आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL, VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं**./I.T.A.No.335/Vizag/2017**

(निर्धारण वर्ष / Assessment Year: 2012-13)

M/s. Fusion Voice Solutions India (P) Ltd., Vijayawada [PAN NoAABCF2029A]	ITO, Ward-2(2), Vijayawada
(**अपीलार्थी** / Appellant)	(**प्रत्यार्थी** / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri G.V.N. Hari, AR
प्रत्यार्थी की ओर से / Respondent by	:	Shri Deba Kumar Sonowal, DR
सुनवाई की तारीख / Date of hearing	:	08.03.2018
घोषणा की तारीख / Date of Pronouncement	:	14.03.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal filed by the assessee is directed against order of the Principal Commissioner of Income Tax, Vijayawada dated 28.3.2017 for the assessment year 2012-13.

2. The assessee filed return of income on 8.9.2012 admitting total income of Rs.4,53,760/-. The assessee is engaged in the business of purchase and sale of mobiles and accessories. The assessee is a wholesale distributor for Nokia mobiles and accessories. The case is selected for scrutiny and the assessment was completed u/s 143(3) of the Act on total income of Rs.7,74,178/-. Subsequently, the CIT(A) has taken up the case for revision u/s 263 of the Act and found that the assessee had debited a sum of Rs.4,46,924/- towards incentives and and the assessee required to deduct the TDS as per the provisions of section 194H of the Act. Since the assessee has not deducted the TDS from the above payments, the said expenditure required to be disallowed u/s 40(a)(ia) of the Act. The assessee neither deducted the TDS nor the A.O. made the addition u/s 40(a)(ia) of the Act, hence the CIT held that the assessment is erroneous and prejudicial to the interest of the revenue and accordingly, set aside the assessment order passed by the A.O. with a direction to redo the assessment do-novo.

3. Aggrieved by the order of the Ld.CIT, the assessee is in appeal before us. During the appeal hearing, the Ld. Counsel argued that the assessee is engaged in the wholesale distribution of Nokia mobiles and accessories for retail trading. The assessee receives the scheme incentives from the Nokia company which were passed on to the retail

traders as per the targets achieved. The details of the trade discounts received and passed on to the retail traders are as under;

Description	*Amount in Rs.*
1. Trade scheme incentives allowed to the assessee on its purchases by the manufacturer during the F.Y. 2011-12 (subject to point 'b' infra)	*1,95,72,851.20*
2. Trade scheme incentives passed on by the assessee to its dealers based on their purchases from the assessee	*1,41,51,791.65*
3. Net trade scheme incentives retained by the assessee as its profit [(1) – (2)]	*54,21,059.55*

4. Out of the said scheme incentive credits of Rs.1,86,15,697/- (after exclusion of Rs.9,57,154/- representing VAT refund by C.T. Department) assessee has allowed the discounts to retail dealers who purchased Nokia hand sets from the assessee during the financial year 2011-12. The incentives were passed on to the retail dealers by credit notes who purchased from the assessee based on their sales turnover. Thus, the assessee contended that the trade incentives are nothing but discounts allowed by the assessee on its purchases, hence, the same is neither commission nor brokerage, hence, argued that the tax deduction at source u/s 194H of the Act has no application in the assessee's case. The Ld. A.R. further argued that for deduction of tax at source u/s 194H of the Act, the assessee should have paid the brokerage or commission as defined in explanation (1) of section 194H of the Act. In the instant case, there were no service rendered by the recipients and no brokerage

or commission was paid to the payees. It is only an incentive passed on to the retailers which goes to reduce the purchase cost in the hands of the retailers and relation between the retailer and the assessee is principal to principal but not principal and agent. The relation between the retail dealer and the assessee is a pure purchase transaction and the incentives passed on are directly linked to the purchases, hence argued that there is no commission or brokerage paid to the recipients, hence section 194H of the Act is not applicable in the assessee's case and consequent disallowance u/s 40(a)(ia) of the Act also is not applicable. The assessee relied on the decision in the case of CIT Vs. United Breweries Limited 387 ITR 150(AP). The assessee also relied on the decision of coordinate bench Kolkata in the case of DCIT, Circle-7, Kolkata Vs. M/s. BCH Electric Ltd, in ITA No.1336/Kol/12 dated 18.3.2016 for the assessment year 2008-09, wherein the coordinate bench held that while passing on the incentive to the dealers for the purpose of selling its goods beyond target quantum, there is no relation of principal and agent and no applicability of section 194H of the Act. Further, the Ld. A.R. also argued that the assessee has submitted the entire details before the AO by production of all the details required for completion of assessment. This is evident from the page No.9 of the Ld. Pr.CIT's order where in it is stated that the A.O. has collected the

details, obtained the ledger accounts of various trade schemes in the books of the assessee company.

5. Further, Ld. A.R. submitted that the assessee has submitted the details of salaries and the incentives paid to the employees which were included in the salaries and the TDS was made as applicable from the salary paid to the employees. Thus, the Ld. Counsel argued that as decided by the courts, the incentives are not covered u/s 194H of the Act for the purpose of commission or brokerage. The A.O. has verified the details filed by the assessee and allowed the incentives as deduction holding that incentives passed on to the retailers were not covered as brokerage and commission. Since the A.O. has allowed the expenditure after due verification of the details, there is no error in the order of the A.O., hence requested to set aside the order u/s 263 of the Act passed by the Pr.CIT.

6. On the other hand, the Ld. D.R. argued that there is no whisper in the assessment order with regard to the verification of the salaries and incentives passed on by the assessee. The incentives were covered u/s 194H of the Act for the purpose of brokerage and commission, hence, requested to uphold the order of the Principal CIT and relied on the orders of the Principal CIT.

7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. It is observed that the assessee is a wholesale distributor of Nokia mobile phones and accessories. During the previous year relevant to the assessment year, the assessee had received the incentives and out of which the assessee had passed on incentives to the retailers to the extent of Rs.1,38,34,314/- and passed on the incentives to the extent of Rs.4,46,924/- to its employees. During the assessment proceedings, the A.O. has called for the details of ledger accounts with respect to the incentives passed on to the retailers and examined the same by the A.O. as evident from the order u/s 263 of the Act passed by the Principal CIT in page No.9 of the order. Similarly, with respect to the incentives passed on to the employees, it was included in the salaries and the same was examined by the A.O. at the time of assessment.

8. The question whether the incentives are covered u/s 194H of the Act or not for the purpose of brokerage and commission is an issue which required to be decided in this case. Explanation (1) to section 194H of the Act reads as under;

"Commission or brokerage includes any payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of products or in relation to any transaction relating to any asset valuable, valuable article or thing not being securities."

9. In the instant case, the assessee is engaged in the purchase and sale of mobile phones and accessories. In the process of the business activity, the assessee sells the goods to retailers and the incentives were passed on to the retailers who have achieved the quantum target. No services were rendered by the retailers to the assessee and it is a mere purchase and sale transaction. In the mere purchase and sale transaction, there is no principal agent relationship exists and only principal to principal relation exists, hence the incentives passed on to the retailers cannot be held to be commission or brokerage within the meaning of section 194H of the Act. Similar issue was considered by the coordinate bench of Kolkata 'A' Bench in the case of DCIT Circle-7 Kolkata Vs. M/s. BCH Electric Ltd. (supra) and held that there is no principal and agent relationship and the payments made to the distributors/dealers by way of incentives would not come under the purview of section 194H of the Act and invocation there on u/s 40(a)(ia) of the Act is bad in law. For the sake of clarity and convenience, we extract relevant paragraph of the order of the coordinate bench which reads as under:

> *9. The facts involved to decide the ground no.2 are that the assessee is manufacturing electricity pumps as equipment and accessories which includes control gears, motor control centres, control panels and enclosures etc. The dealers/ distributors, under an agreement with the assessee would purchase goods from assessee against cash payment or on credit depending upon the agreement under scheme of promotion in selling the assessee's goods beyond targetted quantum for which the incentive is*

being given to the said dealers/ distributors for achieving certain sales target as fined by the assessee.

10. A similar case came up before the Hon'ble Delhi High Court in the case of C1T-vs- Jai Drinks (P) Ltd. reported in 336 ITR 383, wherein the facts of the case are that the assessee therein permitted the distributor to sell its products in a specified area. The products were to be purchased by the distributor from the assessee and was allowed discount per case on the printed MRP. Thereafter, it is the responsibility of the distributor to sell those goods further to the consumers. The Hon'ble Delhi High Court held that the relation between assessee and distributor therein are not of principal and agent and it is a relationship of principal to principal, the relevant portion of which is reproduced hereinbelow:

