IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA Nos. 127 to 133/MUM/2023
(Assessment Years 2013-14 to 2019-20)

DCIT (OSD) TDS 2(3) Room No. 310, 3rd Floor, MTNL Building, Cumballa Hill, Mumbai 400026	Vs.	Total Energies Marketing India Pvt. Ltd. 3rd Floor, the Leela Galleria, Andhri-Kurla Road, Andheri(E), Mumbai 400059
(Appellant)		**(Respondent)**

PAN No. AAACE2175M

Assessee by	:	Shri Ketan Ved, & Shri Abul Kadir Jawadwala, ARs
Revenue by	:	Shri Biswanath Das & Ms. Richa Gulati, DRs

Date of hearing: 17.05.2023
Date of pronouncement : 16.08.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This is the set of 6 appeals filed by The Deputy Commissioner Of Income Tax, (OSD) (TDS) – 2 (3) Mumbai (The Learned AO) for A Y 2013 – 14 to 2019 – 20 against appellate orders passed by the National Faceless Appeal Centre, Delhi (The Learned CIT – A) dated 14/11/2022. All these appeals involve the common issues and therefore they are disposed of by this common order.

02. All these six appeals have following identical grounds and issues.

i. Whether tax is deductible on ESOP provisions as soon as it is granted and provided for in the books of account or at the time of allotment of shares to the employees when it becomes chargeable to tax in their hands as perquisites u/s 17 (2) (vi) of The Act

ii. Whether tax is deductible on the discount offered by the assessee to its various dealers is recharacterised as commission and therefore tax is deductible there on u/s 194H of the Act

iii. Whether on the year end provisions of expenses which are made on the last day of financial year and reversed on the next day i.e. [First day] of next year and tax is deducted by the assessee as and when bills are received from vendors in subsequent year.

03. Issues and its quantification in all these six appeals are as under :-

ITA No	A Y	Grounds of appeal		
		a	b	C
127/M/2023	2013 – 14 as per appellate order dated 14/11/2022 and modified under section 154 of the income tax act by order dated 31/12/2019	failure to deduct tax at source on employee share best payments of ₹ 16,632,320/– on which TDS default under section 201 (1) of ₹ 4,989,696/– on interest under section 201 (1A was bracket is of ₹ 4,640,417	failure to deduct tax at source on discount on debates of ₹ 399,200,000 on which TDS default under section 201 (1) is of ₹ 39,920,000/– and interest under section 201 (1A) of ₹ 37,125,600	failure to deduct tax at source on year end provisions of ₹ 13,30,43,607/– on which TDS default under section 201 (1) is determined at ₹ 1,23,93,752 and interest under section 201 (1A) of ₹ 10,162,877/–
128/M/2023	2014 – 15 against appellate order dated 14/11/2022	Failure to deduct tax at source on ESOP of ₹ 4,398,291 and interest thereon under section 201 (1A) of ₹ 3,562,616	Failure to deduct tax on discounts and rebates of ₹ 457,600,000 having a TDS default under section 201 (1) of ₹ 45,760,000 and interest of ₹ 37,065,600	Failure to deduct tax at source on year end provisions of ₹ 210,311,767 on which TDS default under section 201 (1) of ₹ 1,97,79,204 and interest of ₹ 16,218,947
129/M/2023	2015 – 16 against appellate order dated 14/11/2022	Failure to deduct tax at source on employee share best payment of ₹	Failure to deduct tax at source on discounts and rebates of ₹ 533,500,000	Failure to deduct tax at source on here and provision of ₹ 215,648,240 on which TDS

