आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ, चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "A", CHANDIGARH

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
& SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No. 163/CHD/2020**

निर्धारण वर्ष / Assessment Year : 2018-19

ANI Technologies Private Limited, 33-G, BSR Nagar, Ludhiana Punjab 141012	बनाम	The DCIT (TDS), 3rd Floor Grandwalk Mall,Ferozepur Road, Ludhiana
स्थायी लेखा सं./PAN NO: AAJCA1389G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

Stay Nos. 7 & 8/Chd/2021

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निर्धारिती की ओर से/Assessee by :Shri Deepak Chopra, Advocate
Sh. Anmol Anand, Advocate
Sh. Deepak Aggarwal, Advocate.
Ms. Priya Tandon, Advocate

राजस्व की ओर से/ Revenue by : Sh. Vivek Nangia, CIT DR

सुनवाई की तारीख/Date of Hearing : 20.06.2022
उदघोषणा की तारीख/Date of Pronouncement : 16.09.2022

आदेश/Order

Per Sudhanshu Srivastava, Judicial Member:

The present appeal is directed against order dated 06.01.2020 passed by the Ld. Commissioner of Income-tax, Circle (Appeals)-3, Ludhiana. By way of the impugned order, the Ld. CIT(A) has upheld that the assessee is to be treated as an "assesse-in-default" in terms of Section 201 of the Income Tax Act,1961 since the assessee had failed to comply with the provisions of Chapter XVII-B of the Income Tax Act, 1961 (in short 'the Act') more specifically section 194C of the Act, while making the payments to the Transport Service Providers ("TSPs"). The Assessing officer (AO) has cited various reasons to arrive at such conclusion. The case of the AO is that the assessee has made payments to the TSPs for "carrying out work" relating to the carriage of passengers. In the opinion of the AO, the provisions of section 194C of the Act were applicable and since the assessee had failed to deduct tax at source while making such payments to TSPs, it was liable to be treated as an "assesse-in-default".

1.1 On appeal, the Ld. CIT(A) has upheld the view of the AO and now the assessee has approached this Tribunal and has raised the following grounds of appeal:-

1. *That the Commissioner of Income Tax (Appeals) 3, Ludhiana ["CIT(A)"] erred in upholding the order of the Deputy Commissioner of Income - Tax, Circle (TDS) Ludhiana ("AO") where under the Appellant has been treated as an assessee-in-default under section 201 (1)/201 (1 A) read with section 194C of the Income-tax Act, 1961 ("Act") for non-deduction of tax on "Ride Charges" remitted/ disbursed to driver partners.*

2. *That the CIT(A)/ AO grossly erred in law in not appreciating that the Appellant was not the person responsible for making the payment of "Ride Charges" so as to attract the provisions of section 194C of the Act.*

3. *That the CIT(A) grossly erred on facts and in law to conclude that the provisions of section 194C of the Act were applicable on the "Ride Charges" paid to the Transport Service Providers ("TSPs")/ Drivers.*

4. *That the CIT(A) erred in levying interest under section 201(1 A) of the Act.*

5. *That the CIT(A) erred in levying penalty under section 271C of the Act.*

The Appellant craves, to consider each of the above grounds of appeal independently, without prejudice to one another and craves leave to add, alter, delete or modify all or any of the above grounds of appeal.

2.0. Brief facts of the case are that the assessee was incorporated on 03.12.2010 as a Private Limited Company, promoted by Mr. Bhavish Aggarwal and Mr. Naresh Kumar Aggarwal. The following activities are to be carried out by the assessee in terms of Memorandum of Association (MOA).

> *"(1) To carry on the business in India and abroad for providing customers with a platform, in the physical and/or electronic form, through the means of facsimile, electronic-mail (email), internet, intranet, e-commerce, m-commerce and/or any other means, to enable transactions of hiring of all types of cars, fleet taxis, or any other motor vehicles for consideration, commission, service fee, insertion fee and to act as a platform, consultant, agent and service provider.*
>
> *(2) To carry on the business in India and abroad of providing a platform, technology services and/ or other mechanism through any future known or unknown technology, in the physical and/or electronic form, through the means of facsimile, electronic-mail (e- mail), internet, intranet, e-commerce, m-commerce and/or any other means, to facilitate transactions whether by and between businesses, individual consumers or by and between businesses and consumers and such similar, incidental and ancillary activities thereto including but not limited to any advertisements and promotions."*

2.1 As per assessee's own admittance, assessee is a leading technology service provider in the cab hailing market in India to establish mobility for the Indian masses and it provides internet and

mobile technology platform for cab hailing by the passengers [hereinafter referred to as "Rider(s)"]. The Assessee operates under the brand name "OLA". It started operations in India in December, 2010. Currently, headquartered in Bengaluru, the assessee is a platform based Indian cab hailing service company that has two separate OLA Apps, one for the Rider to enable such Rider to choose his / her ride and the other one for the TSPs/ Drivers, to enable such Drivers to accept / reject the ride chosen by the Rider.

2.2 As per the assessee, in the capacity of a mere facilitator, the assessee is the operator of the said platform, which essentially serves as a repository of potential users (Riders/ Customers as well as Drivers) and is capacitated, through advanced algorithms, to integrate Rider preferences, in terms of the location of the said Rider, his / her vehicle requirements and desired destination, with a suitable Driver, willing to undertake the ride at that point of time. It is the claim of the assessee that only Drivers having with valid permits and duly authorized by the transport authorities, can sign up with the assessee. The said drivers may be self – employed or may be working for a fleet operator owning multiple vehicles. As per the assessee, the assessee undertakes comprehensive authenticity checks and due diligence to ensure that the Drivers and / or fleet operators, as the case may be, prescribe to certain standards in its endeavour to make sure that the

Rider is not directly, indirectly or even remotely harmed during the course of the ride.

2.3 Further, as per the assessee, also prescribes the maximum fare that may be charged by a Driver from a Rider for a ride undertaken by such a Rider. In the process of deducing the said maximum fare, the advanced algorithms afore – stated account for:-

(i) Base Fare (which is the flat rate charged from a Rider desirous of undertaking a ride through the OLA App);

(ii) Distance Fare, (which is charged to a Rider based on the distance covered (in kilometres) through the course of the ride undertaken by such Rider through the OLA App);

(iii) Ride Time Fare, (which is charged to a Rider based on the time taken to complete a ride undertaken by a Rider from the OLA App);

(iv) Surge Price, (which is charged to a Rider when the demand for vehicles is not proportionate *vis-à-vis* the number of vehicles available to service Riders/ Customers, the same being a multiplier of the demand – supply ratio);

(v) applicable Goods and Services Tax; (vi) and toll tax.

2.4 As per the assessee, the ascertainment of the maximum fare that may be charged by a Driver from a passenger for a ride undertaken by such a passenger is a critical function performed by the assessee, for it goes to ensure that a Rider/ Customer is not unnecessarily hassled

and harassed in case of disagreement between a Rider and a Driver, concerning the appropriate rate for the ride undertaken by a Rider. Further, as per the assessee, from the perspective of the Drivers, the Drivers have the flexibility to decide their own timings as well as to decide whether to accept the ride in the first place or not. The Drivers have the option to go offline, declare the last ride as well as desire a ride on the way to their home. The fact of them ignoring or cancelling a ride does not expose them to the possibility of getting debarred from using the interface of the assessee. It is the assessee's claim that the Drivers are, therefore, independent parties who perform the transport function at their own will and accord.

2.5 As per the assessee, the assessee charges a "convenience fee", being a percentage of the Total Ride Fare charged to a passenger for availing the technology services offered by the assessee, door to door service, wi–fi access, customer support and cashless payment options.

3.0 The Ld. AR submitted that the entire case of the Department rests on the erroneous assumption that the assessee is in the business of providing transportation services and that further the services are provided through a sub-contract with third party drivers. It was further submitted that it is also the case of the Department that these third party drivers performed the transportation services under total control and supervision of the assessee thereby attracting

withholding obligations u/s 194 C of the Act. The Ld. AR submitted that this aspect forms a common theme in the orders passed by the AO as well as the Ld. CIT(A) so as to hold the assessee as 'assessee in default' u/s 201 of the Act.

3.1 The Ld. AR further submitted that prima facie the case of the assessee was covered in its favour by the order of the Mumbai Bench of the ITAT in the case of M/s Uber India Systems Pvt Ltd vs JCIT in ITA Nos. 5862/Mum/2018 wherein, vide order dated 04.03.2021, on identical facts and issues, the coordinate Bench of the Tribunal at Mumbai had held that section 194C of the Act was not applicable on such Payments as were collected from customers and were forwarded by the aggregator / intermediary to drivers and further the transportation services were provided by the drivers to the users.

3.2 It was further submitted that the AO as well as the Ld. CIT(A) have also placed reliance on the orders of the lower authorities in the case of Uber India, which now stand overruled by the aforesaid order of the coordinate Bench of the Tribunal (Mumbai Bench). It was submitted that the assessee's appeal deserves to be allowed by following the ratio laid down by the Mumbai Bench of the Tribunal in the case of Uber India Systems Pvt Ltd Vs. JCIT (supra).

3.3 However, the Ld. AR sought to advance his arguments in a detailed manner as under:-

3.3.1 The Ld. AR outlined the steps involved in making a booking through the OLA App by a Rider, which are being listed below:-

Step 1: Installation of the OLA App:

Potential OLA Account holder/ Rider is required to install the OLA application on his/ her mobile phone.

Step 2: Creation of an Ola Account:

The potential OLA Account holder/ Rider is then required to create an OLA Account using his / her phone number or email address. The Riders at this point are also given the option to electronically accept the "User Terms", without acceptance of which, the Rider cannot avail the services of OLA.

Step 3: Input of the One Time Password:

The potential OLA Account holder/ Rider is then required to input the One Time Password ("OTP") sent to such potential account holder on his / her phone number *via* a text or email, as the case may be.

Step 4: Input of the Name Associated with the OLA Account:

Upon acceptance of the User Terms, the potential OLA Account holder/ Rider is required to input the name associated with his / her OLA Account.

Step 5: Detection of Real – Time Location:

When the OLA Account holder/ Rider opens his / her OLA App to book a ride, the screen appears that locates his / her real – time location on the Google maps. The said account holder/ Rider is also entitled to input the location from where he / she desires to take the ride manually.

Step 6: Input the Vehicle Requirement:

The OLA Account holder/ Rider is then required to input his / her vehicle requirements, i.e., whether he / she requires the services of a driver within or outside the limits of a city; vehicle on rent; shared ride; compact vehicle; sedan; luxury vehicle; or an auto.

Step 7: Input the Destination:

Assuming that the OLA Account holder/ Rider opts for intra – city services and a compact vehicle in Step – 6 above, the said account holder/ Rider is then required to input the destination or the drop location where he / she seeks to get dropped at. Following this the OLA Account holder/ Rider is required to click on the "Ride now" option.

Step 8: Display of Total Fare, along with the Details:

The OLA Account holder/ Rider will then be shown the Total Fare, coupled with fare details (including the trip fare, booking fee as well as the applicable taxes thereon).

Step 9: Identification of the Potential Rider:

The OLA Account holder will then be required to input whether he / she is booking the ride for himself / herself or for another person altogether. In case of the latter, the OLA Account holder will be required to provide the phone number of such other Rider for whose benefit the ride is sought to be booked.

Step 10: Input Selection of Payment Option:

The OLA Account holder/ Rider is then required to input whether he / she or any other potential Rider, as the case may be, seeks to make the payment for the ride to be undertaken through cash, debit / credit card, OLA Money Postpaid or OLA Money Wallet.

Step 11: Confirmation of the Booking:

The OLA Account holder/ Rider is then required to confirm his / her booking, post which he / she or any other potential Rider, as the case may be, is provided the particulars of the vehicle, including the type and number of the vehicle; name and rating of the Driver; an interface to connect with the Driver; and an OTP to be shared with the Driver for identification purposes.

Step 12: Entering the vehicle driven by the Driver:

Once the Driver arrives at the pick-up location of the OLA Account holder/ Rider, the OLA Account holder/ Rider enters the vehicle of the Driver and is necessarily required to share the OTP available on the OLA App with the Driver for the purposes of availing transport service by the Driver.

Step 13: Reaching the Destination:

Upon reaching the destination, the OLA Account holder/ Rider receives a confirmation from the OLA App and information about the total amount payable by the OLA Account holder/ Rider.

Step 14: Payment and rating of Driver:

Thereafter, if the OLA Account holder/ Rider had chosen to pay by cash, the Driver is entitled to receive the entire Total Fare for the ride. If on the other hand, the OLA Account holder/ Rider had chosen to pay by any other mode, then an amount equivalent to the Total Fare is debited from the concerned bank account of the OLA Account holder/ Rider. Thereafter, the OLA Account holder/ Rider is required to rate the Driver according to his / her level of satisfaction about the ride.

3.3.2 The Ld.AR also outlined the steps involved in registering as a Driver through an OLA Partner App which are being listed below:

Step 1: Contacting the regional office:

To begin with, the driver seeking to enable transportation services through the OLA App is required to contact/ visit the local attachment centre, which could be located in the city/ town where he has his place of permanent residence or otherwise.

Step 2: Submitting the required documents:

Thereafter, the Driver has to provide on-line self-attested documents like driver's license, proof of address, PAN numbers, bank details, etc.

Step 3: Verifying the Driver Documents:

These documents are verified by a third party hired by the OLA in accordance with the certain guidelines following the best practices. OLA ensures that the Driver receives a detailed walk through on the behavioural aspects, cash flow exchange, customer behaviour lectures and safety instructions. Once the submission and verification of the documents are completed, the Driver is provided with a link to download the OLA Partner App (Driver App). Thereafter, there is a third party who is responsible for physical verification of the address shared by the Driver.

Step 4: Installing the OLA Partner App:

The OLA Partner App is then installed on the smartphone of the Driver.

Step 5: Accepting the Subscription Agreement:

The Driver is then required to accept the Subscription Agreement, which forms a valid contract as far the obligations of the Driver are concerned.

Step 6: Logging into the OLA Partner App:

To log into the OLA Partner App, the Driver is required to enter his / her registered mobile number.

Step 7: Entering the OTP:

The Driver is then required to enter the OTP associated with his / her registered mobile number.

Step 8: Switching onto the Online Mode:

To receive bookings through the OLA Partner App, the Driver is required to switch onto the online mode using the slider on the landing page.

Step 9: Accepting / Rejecting the Offer to Ride:

The Driver will receive a notification when an OLA Account holder / Rider as the case may be, makes a booking request that is in consonance with what the said Driver is capable of offering to the said OLA Account holder/ Rider, as the case may be, at that moment. The Driver is free to either accept the rider or to ignore the same.

Step 10: Reaching the Pick-up location of the Rider:

The Driver can navigate to the location of the Rider through the OLA Partner App and upon arriving which he is required to confirm the fact of his arrival on the OLA Partner App.

Step 11: Rider enters into the vehicle driven by the Driver:

Once the Driver arrives at the pick-up location of the OLA Account holder/ Rider, the OLA Account holder/ Rider enters the vehicle of the Driver and is necessarily required to share the OTP available on the OLA App with the Driver for the purposes of availing transport service by the Driver. The Driver is required to enter the said OTP on his OLA Partner App and commence the ride by clicking on the "Start Trip" Option on the OLA Partner App.

Step 12: Reaching the Destination of the Rider:

After clicking on the "Start Trip" option on the OLA Partner App the Driver gets intimated about the Destination/ estimated amount of Total Fare on the OLA Partner App. After clicking the "Start Trip" option, the Driver navigates to the destination input by the OLA Account holder/ Rider using the OLA Partner App.

Step 13: Ending the Trip of the Rider:

Upon reaching the destination input by the OLA Account holder/ Rider, the Driver is required to click on the "Stop Trip" option. The ride details, including fare details are then displayed on the screen of the OLA Partner App.

Step 14: Collection of Payments and Rating the Rider:

In case the OLA Account holder/ Rider had opted to make payments in cash, the Driver collects cash from the OLA Account holder/ Rider, as the case may be. The Driver is also entitled to rate the Rider.

4.0 The Ld. AR submitted that what essentially emerges from the above is that the assessee essentially partakes the character of an "aggregator" or an online market place for a Rider to communicate with the TSPs/ Drivers for the purpose of transportation. It was submitted that the term "aggregator" has been defined under the Motor Vehicles Act, 1988 in section 2(1A) to mean a "*digital intermediary or a market place for a passenger to connect with a driver for the purpose of transportation*".

4.1 It was submitted that the assessee is predominantly a technology company but the case of the AO is that the assessee is in

the business of transport service that it provides to Riders by sub-contracting with the TSPs/ Drivers and hence the Ride Charges disbursed by the assessee to TSPs/ Drivers are exigible to tax deduction at source under section 194C of the Act. It was submitted that the assessee created and operates the OLA App, which connects Riders/ Customers and TSPs/ Drivers, on a click of a button. The Rider/ Customer, who earlier used to get on the road in the hope of finding a cab, can now log on to the App on his / her mobile phone and request OLA to find a cab for it instead, which would then connect a Driver with the Rider/ Customer.

4.2 The Ld. AR emphasised that these Drivers are valid permit holders, duly authorized and verified by transport authorities, to operate a commercial vehicle for carrying passengers from one point to another. For them to be connected with a Rider/ Customer on the OLA App, they have to sign up/ register on the OLA App as well, which works for them in a way identical to an online marketplace where sellers list their products available for customers to choose from. Once registered on the OLA App, the Drivers can log in to the App and await a request from a Rider/ Customer on the App. It was argued that, therefore, the App actually works for the convenience of the Rider/ Customer and looks for a cab on behalf of the Rider/ Customer. The Driver, on the other hand, cannot request to be connected with a Rider/ Customer. The Driver merely waits for the

App to bring a request to it from a Rider/ Customer, which he is free to accept or reject. During this time, the Driver may be engaged with a different commuter, with whom he may have connected with, independent of the OLA App. It was also argued that both Drivers and Riders/ Customers have access to various applications developed by various "aggregators" like the assessee and can easily switch between different "aggregators".

4.3 The Ld. AR submitted that in a nutshell the Rider/ Customer requests OLA App to find a Driver for him to be taken to a particular location ("Destination"). The OLA App, thereafter, sends an "invitation to offer" to a particular Driver, who is chosen based on various factors (including the location of the Rider) analysed by the in-built technology in the App. Such Driver is given 10-13 seconds (approx.) to accept/ reject such invitation. In case such Driver rejects the invitation or does not respond within the prescribed time, the in-built technology sends the "invitation to offer" to another Driver based on a similar factors. It was further elaborated that the in-built allocation system fetches cabs available near to the Rider's/ Customer's location and sends the booking to the best suited Driver based on a certain ranking logic. Once a booking is sent to the Driver, he/she gets approximately 10-13 seconds to accept the ride. If the Driver accepts, the ride gets allocated to the said Driver, otherwise it disappears from the OLA Partner App on the mobile screen of the Driver who did not

accept the same. If the first Driver does not accept the ride, allocation system again fetches nearby cabs (except the Driver who did not accept) and the ride is sent to the next best suited Driver and the process continues till the time ride gets accepted or Rider/ Customer wait time is over.

4.4 It was submitted by the Ld. AR that in case the Driver accepts the "invitation", an offer for transport service by the Driver to Rider/ Customer is created. Till this point, the Driver does not know the Destination it has to take the Rider to. Once the offer has been made, the Rider/ Customer and Driver are intimated on the OLA App about each other's location and it is for the Driver to reach the pick-up location of the Rider/Customer, for the Rider to enter the cab. The Ld. AR submitted once the Rider/ Customer sits in the cab and verifies his identity by means of an OTP, the Driver gets to know the destination he has to take the Rider/ Customer to. It is now open for the Driver to take his offer back or enter into a contract with the Rider/ Customer (for providing transport service), by accepting the same on the OLA App.

4.5 The Ld. AR submitted that the entire ride is recorded and monitored on the OLA App, providing much needed safety to the Rider/ Customer as well as Driver.

4.6 The Ld. AR further submitted that the revenue model of the assessee works on the "convenience fee" it charges from the Riders/ Customers for providing on-demand cab availing service, GPS tracking, safety features etc. and for collecting such "convenience fee", the assessee requires the Riders/ Customers to provide their credit card/ debit card details while signing-up/ registering on the OLA App. The Riders would then be charged by the assessee using digital means for collecting such "convenience fee".

4.7 It was further submitted that, however, in order to accommodate cash payments by Riders/ Customers and considering that such cash payments directly to the assessee would not be hassle free for the Riders/ Customers as well as the assessee, it became necessary that the Drivers collected "convenience fee", which the assessee could recover from the Drivers separately. Consequently, it was necessary for the assessee to require Drivers to provide their bank account details as well while signing-up/ registering on the OLA App. It was further submitted that to make the OLA App more attractive, the assessee decided to charge the Riders/ Customers based on the distance travelled by them.

4.8 It was further submitted by the Ld.AR that in order to avoid a situation wherein a Driver ends up charging less for his transport service than the total "convenience fee" charged by the assessee and to

also bring transparency to the entire process, the assessee came up with the mechanism of determining the price for each ride using its in-built technology that would be fair to both the Rider and as well as the Driver ("Ride Charge"). The assessee would then charge its "convenience fee" to the Rider/ Customer over and above such Ride Charge in such a manner that "convenience fee" would be equal to a certain percentage of the sum of "convenience fee" and the Ride Charge ("Total Fare"). The estimate of this Total Fare is shown to the Rider at the time he requests the OLA App to find a cab for him. The actual billing of the Total Fare, as calculated by the OLA App, would be more or less the same as the estimate. However, it would be different if the Rider/ Customer or Driver, finishes the ride prior to reaching the Destination or, changes the Destination during the course of the Driver providing the transport service to the Rider/ Customer. It was submitted that, thus, the assessee created a completely hassle free and seamless experience for all the parties involved while meeting its objective of connecting Riders/ Customers with Drivers.

4.9 The Ld. AR submitted that in this background, it is to be appreciated that there is no contract/ sub-contract that the assessee enters into with the Driver. The assessee maintains accounts of all Riders/Customers and Drivers and logs in information about all receivables and payables to each Rider/ Customer and Driver. In case

of a dispute regarding payments between the Rider/ Customer and the Driver, the assessee passes relevant “receivable”/ “payable” entries in each of those accounts that are party to such dispute after having verified the veracity of the allegation involved in the dispute as per its own assessment and discretion. In case it is unable to exercise such discretion, it merely endeavours to act as a communication channel between the Drivers and the Riders/ Customers beyond which the assessee does not interfere in the dispute in any manner, thereby rejecting the request for resolving the dispute that may have come to it either by the Driver or the Rider/ Customer.

4.10 The Ld AR also submitted that at times, to promote its business in the highly competitive market that the assessee operates in, the assessee offers trade discounts to the Riders/ Customers, which are adjusted against the “convenience fee” that it charges from the Riders/ Customers. However, in no event, is the Ride Charge payable to the Driver impacted by virtue of the trade discounts given by the assessee to the Riders/ Customers.

5.0 The Ld.AR submitted that it would be relevant to refer to the various terms & conditions applicable to the TSPs/ Drivers (in terms of the Subscription Agreement) and the Riders/ Customers (User Terms) so as to determine whether the assessee was making any

payment to the TSPs for carrying out any work for the provision of carriage of passengers.

5.1 The Ld. AR drew our attention to the Subscription Agreement and submitted that the Subscription Agreement, which is entered into between the assessee and the TSPs, who are taxi operators/ Drivers, is for the purposes of provision of a Portal owned and operated by the assessee (OLA App) on which such TSPs are allowed to list themselves and represent to the end-users/ Riders/ Customers on such Portal that they are desirous of providing transport services. It was submitted that in the said Subscription Agreement the term "Portal" is defined to mean "*such features of the OLA mobile application, software, mobile applications including but not limited to OLA Play, OLA Tunes and Driver App owned by, licensed to and controlled by OLA and other URLs (Uniform Resource Locator) as may be specified by OLA from time to time*".

5.2 It was further submitted that in the same Agreement, the term "Customer" is defined to mean "*a person who places service request on the portal and has accepted the customers terms of use and privacy policy of the Portal*",

5.3 It was submitted that the Subscription Agreement further provides that the TSP concerned has represented that such TSP fulfils eligibility criteria and is in compliance of all applicable laws for the

provision of transport service through the Portal. The Subscription Agreement enables the TSPs to register themselves on the Portal for the provision of transport services. The Subscription Agreement lays down various terms and conditions in terms of the TSPs using the Portal and the device which enables such TSPs to connect to the Portal for the provision of transport services.

5.4 Our attention was invited to clause XIII of the Subscription Agreement which provides that the TSPs shall operate as and have the status of an "independent contractor" and shall not act, be or construed to be an agent or employee of the assessee. It is also provided that the relationship between the parties shall be on a principal to principal basis and such terms and conditions between the parties shall not create any relationship of an employer and employee. It was submitted that sub-clause (ii) of Clause XIII also provides that the TSPs shall not assume or create any obligation or responsibility on behalf or in the name of the assessee. It is also provided that should the TSPs act over and above the duties and responsibilities envisaged in the Subscription Agreement, such acts shall be deemed to be unauthorized, unlawful and the TSPs shall be personally liable for the same.

5.5 Thereafter, the Ld. AR brought to our notice the various details which the TSP is to submit to the assessee and also drew our

attention to the various terms and conditions under which the TSPs operate. It was emphasized that the Subscription Agreement defines and identifies the scope of work and duties of both the parties to the Subscription Agreement. The Subscription Agreement also defines a zero tolerance policy which lays down certain broad parameters in terms of which the TSPs/Drivers are required to refrain from asking for tips, maintain personal hygiene, vehicle cleanliness.

5.6 It was further submitted that the Subscription Agreement also deals with the commercial terms and also with the mode and manner in which the payments should be effected to the TSP/Driver through electronic medium or bank transfers and other commercial terms.

5.7 The Ld. AR drew our attention to Clause V of the Subscription Agreement which deals with payment terms as under;-

> *"V. Payment Terms.*
>
> *In consideration of OLA providing the Transport Service Provider's and the Vehicle's information on the Portal, and for enabling the Transport Service Provider to provide Transport Services through Service Provider App on the Portal, various payments, more particularly set out in the Commercial Terms Segment annexed hereto as Exhibit C, between the Transport Service Provider and OLA ("Fees") shall be settled in the manner set out and paid in the manner set out in the Commercial Terms Segment annexed hereto as Exhibit C."*

5.8 It was further submitted that the term 'Fare' shall mean fare payable to the TSP. The term "Total Ride Fee" has been defined to include the fare, the convenience fee, total fee and the cancellation fee as applicable. It was submitted that the commercial terms provide that payments due to the TSPs/Drivers shall be remitted through electronic medium. These terms also provide that the incentive would be paid to the TSPs after necessary deductions. It was submitted that the assessee has been authorized to make deduction in respect of withholding tax, service tax, other applicable taxes and amounts due to the assessee. More importantly sub-clause (v) enumerates that the TSP agrees that if discounts are given to the users of the Portal, the same will be decided by the assessee on case to case basis and shall be communicated to the TSPs. It is thus provided that the fee finally appearing on the device shall be subject matter of settlement between the TSPs and the assessee.

5.9 The Ld. AR, thereafter, referred to the User Terms, which are applicable to the Riders/ Customers, who use the Portal / OLA App to place a service request and submitted that a Rider/ Customer is not entitled to hail a cab using the Portal unless and until he has been successfully registered on the Portal and has accepted various terms and conditions as emanating in the User Terms. This necessarily implies that all Riders / Customers wishing to avail the cab hailing service necessarily must have an account on the OLA App. It was

again reiterated that the term "Service" has been explained in clause 1(xvii) to mean the facilitation of transport service by the assessee through the OLA App. Sub-clause (xxi) of clause I defines a TSP to mean a driver or an operator associated with the assessee offering the service of transporting Rider/ Customer within the city of operation as requested by the Rider/ Customer on the OLA App.

6.0 The Ld. AR submitted that the entire focus of the AO was that it was the assessee who had made the payments to the TSPs for carrying out the transportation service. He argued that the term 'Service' in Clause 4 means only facilitation of transport service by the assessee through the OLA app. While referring at length to the various clauses of User Terms, the Ld. AR argued that the OLA App only permits the Rider/ Customer to avail a transportation service offered by the TSP/Driver. He submitted that the Service Portal only allows the Rider to send a request through OLA App to a Driver on the OLA network and that it is further provided that the Driver has the complete discretion to accept or reject a request for Service. It was submitted that the assessee, as a facilitator only, acts as a communication channel between the Rider and the Driver and only once the Driver, being the provider of the transportation service accepts the service request that the necessary details of the Driver, vehicle number etc. are shared with the Rider. He submitted that various other clauses of clause 4 communicate that the assessee bears

no responsibility to the Rider on account of any break-downs etc. and that on a best effort basis, the assessee may provide a substitute vehicle subject to availability. However, it is only on a best effort basis.

6.1 Thereafter, the Ld. AR referred to clauses 5 and 6 of the User Terms and elaborated on the payment terms by submitting that the payment terms clearly provide that for the Service provided by the assessee , the assessee shall charge a "convenience fee" from the Rider/ Customer and the TSP shall charge fare (Ride Charge) from the Rider/ Customer for the ride offered. He also referred to Clause I(xv) wherein the term 'Ride' has been explained to mean "*travel in the Vehicle by the Customer facilitated through the Site"* and submitted that in terms of clause 6, the streams of revenue are clearly divided where it is clearly borne out that it is the customer who pays the cab fare to the TSP/Driver and the assessee only receives the "convenience fee" from the Rider/ Customer for the use of the OLA App.

6.2 The Ld. AR further submitted that the said User Terms also contain liability clauses which clearly provides that the assessee does not assume any liability or responsibility on account of any deficiencies in the transport service provided by the TSP/ Driver. Our attention was specially drawn to clauses 13.8 and 13.9 which limit

any liability *vis-à-vis* the assessee in the context of any deficiencies in terms of the Service provided by the TSP/ Driver:

6.3 Further, our attention was drawn specifically to clause 21.1 which provides that the Rider/ Customer clearly understands that the assessee is merely an electronic platform to facilitate aggregation of vehicle and does not in any manner provide transportation service. The Ld. AR reiterated that the terms and conditions, as contained in the Subscription Agreement as well as the User Terms, clearly define that the transportation service and the contract relating to provisions of such service is between the Rider/ Customer and the TSP/ Driver and in no manner the assessee engages the Driver for the provision of any work which relates to carriage of passengers. He submitted that this itself would be enough to establish that the assessee was not liable under section 194C of the Act, since it was not making any payment for carrying out any work.

7.0 The Ld. AR further submitted that having explained the entire methodology and the contractual terms which emerge out of the "Subscription Agreement" and the "User Terms", it would be apparent that the assessee is not making any payment to the TSPs for carrying out any "work". Thereafter, the Ld. AR referred to the provision of section 194C of the Act (as it stood during the year under consideration) and submitted that it is evident from a plain reading of

the provisions that section 194C of the Act only becomes applicable on a person who is responsible for paying any sum to a resident for "carrying out any work" in pursuance of a contract. If none of the conditions are satisfied, then there arises no question of applicability of the said provision. It was submitted that the term "Work**"** has been defined in Clause 4 of the Explanation to section 194C of the Act and sub-clause (c) provides that work shall include the "*carriage of goods or passengers by any mode of transport other than railways*".

7.1 The Ld. AR again drew our attention to the "Subscription Agreement" by virtue of which the TSPs can list on the OLA Partner App. and submitted that clause 2 defines the "Scope of Services" and records that the assessee's role is limited to being a market place, solely for managing the Portal for the display of Services (transport service to be provided by TSPs/Drivers). It was submitted that it is further provided that the transaction relating to the provision of transport service is between the TSPs/Drivers and the Riders/ Customers. The said clause further clarifies that the assessee is only an intermediary providing an online market place service and the Portal/ OLA App is only a platform where the TSPs/Drivers shall offer such Services to the Riders/ Customers. It was argued that the clinching part of this Clause is that the contract for availing the Service shall only be between the TSPs/Drivers and the Customers/

Riders, and the assessee shall have no obligation in respect of such Contract.

7.2 It was further submitted that the Subscription Agreement also mandates that the TSP/Driver shall undertake to always comply with all laws to be able to register and to provide the transportation service to the Rider/ Customer.

7.3 It was further submitted that at this juncture, it would be relevant to refer to the provisions of Motor Vehicles Act, 1988 which would clarify as to who would be eligible to provide a transportation service. Thereafter, the Ld. AR referred at length to provisions of section 66 of the Motor Vehicle Act, 1988 and submitted that no owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place, whether or not such vehicle is actually carrying any passengers or goods, except for in accordance with the conditions of the permit granted. Reference was made to Clause 5.5 and it was submitted that it specifically provides that the TSPs/Drivers shall ensure registration of the vehicle at all times and shall hold and keep updated/renewed all Licenses, Insurance and Permit necessary for the use of the Vehicle on the Portal. He submitted that on this ground itself, it would be evident that the assessee, being only a market place, was not competent to provide any transportation service in the absence of any Permit in this regard. It

was submitted that it would also be well appreciated that in this entire transaction, at no point of time, does the assessee secure any contract for providing transportation services from the Rider/ Customer - as the contract pertaining to provision of transportation services is only entered into between the TSP/Driver and the Customer/ Rider and the assessee has no role to play in it, apart from providing necessary technology for bringing the TSPs/Drivers (service providers) and the Rider/ Customer (service recipients) together.

7.4 It was further submitted by the Ld. AR that in terms of the documents which are referred to, the assessee is only eligible for receiving the "Convenience Fee" which is paid by the Rider/ Customer to the assessee for the use of the Portal/ OLA App. Thus, it would be seen that neither does the assessee have any permit under the Motor Vehicles Act, 1988 to provide any transportation service, nor does it secure any contract for the provision of such Services. It was reiterated that the provisions of section 194C of the Act becomes applicable only when the recipient of the services makes a payment for carrying out of the work. In this case, the provision of Services *viz.* carriage of passengers is being provided by the TSPs/Drivers, not under any obligation to the assessee, but directly to the Riders/ Customers. In such a situation, there could be no applicability of provisions of section 194C of the Act on the Ride Charges, which are being routed through the assessee to the TSPs/Drivers.

7.5 The Ld. AR, thereafter, again referred to the assessment order and submitted that the first and foremost error made by the AO is that he proceeds on a presumption that the primary service provided through the OLA App is a "transportation service". This is the fundamental fallacy committed by the AO and his subsequent conclusions are primarily based on this incorrect understanding of the business model of the assessee as well as the applicable law. He submitted that on page 85 of the assessment order, apart from recording that the primary service provided through OLA App is a transportation service, the AO also refers to certain other activities carried out by the assessee to support his erroneous conclusions. The AO notes that the assessee is also involved in the recruitment and training of Drivers, getting their verification done from the police, carrying out business development in terms of ensuring that more and more passengers / Riders get associated with the assessee, taking care of legal and statutory responsibilities and so on. The AO further records that the assessee is involved in the task of collecting money from the passengers/ Riders including the commission and making payment to the Drivers for the ride. The ld AR submitted that, thereafter, the AO proceeds on the surmise that given the nature of transaction that is carried out using the OLA App and the manner in which the payment is made, it needs to be analysed whether the assessee had any obligation in terms of the provisions of section 194C

of the Act. The AO then proceeds to analyse the operation of the OLA App and having recorded his understanding of the facts, proceeds to analyse the transaction.

7.6 The Ld. AR pointed out that the AO next refers to the payment process on page 88 of his order. The Ld. AR submitted that the AO has completely ignored the fact that the payments that were being made to the TSPs/Drivers were actually only being routed through the assessee, being electronic payments, to make the entire transaction between the Riders/ Customers and Driver hassle-free and seamless. He submitted that it is not AO's case, that the assessee had the right to receive such income from the Riders/ Customers in its own capacity for provision of any transportation service. This is apparent because the assessee never provided the transportation services and as such, could not have charged the Riders/ Customers, given that the transportation is provided by the TSPs/Drivers and the Ride Charge legally and contractually belongs to the TSPs/Drivers. It was reiterated that it is only in respect of the electronic payments that the money is routed through the assessee. He submitted that the AO has very conveniently also ignored the fact that in the event of cash payments, the payment is kept by the TSPs/Drivers directly from the Riders/ Customers.

7.7 The Ld. AR made a reference to the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Hardarshan Singh* (2013) (350 ITR 427) and submitted that while relying on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Cargo Linkers* [2008] 218 CTR 695 (Delhi), the Hon'ble Delhi High Court has held in this case that where the assessee acted only as a facilitator or an intermediary, no obligation could thrust under section 194C of the Act. Thus, the payment facilitator cannot be construed as having been providing the service and under no circumstances could the provisions of section 194C apply. It was submitted that itself would show that the case of the AO would not stand the test of judicial scrutiny. The Ld. AR made reference to the judgment of the Hon'ble Delhi High Court in the case of CIT Vs Career Launcher India Ltd. reported in (2013) 358 ITR 179 (Del.) and submitted that in this judgement the Hon'ble Delhi High Court has clearly held that control itself was an irrelevant consideration for the purposes of invoking / attracting the provisions of section194C of the Act. Reliance in this regard was also placed on the decision of the Income Tax Appellate Tribunal in *ITO vs. Dilipkumar Bapusaheb Patole* (ITA No. 1398/AHD/2016, judgment delivered on 03.09.2019) and *ITO vs. Rajeshwaree Shipping & Logistics* (2017) 83 taxmann.com 262 (Mumbai – Trib.) and further on the decision of *CIT vs. Truck Operators Union* (2011) 339 ITR 532 (P&H High Court).

7.8 The Ld.AR submitted that on pages 90 and 91 of the impugned order, the AO again wrongly concludes that the payments which are routed through the assessee to the TSPs/Drivers have been made for providing passenger transportation service and as such the same comes under the conclusive definition of "Work" as contained in the *Explanation* to section 194C of the Act. The Ld. AR submitted that the AO further erroneously concludes, without any basis, that the payments have been made in pursuance of a Contract between the TSPs/Drivers and the assessee which is automatically signed when the TSPs/Drivers log in to the OLA App. It was submitted that this conclusion of the AO is not supported by any terms or conditions of the Subscription Agreement which the TSPs/ Drivers accept. It was argued that the entire basis of the AO to come to this conclusion is unsupported by any material on record and is only surmises and conjunctures or his erroneous understanding of the contractual relationship.

7.9 It was further submitted that on page 92, the AO alleges that the agreement camouflages the real intention of the parties or the substance of the agreement that exists in his perspective. The AO, thus, proceeds to understand and record as to what is his understanding of the transaction and applies various erroneous parameters to arrive at his conclusion of the applicability of the provisions of Section 194C of the Act. It was submitted that the

understanding of the AO is not only contrary to the facts but is also in complete violation of all the known principles of contractual law. He submitted that it is the fundamental principle of contractual law that a person should be competent to contract. On the facts of the present case, when under the Motor Vehicles Act, 1988 itself, no Permit is granted to the assessee for the provision of any transportation service, the assessee cannot, by any stretch of imagination, be considered to be competent to provide such service. Thus, it is not clear as to how the AO has come to the conclusion that the Riders/ Customers have contracted with the assessee for the provision of transportation service. Thus, this understanding of the AO is completely erroneous and factually incorrect.

7.10 It was further submitted that in para (ii) on page 92, the AO concludes that the TSP/Driver is actually under the control of the assessee as far as the selection of his client is concerned as such Driver has no right to offer alternatives to the passengers/ Riders. The AO also concludes that the TSP/Driver has been contacted for specific request by the assessee and he provides that only. He also observes that the Driver has no way to contact the passenger/ Rider as well, except through the OLA App, which implies that he cannot negotiate and discuss with the passengers/ Riders. He further concludes that it is the passenger/ Rider who is contacting the assessee for a Driver. The Ld. AR submitted that the entire concept of

an "aggregator" and the technology that the assessee has created has completely escaped the attention of the AO. The first error the AO makes is to conclude that the TSP/Driver is under the control of the assessee. This conclusion is completely contrary to the facts since the terms of the Subscription Agreement make it very clear that the assessee and the TSP/Driver are independent parties and that there is no agency between them. The terms of the Subscription Agreement also clarify that the assessee does not exercise any control over the TSP/Driver because the minute the TSP/Driver is vested with the right of refusal before the allotment is done, it takes away the so called 'control' that the AO is alleging.

7.11 The Ld. AR further argued that it is also a settled position of law (settled by the Hon'ble Supreme Court of India) that even if conditions are mandated in a principal to principal contract, the same would not result in changing the nature of the contract from 'principal to principal' to 'principal to agent'. Reliance in this regard was placed on the decision of the Hon'ble Supreme Court of India in *Bhopal Sugar Industries Ltd. vs. Sales Tax Officer* (1977) 3 SCC 147 (SC). It was submitted that the basis on which the AO has proceeded is against the very concept of 'aggregator", which the law itself has, as recently as now, recognized (Section 2(1A) of the Motor Vehicles Act, 1988). Thus, the law itself has envisaged the concept of an "aggregator" and has not characterized such "aggregator" as TSPs/Drivers. He submitted that it

is worth noting that the Motor Vehicles Act 1988, as amended in 2019, now contains a clear demarcation between "aggregator" and Drivers and how the Government is to regulate the two. The term "aggregator" has been defined under the Motor Vehicles Act, 1988 (as amended in 2019) as under:-

> "*Section 2: Definitions*
>
> *(1A) "aggregator" means a digital intermediary or market place for a passenger to connect with a driver for the purpose of transportation;*"

7.12 It was further submitted that the aggregators are now supposed to get a license/ permit from the Government to operate a digital market place, as per section 93 of the said Motor Vehicles Act, 1988 (as amended in 2019). On the other hand, Drivers are valid permit holders as per section 66 of the Motor Vehicles Act, 1988; and are allowed to enter into contract with Riders for carrying them. In the scenario afore-stated, the vehicle that the Drivers use is called as "contract carriage". The Ld.AR submitted that the Government is authorized to regulate such "contract carriages" under section 95 of the Motor Vehicles Act, 198, which does not contain any whisper of involvement of an aggregator like the assessee. Therefore, section 95 of the Motor Vehicles Act, 1988 covers a cab/ taxi (which is a contract carriage) and a passenger/ Rider/ Customer, but an aggregator like

the assessee can neither be covered under "contract carriage" nor under passenger/ Rider/ Customer, for an aggregator neither owns nor provides taxi service/ transportation service.

7.13 The Ld. AR, still referring to the Assessment Order submitted that the AO in para 3 on page 93 focused his attention on the payments. He goes onto the general principles of contract and holds that the Ride Fare estimate generated by OLA App will tantamount to consideration for the so called completion of the contract between the Riders/ Customers and the assessee which is completely an incorrect understanding of the law, since based on service request generated by the Riders/ Customers, all that the OLA App does is to provide him with an estimated fare amount. This is subject to variance on account of several factors and under no circumstances the Riders/ Customers is under any legal obligation to pay only the estimated fare, since once the journey is concluded, based on the per KM rate as fixed by the RTO and the time taken, the actual bill is generated. It is only this actual bill which is given to the Riders/ Customers that creates obligation on the Riders/ Customers to make the payment. The Ld. AR submitted that thus, under no circumstances an estimate can be considered as a consideration so as to somehow conclude that the assessee has taken the Contract for providing transportation services to the Riders/ Customers.

7.14 It was further submitted by the Ld. AR that in para (iv) on page 94 of the order, the AO has again endeavoured to establish that the fare is determined by the assessee and the TSP/Driver is bound to accept the same. The AO also concludes that the TSP/Driver is a contractor of the assessee who has been carrying out work that has been contracted to the assessee by the Rider/ Customer. It was submitted that this approach completely evidences the intention of the AO to somehow justify his erroneous conclusions. He submitted that thus, the understanding of the AO that the assessee controls the Fare (Ride Charge) is completely erroneous, because if that were the case, then there was no requirement to seek permission of the TSP/Driver to revise the fare as per market conditions. He submitted that this itself would show that the AO has merely convoluted the facts to arrive at the conclusion of his liking. This is not supported by the contractual terms between the parties.

7.15 Continuing with the arguments, the Ld.AR submitted that in para (v) at page 96 of the impugned order, the AO also concludes that it is the recipient of the service who makes the payment, acknowledgment of which is provided by the service provider. This has no bearing on the matter since this is completely a technology-driven platform and unlike conventional taxi service provider, who did not issue any bill for the cab fare, the technology and the portal assists the TSP/Driver in generating the invoice.

7.16 Thereafter, the Ld. AR submitted that at this juncture, it would be relevant to point out that *vide* Service Tax (Amendment) Rules, 2015, the concept of "aggregator" was introduced in the Service Tax Law. Post the amendment, the definition of "aggregator" as contained in Service Tax Rules, 1994 was as follows:

> "*Rule 2 – Definitions*
>
> *1(aa). "aggregator" means a person, who owns and manages a web based software application, and by means of the application and a communication device, enables a potential customer to connect with persons providing service of a particular kind under the brand name or trade name of the aggregator*"

7.17 It was submitted that post this amendment, it became assessee's responsibility/ obligation to charge and collect service tax on behalf of the Drivers given that the Drivers belonged to an unorganized industry. Therefore, it is extremely important to understand that it was of seminal importance for the assessee to know the exact amount on which its liability under service tax became due from time to time and therefore, invoicing the Rider/ Customer through its system was only to maintain proper records so as to transgress of the Service Tax Laws. This aspect of the matter has gone completely ignored by the AO while fastening a liability under section 194C of the Act.

7.18 The Ld. AR submitted that the AO has focused on the promotions and discounts offered by the assessee to attract Riders/ Customers to mean that the assessee controls the pricing and the TSPs/Drivers which was again completely incorrect because all promotions and discounts offered by the assessee are borne by the assessee itself, out of its Convenience Fee. He submitted that a bare perusal of the audited accounts for AY 2018-19 (please refer Note 3.4.) provides that the revenue (Convenience Fee) is accounted for net of discounts offered to Riders/ Customers. The assessee fails to understand as to how the marketing, promotion and discounts offered by the assessee, which are at its own costs, would establish control over the TSP/Driver. There is no merit in this conclusion of the AO also.

7.19 It was further submitted that in para (ix) on page 97, the AO again reiterates that the TSP/Driver has contractual relationship with the assessee as long as he is logged on to the Portal). The AO also concludes that the TSP/Driver is performing the Work in the form of passenger transport to the assessee and, thus, the provisions of section 194C were applicable. He submitted that the AO further notes that the TSP/Driver has the choice of logging off, but only when he is logged on, there subsists a contract and when he is at Work, he is under the control and supervision of the assessee. In view of the AO,

this conclusion tantamounts to a "contingent contract" under the Indian Contract Act, 1872. The Ld. AR submitted that the AO, obviously, is not aware of what is a contingent contract and has erroneously relied on the same. It was submitted that Section 31 of the Contract Act, 1872 defines the contingent contract as under:

> "*A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen*"

7.20 It was submitted that the assessee fails to understand as to how the AO, can arrive at such a conclusion. This entire logic and reasoning of the AO is completely erroneous and is unsupported by any known principles of law.

7.21 The Ld. AR submitted that this "aggregator" concept is relatively a new concept and has gained popularity over the last few years. The whole purpose of this concept was to facilitate the securing of a cab by the Riders/ Customers so that he does not have to stand on the road waiting for a cab. The whole purpose of devising this technology and introducing it in the market was to smoothen the process of making cabs available to Riders/ Customers, while simultaneously generating business for the TSPs/Drivers. This is evident from the fact that being on the Portal/ OLA App, only the Customer/ Rider can place transportation service request and the technology enables such request to transfer to the TSP/Driver who is closest to the Rider's/

Customer's location. The Ld. AR argued that the assessee fails to understand as to how this can be perceived, in any manner, to imply that the assessee is providing any transportation services. It was submitted that the consideration of the business stemming from the Customers/ Riders, the TSPs /Drivers have to be incentivized for a higher use of the portal/ OLA App, which in the end, results in the TSP/Driver getting more Customers/ Riders and consequently, the assessee getting higher Convenience Fee. What is also to be of seminal importance is that the incentives are in respect of certain parameters which have been laid down for the TSPs/Driver and when the TSPs/Drivers adhere to such parameters, they are incentivized. The forms of incentives are in respect of various factors like the TSP/Driver using OLA brand on its vehicle, completing prescribed number of rides, which also increase the brand awareness and market share of the assessee in comparison to its competitors. The Ld. AR submitted that, thus, neither the AO has understood the business model nor has he been able to appreciate the technology driven platform, which brings together the service provider being the TSP/ Driver and the Riders/ Customers.

7.22 The Ld. AR submitted that the AO erroneously also refers to some incidents where the assessee has been impleaded as a party. However, the AO has failed to appreciate that in terms of the contractual arrangements between the assessee and the TSPs/Drivers,

such deficiencies are on account of the TSPs/Drivers and not that of the assessee. It was submitted that the Department is not permitted to re-characterize the contractual relationship as it is neither within their competence nor permissible in law.

8.0 Specifically assailing the order of the Ld. CIT(A), the Ld. AR submitted that the Ld. CIT(A) had erred in upholding the order of the AO in as much as the Ld. CIT(A) had not appreciated a very vital fact that the assessee was not the person responsible for making the payment of 'ride charges' so as to attract the provisions of section 194C of the Act. It was further argued that the impugned order was patently wrong on facts as well as in law as the same was based more on perceptions and surmises rather than the facts of the case and the contractual relationships existing between the assessee, the rider and the driver.

8.1 The Ld. AR further argued that the Ld. CIT(A) had erred on facts as well as in law in reaching the conclusion that the ride charges paid to the TSPs / drivers were in pursuance to a contract between the assessee and such TSPs whereas, as had been earlier argued, the assessee was a mere technology platform which brings the TSPs and Riders together by charging a convenience fee whereas, the contract for provision of transport service is between the TSPs and the customers. It was further argued that the Ld. CIT(A) has made a very

incorrect observation that the contractual agreements was a mere camouflage to hide the real intention of the parties by use of clever phraseology .

8.2 It was further submitted that the Ld. CIT(A) had reached an entirely wrong conclusion that it was the assessee who exercised control over the drivers in respect of the provisions of transport services whereas, the contract was between the driver and the customer. It was further argued that the Ld. CIT(A) had reached a wrong conclusion that since the TSPs and the riders could not exercise control in terms of the choice for TSPs and / or drivers, it was the assessee who was, in effect, contractually providing the transportation service.

8.3 The Ld. AR further submitted that the Ld. CIT(A) had erroneously concluded that it was the assessee who determined the fare whereas the estimated fare was solely based on the details of the customers, intended journey and the rates prescribed by the Regional Transport Authorities. It was also submitted that the surge pricing is also determined and regulated by the Regional Transport Authorities and not the assessee and, therefore, the Ld. CIT(A) had again reached a conclusion which was contrary to the actual facts.

8.4 The Ld. AR further argued that since it was the assessee who provided discounts and promotional schemes by virtue of which the

customers were required to pay lesser fare, it was the assessee who was providing the transportation service and as such the contract was between the assessee and the customer, which in fact, was a totally wrong conclusion, as had been argued earlier also. It was submitted that ultimately the costs of such discounts and promotions were borne by the assessee and not by the TSPs or the drivers and as such it was an entirely wrong conclusion that the assessee could determine the amount which was payable to the TSPs as ride charges.

8.5 The Ld. AR further submitted that the Ld. CIT(A) had also erroneously concluded that since the assessee paid incentives to the TSPs / drivers, there exissted a contractual relationship for provision of transportation service between the assessee and the TSPs whereas, these incentives were paid for reference and were *dehors t*he ride charges.

8.6 It was also submitted that the inference of the Ld. CIT(A) that the TSPs / drivers worked under the direct control of the assessee and, therefore, there was a contractual relationship between the assessee and the drivers vis-a-vis provision for transportation services was also incorrect in as much as the assessee only sets quality standards for the TSPs but does not interfere in everyday running of the vehicles on a principal to principal basis but only requires the drivers to follow minimum safety standards, maintain personal hygiene and vehicle

cleanliness etc. and also give due courtesy and respect to the passengers as the brand name OLA is also associated with the driver. It was submitted that the Ld. CIT(A) had completely failed to appreciate that the assessee could not have contractually entered into a contract providing transportation services as it was neither competent nor had the requisite approval under the Motor Vehicles Act, 1988 to provide any such service. It was submitted that, therefore, the Ld. CIT(A) had erroneously re-characterized the assessee company as a transport service provider which was contrary to the provisions of the Motor Vehicle Act, 1988 under which a transport service provider is required to hold a valid registration and requisite permits in terms of section 66 read with sections 74 and 88 (9) of the Motor Vehicles Act, 1988 which was completely lacking in the present case.

8.7 It was further submitted by the Ld. AR that the Ld. CIT(A) had also ignored a very vital fact that the assessee did not own any vehicles and, hence, could not hold a valid permit for plying commercial transport vehicles in public places in terms of the provisions of Motor Vehicles Act, 1988.

8.8 The Ld. AR further argued that the Ld. CIT(A) had not appreciated that the assessee was only an intermediary qua the ride charges and it was the rider who was liable to pay charges and not the

assessee and as such in terms of section 194C (4) of the Act, the individual customer, who is also the person making the payment of the ride charges was specifically exempted from any withholding obligations and, therefore, in the absence of any such provisions, the liability for deduction of tax could not be legally fastened upon the assessee as he was functioning as a mere intermediary. It was argued that the assessee, being an intermediary, was merely acting as a pass-through between the drivers and the customers and, therefore, the provisions of section194 C of the Act would not be attracted.

8.9 It was further argued that the Ld. CIT(A) has also misdirected himself in laying emphasis on the brand name OLA so as to conclude that the assessee was a party to the transaction of providing a transportation service whereas the service was being provided by the driver and the brand name OLA was only a facility of aggregator or a virtual platform to bring the drivers and the customers together by charging a convenience fee.

9.0 The Ld. AR also drew our attention to the copy of audited Financial Accounts of the assessee numerous times during the course of arguments to demonstrate that the entries in the books of account / audited balance sheets etc. support his various contentions.

9.1 The Ld. AR also sought to provide an illustration and submitted that in exercise of powers provided for in section 67(1) of the Motor

Vehicles Act, 1988, for UT of Chandigarh, a notification was issued as early as in 2013, which prescribes the rates including night charges, waiting charges for taxis. Thus, he submitted that the allegation of the AO that the prices are controlled and fixed by the assessee, which led him to conclude that the assessee was providing the transportation services, is factually incorrect, perverse and contrary to the provisions of the Motor Vehicles Act, 1988.

9.2 The Ld. AR also drew our attention to a sample invoice and submitted that in this invoice the Rider has paid Rs. 71/- to the driver. It was further pointed out that this invoice has been segregated into two invoices. The first invoice was a driver trip invoice for Rs. 55.45 and the other one was for the convenience fee charged by the assessee amounting to Rs. 15.05. It was submitted that in the driver trip invoice the service tax category shown is 'rent a cab scheme operator' and at the bottom of the invoice it has been mentioned that this invoice has been issued by the driver and not the assessee. It was submitted by the Ld. AR that, on the other hand, the convenience fee invoice clearly states that the same is raised by the assessee and the service tax category is stated to be 'business auxiliary services'. It was submitted, thus the assessee only as an intermediary for the transportation services and further the service tax on the total fee is collected and remitted by the assessee in the capacity of the aggregator.

9.3 The Ld.AR also drew our attention to notification No. 5/2015 dated 01.03.2015 issued by the Ministry of Finance, wherein, it was pointed out that the term “aggregator” has been defined as a person, who owns and manages a web-based software application, and by means of the application and communication device, enables a potential customer to connect with persons providing service of a particular kind under the brand name or trade name of the aggregator.

9.4 Our attention was also drawn to another Notification No. MVR 0315/CR109/TRA-2 dated 04.03.2017 issued by the Government of Maharashtra to again demonstrate that the total ride fee, including driver’s fare, is regulated by the State / Regional Transport Authorities in terms of the directions issued to them by the State Government as per section 67(1) of the Motor Vehicle Act, 1988.

9.5 The Ld. AR also submitted that other digital platforms like booking agents for hotels or suppliers or airlines were also similar in features and operations as the features and operations of the assessee’s digital platform i.e. the OLA App and there was no principal to agent relationship in the case of these platforms and similarly in the assessee’s case also no principal to agent contractual relationship existed.

10.0 The Ld. AR submitted that to sum up, it is the case of the assessee that it functions as an "aggregator", which has been explained in the Motor Vehicles Act, 1988 itself as a market place which brings the TSPs/Drivers and the Riders/ Customers together. At the end of the day, the entire case of the Department hinges primarily on the fact, that as per their understanding, the assessee controls the TSPs/Drivers and the TSPs/Drivers are providing the "Work" being carriage of passengers to the assessee. It was submitted that the assessee has clearly established in the arguments that those are not the contractual terms and the assessee undertakes no obligation to provide any transportation service to the Riders/ Customers. He reiterated that the request for transportation service is generated by the Riders/ Customers on the Portal / OLA App and all that the system does is the use of technology and forward such request to the TSPs/Drivers. Under no circumstances can this intermediary act of forwarding the service request would convert the assessee, being a technology company, into a transport service provider. It was reiterated that the assessee neither has any permit under the relevant rules and regulations to provide any transportation services. It was reiterated that a conjoint reading of the terms contained in the Subscription Agreement as well as the User Terms that the contract of providing transportation services is between the Riders / Customers and the TSPs / Drivers and it is the TSPs/Drivers

who are the lawful recipients of the Ride Charge for providing such services. Mere facilitation of the collection of Ride Charge and routing the same through the assessee to the TSPs / Drivers would not result in legally concluding that the assessee is engaged in the business of providing transportation services, which is being provided by the TSPs/Drivers.

10.1 The Ld. AR submitted that in view of the above, it is prayed that without any other factual evidence and in absence of any material on record, it cannot be concluded that the assessee was providing any transportation service that it had sub-contracted to the TSPs / Drivers. The Ld. AR prayed that the impugned order may be set aside.

11.0 Per contra, the Ld. CIT DR submitted that as per the provisions of Section 194C of the Act - any person responsible for paying any sum to any resident for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the resident and a specified person shall, at the time of credit of such sum to the account of the resident or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family. It was submitted that the assessee is making payments to drivers or vehicle owners for carrying out passenger

transport services and, therefore, is liable to deduct tax at source @ 1% on the amount that has been paid. Further, the deduction needs to be done at 20% of the amount paid in case the payment has been made to persons without obtaining PAN as prescribed under section 206AA of the Income Tax Act. It was submitted that same has not been done by the assessee. The Ld. CIT DR submitted that the issue is whether any liability of TDS arises at all and if yes, whether the assessee was the person liable for TDS on the payment made to the drivers/ vehicle owners.

11.1 The Ld. CIT DR submitted that the real intent is to be seen in the agreement between Assessee and the Driver Partners. He argued that words of the subscription agreement are camouflaging the real intent in this agreement and that clever phraseology cannot override the substance and reality of transaction. The situation in the present case is peculiar in that there are three parties involved: OLA, drivers and passengers. But the focus must still be on the nature of the relationship between drivers and OLA (i.e. the assessee). The principal relevance of the involvement of third parties (i.e. passengers) is the need to consider the relative degree of control exercised by OLA and drivers respectively over the service provided to them. The Ld. CIT DR submitted that particularly important consideration is who determines the price charged from the passengers. More generally, it is

necessary to consider who is responsible for defining and delivering the service provided to passengers. A further and related factor is the extent to which the arrangements with passengers afford drivers the potential to market their own services and develop their own independent business.

11.2 The Ld. CIT DR submitted that the language of the agreement is to avoid accountability and legal obligations and meant for convenience of the assessee. It was submitted that various aspects of the agreement make it evident that the driver is under effective control of the Assessee. He submitted that all these aspects also point out a dominant position of assessee vis-a-vis drivers where terms of agreement are heavily loaded in favour of assessee. The driver remains under the effective control of assesse as long as he is logged into the App. The arguments of the Ld. CIT DR can be summarised as under:-

(i) Selection of Client:- No choice is given to the Driver for selection of client. Although drivers have the freedom to choose when and whereto work, once a driver has logged onto the OLA app, a driver's choice about whether to accept requests for rides is constrained by. OLA. OLA itself retains an absolute discretion to accept or decline any request for a ride. A ride is offered to a driver through the OLA app only and OLA exercises control over the acceptance of the request by the driver. OLA controls the information provided to the driver. Notably, the driver is not

informed of the passenger's destination until the passenger is picked up and, therefore, has no opportunity to decline a booking on the basis that the driver does not wish to travel to that particular destination. He submitted that if at all he wants to choose another client, he has to cancel the ride at the risk of downgrading his rating. Even the next client after cancellation is also chosen through OLA App.

(ii) Remuneration or Payment to drivers:-

The remuneration paid to the drivers for the work they do is fixed by OLA and the drivers have no say in it (other than by choosing when and how much to work). For rides booked through the OLA app, it is OLA that sets the fares and drivers are not permitted to charge more than the fare calculated by the OLA app. The notional freedom to charge a passenger less than the fare set by OLA is of no possible benefit to drivers, as any discount offered would come entirely out of the driver's pocket and the delivery of the service is organized so as to prevent a driver from establishing a relationship with a passenger that might generate future custom for the driver personally. OLA also fixes the amount of its own "service fee" which it deducts from the fares paid to drivers. OLA's control over remuneration further extends to the right to decide in its sole discretion whether to offer any discounts or promotions to the passengers or make a refund of cancellation fee. The fare which appears on screen and what driver gets as

per rules may be different due to incentives/discounts offered to passengers. There is no relation between fare and remuneration offered to drivers. So how can it be a contract between driver and passenger? It was submitted that the passengers pay OLA a set price for the trip, and OLA, in turn, pays its drivers a non-negotiable amount. If a passenger cancels a trip request after the driver has accepted it, and the driver has appeared at the pick-up location, the driver is not guaranteed a cancellation fee. The Assessee alone has the discretion to negotiate this fee with the passenger. OLA discourages drivers from accepting tips because it would be counterproductive to OLA's advertising and marketing strategy. It was further submitted that the settlement of accounts with driver takes place at a fixed intervals and not after every trip.

(iii) Negotiation and Communication with Customers:-

OLA restricts communication between the passenger and the driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride. When booking a ride, a passenger is not offered a choice among different drivers and their request is simply directed to the nearest driver available. Once a request is accepted, communication between the driver and the passenger is restricted to information relating to the ride and is channelled through the OLA app in a way that prevents either from learning the other's contact details. All these terms with the

passengers are not as per driver's own free will but only through intervention of digital platform offered by assessee

iv) <u>Delivery and monitory of Services :-</u>

The fact that drivers provide their own cars does not mean that they have more control. OLA vets the type of car that may be used. Moreover, the technology which is integral to the service is wholly owned and controlled by OLA and is used as a means of exercising control over drivers. Thus, when a ride is accepted, the OLA app directs the driver to the pick-up location and from there to the passenger's destination. The quality standards are fixed by OLA which is not the job of a technology company. OLA monitors the performance of driver on each ride. [Refer to zero Tolerance policy on page 103 of CIT (A) order- para 7.3]

v) <u>On boarding. Training and Off boarding of Drivers:</u>

Recruitment of drivers is done by OLA. OLA also conducts training program for drivers for delivery of services. OLA monitors driver acceptance and cancellation rates for trips. A further potent method of control is the use of the ratings system whereby the passengers are asked to rate the driver after each trip and the failure of a driver to maintain a specified average rating results in warnings and ultimately in termination of the driver's relationship with OLA. The ratings are used by OLA as an internal tool for managing performance and as a basis for making

termination decisions where customer feedback shows that drivers are not meeting the performance levels set by OLA.

(vi) Leasing and Financing Activities :-

The Ld. AR has pointed out that there is no leasing and financing option given to drivers. However, both Assessing Officer and the Ld. Commissioner of Income Tax (A) have given a finding that drivers are provided leasing and financing options through related parties (Refer to page 19 of CIT(A) Order, point no xvi)

vii) Consideration/Fare:-

(1) Fare and consideration: - For rides booked through the OLA app, it is OLA that sets the fares and drivers are not permitted to charge more than the fare calculated by the OLA app. The notional freedom to charge a passenger less than the fare set by OLA is of no possible benefit to drivers,as any discount offered would come entirely out of the driver's pocket

(2) OLA also fixes the amount of its own "service fee" which it deducts from the fares paid to drivers.

(3) OLA's control over remuneration further extends to the right to decide in its sole discretion whether to offer any discounts or promotions to the passengers or make a refund of cancellation fee.

(4) The fare which appears on screen and what driver gets as per rules may be different due to incentives/discounts offered to passengers. There is

no relation between fare and remuneration offered to drivers.

(5) The settlement of accounts with driver takes place at a fixed intervals and not after every trip.

(6) The surge pricing which is linked to demand and supply is fixed by OLA.

(7) The AR has referred to guidelines issued by Chandigarh Authority fixing the maximum fare in support of its plea that there is limited freedom to choose fare. The argument is flawed. Firstly, reference is made only to Chandigarh city. No evidence has been brought on record to show that such regulatory fare is fixed by any Authority or any other state. Secondly and more importantly, it is the maximum price which is regulated by Chandigarh Authority and OLA is free to fix any price within this maximum fare.

(8) The invoice is issued by OLA and has OLA stamp on top.

(viii) Assesse is not intermediary or Technology company :-

(1) The activities performed by assessee company are not of a pure technology company but of a person engaged actively in transport services

(2) The income of assesse is not from use of technology or number of clicks but directly proportional to number of rides performed. The earnings are from provision of vehicles on hire to the passengers.

(3) Advertisements - The advertisements by assessee are aimed to create a brand name of itself in the field of provision of quality transport services in India. The cabs are all painted as OLA cabs. All the advertisements such as Save the day, Join the Revolution' make customers identify these rides as OLA rides.

(4) The whole web of transactions from booking to supervision, monitoring, payment, execution, and settlement of accounts is managed by OLA.

(5) Owning of vehicles is not necessary. In many contracts the person providing services gets work done by some other subcontractors using their own plant and machinery.

11.3 The Ld. CIT DR also argued as under:-

(i) Reliance is also placed on Circular/0.M. issued by CBDT dated 14.10.2019 F.No 275/02/2019-IT [refer to remand proceedings mentioned on page 85 of Commissioner of Income Tax (Appeals] order Para 5(4).

(ii) OLA has followed dual invoice concept under aggregator model where in it has deducted tax on the first type of invoices also, it means TDS has been deducted on ride charges also for certain period in past (Refer to page-108 of Commissioner of Income Tax (Appeals) order last 3 paras)

(iii) The assessee has referred to aggregator concept being followed in 'Service Tax Act' and as per Service

Tax Act, the assessee is required to pay Service Tax on ride charges. The aggregator concept is not defined in Income Tax Act, 1961. Moreover liability under one Act may be different from liability under other act and liability under Income Tax Act can still be fastened, independent of liability under 'Service Tax Act' [para 7.7 page 109 of CIT(A) order]

(iv) The Assessee has argued that it is not the owner of vehicles and has no permit to run such business. It is to be said the provisions of Income Tax Act can still be applied if Assessee is not the owner or has no legal authority to ply taxis. What has to be seen is whether the assessee is the person responsible to pay and whether there is contractual relationship with the payee independent of any legal sanctity provided by some other Act.

(v) Introduction of Section 194-O in the Income Tax Act, 1961:-

Section 194-O is reproduced as below:-

"(Payment of certain sums by e-commerce operator to e-commerce participant 194-O. (1) Notwithstanding anything to the contrary contained in any of the provisions of Pan B of this Chapter, where sale of goods or provision of services of an e-commerce participant is facilitated by an e-commerce operator through its digital or electronic facility or platform (by whatever name called], such e-commerce operator shall, at the time of credit of amount of sale or

services or both to the account of an e-commerce participant or at the time of payment thereof to such e-commerce participant by any mode, whichever is earlier, deduct income-tax at the rate of one per cent of the gross amount of such sales or services or both.

Explanation. *For the purposes of this sub-section, any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant for the sale of goods or provision of services or both, facilitated by an e-commerce operator, shall be deemed to be the amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included in the gross amount of such sale or services for the purpose of deduction of income-tax under this sub section.*

(2) No deduction under sub-section (1) shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of an e-commerce participant, being an individual or Hindu undivided family, where the gross amount of such sale or services or both during the previous year does not exceed five lakh rupees and such e-commerce participant has Written submissions in the case of M/s AN I Tech. (P) Ltd., A. Y. 2018 19 furnished his Permanent Account Number or Aadhaar number to the e-commerce operator.

(3) Notwithstanding anything contained in Part B of this Chapter, a transaction in respect of which tax has been deductei by the e-commerce operator under sub section (1), or which is not liable to deduction under sub-section (2), shall not be liable to tax deduction at source under any other provision of this Chapter: Pro rided that the provisions of this sub-section shall not apply to any amount or aggregate of amounts received or receivable 'by an e-commerce operator for hosting advertisements or providing any other services which are not in connection with the sale or services referred to in sub-section (1).

(4) If any difficulty arises in giving effect to the provisions of this section, the Board may, with the approval of the Central Government, issue guidelines for the purpose of removing the difficulty. (5) Every guideline issued by the Board under sub-section (4) shall be laid before each House of Parliament, and shall be binding on the income-tax authorities and on the e-commerce operator. (6) For the purposes of this section, e-commerce operator shall be deemed to be the person responsible for paying to e-commerce participant. Explanation. For the purposes of this section,

(a) electronic commerce" means the supply of goods or services or including digital products, over digital or electronic network; both,

(b) e-commerce operator" means a person who owns, operates or man ages digital or electronic facility or platform for electronic commerce

(c) e-commerce participant" means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerces'

*(d) Services includes "fees for technical services and fees for professional services, as defined in the Explanation to section 194JJ Other sums. (1) "Any person responsible for paying to a non¬resident, not being a company, or to a foreign company, any interest "[(not being interest referred to in section 194LB or section 194LCJJ for section 194LD][*Jor any other sum chargeable under the provisions of this Act" (not being income chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:*

"[Provided thatjn the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only

at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.]"

(vi) This amendment is effective w.e.f 01.04.2020. A bare reading of this provision reveals that service provided by digital platforms like OLA are brought within purview of TDS. The very fact that Parliament, in its wisdom, has brought such provisions proves that there does exist contractual relationship between the assessee and the drivers.

11.4 The Ld. CIT DR placed reliance on the following judicial precedents:

(A) Reliance was placed on a foreign judgment on similar facts; Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748 and following submissions were made.

(a) This Judgment concerns the employment status of private hire vehicle drivers who provide their services through the Uber smartphone application (the "Uber app"). The main question raised in this case is whether an Uber driver is a "worker" for the purposes of employment legislation which gives "workers" rights to be paid at least the national minimum wage, to receive annual paid leave and to benefit from certain other protections. The Hon'ble Supreme Court also considered the related question of what time counts, if drivers are "workers", as working time for the purpose of the relevant rights.

(b) Uber BV is a Dutch company which owns the technology behind the Uber app. Uber London Ltd is a UK subsidiary licensed to operate private hire vehicles in London. The claimants, Mr Aslam and Mr Farrar, at the relevant times were licensed to drive private hire vehicles in London and did so using the Uber app. Their claim was brought in the Employment Tribunal as a test case to establish their employment status. At the time of the Tribunal hearing in 2016, the number of Uber drivers operating in the UK was estimated to be around 40,000 of whom around 30,000 were operating in the London area.

(c) The definition of a "worker" in section 230(3) of the Employment Rights Act, 1996 and other relevant legislation includes anyone employed under a contract of employment and also extends to some individuals who are self-employed. In particular, the definition includes an individual who works under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

(d) The Employment Tribunal found that Mr Aslam and Mr Farrar satisfied this test and worked under worker's contracts for Uber London. The Employment Appeal Tribunal and the Court of Appeal (by a majority) dismissed Uber's appeals.

(e) The Supreme Court unanimously dismissed Uber's appeal.

(f) The question was is a driver a "worker"? Uber argued that Uber BV acted solely as a technology provider with its subsidiary (Uber London in this case) acting as a booking agent for drivers who are approved by Uber London to use the Uber app. Uber argued that, when a ride is booked through the Uber app, a contract is thereby made directly between the driver and the passenger whereby the driver agrees to provide transportation services to the passenger. The fare is calculated by the Uber app and paid by the passenger to Uber BV, which deducts part (20% in these cases) and pays the balance to the driver. Uber characterises this process as collecting payment on behalf of the driver and charging a "service fee" to the driver for the use of its technology and other services. To support its case, Uber relied on the wording of its standard written contracts between Uber BV and drivers and between the Uber companies and passengers. Uber also emphasised that drivers are free to work when they want and as much or as little as they want. In summary, Uber argued that drivers are independent contractors who work under contracts made with customers and do not work for Uber.

(g) The Hon'ble Supreme Court disagreed. As on the facts there was no written contract between the drivers and Uber London, the nature of their legal relationship had to be inferred from the parties'

conduct and there was no factual basis for asserting that Uber London acted as an agent for drivers [50 - 56]. The correct inference was that Uber London contracts with passengers and engages drivers to carry out bookings for it [54 - 56]. The judgment emphasizes five aspects of the findings made by the Employment Tribunal which justified its conclusion that the claimants were working for and under contracts with Uber [93].

(h) First, where a ride is booked through the Uber app, it is Uber that sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. It is therefore Uber which dictates how much drivers are paid for the work they do [94], Second, the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them [95]. Third, once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber [96]. One way in which this is done is by monitoring the driver's rate of acceptance (and cancellation) of trip requests and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on [97]. Fourth, Uber also exercises significant control over the way in which drivers deliver their services. One of several methods mentioned in the judgment is the use of a ratings system whereby passengers are

asked to rate the driver on a scale of 1 to 5 after each trip. Any driver who fails to maintain a required average rating will receive a series of warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated [98 - 99]. A fifth significant factor is that Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride [100].

(i) The Hon'ble Supreme Court considered that comparisons made by Uber with digital platforms which act as booking agents for hotels and other accommodation [103 - 108] and with minicab drivers [109 -117] do not advance its case.

(j) As may be seen the facts, the structure and nature of the service provided to customers and nature of agreement and relationship between the Service provider and Drivers in cases cited supra is very similar to the Indian player (Assessee). The relationship can never be inferred as Principal to Principal basis as the assessee is trying to assert. The relationship can only be inferred as contractual relationship.

(B) Reliance was also placed on case of Association Professional Elite Taxi v. Uber Systems Spain SL (C.J.E.U.) (Judgment by Barcelona Commercial Court (Grand Chamber) on 20 December 2017 and affirmed by EU Court

of Justice on 14 Feb 2018 where on similar facts it was held that Uber was providing Service in the field of transport. The following submissions were made in this regard:-

(a) In 2014, the Association Professional Elite Taxi (Elite Taxi) brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No. 3, Barcelona, Spain) for the infringement of the National Law on Taxi Services and the carrying out of misleading practices and acts of unfair competition by Uber Systems Spain SL (Uber). The two parties in the main proceedings were Elite Taxi, a taxi drivers' association in Barcelona, and Uber, a company related to Uber Technologies Inc. In the proceedings, Uber argued that its smartphone app constituted only a technical platform and should be regulated as an "information society service," subject to EU law. However, the Court ruled against Uber and found that it was providing a "service in the field of transport," making the company subject to potentially more stringent regulations of individual EU member states.

(b) EU Court Of Justice (ECJ) held that Uber Is Transport Services Company. The ECJ delivered its judgment in response to a request for a preliminary ruling from the Barcelona Commercial Court in a dispute between Association Professional elite Taxi ("Elite Taxi"), a professional taxi drivers' association in Barcelona, and Uber Systems Spain SL ("Uber"), a smartphone and technological platform interface and

software application provider acting, for profit, as an intermediary between the owner of a vehicle and persons who wish to make an urban journey by car.

(c) The Barcelona Commercial Court sought guidance from the ECJ on whether Uber's service should be regarded as a "transport service", an "electronic intermediary service" or an "information society service".

(d) In its judgment, the ECJ considered the extent to which Uber acts as an intermediary between drivers and passengers. In the ECJ's view, Uber's commercial offering consists of more than an intermediary service. It noted that Uber is involved in the selection of the non-professional drivers and provides them with the application required to connect with service users. Moreover, Uber also exercises a decisive influence over the conditions under which the drivers can provide their service, such as (i) determining a maximum fare; (ii) receiving the fare from the passenger; (iii) subsequently forwarding the fare to the driver; and (iv) exercising a degree of control over the quality of the vehicle and the conduct of the driver.

(e) According to the ECJ, Uber's activities should therefore be regarded as intermediation services forming an integral part of an overall service, the main component of which is a transport service. Accordingly, Uber offers a "service in the field of

transport" which falls outside the scope of the Services Directive.

(f) There is no reason why on same facts OLA cab service should not be held as 'Service in the field of Transport' and not an intermediary service. Once it is held so, then the relationship between OLA and driver partners have to be construed as contractual service liable for TDS.

[C] Reliance was also placed on decision of ITAT Banglore Bench delivered on 25.11.2020 in case of M/s. Sri Balaji Prasanna Travels Vs. ACIT, Circle-6(3)(1) Bengaluru in ITA No.2078/Bang/2019 and following submissions were made:-

(a) The assesse is engaged in providing vehicles on hire. The A.O. made a disallowance of Rs.1,26,66,648/- being the vehicle hire charges on which TDS had not been deducted. On appeal, CIT(A) observed that the assessee is liable to deduct TDS u/s 194C of the Income Tax Act,1961 on the vehicle hire charges and since the assessee failed to deduct the TDS, the disallowance made by AO u/s 40(a)(ia) of the Act is justified. Against this, the assessee filed an appeal before ITAT.

(b) The assesse carries on the business of providing vehicles to one M/s. Orix Infrastructure India Pvt. Ltd. The assessee is an aggregator of vehicles and thus itself does not own sufficient number of vehicles required for fulfilling its obligations under the Service Contract entered with Orix Company. It necessarily

has to co-opt other third party vehicle owners to fulfill its obligations under the Service Agreement and accordingly it entered into an understanding with several vehicle owners, who are invariably driver cum owners, for fulfilling its obligations. The amounts paid to such third party vehicle owners amounted to Rs.5,75,07,494/-.

(c) The assessee argued that there is no privity of contract between Orix Company and such third party vehicle owners and, thus, there cannot be any subcontract to invoke the provisions of section 194C of the Act. The revenue derived by the assesse is shared between the assessee and such third party vehicle owners, who are themselves carrying on the business of transport operators. The assesse further argued that the arrangement between the appellant and such third party vehicle owners is neither in the nature of a sub-contract nor in the nature of hire. It is more a case of a Joint Venture wherein two persons jointly perform a work and share the revenue received between them.

(d) The Hon'ble ITAT rejected the plea of the assessee and held that there is contractual relationship between the assesse and the cab owners cum drivers. The ITAT held that a contract need not be in writing; even an oral contract is good enough to invoke the provisions of Section 194C. As Hon'ble Karnataka High Court has observed in the case of Smt Rama Vs CIT (236 CTR 105), *"Law does not stipulate the existence of a written contract as a condition*

precedent for (invoking the provisions of Section 194 C with respect to payment of TDS". The cab owners have received the payments from the assessee towards the hiring charges, therefore, the presumption would normally be that one would proceed on the basis that there was a contract for hiring of vehicles. Therefore, if the assessee has made the payment for hiring the vehicles, the provisions of section 194C are clearly applicable. The contract has to be looked into party-wise and not on the basis of the individual. It was further held that all the payments made to a cab owner throughout the year are to be aggregated to ascertain the applicability of the TDS provision as all the payments pertain to a contract. Contract need not be in writing. It may infer from the conduct of the parties. It may be oral also, [para 6.1]

(e) The facts are quite similar. In the present case under reference, the assessee, OLA, is providing vehicles to customers quite similar to the assesse providing vehicles to Orix company in case cited supra. On the other side of agreement exist drivers cum cab owners in both cases who provide vehicles to the customer/passengers through assessee. The only difference is that in our case it is provided by intervention of a software App whereas in case cited supra it was provided manually by the assessee. The decision of Hon'ble ITAT Bengaluru holding assesse as liable for TDS deduction is squarely applicable to present case

11.5 The Ld. CIT DR submitted that there were points of distinction between Uber Systems India Pvt Ltd's case and the assessee's case as under:-

(a) The AR cites the case of Uber systems (UISPL) in his favour. The facts of case of Uber India Systems Pvt Ltd are not applicable to present case. Uber India (UISPL) is a subsidiary of Uber group and its role is only limited to market and promote the use of Uber App in India. The services which the assesse calls in that case as 'Lead Generation Services' are provided by Uber BV, a Netherland company. The Indian counterpart is getting only a remittance of cost plus 8.5% from its holding company. The App is owned and operated by the parent company and, thus, agreements are between parent company and Driver partners. Uber India's role is only to promote use of App amongst Indian customers. [Page 10-11 of the ITAT order] therefore there was no question of examining the relationship between Uber India and Driver Partners (as there is no agreement).

(b) However, in case under reference we are examining the relationship between assessee and the Driver partners where an agreement exists. There are four players in the Uber case and as stated the services are provided by Netherlands company and not Indian counterpart. The ITAT was concerned only with the relationship between (UISPL) (Indian company) and drivers and decided that relationship was not one of Contract. The relationship between the actual service

provider, i.e. Uber BV and drivers was never decided. The assessee in the present case is on same footing as that of Uber BV and not UISPL whose role is not to provide actual service but only to support the provision of services by Uber BV. Thus, case decided by the ITAT and relied upon by the asseessee in its favour has no applicability to present case in view of these peculiar facts.

(c) On the contrary, in para 3.5.2 (page 29) of the order cited supra, Hon'ble ITAT observes that UISPL makes payment on behalf of Uber BV to drivers and has the status of only a remitter of payment. The same can be interpreted to mean that Uber BV is making payment to Driver Partners which would in effect mean that OLA is making payment to Driver partners and hence is a person responsible for making payments under section 194C of IT Act as role of OLA (Assessee) is same as Uber BV.

(d) The Ld AR's statement that AO mentions in his order that facts of the Uber Systems case are same as this case is completely wrong as nowhere it is evident from his order. The AO only mentions that Ld CIT(A) has dismissed appeal of Uber India Systems who is in similar nature of Business which in no way can be interpreted the way the AR interprets.

11.6 The Ld. CIT DR also submitted that the examples cited by the Ld. AR vis-a-vis other types of service providers were also distinguishable and he argued as under:-

(a) It is imperative to compare OLA's method of operation and relationship with drivers with digital platforms that operate as booking agents for suppliers of, for example, hotel or other accommodation. There are some similarities. For example, a platform through which customers can book accommodation is likely to have standard written contract terms that govern its relationships with suppliers and with customers. It will typically handle the collection of payment and deduct a service fee which it fixes. It may require suppliers to comply with certain rules and standards in relation to the accommodation offered. It may handle complaints and reserve the right to determine whether a customer or supplier should compensate the other if a complaint is upheld. Nevertheless, such platforms differ from OLA in how they operate in several fundamental ways.

(i) Firstly, the accommodation or Airline offered is not a standardized product defined by the platform. Customers are offered a choice among a variety of different hotels or other types of accommodation or Airlines (as the case may be), each with its own distinctive characteristics and location.

(ii) Secondly, Suppliers/Hoteliers/Airlines are also responsible for defining and delivering whatever level of service in terms of comfort and facilities etc they choose to offer.

(iii) Thirdly, apart from the service fee, it is, crucially, the supplier and not the platform which sets the price.

(iv) Fourthly, the platform may operate a ratings system but the ratings are published in order to assist customers in choosing among different suppliers; they are not used as a system of internal performance measurement and control by the platform over suppliers.

(v) Fifthly, nor does the platform restrict communication between the supplier and the customer or seek to prevent them from dealing directly with each other on a future occasion.

(vi) Sixthly, it is the suppliers who offer the incentives/discounts to digital platform rather than other way round. In assessee's case it is the assessee (so called digital platform) offers incentives to Driver partners (equated with suppliers for other platforms).

(vii) Lastly, the economic freedom of the partners in these cases is entirely of different kind as compared to economic freedom enjoyed by drivers of OLA cabs.

(viii) The result of these features is that suppliers of accommodation or airlines or Food items (many examples may be quoted) available for booking through the platform are in competition with each other to attract business through the price and quality of the service they supply. They are properly regarded as carrying on businesses which are

independent of the platform and as performing their services for the customers who purchase those services and not for the platform.

11.7 The Ld. CIT DR further submitted that the other case laws relied upon by the Ld.AR were also distinguishable on the following lines:-

(a) C1T vs Career Launcher (20131 358 1TR 179 (Delhi HC) :-

The case deals with Franchise agreements and facts are entirely different. The assessee gives permission to partner to use its goodwill and trademark and shares profits. There is no control over the partner the way OLA exercises control over drivers, (refer to para 7.14, page 113 of CIT(A) order)

(b) CIT Vs. Truck Operators Union (2011) 339 ITR 532 (P&H HC) :-

The assesse here was concerned to obtain contracts only and exercised no control over the Truck owners/Drivers. (Refer to Page 114, Para 7.13 of order of CIT(A)

(c) Bhopal Sugar industries Vs. STO Civil appeal No. 1135-1138 & 1972 :-

(Refer to CIT(A) observation on page 112, Para 7.13 of the order)

11.8 The other cases cited in paper book are also clearly distinguishable on above lines [para 9.1] and factual matrix is entirely different in these cases.

11.9 The Ld. CIT DR also filed written submissions which have been take on record and which will be given due consideration at the time of adjudication.

12.0 The Ld. AR also filed written submissions in response to the Department's arguments which are being reproduced herein under:-

> *"1. At the outset, for the sake of brevity, it is submitted that for applying the provisions of section 194C of the Income-tax Act, 1961 ("ITA") on the facts of the present case, the entire case of the Department rests on the erroneous assumption that the Assessee is in the business of providing transportation services and these services are provided through sub-contract with third party drivers (hereinafter also referred to as "Transport Service Providers" or "TSPs"/ Drivers) (please refer to the definition of "Driver" at Page 124 and Clause 1(ix) at Page 144 of the Paperbook dated 30.09.2020). It is also the case of the Department that these TSPs/Drivers perform the transportation services under total control and supervision of the Assessee, thereby attracting withholding obligations under section 194C of the ITA. This aspect forms a common theme in the orders passed by the Assessing Officer ("AO") as well as the Commissioner of Income Tax (Appeals) ["CIT(A)"], so as to hold the Assessee to be an assessee-in-default under section 201 of the ITA. Needless to state that the Department has completely failed to appreciate the way business is done by technology companies, which failure has led them to arrive at erroneous conclusions.*

2. It is the case of the Assessee that it is a technology company (please refer the Memorandum of Association at Pages 104 - 112 as well audited financials of the Assessee at Pages 302 - 347 of the Paperbook dated 30.09.2020), which has revolutionised and organised hailing taxi in India. The Assessee owns, operates and manages an Application known as the "Ola" App. The Assessee acts as an aggregator/intermediary/marketplace, and facilitates the bringing together the "Customer" (please refer to the definition of "Customer" at Page 124 of the Paperbook dated 30.09.2020) and TSPs/ Drivers on one single platform, in an exceptionally transparent and secure manner. For the use of the platform/App it charges a "Convenience Fee" from the Customer. The Assessee neither owns, nor is in the business of hiring vehicles for provision of the transportation services. In terms of the contractual arrangements, the transportation services are solely provided by the TSPs/Drivers, which understanding forms part of the agreement with the Customer. This entire factual background, along with paragraph-wise rebuttal to the incorrect assumptions drawn by the AO [as echoed by the CIT(A)], has been specifically addressed in the written submissions dated 29.10.2019 filed before the CIT(A) and therefore, the same are not being repeated herein for the sake of brevity (please refer Pages 1 – 103 of the Paperbook dated 30.09.2020). Therefore, at this juncture, our endeavour would to specifically address and rebut the arguments of the Ld. Departmental Representative during the course of the hearing of the captioned appeal.

3. Decision in the case of M/s Uber India Systems Private Limited vs. JCIT, ITA No. 5862/Mum/2018, decision dated 04.03.2021:

> *(a) At the very outset, it was brought to the attention of the Hon'ble Bench that the issue under consideration now stands covered by the decision of the Coordinate Bench of this Hon'ble Tribunal in Uber India (Supra). On identical facts and issues, the Hon'ble Coordinate Bench has held that section 194C*

of the ITA is not applicable on payments (collected from riders/customers) forwarded by an aggregator/intermediary to "Driver-Partners" and the transportation services are provided by the "Driver-Partners" to the "Users". It has been clearly observed in the said decision that neither Uber B.V. (the owner, operator and manager of the App) nor Uber India Systems Private Limited ("Uber India") (the payment and collection service provider) performed transportation services, which services are performed solely by the "Driver-Partners" (please refer Paras 3.6.2 - 3.6.3, Pages 36 – 37 of the Compilation dated 05.03.2021). Since this issue is common and germane to the entire dispute, given the conclusions drawn in Uber India (Supra), the matter is no longer res-integra.

(b) It would be relevant to bring to the kind attention of the Hon'ble Bench that the AO/CIT(A), in the impugned order(s), have placed reliance on the orders in the case of Uber India, which now stand overruled by this decision. Needless to state, given the favourable decision by the Corordinate Bench of the Hon'ble Tribunal, the Department now wishes to change tracks so as to disassociate itself from Uber India's case. The Department cannot be allowed to blow hot and cold in the same breath [please refer Pages 175 - 176 of the Paperbook dated 30.09.2020, containing remand report dated 12.12.2019 of the AO filed before the CIT(A)]. The approach has to be decried.

(c) In view thereof, it is most humbly submitted that given the binding decision of the Hon'ble Coordinate Bench in Uber India's case, the Assessee's appeal deserves to be allowed on this ground alone.

4. Principles governing construction of contracts: As brought to the attention of the Hon'ble Tribunal during the course of the hearing, the commercial arrangements in the present case (which are between unrelated parties) have

been discarded by the Department, terming it as "clever phraseology". There is a clear mandate of the Hon'ble Supreme Court that business efficacy and the intention of the parties cannot be discarded and recharactrised when the intention of the parties is evident from written words, more so, to create legal consequences when none exist. Therefore, since the contractual arrangements in the present case must be viewed qua the intention of the parties, it is not open to the Department to give a different connotation to such arrangements so as to arrive at erroneous conclusions (like using terms like "clever phraseology" etc.). Reliance in this regard is placed on the decisions in Bank of India vs. K. Mohandas, (289) 5 SCC 313 (Supreme Court); Nabha Power Limited vs. Punjab State Corporation Limited and Anr, [2018] 11 SCC 508 (Supreme Court); Satya Jain (Dead) Through L.Rs. and Ors. vs. Anis Ahmed Rushdie (Dead), [2013] 8 SCC 131 (Supreme Court); and Union of India vs. D.N. Revri & Co. and Ors., [1976] 4 SCC 147 (Supreme Court) [please refer Pages 88 – 174 of the Compilation dated 09.10.2020]. Thus, given the clear understanding between the parties in the present case, it is clear that the transportation services can and are provided only by the TSPs/Drivers and not the Assessee. Even under the applicable laws [Motor Vehicles Act, 1988 ("MVA")], there is a specific prohibition to provide transportation services, unless a permit/license has been obtained. It is not the case of the Department that the Assessee possesses a permit/license to provide transportation services under the MVA. The facts speak for themselves, that it is only the TSPs/Drivers, who have the necessary permits/licenses to provide the transportation services. During the course of the hearing before the Hon'ble Bench, the various clauses of the Subscription Agreement dated 01.11.2016 ("Subscription Agreement") and the User Terms dated 08.03.2018 ("User Terms") were pointed out to evidence the clear understanding between the parties that it is the TSPs/Drivers, who will provide the transportation services to the Customer. Kind attention is invited to the various clauses as separately referred to in Annexure A to this note.

5. Change in accounting/invoicing/taxing treatment from AY 2016-17: To reach its conclusion, the Hon'ble Tribunal in Uber India (Supra), took categorical note of the recognition of an "aggregator" for Service Tax purposes, on whom the liability to discharge Service Tax was bestowed, by virtue of Notification No. 7/2015 dated 01.03.2015, issued by the Central Board of Excise and Customs (please refer Para 3.7, Pages 37 – 38 of the Compilation dated 05.03.2021). At this juncture, it is relevant to point out that to comply with its obligation to charge, collect and deposit Service Tax on behalf of the TSPs/Drivers, the Assessee revamped the manner in which accounting treatment and invoicing was undertaken by it. Since it became important for the Assessee to know the exact amounts on which it was to discharge Service Tax liability from time to time, it raised invoices on the Customer through its own system, so as to not fall foul of the Service Tax laws. A perusal of the sample invoices issued by the Assessee would reveal that whereas the "Convenience Fee" invoice has the "OLA" logo (please refer Page 364 of the Paperbook dated 30.09.2020), the said logo does not form a part of the "Driver Trip Invoice". In fact, there is a specific disclaimer therein to say that the Driver Trip Invoice is issued by the TSP and that the Assessee is only an aggregator (please refer Page 363 of the Paperbook dated 30.09.2020). Furthermore, owing to this distinction having been made between "aggregators" and "Service Providers" and corresponding clarity in law by virtue thereof, the Assessee did not route the payments collected by it from the Customer, which were subsequently to be forwarded to TSPs/Drivers from its profit and loss account. In view thereof, the position earlier taken by the Assessee until AY 2015-16, whereby the Assessee deducted tax under section 194C of the ITA for all payments made by it to TSPs/ Drivers, was no longer necessary, even on a conservative basis, on which the Assessee was initially operating. Be that as it may, the Department also pointed out that the Assessee was deducting taxes under section 194C of the ITA on the "incentives" paid to the TSPs/Drivers. Here, it is respectfully pointed out that the payment of incentives was a cost for the Assessee, since

this is paid out of the Convenience Fee earned by it. Further, on a conservative basis and to avoid any dispute/prolonged litigation (since such incentives were being claimed as a deductible expenditure), the Assessee withheld tax while making payments of such incentives. It is a settled position that there is no estoppel in law and merely because a position has been taken on a conservative basis, no obligation can be imposed on the Assessee, where none exists. Reliance in this regard is placed on the decision in CIT vs. V. MR P. FIRM MUAR, [1965] 56 ITR 67 (Supreme Court).

6. *Operation of section 194C(4) of the ITA:*

(a) It is the case of the Assessee that its facts are on a better footing than Uber India (Supra). The Convenience Fee, which is the effective income of the Assessee herein, is payable to it by the Customer placing a "Service Request" on the "Portal" (please refer to the definition of "Convenience Fee" in the Subscription Agreement on Page 124 and in the User Terms on Page 144 of the Paperbook dated 30.09.2020). Furthermore, such Customer is entitled to use the Portal only for personal use (please refer Clause 4.3(i) in the User Terms on Page 147 and Clause 14.1 in the User Terms on Page 156 of the Paper book dated 30.09.2020). On the other hand, the "Service Fee", which is the effective income of Uber B.V., is payable to it by the Driver-Partners (please refer Clause 4.4 at Page 14 and Clauses 4.4 and 4.5 at Page 35 of the Compilation dated 05.03.2021). Consequently, in the present case, it can be reasonably inferred that the Assessee in fact works solely for the benefit of the Customer, not the TSPs/ Drivers. This view is further fortified by the fact that the Assessee, in its discretion, endeavors to arrange for a "Vehicle" in the event of a breakdown on best effort basis for the benefit of the Customer. Therefore, "person responsible", as envisaged under section 204(iii) of the ITA, for the purpose of applicability of section 194C of the ITA ought to be the Customer

making payment to the Assessee, which payment is anyway not exigible to tax under section 194C of the ITA, in view of section 194C(4) of the ITA.

(b) It is worth noting that the source of the Convenience Fee as well as the "Fare" (please refer to the definition of "Fare" at Clause 1(xi) on Page 144 of the Paperbook dated 30.09.2020) for the "Ride" offered by the TSPs/Drivers is the Customer (please refer to Clauses 6.1 and 6.3 in the User Terms dated 08.03.2018 on Page 150 of the Paperbook dated 30.09.2020). Therefore, where the source itself is not liable to deduct tax under section 194C of the ITA, in view of section 194C(4) of the ITA, the action of bringing the aggregator, being a mere intermediary through whom electronic payments are routed, within the clutches of section 194C of the ITA, is devoid of any logic.

7. Unintended consequences by virtue of distinction being made between cash and electronic payments:

(a) In cases involving cash payment by the Customer, the TSPs/Drivers are entitled to collect the "Total Ride Fee" (please refer to the definition of "Total Ride Fee" at Clause 1(xix) on Page 145 of the Paperbook dated 30.09.2020) and remit the Convenience Fee and "Cancellation Fee" to the Assessee (please refer Clause 5.14 in the Subscription Agreement dated 01.11.2016 on Page 129 of the Paperbook dated 30.09.2020). It is an admitted position that section 194C of the ITA has no application in the aforestated fact pattern. It is also not the case of the Department that where cash payments are collected by the TSPs/Drivers from the Customer, the provisions of section 194C of the ITA are applicable. However, in cases involving electronic payment by the Customer, where the Assessee is required to collect the Total Ride Fare and remit the Fare to the TSPs/Drivers (please refer to Clauses 6.10

in the User Terms dated 08.03.2018 on Page 151 of the Paperbook dated 30.09.2020), the Department is seeking to invoke section 194C of the ITA. This is sure to have unintended consequences of subjecting Fare in the hands of the TSPs/Drivers to differential treatment, based wholly on invalid considerations. Incidentally, the absurdity of divergent stances in respect of cash and electronic payments was recognized in the decision in the case of Uber India (Supra) as well (please refer Paras 3.5.3 - 3.5.4, Pages 29 – 30 of the Compilation dated 05.03.2021).

(b) Even otherwise, given that the Customer is specifically exempted from any withholding obligations under the provisions of section 194C(4) of the ITA, in the absence of specific provision in law, how this obligation is being hoisted upon the Assessee is unclear.

8. Control an irrelevant consideration for section 194C purposes: The aspect of "control" emphatically emphasized upon by the Ld. Departmental Representative so as to be determinative of a contract for "carrying out work" and to trigger applicability of 194C of the ITA, is an irrelevant consideration, in view of the decision in CIT vs. Career Launcher India Ltd., [2013] 358 ITR 179 (Delhi High Court). It was held therein that clauses insinuating strict control are incorporated only to ensure proper compliance of arrangements, mutual rights and obligations to ultimately protect the interests of both the sides, thereby ensuring smooth functioning of business arrangements. The Hon'ble Court further went on to hold that composite transactions involving some element of work cannot be brought within the purview of section 194C of the ITA, where the same have ostensibly been undertaken amongst independent parties, mutually desirous of undertaking a profit-making activity basis collective effort. The Hon'ble Court eventually concluded that section 194C of the ITA was inapplicable on the facts of the case before it (please refer Paras 22 – 42, Pages 48 – 55 of the Compilation dated 05.03.2021).

Reliance is also placed on the decision in Bhopal Sugar Industries Limited vs. Sales Tax Officer, Bhopal, [1977] 3 SCC 147 (Supreme Court), wherein it was held that merely because some restrictions are imposed in terms of fixation of price, submission of accounts, selling in a particular area or territory and so on, the same would not have the impact of converting a contract of sale into one of agency, given that such restrictions are imposed as a measure to protect goodwill and ensure quality of goods to be distributed through sale (please refer Pages 74 – 87 of the Compilation dated 09.10.2020). The said decision was relied upon in Foster's India (P.) Ltd. vs. ITO, [2009] 29 SOT 32 (Income Tax Appellate Tribunal, Pune). Even otherwise, in the present case, the alleged control is nothing more than mere compliance by the Assessee with the guidelines issued by the Central Government [pursuant to the Proviso to section 93(1)(iii) of the MVA) (please refer Pages 503 – 508 of the Paperbook dated 30.09.2020) – https://morth.nic.in/advisory-licensing-compliance-and-liability-demand-information-technology-based-aggregator-taxis-4-0)] read with rules made by the State Government [pursuant to section 67(1) of the MVA] (please refer Pages 62 – 76 of the Compilation dated 05.03.2021)], in the capacity of an "aggregator" [recognized under section 2(1A) of the MVA], to whom alone such guidelines/rules apply. Needless to add, the notification afore-stated by the Chandigarh Administration Transport Department is only an illustration, being the most relevant one. Other states, including Maharashtra amongst many more, have come up with similar notifications (please refer to Notification by the Governor of Maharashtra, dated 04.03.2017, annexed hereto as ANNEXURE – B).

9. Concept of "aggregator" under the MVA: It is also the case of the Assessee that the Assessee is now defined under a separate head within the MVA, i.e., section 2(1A) of the MVA, as an "aggregator", and is supposed to obtain a specific license to provide services of an aggregator [pursuant to section 93(1)(iii) of the MVA]. On the other hand, the TSPs/Drivers are valid permit holders as far as

"contract carriage" is concerned [pursuant to section 2(7) read with section 66 of the MVA], and are therefore, the only category under the MVA, permitted to enter into contract with the Customer for carrying the Customer. The State Government is authorized to regulate such contract carriages [pursuant to section 95 of the MVA], which does not contain any whisper of involvement of an aggregator like the Assessee. Therefore, when the Assessee is specifically barred from providing contract carriage services, there can be no occasion for it to enter into a contract/sub-contract to offer the provision of contract carriage services, which is the relevant service/"work" for the purposes of attracting section 194C of the ITA. Reliance in this regard is placed on the decision in ITO vs. Bal Kishan Gupta, [2013] 36 taxmann.com 518 (Income Tax Appellate Tribunal, Mumbai) (please refer Para 15, Page 70 of the Compilation dated 09.10.2020).

10. Pricing not Assessee's discretion: When a Customer places a Service Request on the Portal, an estimate of the Total Ride Fare is communicated to the Customer. This may differ from the actual Total Ride Fare upon completion of the Service. In view of section 67(1) of the MVA, State Government is required to make regulations and issue directions to the State Transport Authorities or Regional Transport Authorities in respect of cab fares. It is in terms of this power that "Surge Pricing" is controlled by the State Governments. Copy of the Notification No. 2/3/20-HIII(7)-2013/, issued by the Chandigarh Administration is already placed on record as an illustration (please refer Pages 192 – 195 of the Compilation dated 05.03.2021). Needless to add, the notification afore-stated by the Chandigarh Administration is only an illustration, being the most relevant one. Other states, including Maharashtra amongst many more, have come up with similar notifications. In fact, in the said Notification, it has been clarified that the minimum and maximum fares will stand prescribed (please refer Para 11 of the Notification by the Governor of Maharashtra, dated 04.03.2017, annexed hereto as ANNEXURE – B).

11. Discounts solely and wholly out of Convenience Fee: The various Discounts offered to the Customer are offered from the Convenience Fee, which is the effective income of the Assessee. Since sums attributable to Discounts do not have an impact on the Fare of the TSPs/Drivers, the fact of the Assessee offering such Discounts to the Customer ought to have no bearing as far as taxability of Fare paid by the Assessee on behalf of the Customer is concerned (please refer Note 3.4 of the Audited Financials of the Assessee for the captioned year, encompassing "Revenue Recognition" to be net of discounts, at Page 314 of the Paper book dated 30.09.2020).

12. Assessee deducting tax on incentives paid to TSPs/Drivers not determinative of taxability basis estoppel or any other equitable doctrine: The Assessee duly deducts and deposits tax under section 194C of the ITA on the incentives paid by it to TSPs/Drivers. Incentives is one of the heads of income under the Commercial Terms Segment (please refer Exhibit – C to the Subscription Agreement dated 01.11.2016 on Page 141 of the Paperbook dated 30.09.2020), taxability whereof has no relevance as far as the taxability of Fare forwarded by the Assessee to the TSPs/Drivers on behalf of the Customer is concerned. Be that as it may, the fact of Assessee deducting tax at source under section 194C of the ITA on the incentives cannot and would not act as estoppel to saddle the Assessee with a liability to deduct tax at source under section 194C of the ITA on Fare forwarded to TSPs/Drivers [please refer V. MR P. FIRM MUAR (Supra)].

13. Applicability of section 194–O of the ITA: With effect from 01.10.2020, the law has imposed withholding obligations on e-commerce operators, such as the Assessee, to withhold tax on payments to be made to e-commerce participants such as the TSPs/ Drivers. The Assessee has been complying with the withholding obligations imposed on it with effect from 01.10.2020. It is the submission of the Assessee that the Legislature has, in its wisdom,

appreciated the gaps in the statute, which existed prior to the coming in force of the said amendment. Accordingly, it filled the void, thereby indicating that none of the pre-existing provisions relating to tax deduction at source obligations could be pressed into operation qua the technologically advanced business models, such as that of the Assessee.

14. Decisions relied upon by the Departmental Representative during the course of the hearing of the subject appeal:

(a) Uber BV and others vs. Aslam and others, [2021] UKSC 5: The issue involved in the said case was rights of the drivers under the National Minimum Wage Act, 1998 (United Kingdom) based on the evidences adduced before the Court. The discussions/ observations therein has nothing to do with the income tax liability of the TSPs/Drivers or any withholding obligation, like in the present case, and is therefore, completely irrelevant for the adjudicating the issue in the present case. At best they echo the "control" aspect, which in terms of the Hon'ble Supreme Court and Delhi High Court view, is not a relevant factor for the applicability of section 194C of the ITA.

(b) Asociación Profesional Elite Tax vs. Uber Systems Spain SL, [In Case C-434/15, Judgment Of The Court (Grand Chamber) decision dated 20 December 2017]: The dispute in the said case revolved around the claim raised by a professional tax driver' association against Uber Systems Spain SL, concerning the provision by the latter, by means of a smartphone application, of the paid service, involving connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorization (as per the laws of Spain). The said dispute again has no relevance whatsoever to the income tax liability of the driver(s) or any withholding

obligation, like in the present case, and is therefore, completely irrelevant for the adjudicating the issue in the present case.

(c) M/s. Sri Balaji Prasanna Travels vs. ACIT, ITA No. 2078/Bang/2019, decision dated 25.11.202: As per the factual matrix in this case, the Assessee company therein was engaged in providing vehicles on hire and it had provided such vehicles to M/s. Orix Infrastructure India Pvt. Ltd, which itself was in the business of providing vehicles on hire. The applicability of section 194C was examined on the vehicle hire charges paid by the Assessee Company therein to third party drivers, who along with the Assessee therein, had provided the relevant services. As can be clearly discerned from the facts of the said case, the Assessee therein itself was in the business of providing transport service and that it had further sub-contracted it to third party drivers. As per the facts of the case in hand, the Assessee is not in the business of providing transport services and therefore, strictly as per law (more specifically the MVA), cannot sub-contract the said services. Therefore, this decision is not applicable in the present case. More importantly, as has already been submitted, on identical facts, Coordinate Bench of this Hon'ble Tribunal in Uber India (Supra), has already decided the issue of applicability of section 194C favourably.

In light of the above, the Assessee most humbly submits that the Fare routed/facilitated by the Assessee to TSP s/ Drivers are not in respect of any transportation services provided by the TSPs/Drivers to the Assessee and consequently, do not attract the provisions of section 194C of the ITA. The Assessee could, therefore, not be held to be an assessee-in-default as per the provisions of section 201 of the ITA.

12.0 We have heard the rival submissions and have also meticulously gone through the records including relevant contracts between the assessee and the Driver and assessee and the Rider. The assessee owns, operates, and manages a mobile app called “OLA”, which brings together the Rider desirous of availing transportation services and the Driver, desirous of providing such service. For the use of the OLA app by the Rider, the Assessee charges a Convenience Fee of approximately 20% of the Total Ride Fee. The Total Ride Fee includes Convenience Fee of the assessee and Driver’s Fare. The Total Ride Fee may be paid by the Rider in cash directly to the Driver or by electronic mode to the assessee. Thereafter, the Driver and the assessee inter-se settle accounts. There is no dispute as to these basic facts.

12.1 However, the dispute, which has arisen between the AO and the assessee is primarily on the issue as to who is responsible for providing the transportation services to the Rider i.e., the Driver, who has the necessary approvals and the vehicle or the assessee, who owns the app? The entire case of the AO is that it is the assessee who is contractually obligated to provide such transportation services to the Rider and then sub-contracts this obligation to provide the transportation services to the Driver. Thus, in the AO’s view, while making the payments to the Drivers deduction of tax under section 194C of the Act was required. The determination of this issue has a

direct bearing on the withholding obligations of the assessee and hence, it becomes critical to examine the various terms of the Subscription Agreement between the assessee and the Driver and the User Terms between the assessee and the Rider. This also becomes relevant since the AO has alleged that the assessee has used 'clever phraseology' in these agreements to hide the true purport and intention of these agreements. On the other hand, the Ld. AR has argued that these agreements are between unrelated parties and hence, the contractual terms cannot be recharacterized to create an obligation in law where none exists. He has also relied on various judgments of the Hon'ble Supreme Court in support of this contention. We shall deal with this proposition and the judgments at a more appropriate place later in this order.

12.2 The other relevant/key factor that the AO and the Ld. Commissioner (Appeals) have taken pains to bring out is the degree of control exercised by the assessee over the Driver. This degree of control also has become a key factor for the lower authorities to conclude that Driver is under absolute control of the assessee and provides the transportation services under a sub-contract from the assessee.

12.3.0 It will be worthwhile to refer to the various clauses of the Subscription Agreement before we proceed to adjudicate the issue at

hand. As per the recitals of the Subscription Agreement dated 01.11.2016 entered between the assessee and the Driver, the assessee is stated to be an online marketplace called "OLA" that lists and aggregates Drivers. On the other hand, a transport service provider has been stated to be either a fleet operator, or a Driver who are/is already licensed to provide transportation services as per the applicable law and who are desirous of listing themselves on OLA app. As per clause IV.1, it has been agreed upon by the Driver that the role of the assessee is limited to (a) managing and operating the app, (b) being an online booking platform facilitating the provision of transport services to be provided by the Driver to the Rider and (c) payment collection through e-wallet to facilitate transaction between the Driver and the Rider. As per clause IV.3., the assessee has disclaimed all liabilities, whether civil, criminal, tortious or otherwise, that may accrue because of a breach by the Driver of the (a) applicable laws in respect of transportation service, (b) terms of applicable licenses issued by transport authorities, (c) terms of the Fleet Operators terms and conditions or (d) duty of care the Driver owes to the Rider.

12.3.1 As per clause IX, it is the Driver who is held to be solely liable for any accident/ incident involving the vehicle, while providing taxi services, and the assessee has been stated to be not liable for any such incident. All miscellaneous expenses pertaining to the Vehicle

such as maintenance expenses, penalty for violation of traffic rules etc. are to be borne solely by the Driver.

12.3.2 Further, Clause XIII states that the assessee and the Driver are independent contractors and that their relationship is on a principal-to-principal basis. It has also been stated therein that the Driver does not have the authority to create, modify or terminate a contractual relationship between the assessee and a third party or act for or bind the assessee in any respect.

12.3.3 The Definition Clause in Exhibit – B defines "convenience fee" to mean the fee payable by the Rider for availing the technology services offered by the assessee. The term "Vehicle" has been defined to mean "motorcars" as defined under the Motor Vehicles Act, 1988.

12.3.4 As per the scope of services clause, it has been stated that the assessee is merely a intermediary providing online marketplace services and that the OLA App is only a platform where the Driver is allowed to offer transportation services to the Rider. Further, it has been stated that the contract for transportation services is solely between the Driver and the Rider and that the assessee does not have any obligation or liability in respect of the same.

12.3.5 As per clause 2.2. (within scope of services), it has been stated that the assessee does not own or in any way control the Vehicle used

by the Driver for rendering transportation services to the Rider. Clause 5 lists various obligations of the Driver including for example, providing transportation services to the Rider in a courteous, effective, and timely manner. In clause 5.14, it has been stated that, in the event the Rider pays by cash, the Driver shall collect so and remit the Convenience Fee to the assessee.

12.3.6 The Zero Tolerance Policy in the Subscription Agreement lays down the instances of breach on the part of the Driver such as rude and abusive behaviour, rejection of booking, asking for tips, wasting Rider's time, personal hygiene, vehicle cleanliness etc. The Ld. AR for the assessee has also placed on record Advisory for licensing, compliance and liability of on-demand information technology-based transportation aggregator issued by the Ministry of Road Transport and Highways. In the said Advisory, it has been stated that the aggregators are required to mandatorily ensure that a zero-tolerance policy is established for discrimination or discriminatory conduct while the Driver is logged onto the OLA App. Discriminatory conduct has been defined to include refusal of service, using derogatory or harassing language directed at the Rider or rating a Rider based on sex, race, caste, creed, religion, or nationality. The Ld. AR has submitted that since the assessee has been mandatorily put to task by the Government to ensure such compliances by the Driver, the

assessee has taken steps to ensure that the Zero Tolerance Policy is adhered to.

12.3.7 According to Exhibit-D to the Subscription Agreement dated 01.11.2016, the Driver desirous of listing on OLA App is mandatorily required to have a commercial driving license as required under the Motor Vehicles Act, 1988. Therefore, a person driving his personal car under a non-commercial license cannot list himself/ herself on assessee's online app.

12.3.8 As per clause 1(ix) of the User Terms between the assessee and the Rider, the term "Driver" has been specifically defined to mean individuals who provide transportation service on their own, using their own vehicle and who have the necessary city taxi permits and other applicable transport vehicle permits and licenses to provide transportation services. It has been stated in clause 4.1 that online app allows the Rider to send a request to the Driver on the network. If the Driver accepts such request, the assessee is required to notify the Rider and provide information regarding the Driver including Driver's name, vehicle registration number etc. Clause 4.13 states that the assessee does not bear any responsibility for delays and losses suffered by the Rider because of the breakdown of the Vehicle.

12.3.9 As per clause 7.3, in case of a cancellation, it has been stated that the assessee will provide a receipt of the Cancellation Fee.

Separate invoices for cancelation qua Driver's Fare and assessee's Convenience Fee, at the request of the Rider, can also be obtained by the Rider. As per clause 10, the assessee aids a Rider during an accident, emergencies, or distress. However, the assessee has disclaimed any liability for any deficiency in such assistance, provided to the Rider on a best effort basis.

12.3.10 As per clause 6.1, the assessee is entitled to charge Convenience Fee to the Rider for providing facilitation services through the OLA App. In clause 6.3, it has been stated that the Driver will charge its Fare for providing transportation services to the Rider. As per Clause 6.10, the Rider has been given an option to either pay by cash or in electronic mode. When choosing the cash mode, the Rider is allowed to make this payment directly to the Driver and when choosing the electronic mode, such payment is made to the assessee.

12.4.0 During the course of the hearing, the Ld. AR has clarified that initially only an estimated fare is communicated to the Rider when such Rider places a service request on the OLA portal operated by the assessee. In addition, in the context of surge pricing, it was clarified that even surge pricing was regulated by law. This was all in context of the submissions that the assessee was not providing any transport services to the Rider and the contract for providing such service was between the Rider and Driver.

12.4.1 It was also brought to our attention by the Ld. Counsel on behalf of the assessee that the AO, in the remand report before the CIT(A), has contradicted her stand by stating that the provisions of the Motor Vehicles Act, 1988 were not applicable to the assessee. It was emphasised that the operations of transport vehicles for carriage of passenger and goods are regulated by the Motor Vehicles Act, 1988, which mandate the person providing such service to be a valid permit holder. Our attention was invited to the definition of "contract carriage" as defined in section 2(7) as well as the provision of section 2(31) of the Motor Vehicles Act, 1988 which defines permit as well as section 2(47) which defines transport vehicle and to the provisions of section 66, which mandates the necessity for permits for providing contract carriage services.

12.4.2 As regards the issue of pricing, it was submitted that a when the Rider places a service request on the OLA App operated by the assessee, an estimated fare is communicated to such Rider. This fare is calculated by the portal basis the rates prescribed by the Regional Transport Authorities. Our attention was also drawn to section 67 of the Motor Vehicles Act, 1988, which specifically empowers the State Governments to make regulations and issue directions to the State Transport Authorities and Regional Transport Authorities regarding pricing of cab fares. It is in terms of this power

exercised by the State Transport Authorities and Regional Transport Authorities, even the surge pricing is monitored and controlled.

12.4.3 To give an illustration, the Ld. Counsel on behalf of the assessee submitted that in exercise of powers provided for in section 67(1) of the of the Motor Vehicles Act, 1988, for UT of Chandigarh, a notification was issued as early as in 2013, which prescribes the rates including night charges, waiting charges for taxis. Thus, he submitted that the allegation of the AO that the prices are controlled and fixed by the assessee, which led him to conclude that the assessee was providing the transportation services, is factually incorrect, perverse and contrary to the provisions of the of the Motor Vehicles Act, 1988.

12.4.4 The Ld. AR also submitted that it is not the case of the AO / Ld. CIT(A) / Ld. Departmental Counsel that payment of Fare made by the Rider to the Driver in cash should be subjected to Tax Deduction at Source under section 194C of the Act. However, when the assessee collects the Fare from the Rider in electronic mode and disburses the same to the Driver, the Revenue is alleging default on part of the assessee for non-deduction of Tax at Source under section 194C of the Act.

12.4.5 Thus, it is seen that the case of the Revenue is that the assessee is engaged in the business of providing transportation services to the Rider and for this purpose, it has sub-contracted with

the Driver, who work under the control of the assessee, and therefore, the Fare disbursed by the assessee to the Driver, ought to have been subjected to tax deduction at source under section 194C. On the other hand, the assessee's contention is that it is a technology company, working merely as an intermediary/ aggregator between the Driver and the Rider on the online mobile app called "OLA". It is also the contention of the assessee that the transportation services in question are independently performed by the Driver and that there exists no sub-contract between the assessee and the Driver in connection therewith.

12.5.0 Section 194C requires the person responsible for paying any sum to a contractor, for carrying out any "work" in pursuance of a "contract", to deduct 1% therefrom. The definition of "work", for the purposes of attracting the rigours of section 194C, includes, "carriage of goods or passengers by any mode of transport other than by railways" or simply put, "transportation services".

12.5.1 In our considered view, section 194C would be applicable where the payments in question are made by the person responsible for paying, under a contract, to another person called the "contractor". In the present case, it is clear from the contracts between the assessee and the Driver and the assessee and Rider, all of whom are unrelated, that the underlying contract for transportation service is between the

Driver and the Rider and that the assessee merely facilitates the entire process on its OLA App. The payment in question is the Fare that the Driver is entitled to for rendering transportation services to the Rider and, accordingly, in our view, the person responsible for paying in such a case is the Rider alone and not the assessee who merely acts as an intermediary to facilitate electronic mode payments. We are supported in the above conclusion by the fact that on the cash payments made by the Rider to the Driver, it is not the case of the AO that section 194C is applicable.

12.5.2 We have also perused a sample invoice placed before us wherein the Rider has paid INR 71/- to the Driver. We find that this invoice has been segregated into invoices. The First invoice is a Driver Trip Invoice for INR 55.45/- and the other one is for the Convenience Fee of the assessee of INR 15.05/-. In the Driver Trip Invoice, the Service Tax Category has been stated to be a Rent-a-cab scheme operator and at the bottom of the invoice it has been stated that the invoice has been issued by the Driver and not assessee. Further, it has been stated the assessee only acts as an intermediary for the transportation services and that Service Tax on the total fee is collected and remitted by the assessee in the capacity of the Aggregator as per the Finance Budget, 2015 read with Service Tax Notification No. 5/2015. On the other hand, the Convenience Fee invoice states that the same is raised by the assessee and the Service

Tax Category is stated to be Business Auxiliary Services. The Service Tax applied in the Driver Trip Invoice is 5.6% and the Service Tax applied in the Convenience Fee invoice is 14%.

12.5.3 We have also perused the Notification No. 5/2015 dated 01.03.2015 issued by the Ministry of Finance. Therein, the term “aggregator” has been defined as a person, who owns and manages a web-based software application, and by means of the application and communication device, enables a potential customer to connect with persons providing service of a particular kind under the brand name or trade name of the aggregator. We find that the pursuant to this Notification, every aggregator, irrespective of the industry they serve, is required to pay Service Tax in relation to a service provided or agreed to be provided by a person that involves such aggregator.

12.5.4 Pursuant to the said Notification, since the obligation to pay Service Tax shifted from the provider of service to the aggregator, the assessee could no longer route the money received from the Rider through its profit and loss account, being an intermediary. After such change in law, the assessee stopped recognising the money received from the Rider as its revenue and the money disbursed to Driver as expenditure. It is for this reason, that two separate invoices are raised on the Rider through the portal of the assessee, so that the assessee keeps a track of amount on which the assessee must discharge its

Service Tax liability as an "aggregator" qua the transportation services rendered by the Driver as well as the "provider" of platform, for which it receives Convenience Fee.

12.6.0 It has also been submitted before us that prior to such change in law, the assessee was deducting tax at source under section 194C on the Fare being disbursed to the Driver. However, since this change in law necessitated change in accounting treatment, the assessee stopped deducting tax at source under section 194C while disbursing the Fare to the Driver, since it acted only as an intermediary as per the applicable law. We find merit in this contention. In any case, we find that after the change of law as described above, the assessee for the year under consideration has not claimed this disbursement made to the Driver as an expenditure. As per the financials of the assessee for the year under consideration, the assessee has only recognised revenue to the extent of its Convenience Fee.

12.6.1 On a query by the Bench the Ld. Counsel on behalf of the assessee stated that the fact that the assessee adopted a different accounting and tax position in preceding years cannot operate as estoppel against the assessee.

12.6.2 We agree with the Ld. AR's submissions that because of the change in Service Tax law, the assessee could not have routed the

money received from the Rider and disbursed to the Driver through its profit and loss account anymore, since it purely acted as an intermediary. The Ld. AR has relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v. Truck Operators Union (2012) 20 taxmann.com 848 and the Hon'ble Delhi High Court in CIT v. Cargo Linkers (2009) 179 Taxman 151 wherein the Hon'ble Courts have expressed that section 194C cannot be applied on intermediaries. In our considered view, the principle laid down in these cases applies to the present case as well, since as per the contracts between the assessee and the Driver and assessee and the Rider, all of whom are unrelated parties, it is being clearly held out that the transportation services is provided by the Driver alone and that the assessee is only providing the OLA App on which the transportation services offered by the Driver are facilitated.

12.6.3 Strong reliance has also been placed on the decision of the Coordinate Bench in M/s Uber India Systems Private Limited vs. JCIT [2021] 125 taxmann.com 185, wherein it was held that Uber was not obligated to deduct tax at source under section 194C while disbursing amounts due to driver. We find that the AO, in his remand report dated 12.12.2019 filed before the Ld. CIT(A), relied upon the findings of the lower authorities in Uber India's case, which were the impugned before the Coordinate Bench. Therein, the AO has stated that the facts in the case of Uber India and the assessee are same. However,

now that the Coordinate Bench has set aside the findings of the lower authorities, the Ld. Departmental Representative has sought to distinguish the facts in the case of Uber India with that of the assessee.

12.6.4 The Ld. Departmental Counsel, in his arguments has also contended that in Uber India's case, there are four players namely, Uber B.V., a company incorporated in Netherlands, which owns and operates the mobile app called "Uber", Uber India, which was engaged in promoting the said app, rider, and driver. It has been contended that the Coordinate Bench did not decide the actual relationship between Uber B.V. and driver and that since the assessee in the present case stands on the same footing as Uber B.V., the decision of the Coordinate Bench in Uber India (supra) was distinguishable on facts. However, we find that the Coordinate Bench in the case of Uber India (supra) has examined the agreement between Uber B.V. and driver and Uber B.V. and rider and has held that neither Uber B.V., nor Uber India were performing transportation services as under:-

> *"3.6 Applicability of provisions of section 194C of the Act.*
>
> *We find that the Driver-Partners enter into only one agreement i.e. with Uber B.V. for availing the 'lead generation service'. The relevant clauses of the said*

agreement which are enclosed in pages 55 to 66 of the paper book filed before us are summarised as under:

(a) *Clauses 1.14 and 1.17 - Transportation service is provided by the Driver-Partner to the User and Uber B.V. merely provides lead generation services to the Driver-Partner.*

(b) *Clause 2.2. - The Driver-Partner provides transportation services to the User at his own expense and the Driver-Partner is responsible for the transaction between them and the User.*

(c) *Clause 2.3. - Transportation service provided by the Driver-Partner to a User creates a legal and direct business relationship between them and Uber B.V. is not responsible for any action, inaction or lack of proper services of the Driver-Partner.*

(d) *Clause 2.4. - Uber B.V. does not control the Driver-Partner in the performance of his service and the Driver-Partner has full right to accept or reject the request received on the Uber App.*

(e) *Clause 2.5. - Driver-Partner is responsible for all obligations and liabilities that arise out of providing transportation service to the User.*

(f) *Clause 2.7.1. - Driver-Partner must use a mobile phone to receive lead generation services from Uber B.V..*

(g) *Clause 2.8. - Driver-Partner must provide information regarding his location so as to receive lead generation services from Uber B.V..*

(h) *Clause 3.1. - It is the Driver-Partner's responsibility to ensure that he holds a valid license, all permits and approvals under the law and possesses necessary skills to provide a transportation service.*

(i) *Clause 3.2. - It is the Driver-Partner's responsibility to ensure that the vehicles used for providing service are registered as required by law, maintained in good condition and are lawfully possessed by them.*

(j) *Clause 4.4. - Uber B.V. will charge a service fee to the Driver-Partner for providing lead generation services which will be a percentage of ride fare charged by the Driver-Partner to the User.*

(k) *Clause 4.6. - Uber B.V. will issue a receipt to the User on behalf of the Driver-Partner, for the money collected for transportation service provided by a Driver-Partner to the User.*

(l) *Clause 8 - It is the Driver-Partner's responsibility to ensure that insurance is taken for any liability*

that may arise on account of transportation services and/or as required by law.

(m) *Clause 13.1. - Uber B.V. acts as an agent of the Driver-Partner for the limited purpose of collecting the payment from the User. The Driver-Partner is not an employee, agent, etc. of Uber B.V. and there is no partnership or Joint venture between Uber B.V. and the Driver-Partner.*

3.6.1 Similarly, the Users wishing to avail of Uber B.V.'s lead generation services enter into agreements/contract with Uber B.V.. The relevant clauses of the said agreement entered into between Uber B.V. and the Users which are enclosed in pages 69 to 75 of the paper book are summarized as under:—

(a) *Clause 2 - Uber B.V. provides a technology platform to the User and the User agrees that the transportation service is not provided by Uber B.V.. Uber B.V. does not control third party transportation services availed by the User.*

(b) *Clause 3 - User must create an account for using the technology platform provided by Uber B.V.*

(c) *Clause 4 - After User receives transportation services from the Driver-Partner, Uber B.V. may, if so required by the User, facilitate the payment to be made by the User to the Driver-Partner.*

It is open to the User by exercise of an option at will, not to avail of this facility provided by Uber B.V. and to pay the Driver-Partner directly for the transportation service availed by remitting cash payment to the Driver-Partner.

(d) Clause 5 - Uber B.V. has no responsibility or liability related to transportation service provided by the Driver-Partner to the User.

3.6.2 From the aforesaid clauses in the relevant agreements, it could be safely concluded that Uber B.V. is involved in rendering lead generation service to the Driver-Partner and transportation service is not provided by Uber B.V. or UISPL. The transportation service is provided by the Driver-Partner to the User for which the car is arranged by the Driver-Partner, all the expenses are incurred by the Driver-Partner, necessary permits and licenses are obtained by the Driver-Partner and the liability arising out of the transaction of transportation service is assumed by the Driver-Partner. Uber B.V. is neither responsible for providing transportation service nor any liability arising out of the transportation service provided by the Driver-Partners. The transportation service provided by the Driver-Partner to Users is a contract between them to which Uber B.V. is not a party. For providing lead generation service, the Driver-Partner pays a percentage of the ride fare as a service fee to Uber B.V. Therefore, it is clear that UISPL is not a part of the contract and no payment obligation is imposed either

under the agreement with the Driver-Partner or under the agreement with the User.

3.6.3 Hence it could be safely concluded that the provisions of section 194C of the Act are not applicable in the instant case of the assessee as —

(a) UISPL is not the person responsible for making payment.

(b) UISPL has not entered into any contract with the Driver-Partners.

(c) No 'work' is carried out by the Driver-Partners for UISPL.

3.7 We find that the ld. AR drew our attention to the fact that Uber B.V. has been recognized as an 'aggregator' under the Service Tax Law. Section 66B of Finance Act, 1994 provides that service tax to be paid at prescribed percentage on the value of services provided in India. Correspondingly, Rule 2(1)(d)(ii) prescribed person providing service as a Person liable for paying service tax. Section 68(2) of the Finance Act, 1994 provides that on specified services the service tax shall be paid by prescribed person. In March 2015, Central Board of Excise and Customs vide Notification No. 7/2015 dated 1-3-2015 notified that whenever an aggregator is involved in any manner in the transactions, then the person providing is not liable to pay service tax but aggregator is the person liable to pay service tax. For this purpose, rule 2(1)(d)(i) (AAA) of Service Tax Rules, 1994 was amended to provide that the aggregator liable to pay service tax if he is involved

in the transaction in any manner. These documents are enclosed in page 90 of the paper book filed before us. Accordingly, later on, vide letter dated 27-4-2015, Uber B.V. intimated the service tax authorities that Uber B.V. has discharged its liability of service tax as an aggregator. Evidences in this regard are enclosed in Pages 82 and 88 of the Paper book filed before us.

3.7.1 From the above, again it becomes very clear that one wing of the legislature has recognized Uber B.V. as an aggregator and not a service provider which again brings us to the same point that the transportation service is provided by Driver-Partner to Users directly for which User is making the payment and it is the User who is the person responsible for making payment. And, Uber B.V. and UISPL are not a party to the contract of transportation entered into between a User and a Driver-Partner."

12.6.5 In our considered view, the Coordinate Bench has analysed the contract between Uber B.V. and the drivers and concluded that neither Uber B.V. nor Uber India could be held to be the "person responsible for making payment" for the purposes of section 194C.

12.6.6 We further find that in the present case, the clauses of the Subscription Agreement dated 01.11.2016 between the assessee and the Driver and Terms of Use between assessee and the Rider are substantially identical to the clauses analysed by the Coordinate

Bench in Uber India's case. On a wholistic reading of both the contracts, we are of the view that the assessee in the present case, much like Uber B.V./ Uber India, the assessee only provides the mobile app "OLA" on which the Driver lists himself/ herself to provide transportation services to the Rider. We find that the contracts in question clearly bring out that it is the Driver that will provide transportation service to the Rider and not the assessee. Even the invoices raised on the Rider clearly demarcate this distinction. Therefore, we are not in agreement with the Ld. Departmental Representative that the Coordinate Bench did not examine the relationship between Uber B.V. and the driver. In our considered view, the decision of the Coordinate Bench in Uber India (Supra) is squarely applicable to the facts of the present case.

12.6.7 The Ld. AR has argued that its case is on a better footing than Uber India (supra). This is because the source of the assessee's Convenience Fee, i.e., its effective revenue, is the Rider, unlike in the case of Uber India (supra), wherein the source of revenue of Uber B.V. was the driver. This, coupled with the terms of the agreements in place, such as the obligation on the part of the assessee to arrange for substitute vehicle on a best effort basis, etc. demonstrate that the assessee's platform works for the benefit of the Rider alone and looks for cabs on behalf of the Rider. The Ld. AR also contented that the source of the assessee's Convenience Fee, Driver's Fare and the

"person responsible" under section 204(iii), for invoking section 194C here, is the Rider. The Rider is entitled to use the assessee's platform or avail transportation services only for personal use, as per the User Terms and Subscription Agreement respectively. Since such personal use by the Rider is exempt from liability to deduct tax, as per section 194C(4), no liability can be fastened on the assessee, a mere intermediary.

12.6.8 We find force in this contention as well. We have already held that the assessee merely acts as an intermediary between the Driver and the Rider. Therefore, when the Rider itself is exempt from deducting tax at source for such personal use, we see no reason why an intermediary such as the assessee, be forced to deduct tax at source at the time of disbursement of Fare to the Driver after collecting it in electronic mode from the Rider.

12.6.9 We are also unable to reconcile the contradictory legal stands with respect to Fare collected by the Driver from the Rider directly and Fare involving electronic payment that is merely routed through the assessee, when the service is undisputedly the same. This was also examined by the Coordinate Bench in Uber India (supra) in the following manner:

> *"3.5.3 Hence we find that the provisions of section 194C of the Act could not come into operation at all in*

the instant case. Our view is further fortified by the fact that the User is also entitled to make payments in cash directly to the Driver-Partner. We hold that there cannot be any divergent stand that could be taken for a User who decides to make payment in Cash directly to the Driver-partner and for a User who decides to make digital payments."

12.7.0 The Ld. CIT DR has contended use of 'clever phraseology' to camouflage the substance of the transaction, which is, exercise of control by the assessee on the Driver. We find that since control itself is an irrelevant consideration for section 194C purposes, as per the decision of the Hon'ble Delhi High Court in CIT vs. Career Launcher India Ltd., [2013] 358 ITR 179, this aspect of the matter does not warrant further deliberation. We are not impressed by the submission advanced by the Ld. CIT DR that the said decision is inapplicable to the facts before us, solely on the ground of the same being in the context of Franchise Agreements. Even otherwise, the terms of the relevant agreements make it clear that in the present case, transportation services are being performed by the Driver, not the assessee. The unequivocal terms of the relevant agreements cannot be disregarded as per the decisions of the Hon'ble Supreme Court in Bank of India vs. K. Mohandas, (289) 5 SCC 313 and Nabha Power Limited vs. Punjab State Corporation Limited and Anr, [2018] 11 SCC 508.

12.8.0 We also agree with the submissions advanced by the Ld. AR that control in the present case is only a measure of compliance by the assessee with the guidelines issued by the Central Government/ State Governments in accordance with the Motor Vehicles Act, 1988 and applicable to an aggregator as defined under section 2(1A) therein, which the assessee before us is. Instances of such guidelines were produced for our perusal and one such guideline may be viewed at: https://morth.nic.in/advisory-licensing-compliance-and-liability-demand-information-technology-based-aggregator-taxis-4-0).

12.8.1 We find that from 01.09.2019, the concept of "aggregator" has been recognised even under the Motor Vehicles Act, 1988. According to section 93(1)(iii) Motor Vehicles Act, 1988, a distinction between license of an aggregator and Transport Service Provider [for "contract carriage" under section 2(7) read with section 66 of the Motor Vehicles Act] like Driver has been carved out. Therefore, since an aggregator, like the assessee, is not entitled to obtain a license in respect of a contract carriage, it cannot be said to have sub-contracted work in respect of such contract carriage to any Driver.

12.9.0 The Ld. Departmental Representative has pointed that until AY 2015-16, the assessee had deducted tax under section 194C for payment of Fare to the Driver and, therefore, mere recognition as an "aggregator" under Service Tax laws should not absolve the

assessee of its liability under Income Tax laws. This aspect has also been addressed in Uber India (supra) in the favour of the assessee. Further, we find reason in the justification given by the Ld. AR that owing to the distinction carved out by the Legislature between an "aggregator" and "Service Provider", the assessee revamped its accounting and did not route amounts of Fare to be forwarded by it to the Driver through its profit and loss account. Therefore, from AY 2016-17, the assessee did not deduct tax under section 194C while disbursing Fare to the Driver. There is no estoppel in law and therefore, no obligation can be imposed on the assessee basis a conservative position having been taken by it in the past, when none may have existed.

12.10.0 In his written submissions, the Ld. Departmental Representative has echoed the finding of the AO/ CIT(A) that the assessee controls the price charged to Rider including surge pricing and therefore, the assessee is the one who is providing transport services to the Rider. On the other hand, the Ld. AR has stated that the Total Ride Fee, including Driver's Fare, is regulated by the State/ Regional Transport Authorities in terms of directions issued to them by the State Government, as per section 67(1) of the Motor Vehicles Act, 1988. We agree with the Ld. AR that section 67 of the Motor Vehicles Act, 1988 empowers only the State Governments to control road transport including fixing of fares for contract carriage. For this

purpose, we have perused Notification No. 2/7/212-H-III(7)-2017/ issued by the Chandigarh Administration as well as Notification No. MVR 0315/CR109/TRA-2 dated 04.03.2017 issued by the Governor of Maharashtra, both of which were placed on record by the Ld. AR. The Ld. Departmental Representative in his written submission has contended that such notifications only fix the maximum price, and the assessee is free to fix any price within this maximum price. However, this contention does not take the case of the Revenue any further. We find that in both the notifications placed before us, the term "aggregator" has been defined to mean an intermediary/marketplace that facilitates Rider for travel by a taxi and connects such Rider to Driver through internet. We note that the assessee was set up with this very objective, as per its Memorandum of Association and as per the record before us. We are unable to draw contrary inference. In both the notifications, it has been clearly stated that the Regional Transport Authority shall prescribe the maximum fare. In the Maharashtra Notification, it has been stated that the Regional Transport Authority will fix the minimum fare as well. In our considered view, this capping of maximum fare by Regional Transport Authorities, puts it beyond all doubts as to who regulates the prices for taxis. Therefore, there is no merit in the argument of the AO/ CIT(A)/ Ld. Departmental Representative that the assessee controls the pricing.

12.11.0 The Ld. Departmental Representative has also contended that the Fare which appears on the OLA App and what Driver receives may be different due to discounts/ incentives offered by the assessee and therefore, it is the assessee who controls the Driver and the transportation service. However, from the Audited Financials of the assessee, we note that the assessee records Convenience Fee, i.e., its effective revenue, net of discounts. The discounts offered by the assessee have no bearing on the Driver's Fare. As far as incentives provided by the assessee to the Driver is concerned, on which tax is deducted at source by the assessee under section 194C, we are inclined to agree with the Ld. AR that it is merely one of the heads of income for the Driver under the Subscription Agreement, taxability of which has no bearing on the taxability of the payment of Fare to Driver. Even otherwise, as has been explained, it is a cost borne by the assessee out of Convenience Fee, i.e., its effective revenue.

12.12.0 The Ld. Departmental Representative also sought to draw a distinction between suppliers of accommodation, airlines or food items and the assessee to state that the said suppliers carry out businesses that are independent from the platform on which they are listed. It was stated that in transactions involving such suppliers, the customers are offered a variety of choices; suppliers offer the facilities and comfort as per their disposition; suppliers set the prices; ratings

are at the disposal of the customers; there exists no restriction on communication between the supplier and the customer; suppliers offer incentives/ discounts to platforms; and suppliers enjoy economic freedom. In our considered view, each case must turn on its own facts and generalities cannot be accepted as valid legal propositions. We have already expressed our view that according to the contracts in place and the conduct of assessee, the assessee is an aggregator/ intermediary. The transportation services in question are provided by the Driver to the Rider and, therefore, the Driver's Fare is payable by Rider either directly or through the assessee. There cannot be any liability on the assessee under section 194C since it is a mere intermediary. The Hon'ble Jurisdictional High Court in CIT v. Truck Operators Union (2012) 20 taxmann.com 848 and the Hon'ble Delhi High Court in CIT v. Cargo Linkers (2009) 179 Taxman 151 have also expressed the opinion that section 194C cannot be applied on intermediaries.

12.13.0 The Ld. Departmental Representative has further contended that if the Rider cancels a trip request after the Driver has accepted it and has reached Rider's location, the Driver is not guaranteed a Cancellation Fee. Even if it is assumed that the Driver does not get any Cancellation Fee, we do not find any merit in this contention, since no transportation services are provided in such a case.

12.14.0 It has also been contended that both AO and CIT(A) have rendered a finding that the Driver provides leasing and financing options through related parties. However, here again, it is not the contention of the Department that it is the assessee which is providing such financing options. Even if it is assumed that a related party of the assessee has provided such options to the Driver, it still, in our considered view, would not saddle the assessee with a liability to deduct tax at source under section 194C.

12.15.0 In support of his contentions, the Ld. Departmental Representative has relied on the decision in M/s Sri Balaji Prasanna Travels vs. ACIT, ITA No. 2078/Bang/2019, decision dated 25.11.2020. We note that the assessee therein was engaged in providing vehicles on hire. It provided such vehicles to M/s. Orix Infrastructure India Pvt. Ltd, which was also in the business of providing vehicles on hire. The Coordinate Bench examined the applicability of section 194C on the vehicle hire charges paid by the assessee to third party drivers, who along with the assessee provided the relevant services. The assessee therein was also in the business of providing transportation services and it had further sub-contracted it to third party drivers. Therefore, the said decision of the Coordinate Bench is inapplicable to the facts of the present case. We find that the term “aggregator” used in the decision is not an “aggregator” as

defined under the Motor Vehicles Act, 1988 or the Service Tax laws. It is used in the context of accumulating sufficient vehicles for discharge of obligation by the assessee.

12.16.0 Further, the Ld. Departmental Representative has relied on the decision in Uber BV and others vs. Aslam and others, [2021] UKSC 5. We note that the issue involved in the said case was whether private vehicle drivers, the Respondents therein, were entitled to rights under the National Minimum Wage Act, 1998 (United Kingdom) and associated regulations, by virtue of them being classified as "worker" under the Employment Rights Act, 1996. In our opinion, reliance on the said decision is misplaced, since the same is in the context of deciding whether Respondents classified as "workers" not "agents", that too, under laws of a foreign jurisdiction. Therefore, the said case cannot be said to be similar to the present case. At most, the decision seems to highlight that Uber B.V. exercises control over driver, but, as has been held by us, control is an irrelevant criterion for deciding applicability of section 194C. The Ld. AR has pointed out that the said decision involves private vehicle drivers, not taxis and that there is a specific finding in the said decision that fares for taxis in London are set by regulators, not Uber. Therefore, the reliance of the Ld. Departmental Counsel on this decision is completely misplaced.

12.17.0 The Ld. Departmental Representative also relied on the decision in Asociación Profesional Elite Tax vs. Uber Systems Spain SL, [In Case C-434/15, Judgment Of The Court (Grand Chamber) decision dated 20 December 2017]. The issue involved in the said case was whether provision of "intermediation services", i.e., transfer of information about booking of a transportation service between a passenger and a non-professional driver (private vehicle driver) through a platform, also classifies as "services in the field of transport" under the relevant regulations. It is relevant that the Court analysed the laws in the context of non-professional driver (private vehicle driver), not commercial taxi driver. Since such non-professional driver (private vehicle driver) is not likely to be state authorized, the level of "control" that an intermediary may be expected to exercise is likely to be higher. Be that as it may, we find that the reliance on the said decision is misplaced, because the same has been decided in view of laws of a foreign jurisdiction.

12.18.0 Lastly, it may be pointed out that it is the contention of the Ld. AR that post the introduction of section 194-O, the assessee is deducting tax at source while disbursing Fare to the Driver. Accordingly, it was contended that therefore, there was no specific provision, including section 194C, to oblige assessee to deduct tax at source on disbursement of Fare to the Driver. On the other hand, the Ld. Departmental Representative has contended that the very

introduction of section 194-O indicates a contractual relationship between the assessee and Driver. Since we have already held that section 194C is not applicable on disbursement of Fare by assessee to the Driver, the discussion around section 194-O is purely academic. Be that as it may, in our view, there is no contract/ sub-contract between the assessee and the Driver under which the Driver provides any transportation services either to assessee or to any Rider on behalf of assessee, for which the Driver is paid by assessee. The contract for transportation services is between the Driver and the Rider and the assessee only facilitates the entire process in the capacity of an "aggregator". Accordingly, the AO and the CIT(A) erred in concluding that the assessee was providing transportation services which was sub-contracted to the Driver and consequently the assessee was liable to deduct tax at source while disbursing Fare to the Driver. We set aside the said findings.

13.0 In view of the above, the appeal of the assessee is allowed.

14.0 Along with the appeal of the assessee, two Stay Applications bearing Nos. SA/7/Chd/2021 and SA/8/Chd/2021 for the captioned assessment year were also listed before us. Since we have adjudicated the appeal of the assessee, these two Stay Applications now become *in fructuous* and the same are dismissed as such.

15.0 In the final result, the appeal of the assessee stands allowed while two Stay Applications stand dismissed.

Order pronounced on 16th September, 2022.

Sd/-	Sd/-
(VIKRAM SINGH YADAV)	**(SUDHANSHU SRIVASTAVA)**
Accountant Member	**Judicial Member**

Dated : 16.09.2022
“आर.के.”

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar