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

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.1298/Chd/2016
(Assessment Year : 2009-10)

Sh.Anil Dhawan, S/o Sh.A.K.Dhawan, Moti Bazar, Mandi, Distt. Mandi (H.P.)	Vs.	The D.C.I.T., Circle-Mandi (H.P.)
PAN: AEJPD7188M (Appellant)		(Respondent)

Appellant by : S/Shri Ashwani Kumar, CA
& Aditya Kumar, CA
Respondent by : Smt.Chanderkanta, Addl.CIT, DR
Date of hearing :28.03.2018 / 17.07.2018
Date of Pronouncement : 17/07/2018

ORDER

PER ANNAPURNA GUPTA, A.M. :

This appeal has been preferred by the assessee against the order of Ld. Commissioner of Income Tax (Appeals), Palampur dated 2.9.2016 relating to assessment year 2009-10.

Ground No. 1 raised by the assessee reads as under:

1. *That order passed u/s 250(6) of the Income Tax Act, 1961 by the Ld. Commissioner of Income Tax (Appeals),Palampur is against law and facts on the file in as much as she was not justified to arbitrarilyuphold the disallowance of Rs. 11,46,311/- by resort to provisions of Sec. 194H r.w.s 40(a)(ia) of the Income Tax Act, 1961 on account of payments made to dealers.*

2. The sole issue in the present ground pertains to disallowance of expenses made u/s 40(a)(ia) of the Income Tax Act, 1961 (in short 'the Act') for non-deduction of tax at source on the same.

3. Brief facts relevant to the case are that the Assessing Officer had noted that the assessee was an authorized dealer of BSNL and was engaged in the business of sale and purchase of sim cards, recharge coupons, mobile phones and accessories etc. During the year, the Assessing Officer noted that the assessee had debited Rs.44,63,094/- in the trading-cum-Profit & Loss Account under the head 'commission to parties' which fell within the ambit of the provisions of section 194H of the Act. On perusal of the books of accounts it was noticed by the Assessing Officer that the assessee had paid commission amounting to Rs.11,46,311/- to 54 dealers, where the amount of commission paid was at a time more than Rs.2500/-, while in the remaining cases, the commission paid was less than Rs.2500/-. The Assessing Officer accordingly, held that the assessee, by not deducting tax at source on the commission paid amounting to Rs.11,46,311/-, had violated the provisions of section 194H of the Act and, therefore, the said expenses were liable to be disallowed as per the provisions of section 40(a)(ia) of the Act. Reliance was placed by the Assessing Officer on the decision of the Hon'ble High Court of Kerala in the case of Vodafone Essar Cellular Ltd. Vs. ACIT (2010) 194 Taxman 518 (Ker.) and I.T.A.T. Mumbai in the case of Mahesh Enterprises Vs. ITO, Mumbai (2010) 42 SOT 125 (Mum). Accordingly, disallowance of expenses to the extent of Rs.11,46,311/- claimed under the head 'commission' was made by the Assessing Officer.

4. Before the Ld.CIT(Appeals), the assessee contended that the payments made were not in the nature of commission but that it was only passing on part of the discount received by it from BSNL to its retailers that too by reducing the value of products sold to them and not in cash. The assessee also submitted that the decision in the case of Vodafone Essar Cellular Ltd. (supra) was not applicable to the facts of the present case since in that case the assessee was a telecom service provider, which the assessee was not in the present case. It was also contended that the assessee was not accountable for any service contract with the customers and the transaction with its customers was on principal to principal basis and, therefore, the incentive given to them could not be termed to be in the nature of commission so as to attract TDS u/s 194H of the Act. The Ld.CIT(Appeals) rejected assessee's contention holding that the agreement between BSNL and the assessee clearly showed that the assessee was providing various services to customers on behalf of the BSNL and relationship between BSNL and the assessee was of principal and agent and the services provided by the assessee were covered within the definition of commission. The Ld.CIT(Appeals) further held that for the said services to BSNL the assessee had appointed agents and retailers to assist it in execution of the contract with BSNL which clearly attracted the provisions of section 194H of the Act to the incentive given to the retailers of the assessee. The disallowance of expenses of Rs.11,46,311/- on account of

non-deduction of tax on the same u/s 194 of the Act was, therefore, upheld by the CIT(A). The relevant findings of the Ld.CIT(Appeals) at pages 7 and 8 of its order are as under:

> *"The appellant has contended that the appellant used to get 5% discount/ commission from the BSNL which used to deduct tax thereon at source and subsequently the appellant had to pass on 4% of the above said discount/ commission which was not paid in cash but was to be adjusted by reducing the value of the product i.e. upfront basis. The appellant has stated that the judgment of Kerala High Court in the case of Vodafone Essar Cellular Ld. Vs SCIT (2010 194 Taxman 518 (Ker.)] is not applicable since appellant is not providing any cellular service, BSNL is the principal nor the appellant and appellant is not accountable for any service contract with customers.*
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> *The contract between the appellant and BSNL is for marketing and selling telecom services. Clause 5 gives the details of scope of work highlights the scope of marketing and distribution services. The Franchisee shall provide BSNL services to walk-in- {customers, it shall also establish through its sales force, direct contact with prospective customers and register as many new BSNL customers as possible. The appellant will be responsible for the verification of credentials of customers. These telecom services come within the purview of services provided by the distributors As per clause 8 of the agreement Franchisee shall exclusively engaged himself/ itself in marketing and selling only BSNL's Telecom Services under this agreement and shall not involve itself/ himself in any manner either directly or indirectly in any business or activity other than of the BSNL The appellant is responsible for the verification of the documents of the new customers as is clearly evident from clause No. 9 of the agreement:*
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> > *"The Franchisee will be fully responsible for the Verification of credentials of new customers-Both as per documents submitted as well as per physical verifications. Franchisee will be responsible for the verifications done by all the channels i.e. sub-franchisees and retailers working under them as per the instructions as laid down in Ir. No. MOB-27/Security-2006 dated 06.02.2007 and any further instructions issued on the subject from time to time shall be scrupulously followed by the franchisees/ point of sale in all channels'.*
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> *The agreement between BSNL and the appellant clearly shows that appellant is providing telecom services of verification of credentials of the customers. BSNL services to walk-in-customer, distribute all type of authorized telecom services. These services clearly shows that the relationship between BSNL and the appellant is of principal and agent and the*

provisions of services are covered within the definition of commission, In order to provide the services appellant has appointed agents and retailers who are assisting the appellant in execution of the contract with BSNL As per section 194H, commission or brokerage includes any payment received directly or indirectly by the person acting on behalf of another person for services rendered or for any services in the course of buying and selling of goods. Therefore, it is clearly evident that provisions of section 194H r.w.s. 40(a)(ia) the disallowance of expenses of Rs.11,46,311/- made by the Ld.A.O. is upheld."

5. Aggrieved by the same, the assessee has come up in appeal before us.

6. Before us, the Ld. counsel for assessee reiterated the contention made before the Ld.CIT(Appeals) emphasizing that the relationship between the assessee and the retailers was on principal to principal basis which was evident from the fact that there was no oral or written agreement between the assessee and its retailers exhibiting any control of the assessee over the goods sold to the retailers and further by the fact that the transaction was undertaken in cash entirely and the bills clearly showed the discount given to the retailers and not commission to them. The Ld. counsel for assessee stated that the facts of its case were identical to that decided by the I.T.A.T. in a number of cases wherein after appreciating the aforementioned facts it was held by the I.T.A.T. that the relationship between the assessee and its retailers was of principal to principal and the incentive given to them, therefore, did not tantamount to commission for the purpose of tax deduction at source u/s 194H of the Act. The case laws relied upon by the assessee in this regard are as under:

1) ITO Vs. M/s Tarun Sales in ITA No.967/DEL/2014, dated 9.12.2016

2) DCIT Vs. Shri Shrawan Kumar Aggarwal, Prop. M/s Usha Agencies in ITA No.1401/JP/2010, dated 21.10.2011

3) M/s Pareek Electrical Vs. ACIT in ITA No.354/CTK/2012, dated 28.9.2012

4) M/s Gurpreet Singh Sethi, Prop. M/s Electronics Vs. ITO, ITA No.608 & 609(Asr)/2013, dated 15.4.2014

7. The Ld. DR, on the other hand, relied upon the order of the CIT(Appeals) stating that the agreement of the assessee with the telecom services provider i.e. BSNL clearly reflected the existence of principal and agent relationship between the two and for rendering the services under the said agreement the assessee had taken the services of the retailers and, therefore, incentive given to them was in the nature of commission attracting the TDS u/s 194H of the Act.

8. We have heard the contentions of both the parties. The issue before us is whether the incentive given by the assessee to its retailers/customers on the sale of sim cards, recharge coupons, etc tantamounted to commission amenable to tax deduction at source u/s 194H of the Act, non-deduction of which would result in attracting the provisions of section 40(a)(ia) of the Act resulting in disallowance of the said expenses incurred by the assessee.

9. We have gone through various case laws cited by the Ld. counsel for assessee before us. We find that in all the said cases the Tribunal had on the facts of each case given

a finding that the relationship between the assessee and its retailers ,on account of the transaction of sale of sim cards and recharge coupons, was on principal to principal basis. For the said reason, the incentives paid to them, therefore, were held to be in the nature of discount and not commission.

10. In the case of ITO Vs. Tarun Sales in ITA No.967/Del/2014 dated 9.12.2016 (supra), the assessee was an authorized dealer of BSNL. The ITAT in the said case found that as per the agreement between BSNL and the assessee no dealer or sub-dealer was appointed either by BSNL or by the assessee for the purpose of marketing the products and/ or services of BSNL. The ITAT further noted that the entire sales made by the assessee to the retailers was in cash at discount and no payment of incentive by way of commission was made. The ITAT, therefore, held that the incentive paid was not in the nature of commission but was in fact discount which was given to the retailers/shopkeepers. The relevant findings of the I.T.A.T. are as under:

> *" We have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issued having similar facts had already been adjudicated in assessee's own case for the preceding year by the ITAT Delhi Bench 'H', New Delhi in ITA No. 3523/Del/2011 wherein relevant findings have been given in paras 15 to 25 of the order dated 22.02.2013 which read as under:*
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> > *"15. We have heard the parties and have perused the material on record. The assessee paid discount of Rs.66,57,565/- and activation scheme of Rs.6,25,600/. Both these amounts, total amounting to Rs. 77,31,395/- were claimed in the Profit & Loss Account. The stand of the*

assessee has been that discount/activation charges were not paid in cash to any retailer. Rather, they were in the nature of trade discount given at the time of sale. The sales were recorded at the maximum retail price and the discount regarded as discount was the retailer's margin. There was no agreement in existence between the assessee and the customers. The assessee, during the year, was an authorized franchisee of Bharat Sanchar Nigal Ltd. (i.e. BSNL) vide agreement dated 12.01.2007 (copy at pages 17-36 of the assessee 's paper book-"APB for short)". Under the agreement, the assessee was to provide services to walk-in customers. It was to distribute all types of authorized telecom services. No dealer or sub-dealer was appointed. The discount/commission was allowed as per the agreement. This position remains undisputed. The retailers simply bought SIM cards/recharge coupons from the assessee at a discounted price. These were sold in the market with no specific obligation towards the distributor.

16. The Assessing Officer, however, concluded that the assessee was having the same relationship with the dealers/retailers, as the one of BSNL with the dealers/retailers; that it was a case of collection of money from the customers for various services to be provided/already provided by BSNL and, as such, it was in the nature of payment to an agent for collection of money on behalf of BSNL; that the assessee had shown the expense as 'commission' in its Profit & Loss Account; that therefore, even though the payments were covered u/s 194H of the IT Act, no TDS had been deducted thereon. It was on this basis that the Assessing Officer made the disallowance. The Ld.CIT(A) deleted the same.

17. The question is as to whether the Ld.CIT(A) correctly deleted the disallowance, holding that there was no principal to agent relationship between assessee and the customers. Now, undoubtedly, the 'commission' in question was, in fact, 'Discount'. It was only that there being no head of 'discount' in ITR-4, the depiction was of 'commission' in column No.23 of the Profit & Loss Account. Thus, however, by itself does not lead to the conclusion that it was 'commission' rather than 'discount'. As per the agreement between the BSNL and the assessee:-

"The Franchisee shall provide BSNL services to walk-in-customers. It shall also establish, through its sale-force direct contact with prospective customers and register as many new BSNL customers as possible subject to a minimum number fixed by BSNL. Franchisee shall also distribute all types of authorized telecom services for marketing to its Franchisees and cash card (prepaid) to its retailers.

No dealer/sub-dealer was either appointed by BSNL on the assessee. The assessee is allowed commission/discount as per Annexure-B and section-III of the said agreement.

18. since no dealer or sub-dealer was appointed either by Bharat Sanchar Nigam Ltd. (BSNL) or by the assessee, for the purpose of marketing the products and/or service of the Bharat Sanchar Nigam Ltd., the entire sales were to customers either directly or through shopkeepers, who rendered services to the customers. Moreover, the entire sales were in cash. No commission was paid by the assessee to the customers. Then, Section 194H of the Act does not cover such discounts as under consideration herein and that being so, obviously the provisions of Section 40(a)(ia) of the Act was wrongly applied. Accounting-wise, the face value of the recharge coupon was debited to the purchase account, whereas the commission given by BSNL was credited to the commission account. At the time of sale, on the other hand, the face value of the recharge coupon was credited to the sales account and the cash receipts was debited to the cash account. The discount offered was debited to the discount account. When purchasiung the SIM cards and recharge coupons from BSNL, the assessee had to deposit the money in advance. Undisputed, it is to customers directly and to petty shopkeepers that the SIM cards and recharge coupons were sold in cash. The customers and shopkeepers were offered discount on the face value of the SIM cards. Apropos the recharge coupons, on the other hand,, a small margin was kept by the assessee out of the commission/discount offered by BSNL. Then activation charges were given by BSNL to the assessee on new connections and a major portion thereof was given to the customers as discount.

19. As discussed, it was on the basis of the mistaken presumption of existence of relationship of principal and agent, that the discount offered by the assessee to its customers was considered by the Assessing Officer as commission. This, however, is not so, to reiterate it was only discount offered to the customers on a principal to principal basis on which no TDS was either required to be made or was actually made.

20. In 'ITL Tours & Travels' (supra), where the assessee was taking airlines tickets, the discount given to intermediaries was held not to be commission, since it was deal on a principal to principal basis and there was no element of agency involved. No TDS was held to be done u/s 194H of the Act.

21. In 'Surndra Buildtech (supra), the assessee was in the real estate business. It received commission from builders for booking flats. Portion of such commission was paid to buyers of flats. It was held that this was like giving a discount to buyers and was not commission and so section 194H of the Act did not apply.

22. In 'Ahmedabad Stamp Vendors Association' (supra) it was held by the Hon'ble Gujarat High Court that where licensed stamp vendors take delivery of stamp papers on

payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities, i.e, buying from the Government and selling to the customers, can be termed as service in course of buying and selling of goods; and that so the discount made available to the license stamp vendors was outside the expression 'commission' or brokerage u/s 194H of the It Act and as such, no TDS is required to be made from the discount.

23. The SLP filed by the Department was dismissed by the Hon'ble Supreme Court vide Order dated 06.09.2012 (copy at page 48 of the case laws paper book filed by the assessee), holding that the discount given to the stamp vendors was for purchasing the stamps in bulk quantity and the discount was in the nature of cash discount, due to which the transaction was a sale and consequently, Section 194H of the IT Act had no application.

24. No decision to the contrary has been brought to our notice.

25. In view of the above, finding no merit therein, the grievance sought to be raised by the Department is rejected."

8. Since the facts involved in the year under consideration are identical to the facts involved in the preceding year of the assessee's case. So, respectfully following the aforesaid referred to order dated 22.02.2013 in ITA No. 3523/Del/2011 for the assessment year 2008-09 in assessee's own case, we do not see any merit in this appeal of the department."

11. In the case of Shri Shrawan Kumar Aggarwal, Prop. M/s Usha Agencies (supra), the assessee was an authorized dealer of BSNL, selling SIM cards, recharge coupons, etc. of BSNL. The ITAT found that as per the agreement between the assessee and BSNL, the assessee was a franchisee of BSNL doing marketing and distribution of BSNL Telecom Service and was not acting as an agent of BSNL. That in doing its business of selling the SIM Cards and recharge coupons by doing marketing and distribution ,it had engaged certain persons in the market and had parted with its share of incentive earned from BSNL. The ITAT held this engagement to be not as agent as there was no independent

contract with the retailers and thus no supervision or control of the assessee over the retailers for the sale of recharge coupons to them. It was also noted that most of the assessee's sale to retailers was in cash and thereafter there was hardly any obligation of the retailers towards the assessee. Further it was found that the sales made to retailers was in cash and discount had been given to them on the Bill raised by reducing the price and that no commission had been paid to the retailers. Therefore, on these facts, the ITAT held that the relationship between the assessee and its retailers was to be treated as that of principal to principal and not that of principal and agent and the provisions of section 194H, therefore, were not applicable in respect of the sale of BSNL products by the assessee to its retailers. The relevant findings of the I.T.A.T. at para 22.1 of the order is as under:

> *21. We have considered the rival submissions and have perused the orders of the authorities below. Written submissions filed by Id. Counsel of the assessee are similar to the written submissions filed before Id. CIT (A). We have already reproduced the written submissions filed before Id. CIT (A) somewhere above in this order, therefore, there is no need to mention the arguments of Id. A/R in detail here once again. In fact, the assessee is an independent businessman and not an agent of BSNL but he has purchased SIM Card and Recharge Coupon from BSNL against full payment of price of the same to BSNL. In this way it can not be termed that the assessee is an Agent of BSNL. However, there is an agency agreement with BSNL and in this agreement it has been referred to as Franchisee, it means that assessee is not an Agent of BSNL. By purchasing SIM Card and Recharge Coupon, the assessee is doing service on behalf of the BSNL as Franchisee. As Franchisee the assessee is doing marketing and distribution of BSNL Telecom Service and as per agreement the BSNL deducting tax at source @ 5.61% and TDS certificate has been issued in Form No. 16A. There is no dispute in these facts. Now the assessee is selling these SIM Card and Recharge Coupons by doing marketing and*

distribution of BSNL Telecom Services. The assessee is doing this business by engaging some persons in the market and have parted with some share of commission earned by him from BSNL. Parting of the commission, the AO has treated that assessee has engaged his Agents and, therefore, is liable to deduct tax in view of provisions of section 194H. In fact, the assessee has not engaged any distributor by appointing agents but has used the services of other persons in the market to do the marketing and distribution work in a large scale on behalf of BSNL and this engagements cannot be termed as his Agent or his broker as there is no independent agreement either with the sub brokers or sub agents who are selling SIM Card or Recharge Coupons on behalf of the assessee. The assessee was making sales of Cash Cards and SIM Cards to retailers at a price which was net of discount. No where in the documents viz. the sale bills etc. issued by the assessee to the retailers the word commission has been mentioned. No commission was paid by the assessee to the retailers. Whatever the price was paid by the assessee to BSNL, the BSNL gave discount/commission to the assessee and assessee has reduced the same in the purchase price and has sold to the retailers on a discounted figure. In this way the assessee has parted some discount availed by it to the retailers. Being Franchisee, a person cannot be termed as Agent as held in the case of Idea Cellular Ltd. 121 TTJ 352 (Del.) wherein it is held that under section 194H discount to market associates on SIM cards and recharge coupons - discount allowed on transactions resulting in outright purchases cannot be treated as brokerages or commission. There should be in existence the relationship of principal and agent in order to bring the discount in the ambit of commission or brokerage. Similar view has been taken in case of Idea Cellular Ltd. by ITAT Hyderabad Bench also.

22.1. In case of Ahmedabad Stamp Vendors Association vs. Union of India, 176 CTR 193 (Guj.), again similar view has been taken by Hon'ble Gujarat High Court. It is also a matter of fact that the BSNL itself has changed the nomenclature of this payment from word 'Commission' to 'discount' with effect from 31.5.2008 and copy of this clarification was issued. From this fact, it is amply proved that assessee is not an agent or BSNL but a Franchisee. Thereafter, the assessee after making full payment of SIM Card/Research Coupons had sold the same to the retailers and on the basis of bill issued by assessee the full payment has been charged. There is no word of any discount or commission in the bill issued by the assessee. Therefore, this is not the case of the department that assessee has deputed any sub agents and charging commission from them. It is also seen that the assessee has purchased SIM Card and Discount Coupons and they have become the property of the assessee as assessee is liable for damage/loss of SIM Card and Discount coupons. Therefore, also it cannot be said that assessee was an agent and assessee has engaged further sub agents. All these facts have been considered by Id. CIT (A) and thereafter he has given his

findings which are recorded in para 6.3 at pages 32 to 33, are also reproduced here as under :-

> *" 6.3. I have carefully considered the facts of the case and submissions of Ld. AR. On perusal of the relevant records, find that the nature of the relationship between the BSNL and the appellant assessee (franchisee of BSNL) was different, as compared to the nature of the relationship between the assessee and his retailers In this regard, it is observed that the appellant was appointed a franchisee of the BSNL, as per the detailed terms and conditions of franchiseeship contained in the agreement dated 21/03/2005, entered into between the BSNL and the appellant, which was subsequently modified, vide another agreement dated 13/11/2006. Therefore, the appellant was obliged to fulfill and conditions of that agreement and, in a way, was under the supervision and control of BSNL, while performing his duties as the franchisee of BSNL, in respect of the sale of recharge coupons etc. of BSNL by him. Hence, the relationship between the BSNL and the appellant is to be treated as that of a Principal and Agent and thus, the commission/discount paid by the BSNL to the appellant fell in the ambit of the provisions of S.194-H of the I.T. Act. In this regard, it is noticed that the BSNL had also treated the aforesaid commission/discount given to the appellant s commission and had also made TDS thereon u/s 194-H of the I.T. Act. However, on going through the relevant material placed on record, I find that the relationship between the appellant and his numerous retailers is not the same, as is between the BSNL and the appellant. In this regard, it is observed that there is no agreement of any kind between the appellant and his retailers and hence, there is no supervision or control of the appellant over the retailers, after the sale of the recharge coupons etc. by the appellant to the retailers. Further, it is also observed that most of the appellant's sales of recharge coupons etc. to the retailers are in cash and, thereafter, there is hardly any obligation of the retailers towards the appellant. Therefore, on these facts, the relationship between the appellant and his retailers is to be treated as that of Principal to Principal and not that of a Principal and Agent. Hence, it is held that though the appellant sold the BSNL products to the retailers at a price, which was lower than the MRP (after passing on a of his commission as a discount to the retailers), yet as the relationship between the appellant and his retailers was that of Principal to Principal, the provisions of S. 194-H of the I.T. Act were not applicable, in respect of the aforesaid sale of the BSNL products by the appellant to his retailers. Thus, it is held that as the appellant was not liable to make TDS, in respect of the sale discount given by him to his retailers, the impugned disallowance of Rs.91,83,554/- made by the Ld. AO u/s 40(a)(ia) of the I.T. Act is not sustainable*

> *Accordingly, the AO is directed to delete the impugned addition and consequently, this ground of appeal is treated as allowed."*

12. In the case of Gurpreet Singh Sethi (supra) the assessee was also an authorized dealer of BSNL selling its products. The I.T.A.T. in the said case, on perusal of the agreement between the assessee and BSNL found that the recharge coupons purchased by the assessee from BSNL became property of the assessee and not of BSNL and on sale of such recharge coupons to sub-distributors they became the property of the sub0distributors who were free to sell them at a price deemed fit though the maximum price was fixed by BSNL. The I.T.A.T. on consideration of these facts held the sale of recharge coupons to sub-distributors different on principal to principal basis finding that there was no written agreement with the sub-distributors and the bills shows discount to the distributors and not commission. In the said case, the I.T.A.T. held that the relationship of the assessee with the BSNL was different from that of the assessee with its sub-franchisee because the assessee had no control over the sub-franchisee and, therefore, was on principal to principal basis. The I.T.A.T., therefore, held that the incentive given to the sub-franchise was, therefore, no in the nature of commission and, therefore, no TDS was required to be deducted u/s 194H of the Act. The relevant findings of the I.T.A.T. at para 10 of its order are as under:

> *10. We have heard the rival contentions and perused the facts of the case. As per Revenue, the PR is engaged in providing telecommunication services and is a service provider and*

after providing such services, the margin so earned is termed as commission liable under the provisions of section 194H to deduct tax at source on the payment made to sub franchisee and since PR assessee has failed to do so, the same is liable u/s 201(1) alongwith interest u/s 201(1A) of the Act. On perusal of record and arguments of both the authorities below, we are of the view that the assessee has declared himself as franchisee of M/s. Bharat Sanchar Nigam Limited (BSNL) and is in the business of purchasing SIM cards and Recharge coupons from BSNL against payment and resells them to Sub Contractors/Sub Distributors/Sub-Franchisee. The assessee is a franchisee of BSNL, who claims himself as a trader and not as service provider or cellular operator. The role of Franchisee is limited to booking of new connections i.e. Subscriber Identification Module cards and sale of Recharge. Booking of new connections i.e. SIM cards. Contributes to less than5% of total business. Accordingly, it was explained that the assessee's role is limited to booking of new connections only and commission after deducting TDS is given on new connections by BSNL and similarly, TDS is deducted and deposited on commission disbursed to Sub-Franchisee on account of new connections booked by them.. On the other hand, sale of Recharge contributes more than 95% of business and only dispute is with regard to Recharge of coupons and Top-ups. The Ld. counsel for the assessee invited our attention to page 68 & 89 of the agreement dated 22.12.2004 and August, 2009 in which the Recharge coupons purchased by the assessee becomes the property of the assessee and when the same are lost or destroyed or not sold the responsibility rests with the assessee. The BSNL does not recoup the loss to the assessee, which is clearly mentioned in clause 22 of the agreement dated 22.12.2004. The assessee has sold the Recharge coupons to the Sub-Distributors so that they also earn some margin of profit and such Recharge coupons once sold become the property of the said Sub-Distributor and such Sub-Distributor is free to sell the same at a price as he deems fit though the maximum price has been fixed by the BSNL with regard to the market condition. The Ld. counsel for the assessee also invited our attention at page 68 of the agreement dated 22.12.2004 and at page 89 of the agreement dated August, 2008 where in clause 24.1, it is clearly stated that there shall not be any partnership, joint venture, employment or relationship of principal and agent between parties. As regards the decisions relied upon by the AO in the cases of Bharti Cellular Ltd; BPL Mobile Cellular Ltd; Ideal Cellular Ltd; and Vodafone Essar Cellular Ltd; the Id. counsel for the assessee distinguished the same by submitting that all these entities are themselves Cellular Operators and service providers and in terms of the agreement between these service providers and franchisees, the Hon'ble Courts held that the margin provided is in the nature of Commission. These cases are not applicable in the present case since the assessee is not a service provider, as he purchased recharge coupons from the service provider i.e. BSNL and not provides any service to the subscribers. The assessee simply sells

recharges to the sub-distributors, which is on principal to principal basis and there is no relationship off principal and agent. Further, there is no written agreement with the sub-distributors. The sale bills are issued to the sub-distributors and copies were produced before the authorities below. The books of account are audited and transactions has been shown as sale and purchase. None of the conditions referred to in section 194H to Explanation (i) is fulfilled. But equal margin earned/profit earned as commission i.e. the sub-distributor is not receiving the payment on behalf of the assessee but on his own and he is not accountable to the assessee. Once the assessee has sold the SIM cards or Recharge coupons, the assessee has no control or liability towards the sub-distributors. A copy of the bills filed before the authorities below issued by the BSNL show that BSNL has allowed the discount in some cases and allowed commission in other cases. The relationship with BSNL is different from the relationships of sub-franchisee and is on principal to principal basis because the assessee has no control over the sub franchisees whatsoever. The sub franchisees are from to sell SIM cards and Top Ups to any customer at any price and once these are sold the assessee loses its control over the same. The authorities below have not appreciated that sub-franchisees themselves are showing purchase and sale, which has not been questioned or objected to by the Department in their cases, whether the assessee has paid the commission, the assessee has duly deducted tax at source, which is not disputed. The reliance has been placed by the Id. counsel for the assessee on the cases mentioned hereinabove. On perusal of the same and the submissions of the Ld. counsel of the assessee and also cases relied upon by the AO and the Ld. CIT(A), having been distinguished and the department having accepted purchase and sale during the preceding year 2007-08 and looking to the doctrine of consistency and in view of the judgment of the Hon'ble Supreme Court in the case of Berger Paints India Ltd. vs. CIT reported in 266 ITR 99, we find that the assessee is a Trader' and relationship is that of the principal to principal and the authorities below are not justified to hold relationship of principal and that of an agent. Accordingly, the assessee is not liable for the provisions of Section 201(1) & 201(1 A) of the Act. Thus, the order of the Ld. CIT(A) and that of the A.O. is reversed and all the grounds of the assessee are allowed.

13. In all the above cases, we find that the I.T.A.T. on examination of the facts of the case found that when recharge coupons and pre-paid SIM cards were sold to the retailers/shopkeepers by the assessee, the assessee lost complete control over the goods and the retailers had full freedom to sell the goods at the price they deemed fit within

the maximum limits set by the BSNL. It was found that the there was no oral or written agreement, stipulating that the assessee retained the control over the goods sold to the retailers/shopkeepers. It was also found that the entire sale was made in cash and the incentive given was shown as discount in the bill issued and no payment of any commission was made. On consideration of these facts, the I.T.A.T. held that the relationship between the assessee and the retailers was on principal to principal basis and the incentive, therefore, given to the retailers was held not to be in the nature of commission attracting TDS u/s 194H of the Act.

14. The facts in the present case, we find are identical to that in various cases referred to above by the assessee .The assessee in the present case we find has entered into an agreement with BSNL to act as its Franchisee for marketing and selling of BSNL telecom services. The same is clearly evident from the copy of agreement placed at paper book page no.6-18. As per clause 1.8 & 5 of the agreement dealing with Agent/Sales Executive/Sales force and the scope of marketing and distribution respectively, the assessee was to entitle to discharge its function of increasing the market base of BSNL by appointing sub franchisees for booking new connections and retailers for selling BSNL products. The relevant clause read as under:

> *"1.8* ***Agent/Sales Executive/Sales Force:*** *In the interest of increasing the customer base, the Franchisee can appoint sub franchises retailer solely for the purpose of booking new*

BSNL connections and retailers for selling BSNL products and service cards.

5. ***Scope of Marketing & Distribution:*** *The Franchisee shall provide BSNL services to walk-in-customers. It shall also establish, through its sales-force, direct contact with prospective customers and register as many new BSNL customers as possible subject to a minimum number fixed by BSNL. Franchisee shall also distribute all types of authorized telecom services for marketing to its Franchisee and cash card (prepaid) to its retailers."*

15. Thus clearly all the functions of the assessee of marketing the telecom products of BSNL was to be done by the assessee through sub franchisees and retailers only and not by appointing any agents. Further there is no oral or written agreement with the retailers by virtue of which the assessee could be said to be exercising any control over the goods sold to the retailers. Moreover entire sales to the retailers have been made in cash and the incentive given to them have been shown as discount in the bills raised ,copies of which were placed before us also at P.B124-135.Clearly once the products have been sold for cash to the retailers the assessee loses all control over the products. Further only discount has been passed on to the retailers and nothing has been brought on record to show any payment made by the assessee to the retailers by way of incentive. Clearly the facts in the present case are identical to that cited above of the Coordinate Benches of the I.T.A.T., and the issue therefore is squarely covered by the aforesaid decisions. The transaction between the assessee and its retailers can safely be held to be on principal to principal basis. The incentive, therefore, paid by the

assessee to the retailers/shopkeepers does not qualify as commission for the purpose of TDS u/s 194H of the Act.

16. In view of the above, Ground No.1 of the appeal raised by the assessee is allowed.

17. Ground No. 2 raised by the assessee reads as under:

> *2. That she was further not justified to arbitrarily uphold the disallowance of Rs. 6,50,131/- made by the Ld. AO on account of cash incentives paid to the dealers and retailers.*

18. The addition being challenged in the present ground relates to claim of the assessee of incentive having been paid to small retailers, which was disallowed by the AO for the lack of evidence that the assessee had made payments to the retailer.

19. Briefly stated the A.O. in the assessment order noted that the assessee had paid Rs.8,80,619/- as incentive to the parties. The A.O. conducted detailed enquiry from the dealers and retailers engaged with the assessee who stated that only 3% commission had been received, but no discount and incentive was received. When the A.O. confronted the same to the assessee the asessee explained that that the incentive had been offered on SIM Cards only. It was because of the fact that the SIM Cards were sold more talk time would be required, therefore, the emphasis was to sell SIM Cards at higher price from BSNL and selling price was much less. The difference was offered as incentives to parties. Further, the assessee submitted confirmation certificates from eleven parties out of which

three parties statement was recorded by the Inspector of which two persons i.e. Sh. Sunil Sharma Prop. M/s Besar Pan House and Sh. Ajay Kasyap Prop. M/s Kasyap Digital World had used the same language as, "I hereby certify that I have purchase BSNL Sim cards, recharge vouchers & easy recharge from Anil Dhawan in the year 2008-09 for sale purpose. I further clarify regarding earlier statement given that I did not know the fact that commission received on Sim cards was named as incentive and commission received in last two months of that financial year was named as discount". In remaining nine cases, all parties had used same language that they had purchased Sim card, recharge vouchers and easy recharge from Anil Dhawan in the year 2008-09. The Font, Language and Page setup in all case were found similar. Further the assessee was asked to produce the persons who had supplied the self made certificate for verification. On 28.12.2011 the assessee produced Sh. Sunil Sharma Prop. Besar Pan House who in his statement recorded accepted that he was not aware of difference between commission and discount. He further accepted that he had purchase Sim and received incentive of Rs. 15-20 in per Sim during the year 2008-09 from Sh. Anil Dhawan but that he had never maintained books of account so it skipped from mind during his 1st statement. The AO thereafter accepted part of the transaction amounting to Rs. 2,30,488/- made through bank and documentary evidence of which was supplied by the assessee. However, the remaining cases, in which as per the

assessee's submission he had made transaction and paid incentive to the respective parties in cash amounting to Rs. 6,50,131/-, the same were not accepted since the assessee had failed to supply/ justify by any means of evidence that the assessee had made payment of incentive to the respective small retailers, who had clearly admitted that they had received no incentive during the period from 01.04.2008 to 31.03.2009 from the assessee except commission. Hence, the remaining amount of incentive Rs. 6,50,131/- where cash transaction was made, as claimed by assessee, was disallowed.

The same was upheld by the Ld. CIT(A)holding that the detailed enquiry conducted by the AO established that no incentive had been paid by the assessee to retailer to the tune of Rs. 6,50,131/- and therefore the addition made in this regard was justified.

20. During the course of hearing before us the Ld. Counsel for the assessee contended that the addition made was not justified since identical incentive paid to the retailer from whom payments for purchase of SIM Card had been received by way of cheques and which were allowed to sell SIM Card at higher price and thereby retain the surplus as incentive was not doubted. Having accepted the modus operandi of the transaction in the case of such retailers there was no reason for the AO to have doubted identical transaction in the case of those retailers with which transaction had beem undertaken in cash especially when those retailers had

later on confirmed that they did receive incentive from the assessee.

21. The Ld. DR on the other hand relied on the order of the Ld. CIT(A).

22. We have heard the contention of both the parties we find merit in the contention of the Ld. Counsel for the assessee. Undeniably the assessee had explained the manner of giving incentive to the small retailers. The said manner of passing on incentive has not been doubted by the AO in the case of similar retailers who had made payment by way of cheques, since the AO had duly verified the manner of passing the incentive. Having accepted the mode and manner of transferring incentive we find there was no reason to doubt the manner of passing the incentive to those retailers also who had made payment in cash considering the fact that the said retailers had confirmed receiving incentive from the assessee on account of sale of SIM Card made to them and had clarified also in their statement that they had misunderstood the question posed to them earlier and had therefore wrongly stated that they had received only commission @3% which infact was the incentive received by them and that they had no knowledge of difference between the two being small time operators. There was no merit in the contention of the department that the certificate confirming the receipt of incentive now furnished by these retailers were not authentic, since they were in a standard format, in the same font, since these factors may lead to a doubt that the statements /

confirmation were fabricated but do not conclusively establish the same. For the aforesaid reasons we hold that the genuineness of the incentive paid to the small retailers in cash was duly established and therefore deletion of addition made on account of same to the tune of Rs. 6,50,131/-.

23. Ground No.2 raised by the assessee is therefore allowed.

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

Order pronounced in the Open Court.

Sd/-	**Sd/-**
(SANJAY GARG)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 17/07/2018
AG
Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR