IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1928/Mum./2023
(Assessment Year : 2012–13)

&

ITA no.1929/Mum./2023
(Assessment Year : 2013–14)

&

ITA no.1930/Mum./2023
(Assessment Year : 2014–15)

&

ITA no.1931/Mum./2023
(Assessment Year : 2015–16)

&

ITA no.1932/Mum./2023
(Assessment Year : 2016–17)

&

ITA no.1925/Mum./2023
(Assessment Year : 2017–18)

&

ITA no.1926/Mum./2023
(Assessment Year : 2018–19)

&

ITA no.1927/Mum./2023
(Assessment Year : 2019–20)

State Bank of India
3rd Floor, State Bank Bhawan,
Madam Cama Road, Nariman Point, ……. Appellant
Mumbai-400021.
PAN – AAACS8577K

v/s

DCIT(TDS), Circle-2(2),
Room No.311, 3rd Floor,
MTNL Building, Cumballa Hill, ... Respondent
Mumbai-400026.

ITA no.1899/Mum./2023
(Assessment Year : 2013–14)

&

ITA no.1900/Mum./2023
(Assessment Year : 2016–17)

&

ITA no.1901/Mum./2023
(Assessment Year : 2017–18)

&

ITA no.1902/Mum./2023
(Assessment Year : 2018–19)

&

ITA no.1903/Mum./2023
(Assessment Year : 2019–20)

DCIT(TDS), Circle-2(2),
Room No.311, 3rd Floor,
MTNL Building, Cumballa Hill, ……. Appellant
Mumbai-400026.

v/s

State Bank of India
3rd Floor, State Bank Bhawan,
Madam Cama Road, Nariman Point, ... Respondent
Mumbai-400021.
PAN – AAACS8577K

Assessee by : Shri P. J. Pardiwala/Shri Paras Salva
Shri Pratik Poddar/Ms. Rajnandini Shukla

Revenue by : Dr. Kishore Dhule/Shri R. A. Dhyani
Shri M. K. Singh

Date of Hearing – 01/03/2024	Date of Order – 07/05/2024

O R D E R

PER BENCH

The present batch of appeals have been filed by the assessee and the Revenue challenging the separate impugned orders of even date 31.03.2023

passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ["*learned CIT(A)*"], for the assessment years 2012-13 to 2019-20, which in turn arose from the separate orders passed under section 201/201(1A) of the Act.

2. Since all the appeals pertain to the same assessee and involve a similar issue that arises out of a similar factual matrix, therefore, these appeals were heard together and are being decided by way of this consolidated order. Further, since the assessee and Revenue have raised similar grounds in their appeals, therefore, the grounds raised by the assessee and Revenue in the cross-appeal for the assessment year 2019-20 are reproduced hereunder for ready reference and with the consent of the parties the cross-appeal for the assessment year 2019-20 is taken up as a lead case.

3. In its appeal for the assessment year 2019-20, the assessee has raised the following grounds: -

> *"1. The learned CIT(A) erred in confirming the action of the Income-tax Officer (TDS) [ITO] of considering the surplus interest retained by Non-Banking Financial Companies (NBFCs] as liable to tax deduction at source under the provisions of the Income-tax Act, 1961.*
>
> *2. The learned CIT(A) erred in considering the excess interest retained by the NBFCs of Rs. 790,10,01,162 as service fee and holding that the TDS should have been deducted under section 194) (if on principal-to-principal basis) or alternatively under section 194H (if on principal to agent basis).*
>
> *3. The learned CIT(A) erred in not appreciating that the excess interest retained by NBFCs cannot be considered as 'fees for technical services' as it does not involve rendering of any services and accordingly does not require tax deduction under section 194J.*
>
> *4. The learned CIT(A) erred in not appreciating that there cannot be any TDS under section 194H as there is no principal agent relationship between the appellant and NBFCs.*

5. The learned CIT(A) erred in holding that the ITO must charge interest under section 201(1A) in relation to non-deduction of tax at source on surplus retained by NBFCs.

6. The learned CIT(A) erred in confirming action of the ITO in passing the order under section 201(1)/201(1A) without having the charge of appellant's jurisdiction. The order dated 7 March 2019 issued under section 201(1)/201(1A) was passed by ITO - (2)(2)(1) and the officer having jurisdiction over appellant's TAN is ITO - 2(2)(2); therefore, the order passed by the ITO is bad in law and void-ab-initio."

4. While the Revenue has raised the following grounds in its appeal for the assessment year 2019-20:-

"1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing no obligation of TDS deduction u/s. 194A as the RBI has laid down in its guidelines that the total interest (pool yield) pertaining to SBI's share first accrued to the SBI and thereafter the same, by virtue of documents executed, is allowed by the SBI to be retained back by the originating NBFCs?'

2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the nature of transaction as 'Interest payment' instead of other nature of transaction (service fee /commission) whereas the assessee has accrued interest @5% out of total 15% interest earned on Loan under Direct Assignment to NBFCs?'

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in considering the TDS deduction u/s, 194J/194H on the services rendered by the NBFC like maintaining the loan account of the pool loan account, loan documents, monitoring of installments and in case of default of loan, correspondences are being issued by NBFC whereas the assessee Bank has accrued interest @ 5% out of total 15% (pool yield) earned on loans disbursed by the NBFCs

4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the findings made by AO in order u/s. s. 201(1/1A) with respect to TDS liability u/s. 194A in this case?'

5. The only issue that arises for our consideration, in the present case, pertains to the liability of the assessee to withhold tax at source under section 194A, section 194H, or section 194J of the Act.

6. The brief facts of the case, as emanating from the record, are: The assessee is a Public Sector bank. During the survey and post-survey enquiry in the cases of Securitisation Trust, it was noticed that the assessee is also engaged in the transactions of purchasing from various Non-Banking Financial Companies ("*NBFCs*"), under different sectors of loan via the Direct Assignment route. However, it was also noticed that the assessee has purchased 90% of underlying assets under the Direct Assessment route, but has not received the total reward/interest attachment to its 90% share. During the assessment proceedings, the assessee was asked to furnish specific details about the Direct Assignment deals done by them. However, despite regular follow-ups very meagre information was provided by the assessee. On the information provided by the assessee in respect of very less Direct Assignment deals, information about pool yield and details of interest kept back by the NBFCs was not available. Therefore, notices under section 133(6) of the Act were issued to the NBFCs to obtain pool yield and interest kept back by the NBFCs. As per the replies received from some of the NBFCs, it was noticed that there is a difference between pool yield and coupon rate given to the assessee. Thus, it was noticed that the assessee is not receiving total interest attached to their share, and Direct Assignment agreements are executed to receive only a certain percentage of their share and any excess interest (difference between pool yield and coupon rate) on 95%/90% share of the assessee is retained by the NBFCs, which is in violation of RBI guidelines on Direct Assignment transactions. Accordingly, the assessee was asked to show cause as to why it should not treated as an assessee in default under section 201(1)/201(1A) of the Act in respect of interest pertaining to assets assigned

to the assessee but allowed to be kept back with the NBFC. Vide order dated 07.03.2019 passed under section 201(1)/201(1A) of the Act, the Assessing Officer-TDS ("*AO-TDS*") after considering the details available on record held that the assessee has committed default by not deducting TDS in respect of such interest pertaining to the assets assign to the assessee but allow to be kept back with the NBFC. It was also held that the assessee who has purchased 95%/90% of the underline assets, as the case may be as per Minimum Retention Requirement ("*MMR*") guidelines, from the NBFC should also receive the total reward/interest attached with the 95%/90% share. However, in the present case, the assessee is not receiving total interest attached to its share, and agreements are executed to receive only a certain percentage of the share and NBFCs are retaining excess interest on the share of the assessee. Thus, the same is not only in violation of the instruction of the RBI but it is also a kind of transaction in which the investors purchased 90% of the pool of assets/receivable but payback the excess interest over and above the agreed coupon rate, which cannot escape the liability of non-deduction of TDS. Accordingly, it was held that when the interest that belongs to the assessee is allowed by the assessee to be retained by the NBFC, the assessee should deduct TDS under section 194A of the Act. Since the assessee has not deducted the TDS under section 194A of the Act on the amount of interest kept by the NBFCs, in contravention of the RBI guidelines, the assessee has committed default under section 201(1)/201(1A) of the Act. Alternatively, it was held that the amount to be kept back by the originating NBFC, by virtue of agreement between the parties, is on account of a kind of services provided by the originating NBFC including maintenance/development of loan portfolio,

even in that case the amount kept back by the NBFC (different between pool yield and coupon rate assigned to the assessee) are subjected to provisions of TDS under section 194J of the Act. Accordingly, vide aforesaid order dated 07.03.2019 liability under section 201(1) of the Act was computed at Rs.790,10,01,162/- and interest under section 201(1A) of the Act was computed at Rs.44,78,30,439/-.

7. The learned CIT(A), vide impugned order, partially allowed the appeal of the assessee and held that as per the RBI guidelines, the entire risk and reward should have come to the assessee and the assessee should get an entire 15% of the interest, as if there is a default on a particular loan (for the 90% pool assigned to the assessee) the entire loss will come to the assessee. Therefore, the learned CIT(A) held that there is no basis that 5% of the interest should go to the NBFC. The learned CIT(A) further held that on the date of the receipt of 10% interest by the assessee, two transactions have actually taken place, i.e. 15% interest on the pool accrued to the assessee; and the assessee paid 5% interest on the pool to the NBFC. The learned CIT(A), vide impugned order, agreed with the submission of the assessee that it has neither borrowed any money nor has it incurred any debt in favour of the NBFCs, and therefore, the obligation to deduct tax at source under section 194A of the Act does not arise. However, the learned CIT(A) held that the NBFC is rendering many services to the assessee, i.e. maintaining the entire loan account; monitoring instalments; and issuance of letters to the defaulters in case of default. Accordingly, the learned CIT(A) came to the conclusion that the service fee of Rs.1 lakh paid to the NBFC is not adequate to handle the

total volume of transactions. Therefore, it was held that since the assessee is the owner of the entire amount of 90% of the pool, the assessee is giving a part of interest income in lieu of the services rendered by the NBFC to the assessee. Thus, the learned CIT(A) held that the tax must be deducted under section 194J of the Act if the transaction is on a principal-to-principal basis, otherwise, under section 194H of the Act if it is on a principal-to-agent basis. Insofar as the findings of the learned CIT(A) that the assessee is liable to deduct tax at source under section 194J or in the alternative under section 194H of the Act, both the assessee and the Revenue are in appeal before us. In addition, the Revenue has also challenged the findings of the learned CIT(A) that the assessee is not liable to deduct tax at source under section 194A of the Act.

8. We have considered the submissions of both sides and perused the material available on record. The assessee is a bank established under the State Bank of India Act, 1955. In order to meet the liquidity needs, NBFCs have entered into transactions that involve the sale of loans to other lending entities/banks through Direct Assignment, or conversion of their loan assets into marketable securities, known as asset-based Securitisation. Financial sector entities enter into Securitisation and Direct Assignment transactions involving the sale of their loan portfolios. Direct Assignment practices involve the sale of loan portfolios without the involvement of the Special Purpose Vehicle, unlike Securitisation, where setting up of a Special Purpose Vehicle is mandatory. The regulatory framework governing Direct Assignment

transactions and Securitisation transactions is laid down by the Reserve Bank of India ("*RBI*").

9. On the other hand, to make good the shortfall of its lending obligation to the priority sector, the assessee enters into the transaction of purchasing loans from NBFCs through the Direct Assignment route. These loans are originally granted by NBFCs to borrowers and fall within the ambit of priority sector (agriculture, housing, etc.) lending as per the extant guidelines issued by the RBI. The assessee, in accordance with the RBI guidelines, entered into a tripartite agreement for the assignment of loans from NFBCs to an extent of 90%-95% of underlying assets under the Direct Assignment route. The balance 5%-10% is required to be retained by the NBFC as per MRR set out in the RBI guidelines. The aforesaid agreement is signed between the NBFC (Assignor), the assessee (Assignee), and the Trusteeship Company (Assignee Representative). The role of the Assignee Representative is to operate an Escrow Account from which the principal and interest component is distributed to the assignor and assignee in the ratio mutually agreed and set out in the tripartite agreement.

10. The assessee has also entered into a tripartite service agreement between the NBFC (as servicer), the assessee (as assignee), and the Trusteeship Company (as Assignee's Representative). The role of the NBFC as a servicer is to, inter-alia, manage, collect, and receive payments of receivable and deposit the same in the '*Collection and Payout Account*', which is the Escrow Account operated by the Assignee Representative.

11. As per the assessee, the NBFCs out of their total loan pool assets carve out a portfolio of good quality loans and offer the same to the Banks for a buy-out. The Bank carries out due diligence of the said portfolio for assessing the credit risk after analysing the repayment track record of the underlying borrowers and, thereafter, cherry picks the loans that meet the Bank's criteria/standard, and which have an established repayment track record, higher credit quality, better CIBIL scores, etc. Considering that the pool consists of cherry-picked loan assets, i.e. the best quality assets out of the portfolio, the market value of such a pool of assets obliviously is higher than the original terms agreed with the borrower. In addition, the NBFCs have made efforts and incurred the cost of identifying and lending to potential borrowers, and the benefit would accrue to the Bank over the balance tenure of the pool. Therefore, as per the assessee, the market value of such a pool will always command a premium over the outstanding loans. As per the assessee, this premium can be recovered by the NBFCs in either of the following ways: -

a) The bank agrees to earn a lower rate of interest on its portion of assigned loans; or

b) The price agreed upon for the assignment of the pool is at a premium over the outstanding amount of loans being assigned and the entire premium is exchanged upfront.

12. In the present case, as per the assessee, it has opted for the first method, i.e. the premium in the form of consideration gets deferred as the assessee agreed to retain a lower rate of interest on its portion of the assigned loans and the balance of the contracted interest from the borrowers goes to

the NBFCs. As per the assessee, it has not opted for the second option, since the entire premium has to be paid upfront which exposes the bank to a higher risk as compared to the first option, where the premium gets spread over the tenure of the loan.

13. The actual delineation of the entire transaction under the Direct Assignment of loans between the assessee and NBFCs, in the present case, can be understood by way of the following illustration: -

a) NBFC has a pool of assets of say Rs.1 Cr under the priority sector.
b) The rate of interest under the said pool is say 15% on a reducing balance basis.
c) The assessee purchases the pool of assets upto 90% of the pool, i.e. say Rs.90 lakh.
d) The assessee purchases the pool of assets from NBFCs at an interest rate of say 10% on a reducing balance basis.
e) Therefore, the assessee receives 90% of the principal repayment by the borrower, i.e. Rs.90 lakh, and also earns interest @10% on 90% of the pool of assets purchased by it.
f) On the other hand, the amount earned by the NBFC will be 10% of the principal repayment by the borrower, an interest of 15% on 10% of the pool retained by the NBFC, and also the balance interest of 5% on 90% of the pool sold to the assessee.
g) The Trusteeship Company will distribute the principal amount recovered in the ratio of 90:10 and out of the interest earned, it will distribute the assessee's share at 10% of 90% of pool and balance interest to the NBFC.

14. In the present case, the entire dispute amongst the parties is regarding the balance contracted interest from the borrowers, i.e. 5% interest on 90% of

the pool purchased by the assessee, which has been kept back by the NBFCs. As per the Revenue, this 5% interest agreed to be paid to the NBFCs belongs to the assessee, and by allowing the NBFCs to retain the same, not only the RBI guidelines are violated but the assessee has also failed to deduct tax at source under section 194A of the Act. On the other hand, it is the plea of the assessee that the assessee has neither borrowed any money nor incurred any debt in favour of the NBFCs, therefore, there is no obligation to deduct tax at source under section 194A of the Act on the assessee. The learned CIT(A) though granted relief to the assessee and held that the obligation to deduct tax at source under section 194A of the Act does not arise in the present case, however, proceeded to also conclude that part interest retained by the NBFCs on the 90% pool purchased by the assessee is for the services rendered by the NBFCs to the assessee and therefore, the tax must be deducted under section 194J of the Act in case the transaction is on a principal-to-principal basis, or in the alternative under section 194H of the Act, if the transaction is on the principal-to-agent basis.

15. Therefore, in the facts and circumstances as noted above, it needs to be examined whether the interest retained by the NBFCs on the pool of assets purchased by the assessee falls within the category of "*interest*" for the purpose of section 194A of the Act or within the category of "*fees for professional/technical services*" for the purpose of 194J of the Act or within the category of "*commission/brokerage*" for the purpose of 194H of the Act. Since neither it is the findings of the lower authorities nor it was contended by the Revenue that the assessee was liable to deduct tax at source under any other

provisions of Chapter-XVII of the Act, apart from the provisions as noted above, therefore we have confined our analysis and findings only qua the assessee's liability to deduct tax at source under section 194A, 194H, or 194J of the Act.

16. In order to decide whether interest retained by the NBFCs on the pool of assets allotted to the assessee falls within the category of "*interest*" for the purpose of section 194A of the Act, it is firstly pertinent to note the relevant provisions of the Act. As per section 194A of the Act, any person, not being an individual or a HUF, who is responsible for paying to a resident any income by way of interest, shall at the time of credit of such income to the account of payee deduct income tax thereon at the rates in force. The term "*interest*" has been defined under section 2(28A) of the Act as under:-

> *"(28A) "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;"*

17. Therefore, from the plain reading of the provisions of section 2(28A) of the Act, it is evident that interest means interest payable in respect of any money borrowed or debt incurred. As per the Revenue, since 90% of the pool of assets was purchased by the assessee, therefore the total interest pertaining to the assessee's share first accrued to the assessee and thereafter the same, by virtue of the tripartite agreement, is allowed by the assessee to be retained back by the originating NBFCs. Therefore, in light of the provisions of section 194A read with section 2(28A) of the Act, it needs to be examined whether the part interest allowed to be retained back with the originating

NBFC by the assessee is payment in the nature of interest to the NBFC for any money borrowed or debt incurred by the assessee. In the present case, it has not been disputed that the assessee purchased a pool of loans from the NBFCs by way of Direct Assignment. It is also the claim of the Revenue that by purchasing the loan, the assessee, to the extent of its share, i.e. 90%, has stepped into the shoes of the NBFCs, and if there is a default on a particular loan (for the 90% pool assigned to the assessee) the entire loss will come to the assessee. In the present case, it also cannot be disputed that the borrowers have taken the loans from the NBFCs, which were subsequently purchased by the assessee by way of Direct Assignment, and on these loans, the borrowers are paying interest, which is getting deposited in '*Collection and Payout Account*', which is the Escrow Account operated by the Assignee Representative and ultimately this interest is distributed amongst the NBFC and the assessee as per the tripartite agreement. Therefore, from the aforesaid undisputed facts, it is sufficiently evident that the assessee has only purchased a part of the loan by making the upfront payment and allowing the originating NBFCs to retain part interest on such loan paid by the borrowers. In the present case, there is no material available on record to show that the assessee borrowed any funds or incurred any debt from the NBFC. Such being the facts of the present case, the question of payment or crediting of interest by the assessee in favour of NBFC does not arise. Therefore, in the absence of any funds borrowed or debt incurred by the assessee from the NBFC, we are of the considered view that the part interest allowed to be retained back with the originating NBFC cannot be said to be interest within the meaning of section 2(28A) of the Act. Further, it is pertinent to note that under section 194A of

the Act, the payment must be in the nature of interest in order to make the payer responsible for deducting tax at the time of payment or credit of such income. Therefore, though the payment by the borrower of the loan, in the present case, is in the nature of interest, however, when the same is allowed to be retained with the originating NBFC by the assessee under the tripartite agreement, the nature of the same is converted to a consideration for the purchase of 90% of the pool of assets. The nature of income in the hands of the recipient and the nature of expenditure of said sum by that person may not always be the same. Therefore, it is not necessary that what is received as interest is also interest when paid, particularly in the absence of any money borrowed or debt incurred. Accordingly, we are of the considered view that there is no obligation on the assessee to deduct tax at source under section 194A of the Act. Thus, levy of tax under section 201(1) and levy of interest under section 201(1A) of the Act for non-deduction of TDS under section 194A of the Act is not sustainable. Accordingly, grounds no.1, 2, and 4 raised in Revenue's appeal are dismissed.

18. Before analysing whether the assessee was under an obligation to deduct tax at source under section 194H or section 194J of the Act, it is necessary to reiterate that both the assessee and the Revenue are aggrieved against the findings of the learned CIT(A) on this issue. As per the assessee, since both the parties agreed that the learned CIT(A) has erred in holding that the tax was required to be deducted under section 194J/194H and thus surplus interest should be considered as fees for technical/professional services or commission, therefore the order of the learned CIT(A) on this aspect should be

reversed without specific adjudication as there is no dispute between the parties. In this regard, it is pertinent to note that both parties have raised specific grounds in their appeal challenging the findings of the learned CIT(A) pertaining to tax withholding under section 194J/194H of the Act. Since the order passed by the learned CIT(A) is the subject matter of the appeal before us and on the aforesaid findings specific grounds have also been raised by both parties, therefore these grounds need to be adjudicated and more particularly as per the provisions of section 254(1) of the Act.

19. Now coming to the issue of whether interest retained by the NBFCs on the pool of assets purchased by the assessee falls within the category of "*fees for professional/technical services*" for the purpose of 194J of the Act, it is pertinent to note the relevant provisions of the Act. As per section 194J of the Act, any person, not being an individual or HUF, who is responsible for paying to a resident any sum, inter alia, by way of fees for professional services or fees for technical services shall at the time of credit of such sum to the account of payee deduct tax at source. The term "*professional services*" has been defined in Explanation (a) to section 194J of the Act as under: -

> *"(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;"*

20. Further, the "*fees for technical services*" has the same meaning as provided in Explanation-2 to section 9(1)(vii) of the Act and the same reads as under: -

> *"Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".”*

21. In the present case, the learned CIT(A) held that since the NBFC is rendering many services to the assessee, such as maintaining the entire loan account of the pool loan account, monitoring instalments, issuing letters to the defaults, etc., therefore, the assessee is giving a part of interest income in view of the services rendered by the NBFC to the assessee and thus the tax must have been deducted under section 194J of the Act. On the other hand, it is the plea of the assessee that it has entered into a separate tripartite service agreement with the NBFC (as a servicer) the assessee (as an assignee), and Trusteeship Company (as Assignee Representative). From the perusal of sample copy of tripartite service agreement, forming part of the paper book from pages 127-147, we find that pursuant to the Deed of Assignment of pool loan, the assessee appointed the NBFC as a servicer, inter alia, for the purpose of managing, collecting and receiving payment of the receivable and depositing the same in the '*Collection and Payout Account*' to enable the distribution of the payout therefrom and providing certain other services. Further, the NBFC, as a servicer, has agreed to administer and service the assets and to devote such time and exercise such skill, care, and diligence in respect of the assets assigned to the assessee as it would have exercised, had the entire right, title, and interest in the assets remained in the name of the NBFC. From the perusal of the aforesaid agreement, we find that for the aforesaid services one-time service fee of Rs.1 lakh was agreed to be payable to the servicer by the

assessee. As per the learned CIT(A), the service fee of Rs.1 lakh is not adequate to handle the total volume of transactions by the NBFC and the interest allowed to be retained with the NBFC is also towards the services rendered by the NBFC in respect of 90% of the pool of assets sold to the assessee.

22. At the outset, it is pertinent to note that the transaction between the assessee and the NBFC is between two independent parties. Further, even though the assessee is the largest public sector bank in India, however, the transaction of assignment of priority sector loans to the assessee under the permissible Direct Assignment route is completely a commercial transaction between two independent parties, wherein the motive of the NBFC is to meet its liquidity needs by assigning its priority sector loans, while on the other hand, the assessee is entering into this transaction in order to make good the shortfall of its lending obligations to the priority sector. Neither the afore-noted facts are in dispute in the present case nor any material contrary to these facts being brought on record. Such being the facts of the present case, the learned CIT(A) though has held the service fee of Rs.1 lakh paid by the assessee to the NBFC under the tripartite service agreement to be inadequate vis-à-vis various services rendered by the NBFC, however, it is pertinent to note that, *firstly*, the issue is not the determination of arm's length price of the service fees paid by the assessee to the NBFC, *secondly*, even otherwise no such comparative transaction, even though prevalent in the banking sector, has been referred by the learned CIT(A) to come to the aforesaid conclusion. Thus, in view of the above, when a specific tripartite agreement has been entered between the

parties which require payment of service fees to the NBFC for the various services rendered by it, we are of the considered view that such an agreement cannot be simply brushed aside and the part interest allowed to be retained with the NBFC in respect of the pool of assets purchased by the assessee, vide separate agreement, cannot be considered as fees for rendering services by the NBFC. It is also pertinent to note that there is no allegation or material on record that the tripartite service agreement is sham or colourable. Therefore, there is no basis to disregard the tripartite service agreement entered for various services as referred to therein. Further, there is no dispute amongst the parties that the service fee paid by the assessee to the NBFC is after all the tax compliances. Therefore, even if the services rendered by the NBFC under the tripartite service agreement are considered to be in the nature of technical/professional services, the liability to deduct tax under section 194J of the Act is only qua the payment of service fees agreed under the tripartite service agreement and same cannot be extended to the consideration received in a separate agreement for a completely different transaction, i.e. sale of a pool of assets to the assessee.

23. From the perusal of sample tripartite Deed of Assignment of receivables entered into by the assessee, forming part of the paper book from pages 8-34, we find that out of the total principal amount of receivables of Rs. 47,81,97,067/-, the assessee was assigned principal of Rs. 43,03,77,360/-, i.e. 90% of the entire pool. In respect of the aforesaid share of the pool, the assessee agreed to make an upfront payment of Rs. 43,03,77,360/-, which is the entire principal amount assigned to it. In this regard, it needs to be

appreciated that the principal amount of the loan given to the borrower is nothing but the direct cost to the NBFC, 90% of which was assigned to the assessee. Further, an independent commercial transaction between two independent parties cannot be on a cost-to-cost basis without any mark-up. Therefore, for selling the share of a loan amounting to Rs. 43,03,77,360/-, the consideration cannot be the same as the principal amount of the loan. Thus, we agree with the submissions of the assessee that in the present case, the assessee has opted to pay the consideration partially by way of an upfront payment equivalent to the principal amount of the loan assigned to it and partly by agreeing to earn a lower rate of interest on its portion of assigned loans and allowing the NBFC to retain the part interest received from the borrower. Accordingly, we find no merits in the findings of the learned CIT(A) that tax must be withheld under section 194J of the Act, and hence the same is set aside.

24. The next aspect that needs our consideration is whether interest retained by the NBFCs on the pool of assets allotted to the assessee falls within the category of "*commission/brokerage*" for the purpose of 194H of the Act. As per section 194H of the Act, any person, not being an individual or HUF, who is responsible for paying to a resident, any income by way of commission or brokerage, shall at the time of credit of such income to the account of the payee deduct tax. The term "*commission or brokerage*" has been defined in Explanation (i) to section 194H of the Act as under:-

> *"(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;"

25. Therefore, as per the aforesaid definition, for a payment to be considered as "*commission or brokerage*", the same must be received by a person acting on behalf of another person for services rendered. In the present case, no material has been brought on record to show that the loans advanced by the NBFC to the borrowers were on behalf of the assessee. Further, from the perusal of the Deed of Assignment of Loans, it is sufficiently evident that the loans already granted to the borrowers by the NBFC were assigned to the assessee. Insofar as various services rendered by the NBFC to the assessee, both parties have separately entered into a tripartite service agreement, which provides for payment of separate service fees in lieu of such services. Thus, in the present case, neither the assessee nor the Revenue has claimed that the NBFC has acted on behalf of the assessee. Since the NBFC is not acting as an agent of the assessee in respect of the loans advanced to the borrowers, therefore, we are of the considered view that no question arises of deduction of tax at source under section 194H of the Act, and accordingly the findings of the learned CIT(A) in this regard are set aside. Accordingly, levy of tax under section 201(1) and levy of interest under section 201(1A) of the Act for non-deduction of TDS under section 194J/section 194H of the Act is not sustainable.

26. Before concluding, for completeness of facts, it is pertinent to note that in the present case, it is undisputed that the NBFCs have already offered to tax in its return of income the interest earned on loans sold to the assessee and requisite documents as per first proviso to section 201(1) of the Act were also

furnished by the assessee before the learned CIT(A). Therefore, tax under section 201(1) of the Act is in any case not leviable on the assessee. Further, the levy of interest under section 201(1A) of the Act is also not sustainable in view of our aforesaid findings.

27. Accordingly, the grounds raised in the cross-appeals challenging the findings of the learned CIT(A) in respect of the deduction of tax at source under section 194J/section 194H of the Act are allowed. Ground No. 5 raised in assessee's appeal pertaining to the levy of interest under section 201(1A) of the Act is allowed in view of our aforesaid findings. Ground No. 6 raised in assessee's appeal was not pressed during the hearing. Accordingly, the same is dismissed as not pressed.

28. Since in other appeals, both the assessee as well as the Revenue have raised similar grounds, therefore, our aforesaid findings/conclusions shall apply *mutatis mutandis* to the other appeals. Accordingly, the appeals by the assessee are allowed, while the appeal by the Revenue is partly allowed.

29. In the result, in the present batch of appeals for the assessment years 2012-13 to 2019-20, the appeals by the assessee are allowed, while the appeals by the Revenue are partly allowed.

Order pronounced in the open Court on 07/05/2024

Sd/-	**Sd/-**
OM PRAKASH KANT	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 07/05/2024
Vijay Pal Singh, (Sr. PS)

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy

By Order

Assistant Registrar
ITAT, Mumbai