



IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR
BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA no.229/Nag./2012
(Assessment Year : 2008-09)

Asstt. Commissioner of Income Tax
Circle-8, Nagpur Appellant

v/s

Shri Prakash Ramdeo Jaiswal
Manohar Chowk, Gondia Respondent
PAN – ABJPJ4064H

Cross Objection no.13/Nag./2012
(Arising out of ITA no. 229/Nag./2012)
(Assessment Year : 2008-09)

Shri Prakash Ramdeo Jaiswal
Manohar Chowk, Gondia Cross Objector
PAN – ABJPJ4064H (Original Respondent)

v/s

Asstt. Commissioner of Income Tax
Circle-8, Nagpur Respondent
(Original Appellant)

Assessee by : Shri M.K.M. Agrawal
Revenue by : Shri A.R. Ninawe

Date of Hearing – 28.06.2017

Date of Order – 29.06.2017

ORDER

PER AMARJIT SINGH, J.M.

The appeal filed by the Revenue and Cross Objection by the assessee are directed against the order dated 12th March 2012, passed

by the learned Commissioner (Appeals)–II, Nagpur, for the assessment year 2008–09.

ITA NO.229/Nag./2012 – Revenue's Appeal

2. The Revenue has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that there existed a relationship of principal and agent between BSNL and the assessee and that provisions of section 40A(3) are not attracted.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of ₹ 44,69,242 made by the A.O. under section 40A(3) of the Income Tax Act, 1961."

3. Brief facts of the case are that the assessee filed its return of income on 6th October 2008, declaring total income to the tune of ₹ 7,99,520. The return of income was proposed under section 143(1) of the Income Tax Act, 1961 (for short "*the Act*") on 24th September 2009. The case was selected for scrutiny under CASS. Notice under section 143(2) was issued on 29th May 2009 and served upon the assessee on 4th June 2009. Subsequently, notice under section 142(1) of the Act was also issued and served upon the assessee. The assessee was deriving his income from salary from Dhanpat Plastic Pvt. Ltd., M/s. Jai Bamleshwari Rice Mill, Broken Rice & M/s. Jai Bamleshwari Travel Agent and income from other sources i.e., dividend and

interest, fixed deposit interest and PPF interest. The assessee was a part of business concern Jaiswal Group of Gondia. The main person in this group was Shri RoshanlalJaiswal, therefore, the matter was taken up with him. A survey action under section 133A of the Act was conducted on this group on 14th December 2007 and 15th December 2007. During the survey, cash of ₹ 1,59,785 was found at Jai Bamleshwari Rice Mill which represented the joint cash of four concerns. Stock-in-trade and books of account were inventorized, however, subsequently, the same were released with the assessee. The assessment of the assessee was completed by assessing the income to the tune of ₹ 54,42,920. Since the assessee was not satisfied, therefore, the assessee filed an appeal before the learned Commissioner (Appeals) who deleted the addition made by the Assessing Officer under section 40A(3) of the Act and also deleted the addition of ₹ 1,28,350 made by the Assessing Officer on account of excess stock. Feeling aggrieved, the Revenue has filed the present appeal before us.

ISSUE NO.1 AND 2

4. These issues are inter-connected, therefore, are being taken up for adjudication. In fact, both the issues are in connection with the deletion of addition of ₹ 44,69,492 made by the Assessing Officer under section 40A(3) of the Act. Before going further, it would be

necessary to advert the finding of the learned Commissioner (Appeals), on this issue.

"4.0 Ground No.2 : This ground is regarding disallowance of payment made to BSNL in cash by appellant u/s.40A(3).

4. During the appellate proceedings, the appellant has submitted that the Allowance of the payment as above to BSNL is not correct on the fact that:

a.The A.O.has not given any cognizance to the relation of BSNL with its franchisee i.e. of Principal and Agent.

b. The A.O. has not taken in factual sense the nature of services provide by the franchisee on' behalf of its principal i.e. Service provider (BSNL).

We take an opportunity to explain the mode of marketing of various cellular products by BSNL.BSNL is a service provider for various cellular services and it appoints the distributors/franchisee at district level to market its products. We have an agreement with BSNL and we are called franchisee of the BSNL. We get commission for the services given by us.

This establishes that BSNL is a principal and we distributors are the agent of BSNL. In this reference the judgement of Vodafone Essar Cellular Ltd., Vs. ACIT dt. 17.8.2010 of The Honourable Kerala High Court is relevant The court has given due consideration to the relation of BSNL with its franchisee while deciding the applicability of Section 194H.

As per the judgement the Honourable High Court has admitted that the role of the distributor is that of a middleman between the service provider and the consumers. The essence of a contract of agency is the agent's authority to commit the principal. In this case the distributor actually canvass business for the assessee (BSNL) and only through distributors and retailers appointed by them assessee (BSNL) get subscribers, for the mobile service. Assessee(BSNL) renders services to the subscribers based on contract entered into between distributors and subscribers. The distributor is only rendering services to the assessee (BSNL) and the distributor commits the assessee (BSNL) to the subscribers to whom assessee (BSNL) is accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee(BSNL).The terminology used by the assessee(BSNL) for the payment to the distributors, in our view, is immaterial and

in substance the discount given at the time of sale of sim Cards or recharge coupons by the assessee (BSNL) to the distributors is a payment received or receivable by the distributor for the services to be rendered to the assessee(BSNL) and so much so ,it falls within the definition of commission or brokerage under Explanation (i) of Section 194H of the Act.

From the gist of the judgment it is clear that the Honourable High Court has stressed upon two facts i.e.relation between BSNL and franchisee and secondly whether there is any sale transaction between the BSNL and the franchisee.

The Honourable High Court has further clarified that a customer can have access to mobile phone service only by inserting Sim Card in his hand set (mobile phone) and the assessee(BSNL) activating it .Besides getting connection to the mobile network, the sim card has no value or use for the subscriber. In other words, sim card is what links the mobile subscriber to the assessee's (BSNL) net work. Therefore supply of sim card whether it is treated as sale by the assessee(BSNL) or not, is only for the purpose of rendering continued services by the assessee(BSNL) to the subscriber of the mobile phones. Besides the purpose of retaining a mobile phone connection with a service provider, the subscriber has no use or value for the Sim Card purchased by him from the assessee's distributor. The position is same so far as Recharge coupons or E Top-ups are concerned which are only air time charges collected from the subscribers in advance.

There is no sale of any goods involved as claimed by the assessee (BSNL) and the entire charges collected by the assessee (BSNL) at the time of delivery of Sim Cards or Recharge Coupons is only for rendering services to ultimate subscribers and the distributor is only middleman arranging customers or subscribers for the assessee (BSNL).

The terms of distribution agreement clearly indicate that it is for the distributor to enroll the subscribers with proper identification and documentation which responsibility is entrusted by the assessee(BSNL) on the distributors under the agreement. It is pertinent to note that besides the discount given at the time of supply of Sim Cards and Recharge coupons , the assessee(BSNL) is' not paying any amount to the distributors for the services rendered by them like getting the subscribers identified, doing the documentation work and enrolling them as mobile subscribers to the service provider namely the assessee(BSNL). Even though the BSNL has contended that the relationship between the BSNL and the distributors is principal to principal basis the Honourable High Court was unable to accept this contention because the role of the distributors as explained above is that of a middleman between

the service provider namely BSNL and the consumers. The essence of a contract of agency is that agent's authority to commit the principal. In this case the distributors actually canvass business for the BSNL and only through distributors and retailers appointed by them, BSNL gets subscribers for the mobile service.

The discount or commission given to the distributor is nothing but a margin given by the BSNL to the distributor at the time of delivery of Sim Cards and Recharge Coupons against advance payment made by the distributor. The distributor undoubtedly charges over and above what is paid to the BSNL and the only limitation is that the distributor cannot charge anything more than the MRP shown in the product namely Sim Cards, Recharge Coupons. Distributor directly or indirectly gets customers for the BSNL and sim cards are only used for giving connection to the customers procured by the distributor for the BSNL. The BSNL is accountable to the subscriber for failure to render prompt services pursuant to connections given by the distributor for the BSNL. Therefore the distributor acts on behalf of the BSNL for procuring and retaining customers.

The mobile service providers are exonerated from sales tax liability and are liable to pay service tax to the Central Government under the Finance Act., 1994 The Honourable High Court has considered the charges received by BSNL as charges for services rendered and not on a/c of sales on which BSNL is not supposed to pay any sales tax.

We enclose a copy of the above verdict of the Honourable High Court for your reference.

We also refer the decision of Honourable ITAT of Cochin Bench in the case of S.Rahumathulla Vs. Assisstant Commissioner of Income Tax.

The decision has been in favour of the assessee which relates to our case in totality. We reproduce the gist of the decision of the ITAT as under:

Business expenditure-disallowance under Sec.40A(3) cash payment for telephone cards, recharge coupons etc. by distributor to cellular service provider. Recharge coupons.SIM cards etc not being goods in the real sense upfront payment .therefore though classified as purchases in the books of the assessee a distributor of service products of BSNL ,are not essentially so. Similarly there is no purchase or any services by the assessee on assuming possession of the said service products. Acquisition of the same only equips it to perform its part of the services to the customers. Position is no different even when the service products are

sourced from other sources, as the origin thereof and the service being provided to the customer is only for and on behalf of BSNL. Thus .the assessee (distributor) does not make any purchases either of goods or services on acceptance of delivery of SIM Cards or other service products and consequently does not incur any expenditure in this respect though the transaction may be classified as such in his accounts. Relationship between the service provider and the franchisee (distributor) is one of principal and agent and there is no question of any purchase by the latter. Therefore no disallowance can be made by applying Section 40A(3) irrespective of the mode of payment.

The A.O. in para 12.9 of his order has made comments regarding of principal and agent between BSNL and franchisee in short which goes against the above verdicts .It seems that the A.O. has not given proper cognizance to the verdict of Honourable High Court of Kerala in the case of Vodafone Essar Cellular Ltd., v/s ACIT dt.17.8.10 which was referred by us in our letter dt. 20.12.10.

Further the A.O.has commented that " This discount is sought to be obfuscated by the assessee for commission to create a relationship of principal and agent which is not a fact". This comment is also against the verdict of Honourable High Court of Kerala in the case of Vodafone Essar Cellular Ltd. v/s ACIT dt.17.8.10 which was referred by us in our letter dt.20.12.10.The Honourable High Court has given verdict that the discount paid to the distributor is nothing but commission so as the Section 194H is applicable.

The A.O.'s contention that we could not explain the relevance of of above verdict of Honourable Kerala High Court to the issue on hand is unjustified and not true. We have explained in details in our letter dt. 20.12.10 the verdict as above which is self explanatory. The A.O. has not commented anything regarding his disagreement with relationship between BSNL and us and also regarding disagreement about nature of charges paid by us to BSNL. However the A.O. has stated that recharge coupons are a tangible commodity for the consumers in the form of "Talk Time". How a service of the service provider can be a commercial commodity is not clear to us. This goes again in contravention of the verdict of the above two higher level of judiciary authorities.

In view of the above facts ,verdicts of Honourable Kerala High Court and ITAT Cochin Bench the addition of the A.O. is not correct and justified .We pray that the additions of Rs.4469492.00 should be deleted and justice be given to us.

4.2 A.O. has held that these are purchases made by appellant. However, appellant has contended that the relationship between him and BSNL is of "principal and agent" and hence cash payment can be made by him to his principal. Appellant has quoted two case laws to support of his contention as mentioned above. I find myself inclined to agree with appellant in the matter in view of specific case laws and hence addition made by A.O. is deleted."

5. On appraisal of the above mentioned findings, we observe that the learned Commissioner (Appeals) deleted the addition raised in view of the provisions under section 40A(3) of the Act on the basis of finding of the learned Commissioner (Appeals)-II, Nagpur, in which on the basis of identical facts by the said appellate authority deleted the addition on the basis of the judgment passed in the case of Vodafone Essar Cellular Ltd., v/s ACIT, dated 17th August 2014 and also relied upon the findings of the Co-ordinate Bench of the Tribunal, Cochin Bench, in the case of S. Rahumathulla v/s ACIT, [2010] 127 ITD 440 (Cochin). The Hon'ble High Court of Kerala and the Tribunal, Cochin Bench, have held that the relationship between the assessee and the BSNL is "*principal and agent*" in nature, therefore, the provisions under section 40A(3) has not been attracted and, accordingly, the learned Commissioner (Appeals) also deleted the addition made by the Assessing Officer to the tune of ₹ 7,62,692. No distinguishable material has been produced before us to deviate from the findings of the learned Commissioner (Appeals) in question. The matter of controversy has been adjudicated earlier in the above mentioned case and the case of the assessee has duly been covered with the case

relied upon by the learned Counsel for the assessee mentioned above. Finding no tangible material or any other law contrary to the law relied upon by the learned Counsel for the assessee, we are of the view that the learned Commissioner (Appeals) has passed the order in question judiciously and correctly which is not required to be interfered with at this appellate stage. Accordingly, these issues are decided against the Revenue and in favour of the assessee. Thus, the grounds raised by the Revenue are dismissed.

6. In the result, Revenue's appeal is hereby ordered to be dismissed.

C.O no.13/Nag./2012

7. The assessee has filed this cross objection against the deletion of addition made by the Assessing Officer in view of the provisions of section 40A(3) of the Act.

8. On appraisal of the finding of the learned Commissioner (Appeals), we observe that the learned Commissioner (Appeals) has rightly deleted the said addition in view of the decision of the Hon'ble High Court of Kerala in Vodafone Essar Celluler Ltd. (supra) and on the basis of decision of Co-ordinate Bench of the Tribunal, Cochin Bench in S. Rahumathulla (supra). No law contrary to the said law has been produced by the Revenue. The learned Commissioner (Appeals) has

rightly deleted the addition raised by the Assessing Officer in view of the provisions of section 40A(3) of the Act. The learned Commissioner (Appeals) has rightly held that the relationship of the assessee with BSNL is "*principal and agent*" to which provisions of section 40A(3) is not applicable. Accordingly, we affirm the finding of the learned Commissioner (Appeals) on this issue and allow the ground raised by the assessee.

ISSUE NO.3

9. Under this issue, the assessee has raised the question that the learned Commissioner (Appeals) has rightly deleted the addition of ₹ 1,28,350, made by the Assessing Officer on account of excess of stock. The finding of the learned Commissioner (Appeals) is hereby reproduced below:-

"3.3 IT is clear that after surrendered, appellant introduced the cash in books and now wants to take its advantage against the additions made on account of;

- i) Disallowance of travelling expenses of Rs.10,000/-*
- ii) Disallowance of agricultural expenses*
- iii) Addition against excess stock of Rs.1,28,350/-*

It is clear that first two disallowances are not connected with survey and that cannot be telescoped in to Rs.8 lakhs surrendered by appellant during survey they are additional points raised by A.O. not emanating from survey, hence, cannot be set off against Rs.8 lakhs surrendered by appellant. However, third addition on account of excess stock is directly related to survey and hence separate addition made by A.O. on this account is held to be part of Rs.8 lakhs declared. Hence, separate addition is not called for. Hence this ground is partly allowed."

10. On appraisal of the above mentioned findings, we observe that the disallowance of travel expenditure and agricultural expenditure were not part of survey. However, the addition against the excess stock of ₹ 1,28,350 was the part of survey and during the survey the assessee has declared his additional income to the tune of ₹ 8 lakh, therefore, in the said circumstances, the learned Commissioner (Appeals) has rightly deleted the said addition. Consequently, we affirm the findings of the learned Commissioner (Appeals) on this issue and decide the issue in favour of the assessee.

11. In the result, Revenue's appeal is dismissed and assessee's cross objection is hereby dismissed being infructuous.

Order pronounced in the open Court on 29.06.2017

Sd/-
P.K. BANSAL
VICE PRESIDENT

Sd/-
AMARJIT SINGH
JUDICIAL MEMBER

NAGPUR, DATED: 29.06.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Nagpur City concerned;
- (5) The DR, ITAT, Nagpur;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt.Registrar)
ITAT, Nagpur