> *"8. A perusal of the agreement shows that the 'assessee had permitted the distributor to sell its products in a specified area. The distributor was to exclusively deal in the products of assessee in a specified territory. The products were to be purchased by the distributor from the assessee against 100 per cent advance payment, though decision rested with the assessee to give the products on credit to the distributor. The distributor was to maintain at all times the minimum stock and was to deal only in the products of the assessee. The distributor was to maintain its operational infrastructure including requisite staff under its employment with liability of PF contribution, ESI contribution, etc. as per the laws. It was specifically stated in ci. 16 that the arrangements under this agreement are on principal-to-principal basis and nothing in this agreement shall be construed to confer the authority of an agent to bind the assessee. In ci. 17 it was specifically mentioned that the distributor was to purchase the products of the assessee and was to be allowed discount per case on the printed MRP. In case of any breakage, leakage, etc., it was the distributor who was liable and not the assessee. Not only this, even all the approvals, consents, registrations, licenses, etc. whatever may be required from departments or authorities were to be obtained by the distributor.*
>
> *9. From all that has been noted above, it is evident that the distributor was to purchase products at predetermined price from the assessee for selling the same within specified area. The products were to be purchased by the distributor against 100 per cent advance payment or may be sometimes on credit at the discretion of the assessee. Both the assessee and the distributor have been collecting and paying their sales-tax separately. Both the parties have clearly understood and accepted the agreement between them. That being the arrangement between the assessee and the distributor, it could not be said that the relation between them was that of principal-agent. On the other hand it was clearly stipulated to be an agreement between them on principal-to-principal basis. Both the C'IT('A) and also the Tribunal rightly held that the payments being made by the assessee to the distributor were incentives and discounts and not commission. We find*

no infirmity in the findings of the CIT(A) and also Tribunal.

10. Keeping in view the above-mentioned facts and circumstances of the case, the present appeal has no merits and is hereby dismissed."

11. Recently, Hon'ble Bombay High Court in the case of CIT-vs- Intervet India Pvt. Ltd. in 364 ITR 238 dealt with the same issue as that of the assessee herein in claiming deduction towards expenditure incurred under the sales promotion scheme. The facts involved therein, was, that the assessee had undertaken sales promotional scheme under which assessee therein had offered an incentive on case to case basis to its stockists/dealer/agents. The distributors were the customers of assessee therein to whom the sales were effected. The Hon'ble high Court held that the distributors/ stockists were the persons to whom the product was sold, no services were offered to the assessee. The distributors/ stockists were not acting on behalf of the assessee and hence, it could not be said to be a commission payment within the meaning of Explanation (i) to section 194H of the Act. The relevant portion of which is reproduced herein as below:

"7. We have perused the concurrent orders with the assistance of the learned Counsel for both the parties. The Assessee had undertaken sales promotional scheme viz. Product discount scheme and Product campaign as discussed hereinabove under which the Assessee had offered an incentive on case to case basis to its stockists /dealers/agents. An amount of Rs. 70,67,089/- was claimed as a deduction towards expenditure incurred under the said sales promotional scheme. The relationship between the Assessee and the distributor / stockists was that of principal to principal and in fact the distributors were the customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributor / stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee 's product. The distributors / stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be a commission payment within the meaning of explanation (i) to Section 194H of the Income Tax Act, 1961. The contention of the Revenue in regard to the application of Explanation (i) below Section 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Explanation (i) below Section 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case. We are satisfied that in the facts of the present case that as regards sales promotional expenditure in question, the provisions of Explanation (i) below Section 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers / stockists of the Assessee is appropriately held to be not a payment of any commission in the concurrent findings as recorded by the CIT (Appeals) and the Tribunal.

7. Having considered the findings recorded by the CiT (Appeals) and the Tribunal and taking into consideration the provisions of Explanation (i) to Section 194H of the Act, we do not find that the appeal gives rise to any substantial question of law. It is accordingly dismissed."

12. As discussed above, the facts of the present case, falls within facts of the cases dealt by the Hon'ble Delhi and Hon'ble Bombay High Court. In the present case, the ld. CIT(A) examined the copies of agreements of dealers and he found that dealers are the receipts of the amount given by the assessee as incentive. The dealers are buying the goods from the assessee on their own risk. The assessee paid the incentive to the dealers for the purpose of promotion in selling its goods beyond a targeted quantum. Therefore, we see no relation of principal and agent as agitated by the id. DR. If that be the case, the applicability of section 194H and invocation of section 40(a)(ia) of the Act for violation of section 194H is bad under law. Thus, it is clear that the liability to deduct TDS under section 194H of the Act arises only when a person acts on behalf of another. The incentives received by the distributors/dealers is neither contractual transaction nor payment commission or brokerage under the relation of principal and agent and which are a strict requirement of section 194H of the Act to deduct the TDS. Therefore, we are of the view, that the principle laid down by the Hon'ble High Courts at Delhi and Bombay in the decisions (supra) applicable to the case on hand. Respectfully following the same, we hold that the payments paid to the distributors/ dealers by way of incentives would not come under the purview of section 194H and invocation thereon under section 40(a)(ia) is bad and hence no interference is required with the order of the CIT(A), therefore, it is confirmed. The ground no.2 raised by the Revenue is dismissed.

13. In the result the appeal filed by the Revenue and the CO. filed by the assessee are dismissed.

10. Hon'ble A.P. High Court in the case of United Breweries Ltd. (supra) held as under:

4. In the order under appeal the Tribunal, after extracting Section 194H of the Act, held that the definition of "commission or brokerage" made it clear that the payment received by a person for acting on behalf of another for services rendered or for any services in the course of buying or selling of goods etc fell under the category of "commission or brokerage"; provision of service, by a person acting on behalf of another person, signified the principal-agent relationship between the payer and payee, since the agent acts on behalf of the principal; it cannot be said to be a service provided by one person on behalf of another person, and the said payment cannot fall under the definition of "commission"; in the case on hand, the asessee supplied beer to APBCL, a Government of Andhra Pradesh undertaking, which, in turn, sold beer to various retail dealers; in effect there was no direct relationship between the assessee and the retail dealers; however, since the turnover of the assessee would depend upon the

sales effected with the retail dealers, the assessee had promoted a sales promotion scheme under which incentives were given to retail dealers upon achievement of certain targets in sales; by this scheme retail dealers were motivated to purchase more quantity of beer manufactured by the assessee, which in turn would increase the turnover of the assessee; in order to market the trade discount scheme, and also in order to promote sales of its products, the assessee had appointed del-credere agents; there was no dispute that payment made to del-credere agents, for the services provided by them to the assessee, was treated as commission by the assessee; TDS had been deducted, under Section 194H of the Act, from them; the incentives payable under the trade discount scheme was disbursed by the assessee to the retail dealers through del-credere agents who had opened separate bank accounts for the said purpose; and the del-credere agents had only acted as a conduit for transferring incentives to the retail dealers.

5. Placing reliance on the judgment of the Supreme Court in Bhopal Sugar Industries Ltd. vs. STO the Tribunal held that the essence of a "Contract of Agency" was that the agent did not sell the goods as his own, but sold the same as the property of the principal under his instructions and directions; an agent always acts on behalf of his principal, and the benefits of the activities of the agent would be reaped by the principal; since the agent was not the owner of the goods, the loss, if any, suffered by the agent was to be borne by the principal, and the agent was required to be indemnified by the principal; and the payment received by the agent for the services rendered to the principal is understood as "Commission".

6. After referring to the judgment of the Gujarat High Court in the case of Ahmedabad Stamp Vendors Association vs. Union of [21 India, the Tribunal held that the "element of agency" was an essential requirement in order to characterise a payment made for services provided as "commission". The Tribunal relied on the judgment of the Bombay High Court in Harihar Cotton Processing Factory vs. CI and held that commission was in the nature of recompense or reward for the services rendered, and expressed its inability to agree with the view of the Commissioner of Income Tax (Appeals) that the discount should be shown as a reduction in the selling price.

7. The Tribunal also relied on the order of the Visakhapatnam Bench of the Tribunal in Additional Commissioner of Income Tax vs. Pearl Bottling (P) Ltd. wherein discounts offered to retailers, and also promotional discount, were held not to be "commission" as the relationship between the assessee therein and its distributor was on a principal to principal basis. The Tribunal held that, since the assessee had sold the goods to APBCL and the retail dealers had purchased the goods from APBCL, the sale between the assessee and APBCL, and the sale between APBCL and retail dealers, was on a principal to principal basis; the retail dealers had not provided any services to the assessee, since there was no direct connection between the assessee and retail dealers; the trade discount scheme was announced by the assessee in order to promote its sales; under the said scheme, the assessee had disbursed the eligible amount of incentive or rebate or discount to the retail dealers through its del- credere agents; payment was actually made to the retail dealers; and, as such, the payment constituted sales promotion expenses and did not fall within the category of "commission" attracting Section 194H of the Act.

8. Before us Sri K. Raji Reddy, learned Senior Standing Counsel for Income Tax, would reiterate the very same submissions as were urged by the Revenue before the Tribunal. As has been noted by the T ribunal, in the order under appeal, the Explanation to Section 194H of the Act defines "commission or brokerage" to include any payment received directly or indirectly by a person acting on behalf of another person for services rendered, or for any services in the course of buying or selling of goods, or in relation to any transaction relating to any asset, valuable articles or thing, not being securities. Payment received by a person from another, for services rendered, constitutes "commission" under the Explanation to Section 194H of the Act.

9. From the facts noted by the Tribunal, in the order under appeal, it is evident that beer was sold by the respondent-assessee to APBCL, and APBCL had, in turn, sold the beer, purchased by them from the respondent-assessee, to retail dealers. Both these transactions were independent of each other, and were on a principal to principal basis. No services were rendered by the retail dealer to the respondent- assessee, and the incentive given by the respondent-assessee, to the retailers as trade discount, was only to promote their sales. The Tribunal rightly held that in the absence of relationship of a principal and agent, and as there was no direct relationship between the respondent-assessee and the retailer, the discount offered by the respondent-asessee to the retailers could only be treated as sales promotion expenses, and not as commission, as no services were rendered by the retailers to the respondent-assessee.

10. An appeal under Section 260-A of the Act would lie only on a substantial question of law. Save perversity, or a finding based on no evidence, the findings of fact recorded by the Tribunal would not give rise to a substantial question of law. The findings of the fact recorded by the Tribunal cannot be said to suffer from any such infirmity. The order of the Tribunal does not also suffer from any error of law necessitating interference in proceedings under Section 260-A of the Act. We see no reason, therefore, to interfere with the order of the Tribunal in the exercise of our jurisdiction under Section 260A of the Act.

11. The appeals fail and are, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs."

11. From the above judicial pronouncements, it is evident that passing on incentives by the wholesale distributor to the retail dealer, there is no principal and agent relationship and cannot be held to be commission or brokerage paid to the recipient. Therefore, the provisions of tax deduction at source u/s 194H of the Act would not

attract the tax and accordingly disallowance u/s 40(a)(ia) of the Act is applicable, thus the assessment made u/s 143(3) cannot be held to be erroneous since the incentives passed on by credit note to the retail dealers is neither commission nor brokerage as discussed above, the section 194H of the Act has no application in this case.

In the instant case as observed from the Ld. Principal CIT's order, the A.O. has called for the details of the ledger accounts of the incentives and the details of salaries paid to its employees. In respect of salaries paid to employees, the A.O. did not make any addition in the consequential order passed u/s 143(3) r.w.s. 263 of the Act dated 29.12.2017. In respect of the incentives passed on to the retailers, the A.O. has obtained the details of ledger accounts and examined the same. Therefore, it is established beyond doubt that the A.O. has examined the issue and taken one of the possible views. Not examining the entire transaction and sales by the assessee company to its retail dealers and sales by its dealers till to the end users and verification of principal agent relationship etc. at best can be treated as inadequate enquiry but not lack of enquiry. Once the A.O. has conducted the enquiry and completed the assessment and the enquiry conducted was inadequate, there is no case for revision u/s 263 of the Act for inadequate enquiry. Lack of enquiry is a reason for taking up the case

for revision u/s 263 of the Act but the inadequate enquiry cannot be a reason for taking up the case for revision u/s 263 of the Act. This view is supported by the Hon'ble Supreme Court judgements in the case of CIT (Central) Ludhiana Vs. Max India Ltd 166 Taxman 0188 (SC) and CIT Gujarat-2 Vs. Quality Steel Supplies Complex 84 Taxman.com 234 (SC). The Ld. D.R. relied on the decision of Hon'ble Kolkata High Court in the case of Bharati Cellular, wherein the issue is commission receivable in future but not related to the incentives passed on to the retail traders. Therefore, the decision relied upon by the Ld. D.R. is in no way helpful to the revenue. Since the A.O. has examined the issue before completion of assessment there is no error, which is prejudicial to the interest of the revenue. Therefore, we are unable to sustain order passed u/s 263 of the Act of the Principal Commissioner of Income Tax and accordingly, we set aside the order passed u/s 263 of the Act and allow the appeal of the assessee.

12. In the result, the appeal of the assessee is allowed.

The above order was pronounced in the open court on 14th Mar'18.

Sd/-	Sd/-
(वी. दुर्गाराव)	**(डि.एस. सुन्दर सिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 14.03.2018

VG/SPS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-</u>

1. अपीलार्थी / The Appellant – M/s. Fusion Voice Solutions India (P) Ltd., D.No.36-14-2, 2nd Floor Fusion Towers, Opp. Siddhartha Public School, Moghalrajpuram, Vijayawada-520 020.
2. प्रत्यार्थी / The Respondent – The ITO, Ward-2(2), Vijayawada
3. आयकर आयुक्त / The CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The Principal CIT, Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम **/**
   DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM