

**IN THE INCOME TAX APPELLATE TRIBUNAL
“ SMC ” BENCH, AHMEDABAD**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.330/Ahd/2017

(निर्धारण वर्ष/Assessment Year : 2012-13)

Amit Sureshbhai Masrani Old LIG-566 Anandnagar Bhavnagar-364 005	बनाम/ Vs.	The ITO Ward-1(1) Bhavnagar
प्रथायी लेखा सं./जीआइआर सं./PAN/GIR No. : AVDPM0160B		
(अपीलाथ/ Appellant)	..	(प्रत्यथ/ Respondent)

अपीलाथ ओर से/ Appellant by :	Smt. Aditi Sheth, AR
प्रत्यथ क ओर से/Respondent by:	Shri Nilabhra Dasgupta, Sr.DR

सुनवाई क तारख/ Date of Hearing	29/08/2019
घोषणा क तारख/Date of Pronouncement	01/10/2019

आदेश / ORDER

PER BENCH:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)06, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-6/40/15-16 dated 28/11/2016 arising in the assessment order passed under s.143(3) of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 18/03/2015 relevant to Assessment Year (AY) 2012-13.

2. The assessee has raised the following grounds of appeal:-

The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO of disallowing an amount of Rs.17,59,085/- u/s.40(a)(ia) r.w.s. 194H of the Act.

- 2 -

2. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO of disallowing Rs.16,22,125/- out of retailer support incentive expenses u/s.40(a)(ia) of the Act.*

3. *Both the lower authorities have erred in law and on facts in considering the expense of trade discount and retailer support incentive expense as payments u/s.40(a)(ia) of the Act.*

4. *Alternatively and without prejudice to the above, the recipients of the alleged amounts have already paid taxes on the same and therefore as per provisions of s.201(1) of the Act the appellant cannot be treated as assessee in default for non-deduction of TDS u/s.40(a)(ia) of the Act.*

5. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO of disallowing Rs.4,08,517/- claimed by the appellant for free distribution of SIMs by holding that the expenses were claimed twice by the appellant in the year under consideration.*

6. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*

7. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld.AO in levying interest u/s.234A/B/C/D of the Act.*

8. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the ld.AO in initiating penalty u/s.271(1)9c) of the Act.*

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

The issues raised by the assessee in ground No. 1 to 4 in the appeal are interconnected and revolves to the dispute that the assessee has failed to

- 3 -

deduct the TDS on the commission expenses incurred under section 194H of the Act by him.

3. The facts in brief are that the assessee in the present case is an individual and running his proprietorship business under the name and style of M/s AUM enterprises. The assessee is a distributor of Unitech wireless (Tamilnadu) Pvt Ltd.

4. The AO during the assessment proceedings found that the assessee has incurred commission expenses and retailer support incentive expenses amounting to Rs. 17,59,085/- and Rs. 16,22,125/- respectively without deducting the TDS under section 194H of the Act. Therefore the same was disallowed by the AO and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the Ld. CIT(A) who has also confirmed the order of the AO.

Being aggrieved by the order of the Ld. CIT(A) the assessee is in appeal before us.

6. The Ld. AR before us submitted as under:

“• Assessee through his proprietary concern is a distributor of Uninor. AO noticed that assessee had claimed expenses of Rs. 17,59,085/- under the head direct expense, being Commission Expense of Rs.4,18,588/- and Retailer Commission of Rs. 13,40,497/-. As per Daily Report in Annexure-A to

- 4 -

Assessment Order, it is seen that opening balance for one Kashyap is Rs. NIL Eload and 6 Sim Cards to which Eload balance of Rs. 10,500/- and 50 sim cards are added. After sale of Rs.6,000 Eload and 20 Sim of Rs.400, Eload balance received is Rs.4,200/- i.e., Kashyap retains Eload balance of Rs.300. Cash received by assessee is Rs.6,000+Rs.400. AO held that there is a principal agent relationship and payments made to him are liable for deduction at source u/s.194H of the Act and made a disallowance of Rs. 17,59,085/- u/s.40(a)(ia) of the Act.

- *AO also made a disallowance of retailer support incentive expenses of Rs. 16,22,125/- on the basis that no tax was deducted at source from the said expense. Assessee submitted that Uninor paid trade commission directly to small retailers but bill was made in the name of the assessee, which he gets to know only at the end of the year. However, AO made a disallowance of the expenses u/s.40(a)(ia) of the Act citing same reasons as disallowance of Rs. 17,59,085/-.*

- *CIT(A) confirmed the disallowance on the basis that the payments fall u/s.194H of the Act.*

It is submitted that:

> *The relationship between the assessee and the retailers is that of principal to principal and not principal to agent.*

- *The retailers are free to sell the sim cards and top up at a discount. That will only reduce the retailers income, and payment to be made to the assessee will not be affected.*
- *o Retailers are not bound by any conditions laid down by the assessee with respect to further sale of SIM cards and Eload balance.*

> *As per Explanation (i) to S.194H, payment is commission or brokerage when a person is acting "on behalf of" another person. Hence, S.194H is only applicable where the relation between assessee and retailer is that of a principal and agent as held by the Hon'ble Gujarat High Court in **Ahmedabad Stamp Vendors Association vs. UOI [2002] 257 ITR 202 (Gujarat)** and affirmed by the Hon'ble Supreme Court in **CIT vs. Ahmedabad Stamp Vendors Association [2012] 348 ITR 378 (SC)**.*

> *The payment being made to the retailer is not in the form of cash, but in the form of extra Eload amount retained by him. It does not represent his net income, as he may transfer it further or sell it at a discount. Hence, without being in possession of the net income of the retailer, question of deducting tax does not arise at all.*

> *The basic requirement for deduction of tax at source is not fulfilled, as the assessee is the payee and not the payer. Subsequent to sale, assessee receives*

- 5 -

payment as per the number of sim cards and amount of Eload sold. Unsold Eload balance is returned to the assessee.

> In any case, no payment or credit to the account of the retailers has been made by the assessee towards discount extended to them. Therefore, in absence of a payment/credit towards the discount extended by the assessee, provisions of section 194H of the Act cannot be applied. Since there is neither payment nor any credit of any commission by the assessee, there was no occasion for the assessee to deduct tax at source and hence, the assessee cannot be held responsible for non-deduction of tax at source from the discount extended to its prepaid distributors. Assessee is never in possession of income belonging to the retailer, and hence liability to deduct tax at source cannot arise.

> Decisions holding that no TDS is to be deducted u/s. 194H from discount in sale of SIM card and top up are:

o Bharti Hexacom vs. ITO [2015] 42 ITR(T) 686 (Jaipur -Trib.) [Annexure-A]

o ACIT vs. Idea Cellular Ltd. [2010] 125 ITD 222 (Hyderabad)

> It has also been held by the Hon'ble Gujarat High Court in Gujarat Tea Processors & Packers Ltd. vs. DCIT [2014] 220 Taxman 426 (Gujarat) [Annexure-B] that no that no TDS is to be made U/S.194H on trade incentives.

Alternatively and without prejudice, the case may be remitted to the AO to verify whether recipients have paid tax on the impugned amounts in accordance with the second proviso to s.40(a)(ia) of the Act which has been held to be retrospective. M/s.G.M. Agro Industries vs. DCIT ITA No. 1303/Ahd/2018 dated 01.08.2018 [Annexure-C].”

7. On the other hand, the Ld. DR submitted that the arguments raised by the Ld. AR for the assessee were not placed before the authorities below. Therefore, the Ld. DR requested that in the interest of justice and fair play the matter needs to be re-examined by the AO. Accordingly, he prayed to refer the matter to the file of the AO for fresh adjudication as per the provisions of law.

- 6 -

8. The Ld. AR, in his rejoinder, did not raise any objection if the matter is set aside to the file of the AO for the fresh adjudication as per the provisions of law.

9. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that there was no documentary evidence furnished by the assessee before the authorities below suggesting that there was the principal to principal relationship between the assessee and the distributor. Moreover, we also note that the assessee before the authorities below has not filed the necessary evidences which were necessary to decide the issue on hand. Therefore, in the interest of justice and fair play we are setting aside the matter to the file of the AO for de-novo assessment and without getting influenced by the earlier findings. The matter will be decided by the AO afresh as per the provisions of law. Hence the ground of appeal of the assessee is allowed for the statistical purposes.

The 2nd issue raised by the assessee in ground No. 5 is that the Ld. CIT(A) erred in confirming the addition of Rs. 4,08,517/- on account of the distribution of SIMs.

10. At the outset we note that, the impugned issue is also connected with the issue as discussed above which we have restored for fresh adjudication to the AO as per the provisions of law. Therefore, we are inclined to restore the impugned issue to the file of the AO for de-novo

- 7 -

assessment and without getting influenced by the earlier findings. The matter will be decided by the AO afresh as per the provisions of law. Hence the ground of appeal of the assessee is allowed for the statistical purposes.

11. In the result, the appeal filed by the assessee is allowed for the statistical purposes.

This Order pronounced in Open Court on 01/10/2019

-Sd-
(KUL BHARAT)
JUDICIAL MEMBER

-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated (True Copy) 01/10/2019