		13,709,009 808/- on which TDS default under section 201 (1) is of ₹ 4,112,942 and interest under section 201 (1A) is of ₹ 2,837,930	on which TDS default under section 201 (1) of ₹ 53,350,000 and interest under section 201 (1A) of ₹ 36,811,500	default under section 201 (1) is determined of ₹ 19,852,417 and interest under section 201 (1A) of Rs. 115,14,402
130/M/2023	2016 – 17 against appellate order dated 14/11/2022 rectified under section 154 of the income tax act by the learned assessing officer dated 31/12/2019	Failure to deduct tax at source on employee share best payment of ₹ 14,053,480/– on which TDS default under section 201 (1) is determined at ₹ 4,216,044 and interest under section 201 (1A) of ₹ 2,403,145	Failure to deduct tax at source on discount and rebates of ₹ 1844 Lacs on which TDS default under section 201 (1) of ₹ 18,440,000 and interest under section 201 (1A) of ₹ 6,085,200	Failure to deduct tax at source on year and provision of ₹ 344,055,935 on which TDS default under section 201 (1) is determined of ₹ 34,145,594 and interest under section 201 (1A) is determined at Rs. 112,68,046
131/M/2023	2017 – 18	Failure to deduct tax at source on employee share best payment of ₹ 1,79,73,114 on which TDS default under section 201 (1) is of ₹ 5,391,934/– and interest under section 201 (1A) of ₹ 2,426,370	Failure to deduct tax at source on discount and rebates of ₹ 135,9000/- on which TDS default under section 201 (1) is of ₹ 13,590,000 and interest under section 201 (1A) of ₹ 6,115,500	Failure to deduct tax if source on year and provisions of ₹ 30,92,02,890/– on which TDS default under section 201 (1) is determined at ₹ 30,920,289 and interest under section 201 (1A) of ₹ 13,914,130/–
132/M/2023	2018 – 19 appellate order dated 14/11/2022 and rectified under section 154 of the income tax act by the order of the	Failure to deduct tax at source on employee share best payment of ₹ 15,773,187/– on which TDS default under section 201	Failure to deduct tax at source on discount and rebates of ₹ 38,96,00,000 on which TDS default under section 201 (1) is of ₹	Failure to deduct tax at source on year and provisions of ₹ 450,702,965 on which tax deducted at source default under section

	learned assessing officer dated 31/12/2019	(1) is of ₹ 4,731,956 and interest under section 201 (1A) is of ₹ 5,061,546	19,480,000 and interest under section 201 (1, A) is of ₹ 64,28,400	201 (1) is of ₹ 28,005,776 and interest under section 201 (1A) is of ₹ 4,797271/-
133/M/2023	2019 – 20 appellate order dated 14/11/2022 and order under section 154 of the act dated 31/12/2019	Failure to deduct tax at source on employee share best payment of ₹ 22,471,662 and TDS default thereon under section 201 (1) of ₹ 6,741,499 and interest under section 201 (1A) of ₹ 4,015,715	Failure to deduct tax at source on discount on rebates of ₹ 203,400,000 on which TDS default under section 201 (1) is determined at ₹ 20,340,000/– and interest under section 201 (1A) of ₹ 4,271,400	Failure to deduct tax at source on year and provisions of ₹ 34,72,33,583 having a TDS default under section 201 (1) of ₹ 34,723,358 and interest under section 201 (1A of ₹ 7,291,905

04. We take appeal of LD AO for AY 2013-14 as lead appeal.

05. ITA number 127/M/2023 is filed by the Deputy Commissioner Of Income Tax for assessment year 2013 – 14 against the appellate order passed by the National faceless appeal Centre Delhi dated 14/11/2022 wherein the appeal filed against the order passed under section 201 of The Income Tax Act, 1961 [The Act] dated 11/12/2019 by the AO was partly allowed.

06. The learned assessing officer is aggrieved with the appellate order and is in appeal before us raising following grounds:-

a) On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in relying on the honourable ITAT decision deleting addition made by AO in respect of tax not deducted at source on account of ESOP without appreciating the fact that the T D S provision will come in picture, the moment is provided to employees to exercise the option.

b) On the facts and circumstances of the case and in law, the learned CIT (A) has erred in relying on the Supreme Court decision in holding that rebates and discounts offered by the assessee company to distributors, dealers, customers are not covered under section 194H, without appreciating the fact that all these discounts

have been given which are basically incentives and benefit accrued to the distributors, dealers, customers which are in nature of commission given. Therefore the amount of discount offered by the assessee has to be termed as 'commission' under section 194H of The Act

c) on the facts and circumstances of the case and law, the learned CIT (A) has erred in relying on honourable ITA T decision in deleting tax deducted at source on account of section 40 (i) (ia) without appreciating the fact that the provisions have been made by the assessee company after taking into account the quantum of work done by them for the company and consequent liability arising on the company to pay for such work.

