



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5031/Mum./2016
(Assessment Year : 2006-07)

Asstt. Commissioner of Income Tax
Central Circle-8(3)(1), Mumbai Appellant

v/s

Tata Teleservices (M) Ltd.
TTC Industrial Area, MIDC Sanpada
P.O. Turbhe, Navi Mumbai 400 073 Respondent
PAN - AAACH1458C

ITA no.5032/Mum./2016
(Assessment Year : 2007-08)

Asstt. Commissioner of Income Tax
Central Circle-8(3)(1), Mumbai Appellant

v/s

Tata Teleservices (M) Ltd.
TTC Industrial Area, MIDC Sanpada
P.O. Turbhe, Navi Mumbai 400 073 Respondent
PAN - AAACH1458C

ITA no.5033/Mum./2016
(Assessment Year : 2008-09)

Asstt. Commissioner of Income Tax
Central Circle-8(3)(1), Mumbai Appellant

v/s

Tata Teleservices (M) Ltd.
TTC Industrial Area, MIDC Sanpada
P.O. Turbhe, Navi Mumbai 400 073 Respondent
PAN - AAACH1458C

Revenue by : Shri Abhijit Patankar
Assessee by : Shri Nikhil Malaviya

Date of Hearing - 12.04.2018

Date of Order - 27.04.2018

ORDER**PER BENCH**

Aforesaid appeals of the Revenue are against three separate orders, all dated 16th May 2016, passed by the learned Commissioner (Appeals)-14, Mumbai, pertaining to assessment years 2006-07, 2007-08 and 2008-09.

2. At the outset, it needs to be mentioned, Registry has pointed out inordinate delay in filing of the present appeals by the Revenue. However, in course of hearing, the learned Departmental Representative explained that in Col. No.9 of Form no.36, filed originally in all these appeals, the date of communication of the order of the Commissioner (Appeals) was wrongly mentioned as 22nd March 2013 instead of 9th June 2016. In support of such explanation, he also filed revised form no.36, verified by the Assessing Officer mentioning the correct date of communication of learned Commissioner (Appeals)'s order. After considering the submissions of the learned Departmental Representative and perusing the material on record, we are satisfied that these appeals were filed within the prescribed period of limitation. Therefore, the delay pointed out by the Registry is ignored and appeals are admitted for adjudication on merit.

3. Aforesaid appeals have been filed by the Revenue on the common issue of deletion of disallowance made under section 40(a)(ia) of the Act by the Assessing Officer on account of non-deduction of tax at source on alleged commission payment to the distributors on sale of recharge coupon vouchers (RCVs). The ground raised by the Revenue on the aforesaid issue in all these appeals are identical except the figures. The facts relating to the disputed issue in all these appeals, though, are more or less common, however, considering the fact that the learned Departmental Representative took up ITA no.5032/Mum./2016, pertaining to the assessment year 2007-08 as the lead appeal, it is deemed appropriate to cull out the facts involved in the said appeal.

4. Brief facts are, the assessee company is engaged in the business of providing basic and mobile telecommunication service and internet service. The assessee had filed its returns of income for the impugned assessment years in regular course declaring loss of various amounts. Assessments in case of the assessee were completed for the aforesaid assessment years under section 143(3) of the Act accepting the loss declared in the returns of income. However, subsequently, the assessments as were completed for the aforesaid assessment years under section 143(3) of the Act were re-opened under section 147 of the Act. In the course of assessment proceedings, the Assessing

Officer while verifying the details of advertisement and business promotion expenses, sales commission, inter-connection and other access cost charges and discount extended by the assessee to its distributors / vendors found that the assessee has not deducted tax on the alleged commission paid to distributors on sale of prepaid sim cards and recharge coupon vouchers (RCVs). Therefore, he called upon the assessee to justify non-deduction of tax at source on such payment and proposed to disallow the payment under section 40(a)(ia) of the Act. In response to the query raised by the Assessing Officer, the assessee made elaborate submissions stating that the business model of the assessee is divided to post paid and pre-paid models. It was submitted, under the post paid business model, the subscribers pay for the services subsequent to use on being billed by the operator. For acquiring new customers / subscribers the operator appoints franchise / agent and pays compensation in the nature of commission on which due TDS is deducted. However, under the pre-paid business model, the distributors buy starter kits, bulk talk-time i.e., telecom products from the operators by paying for the same and thereafter trade in telecom products through their network of retailers. This enables the ultimate subscriber to purchase the said products for whatever denomination by paying the same to the retailer in advance. It was submitted by the assessee that the starter kits and RCVs were sold to distributors on principal-to-principal basis and there is no

relationship of principal and agent with the Distributors. Therefore, the discount given to the distributors on the MRP of the starter kits and RCVs cannot be treated as commission as provided under section 194H of the Act. In support of its contention, the assessee relied upon a number of judicial pronouncements. The Assessing Officer after considering the submissions of the assessee, however, was not convinced with them. Referring to the sample copy of the agreement entered into by the assessee and the distributor and relying upon certain clauses of the agreement, as reproduced in the assessment order, the Assessing Officer observed, though, the assessee has tried to make out a case to show that the business model followed by it is different from other mobile operators, in the sense, that the sale transaction between the assessee and the distributor is complete when the distributor purchases the prepaid sim card and RCVs from the assessee for subsequent sale to the mobile users, however, according to the Assessing Officer, the change in the business model do not alter the character of the business at the macro level. The Assessing Officer observed, the assessee is a mobile service provider to the customers and the intermediaries like distributors are provided in the system in order to facilitate the service to be rendered to the customers. The assessee owns the technology and the infrastructure which is used to run the mobile service in various circles. The assessee provides prepaid sim cards and RCVs and the technologies / service with the

talk-time embedded therein. Therefore, even if the distributors down the line purchase the prepaid sim cards / recharge coupon from the assessee and the sale thereof is shown to be complete in an accounting sense, it is not so because the end customer who is using the technology / prepaid sim cards and the services associated with that mobile number goes back to the assessee company in the event of any failure or any complaint with regard to the services relating to the telecom services even though the customer has not purchased the goods from the assessee. The Assessing Officer observed that the basic facts relating to the business model is, the customer avails the services of the assessee company who renders such services as mobile service provider. The Assessing Officer observed, if assessee's contention is to be accepted then once the sim card / RCVs are sold by the assessee to the distributors and the sale is complete, the assessee as a telecom service provider will have nothing to do with the goods purchased by the customers from the distributors, which is not the case, since, the relationship between the assessee as a service provider and the end customer is established only upon the purchase of prepaid sim cards and RCVs by the end customer from the distributors as the services embedded therein are provided by the assessee and not the distributors irrespective of the sale transaction between the assessee and the distributors. The Assessing Officer observed, assessee's contention that the margin earned by the

distributor on the MRP of sim card / RCVs vis-a-vis the money paid for acquiring them is actually not the income of distributor in the form of commission or brokerage, is not acceptable. He also held that the contention of the assessee that the relationship between the assessee and the distributor in so far as it relates to sale of prepaid sim card / RCVs is on principal-to-principal basis is not acceptable in view of the provisions contained under section 194H of the Act. The Assessing Officer observed, the discount on MRP given by the assessee to the distributor on sale of prepaid sim card and RCVs is in the nature of commission as per section 194H of the Act. Referring to the decision of the Hon'ble Delhi High Court in case of CIT v/s Idea Cellular Ltd.[2010] 325 ITR 148, and the decision of the Hon'ble Calcutta High Court in case of Bharti Cellular Ltd. v/s ACIT[2013] 354 ITR 507, the Assessing Officer ultimately held that the discount given to the dealers is in the nature of commission on which tax was deductible at source under section 194H of the Act. Accordingly, he made disallowance under section 40(a)(ia) of the Act for an amount of ₹ 37,23,82,412 under section 40(a)(ia) of the Act. Similar disallowances were also made in the other assessment years under appeal. Being aggrieved with the disallowances made as aforesaid, assessee preferred appeals before the first appellate authority.

5. The learned Commissioner (Appeals) after considering the submissions of the assessee and having found that in assessee's own case for assessment years 2009-10 and 2010-11, the Commissioner (Appeals) following the decision of the Hon'ble Karnataka High Court in assessee's case has decided the issue in favour of the assessee, followed the same and deleted the disallowance made under section 40(a)(ia) of the Act in the aforesaid assessment years.

6. The learned Departmental Representative relying upon the observations of the Assessing Officer and referring to different clauses of the agreement reproduced by the Assessing Officer in the impugned assessment order submitted that if the said clauses of the agreement are read carefully it is clearly established that the assessee exercises some amount of control over the distributors with regard to sale of prepaid sim cards and RCVs. The learned Departmental Representative submitted, if the duties and obligations of the distributors under the agreement is seen in the right context it cannot be considered to be a transaction on principal-to-principal basis. He submitted, in such type of transaction, the deciding factor is the independence of the distributor. He submitted, the agreement in the present case demonstrates that the distributor cannot act independently but has to be bound by the restrictions / conditions imposed under the agreement. Thus, he submitted, in such circumstances, it cannot be

held that the transaction relating to sale of prepaid sim card / RCVs between the assessee and the distributors are on principal-to-principal basis. Therefore, the discount given by the assessee to the distributors on MRP is nothing but commission liable for deduction of tax under section 194H of the Act. The assessee having not deducted tax at source, the Assessing Officer has rightly made disallowance under section 40(a)(ia) of the Act. In support of his contention, the learned Departmental Representative relied upon the following decisions:-

- i) *Hutchison Telecom East Ltd. v/s CIT, [2015] 59 taxmann.com 176 (Cal.); and*
- ii) *Vodafone Mobile Services Ltd. v/s DCIT, [2017] 86 taxmann.com 115 (Hyd.) (Trib.).*

7. The learned Authorised Representative strongly relying upon the observations of the learned Commissioner (Appeals) submitted that the issue stands covered in favour of the assessee by virtue of the decision of the Tribunal, Mumbai Bench, in assessee's own case. In this context, he placed reliance on order dated 27th May 2016, in case of M/s. Tata Teleservices (Maharashtra) Ltd. v/s ACIT, ITA no.2043/Mum./2014 and Ors. For assessment year 2009-10, 2010-11 and 2011-12. Further, he submitted that the Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. v/s DCIT [2015] 372 ITR 33, wherein, assessee's group company viz. Tata Teleservices Ltd. was also a party,

upon considering similar nature of transaction has held that the nature of transaction between the assessee and its distributors being on principal-to-principal basis the trade discount given to the distributor is not in the nature of commission, hence, does not attract the provisions of section 194H of the Act. He submitted, following the aforesaid decision of the Hon'ble Karnataka High Court, the Tribunal, Jaipur Bench, in case of assessee's group company Tata Teleservices Ltd. has held that provisions of section 194H of the Act is not applicable in respect of sale of pre-paid sim cards and RCVs to the distributors. Further, learned Authorised Representative relied upon the decision of the Hon'ble Rajasthan High Court in case of M/s. Tata Teleservices Ltd and Ors. in the judgment delivered on 11th July 2017 in ITA no.124/2015 and group of other appeals to contend that while deciding identical issue, the Hon'ble Court has held that the provision of section 194H of the Act is not attracted to the transactions involving sale of pre-paid sim cards and RCVs to the distributors. With reference to the decisions cited by learned Departmental Representative, he submitted, when there are conflicting decisions of non jurisdictional high courts on the same issue, the decision favourable to the assessee has to be followed. In this regard he relied upon the decision of the Hon'ble Apex court in case of CIT V/S. Vegetable Products Ltd, 88 ITR 192 (SC).

8. We have patiently and carefully considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon by the learned Counsels appearing for both the parties. The basic issue arising for consideration is, what is the nature of transaction between the assessee and the distributors insofar as it relates to sale of pre-paid sim cards and RCVs? The further issue is, whether the discount on MRP given to the distributors towards sale of prepaid sim cards and RCVs is in the nature of commission attracting the provisions of section 194H of the Act. As could be seen, in assessee's own case while dealing with identical issues arising in the appeals against demand raised under section 201(1) and 201(1A) of the Act, this Bench of the Tribunal after considering the submissions made by the parties in the context of judicial precedents cited before it, including the decision of the Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. v/s DCIT (supra) as well as the decision of the Tribunal, Jaipur Bench, in case of Tata Teleservices Ltd. (supra), has decided the issue in favour of the assessee holding as under:—

"7. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon by the learned Authorised Representative and the learned Departmental Representative. As could be seen, the Assessing Officer has treated the assessee as assessee in default alleging non-deduction of tax at source under section 194H, on the reasoning that it has paid commission to the distributors for selling the pre-paid sim card / starter kit and recharge vouchers. However, on a perusal of the facts on records, it is noticed that though the assessee has fixed an MRP on the starter kits / pre-paid sim card and recharge vouchers

but that is only for the purpose of allowing margin to the distributors. The assessee does not sell the starter kit pre-paid sim card to the distributor at the MRP but at a lesser price. The distributor is permitted to sell the starter kit / pre-paid sim card to the retailer / consumers after retaining his margin but under no circumstances, the distributor can charge over and above the MRP. For example, if the MRP of the starter kit is ₹ 100, the assessee sells it to the distributor at ₹ 80 and the distributor can sell it to the retailer or customer for a price ranging from ₹ 80 to ₹ 100. However, as far as the assessee is concerned, it raises the invoice for ₹ 80 only to the distributor and also the same amount is reflected in the books of account towards the sale price. The assessee never credits the amount of ₹ 100 towards the sale price and allows discount of ₹ 20 in its books of account. Thus, as far as the assessee is concerned, sale price of the starter kit / sim card is ₹ 80. Furthermore, as per the terms and conditions, once the sim card / starter kits are sold to the distributor, the sale is complete and under no circumstances, they can be returned back to the assessee. From the aforesaid facts, it is clearly evident that as far as sale of starter kit / sim card is concerned, it is purely a purchase / sale transaction on principal-to-principal basis and there is no relationship of agency. That being the case, the provisions of section 194H are not applicable. The Hon'ble Karnataka High Court after examining in detail the aforesaid factors have decided the issue in favour of the assessee by reversing the order of the Tribunal. In view of the changed scenario, after the order of the Hon'ble Karnataka High Court as referred to above, the decision of the learned Commissioner (Appeals) cannot be sustained. In fact, ITAT, Jaipur Bench, in case of M/s. Tata Teleservices Ltd. v/s ITO, ITA no.309/Jp./2012 and others, dated 13th March 2015, following the decision of Hon'ble Karnataka High Court (supra), held that provisions of section 194H is not attracted on the discount given on sale of pre-paid starter kit and accordingly, following the decisions referred to above, we set aside the impugned order of the learned Commissioner (Appeals) and quash the demand raised by the Assessing Officer under sections 201(1) and 201(1A)."

9. Notably, in the cited case of the Hon'ble Karnataka High Court (supra), wherein, M/s. Tata Teleservices Ltd. was a party, the substantial question of law arising for consideration before the Hon'ble High Court were as under:-

"(1) Whether the word 'income' which is defined under Section 2(24) of the Income Tax Act, 1961 can be given a wider meaning by the Department so as to include within its scope also a 'trade discount' for bulk sales such as discount allowed by the assessee to its distributors (channel partners) on the bulk purchases made by them of Starter-kits (SUKS), Recharge Vouchers (RCVs) and prepaid cards?"

"(2) Whether Section 194H of the Income Tax Act, 1961 is attracted to sale of RCVs, prepaid cards and starter kits and the trade discount allowed by appellant to its distributors would amount to payment of "Commission" requiring deduction of tax at source?"

10. The Hon'ble High Court after examining the agreement between the parties and analyzing the provisions of section 194H of the Act as well as other provisions of the statute ultimately concluded that there is no relationship of principal and agent between M/s. Tata Teleservices Ltd. and the distributor. The reason being, it is a completed sale transaction and after the sale is effected the distributor cannot return the goods to the assessee. What the assessee gives to the distributor is a trade discount and not commission. The Hon'ble Karnataka High Court after considering a number of decisions including the decision of the Hon'ble Delhi High Court in Ideal Cellular Ltd. (supra) and the decision of the Hon'ble Kerala High Court in case of Vodafone Essar Cellular Ltd. v/s ACIT [2011] 332 ITR 255, ultimately concluded that the provisions of section 194H of the Act are not attracted. The Tribunal, Jaipur Bench, in case of M/s. Tata Teleservices Ltd. v/s ITO, ITA no.309/Jp./ 2012, dated 13th March 2015, following the aforesaid decision of the Hon'ble Karnataka High Court has held that provision of section 194H of the Act is not applicable to the

transaction relating to sale of prepaid sim cards and RCVs to the distributors as it is on principal-to-principal basis. The Hon'ble Rajasthan High Court in the case cited by the learned Authorised Representative while considering identical nature of dispute after examining the relevant agreement has ultimately concluded that the distributor cannot be treated as an agent of the assessee, hence, the provisions of section 194H of the Act are not applicable in respect of discount given on sale of prepaid sim cards and RCVs to the distributors. Thus, from the aforesaid decisions as referred to by us, it is clear that after considering the scope of agreement between the assessee and assessee's group companies with the distributors it has been concluded that the sale of prepaid sim cards and RCVs are completed sale transaction on principal-to-principal basis and there is no principal-agent relationship involved. Therefore, provisions of section 194H of the Act are not attracted. In view of the aforesaid, factual and legal position we are unable to accept the contention of the learned Departmental Representative. As regards the decisions relied upon by the Assessing Officer as well as the learned Departmental Representative, we must observe that the decisions of the Hon'ble Delhi High Court in case of Idea Cellular (supra) and the decision of Hon'ble Kerala High Court in case of Vodafone Essar (supra) were considered by the Hon'ble Karnataka High Court and Hon'ble Rajasthan High Court while deciding the case of M/s. Tata Teleservices Ltd. The

Hon'ble Karnataka High Court and Hon'ble Rajasthan High Court after taking note of such decisions have held that provisions of section 194H of the Act are not applicable on the discount given to the distributors on sale of prepaid sim cards and RCVs. Insofar as the decisions relied upon by the learned Departmental Representative are concerned, on a perusal of the decision of the Hon'ble Calcutta High Court in case of Hutchison Telecom East Ltd. (supra) it is evident that the contract between the telecom company and its distributors are different from the contract between the present assessee and its distributors. Therefore, upon consideration of the specific fact of that case, the Hon'ble Calcutta High Court held that there is a principal-agent relationship between the telecom company and its distributor. Similarly, on a perusal of the decision of the Tribunal, Hyderabad Bench in case of Vodafone Mobile Services Ltd. (supra), it is seen that the Bench on examining the facts on record found that the assessee had not paid sales tax on the ground that there was no transfer of properties to the distributors. Apart from the terms and conditions of the agreement, the most important and potent factor which guided the Bench to conclude that there is a principal-agent relationship between the assessee and the distributors to attract the provisions of section 194H of the Act is the binding decision of the Hon'ble Andhra Pradesh High Court in case of M/s. Vodafone Essar South Ltd. v/s ACIT, [2010] 7 taxmann.com 43. Though, the Tribunal, Hyderabad Bench,

acknowledged the fact that the Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. v/s DCIT, (supra) has taken a diametrically opposite view by holding that the sale of prepaid sim cards and RCVs by the assessee to the distributors are on principal-to-principal basis, however, the Hon'ble Bench has also expressed the view that they are bound by the decision of the Hon'ble Jurisdictional High Court. It has not been demonstrated before us by the learned Departmental Representative that the agreements on the basis of which the cases of Hutchison Telecom East Ltd. (supra) and Vodafone Mobile Services Ltd. (supra) were decided are identical to the agreement between the present assessee and its distributors. On the contrary, in the impugned assessment order the Assessing Officer has acknowledged that the business model of the assessee is different from other mobile operators, though, of-course, he has attempted to get over it by observing that the little changes in the business model do not alter the character of the business at the macro level. Thus, in view of the aforesaid distinguishing features, the decisions cited by the learned Departmental Representative, with due respect, are not applicable to the facts of the present appeals. On the contrary, the decisions relied upon by the assessee, in our considered opinion, are applicable to the facts of the assessee's case, since, they are rendered either in the case of the assessee or its group companies, wherein, the business model are more or less of identical nature. In any case of the matter,

when no decision of the Hon'ble Jurisdictional High Court is available on the disputed issue, whereas, there are decisions of Non-jurisdictional High Courts expressing contrary view, as per the settled legal principle, the view favorable to the assessee has to be adopted, as held by the Hon'ble Supreme Court in case of CIT v/s Vegetable Products Ltd., 88 ITR 192 (SC) and CIT v/s Vatika Township Pvt. Ltd., 367 ITR 466 (SC). It is more pertinent in the present case, as these favorable decisions were rendered either in assessee's own case or in the case of assessee's group concerns. In view of the aforesaid, upon considering the totality of facts and circumstances of the case and applying the principle laid down in the judicial precedents cited before us, we hold that the sale of prepaid sim cards and RCVs by the assessee to the distributors are on principal-to-principal basis, hence, outside the ambit of section 194H of the Act. Therefore, no disallowance under section 40(a)(ia) can be made. Accordingly, we uphold the impugned orders of the learned Commissioner (Appeals) in all these assessment years. The grounds raised are dismissed.

11. In the result, Revenue's appeals are dismissed.

Order pronounced in the open Court on 27.04.2018

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 27.04.2018

Copy of the order forwarded to:

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

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai