611(SC) at pages 615 & 616.***

(iv) There is no necessity of a formal contract of agency, it can be implied which could arise from the act of parties or situations in which parties are put.

17. Let us apply this test to the transaction, in issue.

17.1 For this we shall first advert certain operational aspects of the transaction which are not in issue :- What is not disputed is that IATA monitors the trade in air traffic and lays down guidelines for carrying on civil air transportation business. As a matter of fact IATA prescribes PSA agreements which most airlines have executed with their travel agents. It is also not disputed that in respect of commission which the assessee-airline are required to pay to the travel agent is fixed by IATA. This commission is termed as standard commission. The IATA commission, that is, the standard commission payable by assessee-airline to travel agent prior to 01.07.1999 was 9% and thereafter it dropped to 7%. It is also an admitted fact that in so far as assessee(s)-airline(s) which operate from India are concerned they are required to

file a fare list with the Directorate General of Civil Aviation (in short 'DGCA') for its approval. This fare which is called the DGCA fare is more often than not below the IATA fare. It is important to note for the period, under consideration, assessee-airline were prohibited from mentioning a fare below the IATA/DGCA approved fare on air tickets. What is of importance is that this is referred to as the published fare on which the commission fixed by IATA, that is, the standard commission is paid by the assessee-airline to their respective travel agents. It is also undisputed that IATA in order to streamline the financial aspects of air transportation service provides a service for settlement of financial transaction between the travel agent(s) and their assessee(s)-airline(s). This is done broadly in the following manner:-

(i) IATA prints neutral tickets and distributes them to all agents.

(ii) Agents issue tickets to passengers and sent audit coupons to the BSP.

(iii) The BSP captures the information from these audit coupons and prepares a billing statement which clearly reflects the gross/ published fare, standard IATA commission paid to agents as well as the supplementary commission. The net fare payable by the travel agent to the assessee-airline is also reflected in the billing statement.

(v) The travel agent then pays a single cheque to IATA/BSP for tickets sold on behalf of various assessee-airlines, who then distribute the money received to respective assessee-airline.

18. It is not disputed that each billing analysis received from the BSP contains the following details:

(i) The name of the agent

(ii) Identification number of the tickets sold

(iii) Gross value of the tickets sold

(iv) Standard commission or the IATA commission payable to travel agent, and

(v) The supplementary commission, which is the difference between the gross fare, net fare, taxes and standard commission payable to the travel agent.

19. At this stage, it would be important to note two things that the supplementary commission varies from one travel agent to another and also from one transaction to another. The learned counsel for the assessee-airlines have contended that the supplementary commission which they claim is a discount is paid only on deal tickets. It was, therefore, important to briefly examine as to how the fare-sheet would look. For this purpose we were given a fare-sheet which, we were told, was part of the record below by the learned counsel for the assessee. The portion of the fare-sheet reads as follows:-

SINGAPORE						
(1)	(2)	(3)	(4)	(5)	(6)	(7)
ON EX BOM	Fare Basis	Gross	Net Fares	SP Code	BSP Code	Bkg Class
	QEE3M	26,795/-	17,500/-	AG/UT	SQSIN3	N

20. A perusal of the extract above would show that this fare-sheet would indicate that for journey which originates from Bombay[see column (1)], the gross or the published fare would be Rs 26,795/- [see column (3)] and the net fare would be Rs 17,500/- [see column (4)]. The net fare is calculated on the basis of the code given under the heading '**SP Code**' which reads in the instant case as **AG/UT** [see column (5)]. We were informed by the learned counsel for the assessee that AG stands for agent and '**UT**' represents the percentage in numerical terms which the agent would retain from the published fare and the balance would be remitted to the assessee-airline in the form of net fare. In order to understand the code **UT** which translates into figures we were given the following explanation. The code is encapsulated in the words MOUNTFABER. Each alphabet of these words is represented by figures 1, 2, 3…… 9 & 0. For convenience it may be read as under:-

M	O	U	N	T	F	A	B	E	R
1	2	3	4	5	6	7	8	9	0

21. Therefore, in the code that we are considering which is **AG/UT**, **AG** would stand for agent **U** is equivalent to numerical **3** while **T** is equivalent to numerical **5**. Therefore, in the example given above from the gross fare of **Rs 26,795/-** the agent would retain **35%** of the amount and would be responsible for remitting **65%** to the assessee-airline in

respect of the transaction, in issue. The assessee has submitted that in the transaction, in issue, it is interested only in receiving 65% of the gross/ published fare in the form of net fare. Any amount which the travel agent earns over and above the net fare or does not earn is not the concern of assessee-airline and hence is neither income paid directly or indirectly to the travel agent and, therefore, there cannot be any liability firstly on the assessee-airline to deduct tax at source on the balance 35%, evidently received by the travel agent of which there is no evidence putforth by the Department. In order to appreciate this aspect it may be important to look at the provisions of PSA agreement. In this regard while summarizing the relevant provisions of the PSA a reference will be made to the relevant clauses.

(i) The PSA provides that the travel agent is authorized to sell air passenger transportation services of the carrier and such services of other air carriers as authorized by the carrier(s). (See clause 3.1 of the PSA agreement).

(ii) All services offered by the carrier are sold by the travel agent on behalf of the carrier. The travel agent is not empowered to vary or modify the terms and conditions setforth in the traffic document used for services provided by the carrier(s) and the agent is obliged to complete the documents in the manner prescribed by the carriers(s). (See clause 3.2 of the PSA agreement).

(iii) The agent shall make only such representations as authorized in the PSA agreement or by the carrier. In respect of Traffic Documents/Air Tickets previously issued the travel agent is authorized to accept, re-issue, validate or re-validate all such Traffic Documents only in accordance with carrier's-tariff conditions, conditions of carriage or written instructions. (See clause 3.3 & 3.5 of the PSA agreement).

(vi) Any request made by the passenger shall be forwarded by the agent to the traffic carrier to enable the carrier to extend such services to the customer. (See clause 3.6 of the PSA agreement).

(v) The agent is prohibited from making any representation which would indicate or imply its office is the office of the carrier or any of its members. (See clause 5 of the PSA agreement).

(vi) Traffic Documents deposited by the carrier or by the billing settlement plan management on behalf of the carrier, as the case may be, ***are and will remain the property of the carrier or plan management unless they are issued and delivered pursuant to a transaction***. (See clause 6.1 of the PSA agreement).

(vii) The carrier or the BSP is empowered to carry out an audit or procure audit of the traffic documents as and when it so desires. (See clause 6.2 of the PSA agreement).

(viii) Where carrier participates in an automated ticketing system for issuance of standard traffic documents or other neutral traffic documents and the travel agent issues such traffic documents through the system on behalf of the carrier, the carrier at any time may withdraw from the agent, the authority to issue neutral traffic documents on its behalf. In the event the agent is in default or suspended in accordance with the sales agency rules, in such situation, the agent is prohibited from issuing neutral traffic documents which he always does on behalf of the carrier. (See clause 6.3 of the PSA agreement).

(ix) Where money is received by the agent on issuance of traffic documents to the passengers for a transportation or ancillary service, it shall be the agent's responsibility to remit the amount to the carrier. (See clause 7.1 of the PSA agreement).

(x) The monies collected by the agent for transportation and ancillary services shall be the property of the carrier and the agent shall hold the monies in trust on behalf of the carrier until satisfactorily accounted for to the carrier and settlement made. (See clause 7.2 of the PSA agreement).

(xi) The agent is prohibited from pledging, ceding, promising or otherwise transferring to third parties any claim to monies due to the agent or to the carrier, but not yet collected for transportation and

ancillary services sold under the PSA agreement. (See clause 7.3 of the PSA agreement).

(xii) In the event of agent becoming bankrupt all monies due to the carrier or held on behalf of the carrier in connection with the PSA agreement shall become immediately due and payable to the carrier. (See clause 7.4 of the PSA agreement).

(xiii) Agent is empowered to make representations only in accordance with the carrier's tariffs, conditions of carriage and written instructions, and against receipts. (See clause 8 of the PSA agreement).

(xiv) The agent shall be remunerated for sale of air transportation and ancillary services in the manner and amount as may be agreed and communicated to the agent from time to time which shall construed full compensation for services rendered to the carrier. (See clause 9 of the PSA agreement).

(xv) The agency under the PSA shall be terminated in accordance with sale agency rules, in particular where the carrier withdraws the appointment of agent or agent withdraws from its appointment by the carrier or the agent is removed from the agency list or the agent relinquishes its IATA approval or accreditation. (See clause 13 of the PSA agreement).

(xvi) The carrier would indemnify and hold the agent harmless for any liability on account of loss, injury or damage whether direct or indirect

or consequentially arising in the course of transportation or other ancillary services provided by the carrier pursuant to a sale made by the agent which arises from failure on the part of the carrier to provide such transportation or services. (See clause 15 of the PSA agreement).

(xvii) The agent also in turns is obliged to indemnify and hold the carrier harmless for any negligence and/or omission on its behalf which causes loss, injury or damage to the carrier. This also includes any loss caused to the carrier resulting from negligent or unauthorized use by the agent or his employees and service by the agent on account of unauthorized issuance of traffic documents through an automated ticketing system. (See clause 15.2 & 15.3 of the PSA agreement).

22. A reading of the provisions of the aforesaid clauses would clearly establish that the travel agent acts on behalf of the assessee-airline whereby a legal relationship is established between the assessee-airline and the third party, that is, the passenger. By entering into such a legal relationship on behalf of the principal, that is, the assessee-airline by issuing the traffic documents to a third party, that is, the passenger, the travel agent makes the assessee-airline liable to a legal action by the passengers, that is, the third party. Similarly by virtue of such a transaction, that is, issuance of traffic documents by the travel agent to the passenger it enables the principal, that is, the assessee-airline to sue the third party which is the passenger. The travel agent by virtue of the

provisions of the PSA agreement is empowered to create, modify and terminate contractual relationship on behalf of the principal, that is, the assessee-airline. In this context see the provisions of clause 3.1 to 3.6 and clause 8 of the PSA agreement. Furthermore as is evident from a reading of clause 6, in particular, clause 6.1 of the PSA agreement the traffic document at any given point in time remain the property of the assessee-airline. As a matter of fact since the traffic documents, that is, the air tickets are issued by the travel agent on behalf of the assessee-airline who is the provider of the air transportation and other ancillary services it holds the travel agent harmless and is obliged to indemnify the travel agent for any loss caused on account of failure to provide such air transportation or other ancillary services contracted for by the travel agent on behalf of the assessee-airline. This situation obtains even where the air tickets are issued by the travel agent on behalf of the assessee-airline through an automated system. Similarly any negligence on behalf of the agent in issuing the traffic documents/air tickets would render him liable to the assessee-airline/the carrier.

22.1 The provisions in the PSA agreement leaves us in no doubt whatsoever that the relationship between the travel agent and the assessee-airline is that of a principal and agent, which is why perhaps none of the airline except Thai Airways and Belair Airways have submitted that their relationship is one which is of a nature of principal to principal as against principal and agent.

22.2 We may note here that the learned counsel Mr C.S. Aggarwal, Sr. Advocate who appears for Singapore Airlines has informed us that Singapore Airlines has not executed a PSA agreement with its travel agents. Even though such was the situation obtaining in his case, the learned counsel did not dispute the fact that the relationship between Singapore Airlines and its travel agents was that of principal and agent. In so far as the learned counsel for Thai Airways and Belair Airways are concerned, even though they submitted that the relationship between them and their travel agent was not of principal and agent, they did not elaborate as to how their relationship fell within the exception. There is no clue whatsoever in their submissions as to why their travel agent should be treated as not having acted as an agent. The only possible answer to this would perhaps be in the argument which is being taken by all other airlines that in so far as the first leg of the transaction is concerned whereby the travel agent is paid on IATA approved commission, that is, standard commission the relationship between the assessee-airline and the travel agent is one of principal and agent while when it recovers money from the passengers over and above the net fare, and in its own right then the transaction transforms into between one principal and another. We are unable to appreciate that a single transaction whereby a traffic document in the form of an air ticket is sold by a travel agent on behalf of its principal would result in a hybrid relationship, that is, in so far as payment of the IATA/standard

commission is concerned the same transaction would be treated as one between a principal and the agent and in so far as the payments over and above the net fare are concerned it would then, in a manner of speaking, metamorphise into a transaction of a different kind, that is, principal to principal. Such a submission is completely at odds with the manner in which the transaction is conducted. In our minds, there is no doubt, that the relationship between the assessee-airline and the travel agent is one of principal and agent. This is a finding of fact which is being returned by Assessing Officer and the CIT(A) which has not been upset even by the Tribunal.

23. This brings us to the second leg of the transaction as to whether income by way of commission has been paid by the assessee-airline to the travel agent. It is not disputed that any amount which the travel agent would receive over and above the net fare would be assessed in the hands of the travel agent as profit, gain or income. As a matter of fact one of the submissions of the learned counsel for the assessee-airline has been that they ought not to be held an assessee-in-default in view of the fact that the supplementary commission, that is, sums received over and above the net fare by the travel agent and retained by them have been disclosed by travel agent as their income on which the travel agents have paid tax. In view of this we find no difficulty in holding that supplementary commission is income within the meaning of section 194H of the Act.

24. The submission of the some of the learned counsel for the assessee-airline that the monies retained in the form of supplementary commission are really in the nature of discount rather than commission is not tenable. The fact that this is a payment which the travel agent receives from the passenger by virtue of the sale of the Traffic Documents/Air Tickets of which the assessee is the proprietor at a point till the transaction is made would clearly establish that it is a commission as against the discount. The word 'discount' is normally used to describe a deduction from the full amount or value of something, especially a price (see Black's Law Dictionary VIIth Edition page 477) whereas a commission is defined in Explanation (1) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the assessee-airline. In view of the fact that the payment retained by the travel agent is inextricably linked to the sale of the traffic document/air ticket, it cannot but lead to a conclusion that the payment retained which is the supplementary commission, is a commission within the meaning of Section 194H of the Act. This is especially so, as indicated above, at no point in time the travel agent obtains proprietary rights to the Traffic Documents/Air Tickets. There is no value or price paid by him on which the travel agent gets a deduction. The price or value is received by the assessee-airline through the medium of the travel agent from the passenger which is also one of the facets of the services

offered by the travel agent. The price or value of the Traffic Document received by the travel agent for and on behalf of the assessee-airline is held in trust. Thus the money retained by the travel agent is commission (supplementary commission) within the meaning of Section 194H of the Act. Therefore, for the assessee-airline to contend, as discussed hereinabove, that in so far as the first leg of the transaction is concerned whereby they pay standard commission to the travel agent on which assessee-airline deduct tax at source, the relationship between the assessee-airline and the travel agent is that of principal and agent, whereas the money or monies which the travel agent retains over and above the net fare is not commission since the relationship transforms - from one which commences as a principal and agent relationship and ends up into that of a principal to principal relationship; is completely untenable as there are no two transactions in point of fact. The transaction is a singular transaction which is executed between the travel agent while acting on behalf of the principal airline in selling the traffic documents/ air tickets to a third party which is the passenger and thereby creating a legal relationship between the principal that is, the assessee-airline and the third party, which is the passenger. For any enforcement of rights emanating therefrom the principal would have the right to sue the passenger and similarly the passenger would have the right to sue the principal, that is, the assessee-airline.

25. The submission of the assessee-airline which has found acceptance, with the Tribunal and on which an enormous emphasis is laid is that:

(i) there is no evidence as to whether the travel agent has received anything over and above the net fare. As a matter of fact the assessee-airline is not interested in receiving anything from the travel agent over and above the net fare; and

(ii) the assessee-airline is unable to deduct tax at source since it is unaware till a billing analysis is placed before it by the BSP as to the amount received by the travel agent.

26. In so far 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.

27. As regards the submission of the learned counsel for the assessee-airline that the facts of the present case are in pari materia with the Judgment of the Kerala High Court in ***M.S. Hameed*** *(supra)*, we may only note that the said judgment of the Kerala High Court is clearly distinguishable from the facts obtaining in the present case. The points of distinction are as follows:-

(i) The case pertains to deduction of tax at source under Section 194G of the Act while the present case pertains to Section 194H of the Act. It is important to note that Explanation (1) which finds mention in

Section 194H and sets out the wide definition of expression ***'commission***' does not find mention in Section 194G.

(ii) The Court found as a fact that the sale of lottery tickets by the State Government to registered agents who sold the tickets further to the public or the sub-agents was an out-right sale because registered agents after purchasing the tickets would sell them either directly to the public or to the sub-agents who would further sell it to the public. The tickets were purchased at a discounted price, therefore, the Court came to the conclusion that discount cannot be termed as a commission. It is important to note that the Court in ***M.S. Hameed*** *(supra)* observed that given fact that perhaps the idea behind incorporation of Section 194G was to bring such transactions within the net of Section 194G of the Act, however, since the fiction did not extend to the payments, in issue, it could not be brought within the purview of Section 194G. In the instant case the Legislature by spreading the net wide by inserting explanation (i) to Section 194H of the Act, has made its intention crystal clear.

27.1. As indicated above the point of distinction here is clearly the explanation (i) to Section 194H of the Act which did not find mention in Section 194G of the Act. Furthermore, as discussed above in the present case as found as a matter of fact by the Assessing Officer that the billing analysis clearly shows that supplementary commission was received by the travel agent. The several "ifs" which crept up in

M.S.Hameed *(supra)* did not arise in the present case. In our view this case has no applicability to the present fact situation and is clearly distinguishable.

27.2 The counsel for the assessee(s)-airline(s) to buttress their submission that transaction in relation to which supplementary commission was earned by the travel agents was in the nature of contract of sale as against a contract of agency, relied upon the following judgments:

Shree T.V.T. & B. Firm vs Commercial Tax Officers, Rajamundry AIR 1968 SC 784 and ***Ahmedabad Stamp Vendors Association vs UOI (2002) 257 ITR 202 (Guj.)***

27.3 On reading of the judgments it is clear that the distinction between a contract of sale and a contract of agency has to be borne in mind before the transaction can be dubbed as one or the other. In coming to a conclusion one way or the other what would be determinative would be the nature of the transaction and not its form. And this exercise undoubtedly involves delving into both facts and law. The observations in Sri T.V.T & Firms (supra) being apposite are culled out hereinbelow:-

> *"As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale*

is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. 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 will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship……"

"……It is manifest that the question as to whether the transactions in the present case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the appellant might be able to place before the appropriate authority."

27.4 In the instant case in our view the Tribunal has misapplied the law to the facts determined or even those which are undisputed.

27.5 In so far as the ***Ahmedabad Stamp Vendor & Association*** *(supra)* case is concerned it is clear that it does not assist the assessee(s)-airline(s), if at all the ratio of the judgment clearly helps the Revenue. In the said case the petitioner association whose members were stamp vendors had approached the court, amongst others, with a prayer of declaration to the effect, that the provisions of Section 194H of the Act were not applicable in respect of discount available to them with regard to stamps bought by them at a discount from the State Government. It is in this context the court was called upon to determine whether the discount made available to the stamp vendors by the State Government

was a 'commission' or 'brokerage' within the meaning of the explanation (i) to Section 194H of the Act. The Court came to the conclusion that stamp vendors had ***purchased*** the stamps at a ***discounted price*** and hence the provisions of Section 194H of the Act had no applicability. This is clear from the following observations of the Court

> *"There is no dispute about the fact that the licensed vendor has to pay the price of the stamp papers less the discount at the rates provided in Appendix III to the Rules, which rates vary from 0.5 per cent to 4 per cent. It is not that the stamp vendor collects the stamp papers from the Government, sells them to the retail customers, and then deposits the sale proceeds with the Government less the discount. The liability of the stamp vendor to pay the price less the discount is not dependent upon or contingent to sale of the stamp papers by the licensed vendor. The licensed vendor would not be entitled to get any compensation or refund of the price if the stamp papers were to be lost or destroyed……."*

> *"….The crucial question is whether ownership in the stamp papers passes to the stamp vendor when the treasury officer delivers stamp papers on payment of price less discount. The rules themselves contemplate that what the licenses vendor does, while taking delivery of the stamp papers from the Government offices,* ***is purchasing the stamp papers.*** *Clause (b) of sub-rule (2) of rule 24 indicates that the discount which the licensed vendor had obtained from the Government was* ***on purchase of the stamp papers****……."*

28. In view of the above we hold that the supplementary commission which is the amount retained by the travel agent is commission within the meaning of Section 194H read with Explanation (i) to the said

section. The assessee-airlines were thus obliged to deduct tax at source at the rate prescribed during the relevant period. The assessee-airline having not deducted the tax at source, they are liable to be held, within the terms of Section 201(1), as assessee(s)-in-default and also liable for payment of interest in terms of section 201(1A) of the Act. In view of the fact that the Tribunal having coming to the conclusion that Section 194H of the Act was not applicable and hence did not examine any other contention of the assessee-airline, as also, the quantum and the period for which assessee-airline would be entitled to pay interest or to what extent the benefit of the certificate issued to them, if any, under Section 197 of the Act would be available. We allow the following appeals and set aside the impugned judgments passed by the Tribunal in each of these appeals and remand the matter to the Tribunal for examining all other aspects of the matter as also the consequences which would flow therefrom.

29. This leaves us with the third set of appeals which relate to cases where assessee(s)-airline(s) had issued tickets at concessional price to their respective travel agents.

29.1 The learned counsel for Revenue Ms Bansal, as noted hereinabove, has submitted that even these would come within the ambit of Section 194H of the Act for the reason that the concessional tickets are given to the travel agents for the services rendered by them. Therefore, the difference between the full value of the ticket and the

concessional ticket would be the ‘commission’ on which tax at source should have been deducted by the assessee(s)-airline(s).

29.2 The learned counsel appearing for the assessee(s) refute this submission. They have submitted that the said concessional tickets are for the personal use of the travel agents; they are non-transferable and the difference between the full value of the ticket and the concessional price is not ‘income’ within the meaning of Section 194H of the Act.

29.3 After considering the matter carefully we tend to agree with the submission of the learned counsel for the assessee(s)-airline(s). The difference in value in these cases cannot be termed as ‘commission’ for the following reasons:-

(i) the concessional ticket may have been given to the travel agent for carrying out his function as an agent; however, the transaction between the two is that of principal to principal. The travel agent upon payment of concessional price adorns the robe of a customer of the assessee-airline;

(ii) the difference in price is a discount, that is, a deduction on the full value of the ticket;

(iii) no income having been received by the travel agent, it is not offered to tax by them. We are not told that the department sought to tax the travel agent on the difference in price i.e., concession received by the travel agents except to the extent of holding the assessee(s)-airline(s) liable under Section 194H of the Act for failure to deduct tax at source in respect of such concession; and

(iv) lastly, the transferee i.e., travel agent is liable to the transferor i.e, the assessee-airline in its capacity as a debtor and not an agent for the price of ticket as soon the property in ticket passes to the travel agent.

29.4. Keeping the aforesaid in mind, the appeal of the Revenue in CIT vs Lufthansa German Airways in ITA no. 1269/2007 is dismissed.

30. Consequently, in the result the appeal is allowed in ITA Nos. 306/2005, 123/2006, 121/2006, 432/2006, 124/2006, 116/2006, 952/2008, 964/2008, 51/2006, 119/2006, 120/2006, 256/2006, 969/2008, 897/2008, 1501/2006, 1139/2005, 108/2007, 105/2008 336/2008, 117/2006 & 118/2006 in terms of the directions contained in our judgment.

RAJIV SHAKDHER, J

April 13, 2009/kk **BADAR DURREZ AHMED, J**