07. Brief facts of the case shows that assessee deals in business segment like lubricants for automotive and industrial applications, liquefied petroleum gas for domestic and commercial applications, other products and special fluids. As there was a significant decrease in the tax deduction at source in case of a company compared to earlier years, verification was conducted by The Deputy Commissioner Of Income Tax (OSD) (TDS), 2 (3), Mumbai at the business premises of the assessee.

08. During the course of verification it was found that:-

a. Assessee has incurred expenses on employee share-based payment debited to profit and loss account of ₹ 1.66 crores. Assessee did not deduct any tax at source on the above sum. The reason for non-deduction of the tax was that the employee share-based payments during the financial year 2012 – 13 a sum of Rs 1 66,32,320 has been paid on account of incentive plans to its employees in the nature of performance shares of TOTAL SA France. This performance shares is awarded become final after the specified three-year vesting period subject to a presence condition and performance condition based on the return on equity. The claim of the assessee was that assessee has made a provision of the above sum on account of employee share-based payments which represents grant of performance shares. The provision of performance share is made over the vesting period of 2 – 3 years on the basis of guidance note 18 on accounting for employee share-based payments issued by the Institute of chartered accountants

of India. The employee becomes eligible for vesting exercise at the end of two years. Therefore performance shares granted in financial year 2011 – 12 have vested in financial year 2012 – 13 and accordingly considered for perquisites for the purpose of computation of tax deduction. Details for all the two years of grant vesting and exercise are disclosed to the assessing officer as per the note on account. Assessee further submitted that in case of employees, shares have been allotted at the end of the second year vesting period and details of the perquisites on the same for assessment year 2013 – 14 are submitted before the assessing officer. Therefore the claim of the assessee is that since the assessee has considered the employee share option plan as part of perquisites forming part of the salary and deducted appropriate tax at source in the year in which shares are allotted there is no default for non-deduction of tax at source when the shares are granted. The assessee further stated that whenever the income becomes taxable in the hands of those employees, assessee has already deducted tax at source and issued a TDS form No 16. Therefore there is no default on part of the assessee. The learned assessing officer was of the view that the amount of taxes required to be deducted as soon the amount is debited in the books of accounts whereas the claim of the assessee is that it is deducted at the source when the actual ESOP is taxable in the hands of the assessee. The learned assessing officer rejected the contention of the assessee and held that since the right to exercise the option has been provided in financial year 2012 – 13 when it is granted , tax deduction at sources would be applicable in that year. Accordingly it was held that the assessee has failed to deduct tax at source on the employees' share-based payments.

b. It was further found that that assessee company has made a provision of ₹ 215,069,651 at the end of the year on account of various expenses on which tax at source was deductible under the T D S provisions of section 192, 194C and 194J of the act. Assessee did not tax deduct tax at source on the above sum. The assessee submitted that assessee has made a year end provision for the purposes of the accounts. Assessee makes year end provision on 31st of March of the respective financial year and then reverses the entire provision on first day of the next financial year. Therefore as and when the services are rendered

and invoices received, the respective vendors are credited and T D S is deducted on that sum. Thus above provision was created at the end of the year is then reversed on the very first day of the next assessment year. Further provision being sum which are estimates, the assessee contended that it has no responsibility to pay these specific amounts at the time of making this provisions this year and provisions are reversed in the beginning of the subsequent period. Accordingly, as and when the sum is paid to the vendor or credited to the account of the vendor, the appropriate tax is deducted at source. Thus, assessee has submitted that it has made tax deduction at source in the subsequent year whenever vendor is ultimately credited. Assessee also submitted a detailed sheet listing of provision made as at the end of the financial year and reversed in the subsequent year. The learned assessing officer noted that expenditure has been credited by the assessee company in its books of accounts and liability for payment of such expenses have crystallised and therefore the assessee should have deducted tax at source. Accordingly it was found that Assessee Company is liable to deduct tax at source on expenses debited in the books of account of ₹ 215,069,651.

c. The learned AO found that assessee has claimed discounts in the profit and loss account amounting to ₹ 399,200,000. Assessee explained that as assessee is in the business of manufacturing and sale of various products such as lubricants, liquefied petroleum gas etc. These products are sold to independent distributors who in turn may sale to the multi brand retailers and finally to the consumers. The distributor purchases the products on the basis of dealers landed price and not on the basis of the maximum retail price. On such dealers landed price, distributors are entitled to various seasonal or product promotion scheme that the marketing department frames based on the prevailing market condition and the scheme of the competitors. Based on the scheme, assessee has made various deductions under various heads on sales made to the purchaser/vendor/distributor on the unit price of the products such as product discount or invoice discount on percentage basis. Since only the net invoice price/value is liable to GST all the discounts and rebates are deducted for computation of liability under the goods and service tax. Assessee also explained that there

are various types of discounts offered by the assessee by way of product discount, primary scheme, seasonal secondary schemes etc. Assessee also submitted that as the discounts are not covered under section 194H of the act because of the several judicial precedents as it is a rebate and discount; there is no failure on part of the assessee to deduct tax at source on such discounts. The learned assessing officer on the basis of the statement of the Asst VP taxation of the assessee held that the amount of discount offer to the distributors and finally to the customers were subject to various terms and conditions based on competition etc. and therefore it partakes the character of the commission. This discounts are also in the nature of incentives given on account of competition, sales promotion, pricing and to counter various market challenges. Commission/discount offered by the assessee is directly linked or related to its liquidity which proves that these are not normal discount offered by the assessee but represents the amount of commission. Accordingly he held that the amount of discount offered is commission in substances and provision of section 194H applies, therefore assessee should have deducted tax at sources on it. Accordingly the learned assessing officer held that assessee has failed to deduct tax at source on discount and rebates amounting to ₹ 399,200,000 under section 194H of the act.

09. Accordingly an order under section 201 (1) /201 (1A) of the act was passed on 11/12/2019 wherein the employee share-based payment of Rs 1,66,32,320/- discount and rebates of ₹ 399,200,000/- and expenses of ₹ 215,069,655/- were held to be subject to tax deduction at source. Assessee was found to be in default for tax deduction at source under section 201 (1) of the act of ₹ 6,64,16,661/–. Interest was also chargeable under section 201 (1A) amounting to ₹ 61,767,495/–. Accordingly the assessee company was directed to pay the above defaulted amount of ₹ 128,184,156/–.

10. Assessee aggrieved with the above order preferred an appeal before National Faceless Appeal Centre Delhi (the learned CIT – A) who passed an appellate order on 14/11/2022 wherein he held that :-

a) With respect to the tax deduction at source on account of employee share-based payment amounting to ₹ 1,66,32,320/– the learned CIT – A following the decision of the coordinate

benches in case of Biocon Ltd versus DCIT, Bharat financial inclusion Ltd versus DCIT **[**2018] 96 taxmann.com 540 (Hyderabad - Trib.)and IBM India private limited versus ITO held that assessee is not liable to deduct tax at source. He further held that the assessee has demonstrated that the tax deduction at source has been deducted at the stage of employee actually availing the ESOP options every year and has been deducted to the extent during this year also.

b) With respect to the non-deduction of tax at source on account of section 40 (a) (ia) amounting to ₹ 133,043,607, he held that there is no failure to deduct tax at source following several judicial precedents of coordinate benches that on year end provisions there is no liability of tax deduction at source

c) With respect to the non-deduction of tax at source on account of rebates and discounts amounting to ₹ 399,200,000 the learned CIT – A following the decision of the honourable Gujarat High Court in case of Ahmedabad stamp vendors association versus Union of India 124 taxmann 628 and of the honourable Supreme Court in case of CIT versus Ahmedabad stamp vendors association 25 taxmann.com 201 held that no taxes required to be deducted on discounts.

11. Accordingly the appeal of the assessee was allowed and therefore the learned assessing officer is aggrieved with the same and is in appeal before us.

12. The learned departmental representative vehemently stated that the learned CIT – A has merely followed the decision of the various tribunals and held that no taxes required to be deducted on the above sum based on the written submission made by the assessee.

a. With respect to the employee stock option scheme payment to the employees the learned departmental representative vehemently stated that the assessee is required to deduct tax at source on the date of granting of such rights to the employees.

b. With respect to the yearend provisions it was submitted that the assessee should have deducted tax at sources. In this case Payees are identified and the amount is also crystallised. Merely non receipt of the bill could not be the reason for non-deduction of tax at source. It was submitted that if the assessee does not

have any information that to whom it is payable then how the assessee can make a provision. Provisions can only be made when there is a clear cut liability arising towards some services received by the assessee or some obligation of payment has arisen. Assessee is a company to whom the Companies Act a[[lies and all the expenses are incurred on the basis of accounting policy and method adopted by the assessee, therefore the ld COIT (A) is grossly erred in noting than payees cannot identified. He submits that when assessee itself submits that it is reversed on the very next date, and when the bills of those parties are received tax is deducted, shows that payees are identified. He submits that quantification is also made on the basis of the mandate, work order etc. It cannot be a wild estimate. Hence Assessee should have deducted tax at sources on the year end provisions. He relied up on Biocon Ltd. V Deputy Commissioner of Income-tax, [2023] 152 taxmann.com 55 (Bangalore - Trib.) Where in it is held that Tax is required to be deducted on year-end provisions made by assessee which are ascertained liabilities. He also relied on Inter Globe Aviation Ltd. V ACIT [2020] 114 taxmann.com 460 (Delhi - Trib.).

c. With respect to the rebates and discounts it was submitted that it is in the nature of commission and tax should have been deducted under section 194H of the act.

13. The learned authorised representative submitted a paper book containing 191 pages. His arguments with respect to all these three issues are as under:-

a) With respect to the tax deduction at source on employee share-based payment, he submitted that the submissions were made before the learned CIT – A as per paragraph number 2 of their submission which is placed at page number 63 of the paper book. He referred to the various dates when the ESOP is granted, when it vested and when employee exercised the option. He further referred that mandatory holding period after exercise two years and the eligibility for transfer of the performance shares was on 29/7/2016. He submits that assessee has not granted tax when ESOP is granted but as soon as the shares are allotted to the assessee same is

considered as perquisite in the hands of employees u/s 17 (2) (vi) of the Act. Accordingly he submitted that as on 31/3/2013 the assessee has made a provision of ₹ 1.66 crores on account of the above payment which represents grant of performance shares. He further referred to the guidelines issued by the Institute of chartered accountants of India and also the provisions of section 17 (2) (vi) when the same is taxable in the hands of the employee. He further stated that since the assessee has considered the allotment date which is chargeable to tax in the hands of these employees and on that particular date the tax has been deducted at source under the head salary. He stated that there is no reason that the tax deduction at source be made in the year of grant of such ESOP. Therefore he submitted that considering the various decisions perused by the learned CIT – A, he has correctly held that assessee is not required to deduct tax at source on ESOPs.

b) With respect to the year end provisions, he submitted that for the purpose of the account the assessee makes year end provisions on 31st March of the respective financial year and then reverses the entire provision on first day of the next financial year. Thereafter as and when the invoices are received, the amount is credited to the respective vendor's account and at that particular time the tax is deducted at source on taxes. Therefore in fact the assessee has deducted tax at source on such payment as and when required. It was further stated that at the most the provision made by the assessee can be considered to be estimates made only, on which no taxes required to be deducted. It was further stated that the assessee has already disallowed the above expenditure under section 40 (a) (ia) in the year of provision and considered for deduction in the year of deduction of tax at source and paid income tax liability as per computation in accordance therewith. Assessee has in fact made TDS in the subsequent year and whenever the vendor was ultimately not paid or the provision was excessive, the same has been reversed. Therefore the only default that the assessee is liable to his payment of interest for delayed payment of tax

deduction at source and not for complete non-deduction of tax at source. Accordingly, he submitted that the learned CIT – A has correctly held that no taxes required to be deducted at source following the several judicial precedents on year end provisioning. He submitted that Honourable Karnataka High court in Subex Limited V DCIT [2023] 148 taxmann.com 271 (Karnataka)[22-12-2022] has held that Where assessee made yearend provision for payments towards legal and professional charges, since said provisions made at end of accounting year were reversed in beginning of next year and neither payees nor exact amount payable were identifiable during year and, further, assessee had deducted tax at source in subsequent year on said payments in accordance with section 194J and also remitted same, no TDS was to be deducted on such payments by assessee during relevant year. He also relied up on Karnataka Power Transmission Corporation Ltd. v. Dy. CIT [2016] 67 taxmann.com 259/238 Taxman 287/383 ITR 59 (Kar.) and [2020] 119 taxmann.com 424 (Mumbai - Trib.)

c) With respect to the rebates and discounts of ₹ 399,200,000, he explained the business of the assessee and submitted that these are various types of discounts included in the invoice of the assessee and such rebates and discounts given in the invoice to the buyer of the products of the assessee only goes to reduce the sale price of the product and hence not liable to be tax deduction under 194H as commission expenditure. He referred to the distributorship agreement of the assessee with its vendor's and submitted that it is a 'principal to principal' basis transaction and discount given by the assessee and it cannot be considered as a payment of commission or brokerage because there is no intermediary or commission agent or broker in this case. He submitted that issues are squarely covered by several judicial precedents including decision of Honourable Bombay high court. Where assessee offered incentive to distributors/stockists on meeting of sales target on principal to principal basis, that incentive could not be treated as commission payment under section 194H as held by

Honourable High court in CIT V Intervet india P Limited [2014] 49 taxmann.com 14 (Bombay).

14. Accordingly it was the contention of the learned authorised representative that the learned CIT – A has correctly held that no taxes required to be deducted on above payment and therefore the order of the learned CIT – A deserves to be upheld.

15. The ld DR in rejoinder submitted that the agreement for distributor with an agent and not on principal to principal basis. Further year end provisions are identified provisions, so decision cited by the ld AR does not apply.

16. We have carefully considered the rival contention and perused the orders of the lower authorities. The only issue involved in this appeal is whether taxes required to be deducted on several payments made by the assessee or provisions of expenditure.

a) With respect to the ESOP payment, it would be considered as perquisite of the eligible employees when shares that have been granted, vested in the employees are allotted on exercise of option on completion of the vesting period. Therefore at the time of allotment of shares on the exercise, difference between the fair market value and the value of the shares as on exercise date and the amount that employees have paid is calculated and taxed accordingly. The difference is subject to tax in the hands of assessee. This is the provision of taxation of perquisites in the hands of employees u/s 17 (2) (vi) of the Act. Provisions of TDS are enacted with the basic objective of 'pay [tax] as you earn'. Further TDS is considered as advance tax paid in the hands of recipient of income. Therefore, the taxes not required to be deducted at source the time of grant of ESOP but at the time of option is exercised by employees of the assessee and shares are allotted to the employees, because it is that time it is taxable in the hands of employees. The learned assessing officer has treated that taxes required to be deducted at source at the time of granting of the ESOPs. The assessee has deducted tax at the time of the option exercised by the employees of the assessee. Therefore the learned CIT – A has held that no taxes required to be deducted at source at the time of granting of such option and when assessee has deducted tax at source on allotment of

performance shares, assessee could not be said to be in default for non-deduction of tax. The assessee has produced before us at page number 90 details of perquisite on allotment of performance shares which were granted in year 2010. In assessment year 13 – 14, assessee has deducted tax at source thereon, when the shares were allotted. Assessee has also submitted copies of form number 16 and form number 12 BA of the employees for the respective period Wherein the ESOP is considered as perquisite and taxes deducted at source by the employer assessee. Deduction is allowed to the assessee on the basis of provisions of the income tax Act. Disallowance u/s 40 (a) (ia) can be made only when the tax is deductible at source. TDS u/s 192 ids made at the time of payment and not at the time of accrual. In view of this, we do not find any infirmity in the order of the learned CIT – A.

b) On the second issue of the year end provisions, we find that issue is squarely covered against the assessee by the decision of the honourable Supreme Court in case of Palam Gas Services 2017] 81 taxmann.com 43 (SC)/[2017] 247 Taxman 379 (SC) because in this case we find that at page number 91 of the paper book wherein identification of the vendor, permanent account number, particulars of the head under which tax is required to be deducted mentioning the section, amount paid or payable, TDS amount deductible but not deducted. These are the details in tax Audit form no 3 CD which is prepared by assessee and certified by the auditor as Correct. Thus it is clear that payees are identified. In any way 'provision' is also required to be made on the basis of some estimate and with respect to a payee. If payee is not indentified we failed to understand how and what basis the provisions are made. It is not the case that assessee is making a provision without any basis. Such a provision is a violation of accounting standards, accounting policy of the company and against provisions of the companies Act! As per accounting standard 29 the provision cannot be made unless the payee is identified. Therefore the various judicial precedents relied upon by the learned authorised

representative does not apply to the facts of the case. However it is also the fact that the assessee has subsequently deducted tax at source on such payment and therefore the assessee is only liable to the extent of interest under section 201(1A) of the act. Accordingly on this issue we confirm the order of the learned assessing officer only to that extent of charging of the interest as the taxes already deducted on such payment and paid albeit late.

c) On the third issue of discount given by the assessee of ₹ 399,200,000 which were held by the learned AO as commission expenditure subject to tax deduction at source under section 194H of the act. We find that this issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in case of CIT versus Intervet India private limited (2014) 49 taxmann.com 14 wherein it is held that where the assessee offered incentive to Distributors and stockist meeting of the sales target on 'principal to principal' basis that incentive could not be treated as commission payment subject to tax deduction at source under section 194H of the act. This is also mandate of decision of Honourable supreme court in case of Singapore Airlines limited [2022] 144 taxmann.com 221 (SC), that unless there is principal to agent relationship established as per agreement , there is no requirement of TDS on Commission payment. Assessee has also produced before us the details of several sales promotion schemes based on which discounts are offered to the various Distributors. The distributorship agreement clearly states that company shall supply the products on the basis of the order placed by the distributor from time to time and as soon as the products are delivered to the distributor the responsibility of the assessee ceases. As per clause number 4 of the distributorship agreement it is clear that risk and reward of the goods passes on to the distributor from the assessee as soon as the goods are delivered to the distributor. Therefore it is an agreement having a relationship of 'principal to principal' and not 'principal to agent'. Therefore, respectfully following the decision of the honourable Bombay High Court, we confirm the

order of the learned CIT – A and hold that assessee is not required to deduct any tax at source under the provisions of section 194H of the act on the discount given to the Distributors of the assessee.

17. Accordingly ground number (a) and (b) of the appeal of the learned assessing officer is dismissed and ground number (C) is partly allowed. With respect to non deduction of tax on year end provision ld AO is directed to compute interest u/s 201 (1A) of the Act to the extent and period of TDS to be deducted by the assessee and taxes paid by the payees.

18. Accordingly, as the grounds are similar, all other five appeals are also decided on similar reasons giving similar results.

19. Thus all these six Appeals are partly allowed.

Order pronounced in the open court on 16.08. 2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 16.08. 2023
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai