

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 238/JP/2016
निर्धारण वर्ष / Assessment Year : 2011-12

Shri Manoj Kumar Jain Prop. Mahaveer & Co. Nazar Bagh Road, Tonk	बनाम Vs.	The ITO, Ward, Tonk.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFEPJ 4688 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (C.A.)
राजस्व की ओर से / Revenue by : Shri P.P. Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 17/07/2018
उदघोषणा की तारीख / Date of Pronouncement: 19/07/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 28.12.2015 of CIT (A), Jaipur for the assessment year 2011-12. The assessee has raised the following grounds:-

"1. On the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in sustaining the disallowance of Rs. 28,22,036/- made by Ld. AO u/s 40(a)(ia) of the Income Tax Act,

1961 by alleging non-deduction of tax at source u/s 194H on the commission payment made by assessee as wholesaler of SIM cards / mobile phones etc to retailers / sub-dealers thereof without appreciating the nature of payment explained during the course of assessment proceedings. Thus, the addition of Rs. 28,22,036/- deserves to be deleted.

1.1 That, the Ld. AO has further erred in ignoring the fact that part of the commission payment received by the sub-dealers / retailers was made directly by the mobile companies to them through the assessee, and the companies issued debit/credit note to assessee in respect thereof and accordingly, the assessee passed entries in its books of account. Thus, there was no payment on part of assessee and provisions of section 194H are not applicable to mere entries of neutral effect recorded in the books of account, without there being any actual payment. Thus, the impugned addition deserves to be deleted.

1.2 That, the Ld. AO has further erred in ignoring the fact that any commission other than referred to in Ground of Appeal No. 1.1 above, was merely forwarded by assessee out of the commission received by him from the mobile companies on which TDS already stood made by the mobile companies and no further TDS could be made on the same amount. Thus, the impugned addition deserves to be deleted.

1.3 That, the Ld. CIT(A) as well as the Ld. AO has failed to consider the fact that the entire amount stood paid during the year itself and no amount remained payable as on the end of the year. Therefore, as per the settled law, provisions of section 40(a)(ia) do not apply to the present case.

2. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in sustaining the addition of Rs. 10,27,298/- made on the alleged ground of under reporting of

commission income by the said amount by completely ignoring the fact that the said amount included the amount directly paid by mobile companies to sub-dealers and was also inclusive of service tax refund and other amounts. Thus, the amounts not being the nature of commission could not be treated as income of assessee. Thus, the addition of Rs. 10,27,298/-deserves to be deleted.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the addition of Rs. 2,234/- being the difference of interest on Income Tax refund by completely ignoring that the actual interest received u/s 244A is of Rs. 7,200/- only whereas, the Ld. AO has held the same to be Rs. 9,434/- without any basis. Thus, the addition of Rs. 2,234/- deserves to be deleted.

4. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal.”

2. The assessee is an individual and wholesale dealer of M/s Sistema Shyam Teleservices Pvt. Ltd. and Idea Cellular Ltd. The assessee is engaged in purchase and sale of mobile & accessories, SIM Cards, Recharge coupons etc. During the course of assessment proceeding the AO noted that the assessee has not deducted tax at source on the commission paid to the retailer/sub-dealer to the tune of Rs. 28,00,946/-. In response the assessee submitted that the mobile service provider companies have already deducted TDS as per the

provisions of Section 194H on behalf of the assessee on commission paid to the retailer. The assessee has explained before the AO that the Commission was directly paid to the retailer/sub-dealer by the mobile companies though for account purpose the assessee is showing the payment of commission to the retailer/sub-dealer in his books of account. The AO did not accept the contention of the assessee and made disallowance U/s 40(a)(ia) for want of deduction of TDS by the assessee. The assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

3. Before us, the Id. AR of the assessee has submitted that at the top is "Telecom Company", which appoints dealers for various regions, who are given targets for expansion of customer base through sale of mobile connection through pre/post paid sim cards, for which incentive/Commission is payable to them. Since, the nature of industry is such that it is not possible for a wholesale dealer to reach individual customers in entire region on one to one basis, they are allowed to appoint retailers/sub distributors in their region and payment to them is made on the basis of total number of SIM cards/recharge coupons sold by them. It is pertinent to note here that payment to be made to retailers/sub distributors is of the sole

discretion of Telecom company and wholesale dealers like appellant are intermediaries and play no role except providing information about the quantity sold through such sub-dealer. In fact, dealer sends a list of all the retailers/sub distributors to telecom companies, who makes payment to them directly. In other words, appointment of retailers/sub distributors by dealers is merely for the sake of convenience and completely upon the terms and conditions decided by telecom companies as it is not possible for telecom companies to appoint retailers/sub distributors in interior villages and semi urban areas, on a large scale to cover and provide the telecom facility to the people living there. Thus, for all the practical purposes, these sub-dealers are agents of telecom companies and not the wholesale dealers like assessee. The telecom companies assign targets for a particular region to the wholesale dealer, and substantial part of such targets are achieved/executed through sub dealers/distributors and payments towards such services is directly made by telecom companies to these retailers and net amount only is paid to intermediate dealers like assessee. It is pertinent to note here that payment to dealers is made by companies after deduction of tax at source on the whole amount payable to it which is inclusive of

payment of retailers/sub-distributors of the region. He has relied upon the decision of the Coordinate Bench of this Tribunal in case of 13.10.2017 in case of **M/s Chocopack Enterprises vs. ITO** in ITA No. 821/JP/2016 as well as decision dated 24.05.2018 in case of **Shri Virendra Kumar Jain vs. ITO** in ITA No. 970/JP/2017. Thus, the Id. AR of the assessee has submitted that the issue is covered by the decision of the Coordinate Bench of this Tribunal.

4. On the other hand, the Id. DR has relied upon the orders of the authorities below and submitted that when the assessee is showing the entries of receipt and payment of the commission amount then it is obligatory on the assessee to deduct TDS U/s 194H of the Act failing which the provisions of Section 40(a)(ia) of the Act are applicable.

5. We have considered the rival submissions as well as relevant material on record. At the outset we note that the Coordinate Bench of this Tribunal in case of M/s Chocopack Enterprises vs. ITO (supra) has dealt with this issue of disallowance U/s 40(a)(ia) for want of deduction of TDS U/s 194H in respect of the commission paid to the retailer/sub-dealer. The said decision was subsequently followed by

the Tribunal in case of Shri Virendra Kumar Jain vs. ITO (Supra) and held in para 4 as under:-

"4. We have considered the rival submissions as well as the relevant material on record. The assessee has produced the confirmation from M/s. Vodafone Digilink Ltd. to show that the payment in question was directly paid by the said company to the retailers. The assessee has only carried out the necessary entries in his books of account for completion of record being the dealer and all the transactions are passing through the assessee. Once the payment in question was not made by the assessee and it was directly paid by the company and further the quantum and percentage of the said commission/discount was also in the full control of the company and not in the hands of the assessee, then merely because the assessee has passed the contra entry of the said amount would not bring the said transaction in the category of commission paid by the assessee so as to attract the provisions of section 194H. The Coordinate Bench of this Tribunal in the case of Chocopack Enterprises vs. ITO (supra) has considered an identical issue in para 9 as under :-

"9. I have considered the rival submissions as well as relevant material available on record. The assessee's firm engaged in the business of distributorship of Idea recharge cards. The issue involved in case of the assessee is in respect of sale of recharge coupons and not the sale of sim cards. Therefore to the extent the issue of sale of sim cards by the service provider it is held by the Hon'ble Karnatka High Court in the case of Bharati Airtel Ltd. vs. CIT (supra) that the assessee is the service provider had no obligation to deduct TDS and accordingly when the service provider has is under no obligation to deduct tax, the distributor would also not under obligation to deduct TDS. However, the said decision is only on the issue of sale Sim cards and

therefore, will not applicable in the case of the assessee. The Hon'ble Supreme Court in case of Bharat Sanchar Nigam Ltd. vs. Union of India 282 ITR 273 as also observed in paras 85 and 86 which are reproduced as under:-

"85. In that case Escotal was admittedly engaged in selling cellular telephone instruments, SIM cards and other accessories and was also paying Central sales tax and sales tax under the Kerala General Sales Tax Act, 1963, as applicable. The question was one of the valuation of these goods. The State sales tax authorities had sought to include the activation charges in the cost of the SIM card. It is contended by Escotal that the activation was part of the service on which service tax was being paid and could not be included within the purview of the sale. The Kerala High Court also dealt with the case of BPL, a service provider. According to BPL, it did not sell cellular telephones. As far as SIM cards were concerned, it was submitted that they had no sale value. A SIM card merely represented a means of the access and identified the subscribers. This was part of the service of a telephone connection. The court rejected this submission finding that the SIM card was "goods" within the definition of the word in the State sales tax act.

86. It is not possible for this court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles : If the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales

tax authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However, we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel and Restaurant Association of India v. Union of India [1989] 3 SCC 634— "subjects which in one aspect and for one purpose fall within the power of a particular Legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping ; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects". No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction."

Therefore, as the issue of sale of sim cards is concerned the Hon'ble Supreme Court has clearly held that the sale of sim cards merely incidental to the service being provided and only facilitates the identification of subscribers their credit and other details it would not be assessable to sale tax. As regards the sale of recharge coupons it is clearly a transaction of sale of goods as held by the Hon'ble Supreme Court that the telephone is nothing but a service. However, since the service is provided by the company which is the service provider and assessee is only a

distributor and intermediatory, therefore, the tax liability for paying the commission, if any, is attracted u/s 194H only against the person responsible for paying the commission. In case in hand the assessee is not paying any commission to the retailers but this commission or so called discount is allowed and paid by the service provider. The assessee is an intermediatory and only recording this transaction in the books of account for the purpose of completeness. Hence, when the assessee is neither competent nor responsible nor actually paying any commission to the retailer on sale of recharge coupons to the retailers then the obligation for deduct tax u/s 194 H is attracted only against the service provider and not against the assessee who is only a distributor and receiving its share of the commission/ margins provided by the service provider. The determination of sale price of recharge coupons is in the sole domain of the service provider and the assessee is no role in determining the retail price at which the retailer is selling the recharge coupons to the customer or end user of the service. Therefore, in the facts and circumstances of the case when the assessee's role is only an intermediatory and passing the services from one hand to the other hand then merely because the assessee is showing an amount of commission/discount in the books of account for completeness of accounts and transactions will not impute any liability of deducting tax at source. The decisions relied upon by the Id. DR are also on the point where the service provider is allowing or paying the commission to the distributors or retailers and sale of sim cards as well as recharge coupons, therefore, even for the sake of arguments if it is accepted that the benefit allowed by the service provider to the distributors and retailers is commission it is service provider who is responsible for paying the said commission and therefore, the provisions of section 194H are not attracted against the distributor. Accordingly, when the assessee is not directly and indirectly in deciding the quantum of alleged commission/discount as well as determining the retail price at which the recharge coupons is sold to the customer then

the provisions of section 194H cannot be applied on the assessee. Consequently disallowance made by the AO u/s 40 (a)(ia) is deleted."

Thus the Coordinate Bench has followed the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. vs. Union of India, 282 ITR 273 (SC). It is pertinent to note that the issue in case of Bharat Sanchar Nigam Ltd. vs. UOI (supra) as well as in the cases which are relied upon by the Id. CIT (A) was regarding the nature of the payment made by the operating companies whether it was commission or discount allowed by the Cellular/Mobile operators. Therefore, even otherwise the decisions on those cases are not directly applicable in the case of the assessee where the assessee is a distributor and an intermediary between the Cellular/Mobile operator and the retailers. Following the decision of the Coordinate Bench of this Tribunal, we set aside the orders of the authorities below qua this issue and delete the disallowance made by the AO under section 40(a)(ia).

Thus, it is clear that the Tribunal has been taking a consistent view that when the assessee is only an intermediary between the cellular/mobile operator and retailer and the payment of commission was directly made by the cellular/mobile operator companies to the retailer/sub-dealer after deduction of TDS then, the assessee is not required to deduct any TDS on the said amount directly paid by the company and only the accounting entries were carried out by the assessee. Therefore, following the decisions of the Coordinate Bench

of this Tribunal we delete the disallowance made by the AO u/s 40(a)(ia) of the Act.

6. Ground No. 2 is regarding disallowance made on account of under reporting of commission by the assessee. The assessee has credited commission income of Rs. 45,46,072/-. The AO called the information from the mobile operating companies and as per the details provided by the companies the AO found the total commission received by the assessee during the year was Rs. 55,73,310/-. The AO accordingly asked the assessee to furnish the details of commission and copies of TDS certificate. The assessee filed a revised return showing the commission receipt at Rs. 52,25,514/-, however, there was no consequential change in the total income declared by the assessee as some of the entries were having neutral effect. Thus the assessee explained before the AO that the assessee has shown the net commission income without including the contra entries of receipt and payment to the dealers/sub-retailer. The said payment of commission was made by the companies directly to the retailer/sub dealer however, the AO made an addition of the differential amount of commission income reported by the assessee

as against the amount shown by the company. The Id. CIT(A) has confirmed the addition made by the AO.

7. Before us, the Id. AR of the assessee has submitted that the difference amount of commission credited in the profit and loss account and the amount which is intimated by the company is due to the service tax reimbursement of Rs. 3,73,953/- and direct payment of commission by the company to the retailer of Rs. 6,60,876/-. Therefore, if these two amounts are taken into consideration then the difference is reconciled, rather the assessee has offered excess commission of Rs. 7,531/-. The Id. AR has thus submitted these details have not considered by the authorities below and therefore, the same may be remitted to the record of the AO for verification of the reconciliation of the differences.

8. On the other hand, the Id. DR has relied upon the orders of the authorities below and submitted that despite sufficient opportunities given by the AO as well as Id. CIT(A) the assessee has not reconciled and explained the difference of more than Rs. 10 lacs in the commission credited in the profit and loss account and actual amount

received by the assessee as per the information received from the mobile operating companies.

9. We have considered the rival submissions as well as relevant material on record. Though there is a difference of more than Rs. 10 lacs in the commission receipt credited in the profit and loss account and commission payment shown by the mobile/cellular operating companies. As pointed out by the AO the discrepancy in the amount could not be reconciled properly by the assessee, therefore, the addition was made by the AO. Now we find that the assessee has explained the difference in the amount due to service tax reimbursement and commission directly paid to the retailer by the companies. The details of the reconciliation are as under:-

(1) Commission credited in profit & loss A/c *Rs. 45,46,072/-*

(2) Service Tax reimbursement *Rs. 3,73,953/-*

(3) Commission directly paid to retailers

By companies for which intimation

Received by us in June, 2011 *Rs. 6,60,876/-*

Total *Rs. 55,80,901/-*

The amount of commission as shown in show notice *Rs. 55,73,370/-*

Excess commission shown by us *Rs. 7,531/-*

Since, these details and relevant recorded have not been examined by the AO, therefore, we remit this issue to the record of the Assessing officer for verification and considering the reconciliation furnished by the assessee. The AO then decide the issue after giving appropriate opportunity of hearing to the assessee.

10. Ground No. 3 is regarding of addition on account of interest received U/s 244A of the Act. At the time hearing, the learned counsel for assessee stated at bar that the assessee does not press ground no. 3 and the same may be dismissed as not pressed. The Id. DR has raised no objections if ground No. 3 of the assessee's appeal is dismissed as not pressed. Accordingly the ground No. 3 of the assessee's appeal is dismissed being not pressed.

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

Order pronounced in the open court on 19/07/2018.

Sd/-

(भागचंद)

(Bhagchand)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 19/07/2018.

*Santosh.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

Sd/-

(विजय पाल राव)

(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

1. अपीलार्थी / The Appellant- Shri Manoj Kumar Jain, Tonk.
2. प्रत्यर्थी / The Respondent- ITO, Ward, Tonk.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 238/JP/2016}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar