आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 2541/Ahd/2017

(**निर्धारण वर्ष /** Assessment Year : 2009-10)

GM CMTS Cellular, DN, BSNL 3rd Floor, T. E. Building, HC Mathur Lane, Bimanagar, Ahmedabad- 380015	**बनाम**/ Vs.	**DCIT(TDS)** Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAB CB5 576 G		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से **/Appellant by :**	Shri Shaleen Patni, A.R.
प्रत्यर्थी की ओर से **/ Respondent by :**	Shri S. K. Dev, Sr. DR

सुनवाई की तारीख **/ Date of Hearing**	25/06/2019
घोषणा की तारीख **/Date of Pronouncement**	28/06/2019

आदेश/O R D E R

PER SUDHANSHU SRIVASTAVA - JM:

This appeal is preferred by the assessee against the order dated 11.09.2017 passed by the Ld. Commissioner of Income Tax (Appeals) – 8, Ahmedabad (hereinafter called 'CIT(A)') for Assessment Year 2009-10.

2.0 The brief facts of the case are that the assessee company Bharat Sanchar Nigam Limited (BSNL) is in the business of telecom operatives and providing telecom services. The assessee company provides its services through the distributors by selling them starter packs and rechargeable coupons commonly known as Subscriber Identification Mobile Cards (SIM Card and Prepaid Card). These SIM cards and rechargeable coupons were purchased by distributors/franchisees appointed by the assessee at a rate below the market price and they were sold to the retailers who ultimately sold them to the customers. The Assessing Officer (AO), while going through the records, came to the conclusion that the assessee had paid commission on starter packs and rechargeable coupons to the franchisees and had deducted tax at source in earlier years, but after 2008 such deduction of tax at source was discontinued by the assessee by treating such differential amount as discount. The AO was of the view that the franchisee and the assessee maintained principal - agent relationship and, therefore, any payments made to such franchisees was liable for deduction of tax at source under sec. 194H of the Income Tax Act, 1961 (hereinafter called 'the Act;). The AO proceeded to treat the assessee as a defaulter and computed the quantum of such un-deducted tax under sec. 201(1) of the Act and interest chargeable thereon under sec. 201(1A) of the Act to the

tune of Rs. 3,88,177/- and Rs. 3,72,650/- respectively thereby creating a total demand of Rs. 7,60,826/-.

2.1. Aggrieved, the assessee approach the Ld. CIT (A) who upheld the findings of the AO by holding that the provisions of Sec. 194H of the Act were clearly applicable in the case of the assessee.

2.2 Now, the assessee is before this Tribunal (ITAT) and has challenged the order of the Ld. CIT (A) by raising the following ground of appeal:-

> *"1. The Ld. AO has erred in law and facts by stating that the discount given by the appellant Company to it Distributors is in nature of Commission liable to TDS u/s. 194H of the Act.*
>
> *2. The Ld. CIT(A)-8, Ahmedabad, had erred in law by not fully considering, and not giving benefit of, the submissions by the appellant's AR and, also, passed its order without discussing the various case laws submitted before the Ld. CIT(A) in its order. More specifically, the Ld. CIT(A) failed to consider, discuss and reject the following case laws while ruling against the assessee:*
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> - *Hon'ble Karnataka High Court's common judgment in the case of Bharti Airtel Limited, Tata Teleservices Limited and Vodafone South Limited, reported as Bharti Airtel Limited vs. DCIT [(2015) 372 ITR 33 (Kar)]*
> - *CIT vs. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]*
> - *Vodafone Essar Gujarat Limited vs. ACIT, TDS Circle, Ahmedabad- ITA No.386/Ahd/11*
> - *Hindustan Coca Cola Beverages (P.) Ltd. (2007) 211 CTR (SC) 545: (2007) 293 ITR 226 (SC)*
> - *Jagran Prakashan Ltd. vs. Dy. CIT (2012) 73 DTR (All) 233: (2012) 251 CTR (All) 65*
>
> *3. The appellant prays that the demand raised by the DCIT (TDS), Ahmedabad, amounting to Rs. 7,97,946/- (TDS u/s. 194H: Rs. 4,07,115.30 + Interest u/s. 201(1A) from 01.04.2008 to 31.03.2016: Rs. 390,830.68] be quashed by the Hon'ble ITAT."*

3.0 The Ld. Authorised Representative (AR) submitted that ITAT Ahmedabad Bench in the case of Vodafone Essar Gujarat Ltd. vs. ACIT in ITA No. 386/Ahd/2011 vide order dated 07.07.2015 for Assessment Year 2008-09 had adjudicated an identical issue and had decided in favour of the telecom operator by holding that when the assessee had credited the sale proceeds at the transaction value, the tax deduction liability under sec. 194H of the Act would not arise. A copy of the said order was placed on record and the Ld. Authorised Representative drew our attention to the relevant paragraphs to substantiate his arguments. It was also submitted that the Ld. CIT (Appeals) of Amreli, Junagadh and Rajkot, on identical issue, had allowed relief to the assessees before them. Our attention was drawn to the copies of the said first appellate orders placed in the paper filed by the assessee.

4.0 In response, the Ld. Senior Departmental Representative (Sr. DR) submitted that although the assessee might have used the term 'discount' for the payment to the distributors, the same was immaterial inasmuch as in substance the said discount given at the time of sale of SIM cards or recharge coupons by the assessee to the distributors was a payment received or receivable by the distributor for the services to be rendered to the assessee and the same fell

within the definition of commission or brokerage under explanation (i) to Sec. 194H of the Act. It was submitted that the contention of the assessee that the relationship between the assessee and the distributors was on principal to principal basis was incorrect and in fact there was a principal to agent relationship as had been held by the Hon'ble High Court of Delhi in CIT vs. Idea Cellular Ltd. reported in 325 ITR 148 and the Hon'ble High Court of Kerala in the case of Vodafone Essar Cellular Ltd. vs. ACIT reported in 332 ITR 255. It was contended by the Ld. Sr. Departmental Representative that the demand had rightly created by the AO in this case.

5.0 We have heard the rival submissions and have also perused the relevant material on record. We find that the contention of the Ld. Authorised Representative that an identical issue was decided in favour of the assessee by ITAT Ahmedabad Bench in the case of Vodafone Essar Gujarat Ltd. vs. ACIT (Supra) is correct. In the said order the ITAT Ahmedabad Bench has decided the issue in favour of the assessee by following the judgment of the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd., Tata Tele Services Ltd. and Vodafone South Ltd. which has been reported as Bharti Airtel Ltd. vs. DCIT (2015) 372 ITR 33 (Karnataka). The

Ahmedabad Bench in the case of Vodafone Essar Gujarat Ltd. vs. ACIT (Supra) has also noted that this issue had been decided against the assessees by Hon'ble Kerala High Court as well as by the Hon'ble Delhi High Court and that in cases where non-jurisdictional High Courts have given contradicting judgments on a particular issue, guidance has to be taken from the judgment of the Hon'ble Apex Court in the case of CIT vs. Vegetable Products Ltd. reported in (1972) ITR 192 (SC) wherein the Hon'ble Apex Court had laid down the principal that if two interpretations of a taxing provision are possible, the interpretation favouring the assessee must be adopted. Thereafter, discussing the issue at length, the Ahmedabad Bench in the case of Vodafone Essar Gujarat Ltd. vs. ACIT (Supra) held as follows:-

> *"4. In the light of the above discussions, and particularly as there is no dispute that the factual matrix of all the cases before the Hon'ble non jurisdictional High Courts were materially the same as in this case, in conformity with the esteemed views of Hon'ble Karnataka High Court in Bharti Airtlel's case (supra), and hold as follows:*
>
> *(a) On the facts of the case, and as is evident from a reading of the agreements before us, the assessee has sold, by way of prepaid vouchers, e-top ups and prepaid SIM cards., the 'right to service' on principal to principal basis to its distributors. As evident from the terms and conditions for sale, placed at page 136 of the paper-book, not only that the sale was final and the assessee was not responsible for any post-delivery defects in the services, it was specifically agreed that "no request of refund of any money shall be entertained by VEGL (i.e. the assessee) under any circumstances".*

b) The fact that there are certain conditions and stipulations attached to the sale of this right of service by the assessee to his distributors does not affect the character of sale on principal to principal basis.

(c) Section 194 H comes into play only in a situation in which "any person, ……..responsible for paying….. to a resident, any income by way of commission" pays or credits such "income by way of commission". However, since at the time of the assessee selling these rights for a consideration to the distributor, the distributor does not earn any income, the provisions of Section 194 H do not come into play on the transaction of sale of the right to service by the assessee to his distributors. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor.

(d) So far as the transaction of sale of 'right to service' by the assessee to his distributor is concerned, while it has income potential at a future points of time (i.e. when this right to service is sold at a profit by the distributor), rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Therefore, at the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Accordingly, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise.

(e) In a situation in which the assessee has credited the sale proceeds at the transaction value (in contrast with the transaction being shown at face value and the difference between face value and the transaction value credited to the distributor), the tax deduction liability under section 194H does not arise. While learned counsel for the assessee has stated at the bar that the sale proceeds are credited at the transaction value, this aspect of the matter is to be verified by the Assessing Officer, and in case the sales is accounted for at the face value, to that extent, the tax withholding liability is to be sustained."

5.1 Accordingly, respectfully following the earlier order of ITAT Ahmedabad Bench in the case of Vodafone Essar Gujarat Ltd. vs. ACIT (Supra) on identical set of facts and there being no judgment of the jurisdictional High Court on the issue as yet, we allow the

assessee's appeal by holding that the assessee was not liable to deduct tax at source under the provision of Sec. 194H of the Act.

6.0 In the final result, appeal of the assessee is stands allowed.

This Order pronounced in Open Court on 28/06/2019

Sd/-	Sd/-
(AMARJIT SINGH)	(SUDHANSHU SRIVASTAVA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 28/06/2019

TANMAY *TRUE COPY*

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।