

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH, CHENNAI
श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी.मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No.774/Chny/2016

(निर्धारणवर्ष / Assessment Year: 2011-12)

Mr. Krishnaswamy Yoganandan, Prop: M/s. Ess Vee Enterprises 2/24, MMDA Colony Mogappair East, Chennai-600 050.	Vs	Joint Commissioner of Income Tax, Business Circle-XIV Chennai.
PAN: AXPY 8733B		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Ms. N.V.Lakshmi, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. AR V. Sreenivasan, Addl.CIT

सुनवाईकीतारीख/Date of hearing	:	16.02.2022
घोषणाकीतारीख /Date of Pronouncement	:	23.02.2022

आदेश / ORDER

PER G.MANJUNATHA, AM:

This appeal filed by the assessee is directed against order passed by the learned Commissioner of Income Tax (Appeals)-7, Chennai, dated 27.01.2016 and pertains to assessment year 2011-12.

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

"1. The order of the Commissioner of Income Tax (Appeals) is contrary to law facts and circumstances of the case.

2. The Commissioner of Income Tax (Appeals) as on facts and on law is wrong in confirming the disallowance of Rs.68,94,551/-.

3. The Commissioner of Income Tax (Appeals) has failed to appreciate that the appellant was only an agent of Aired Cellular Services Ltd. and the prime responsibility to deduct the commission lies with the Company.

4. The expenditure of commission is not to be booked in the Profit and Loss account of the appellant but is was booked in the hands of the Aired Cellular Services Ltd. and therefore it is erroneous to disallow.

5. The appellant was only an Agent and commission was routed through him and he has not incurred the expenditure. Therefore the Commissioner of income Tax (Appeals) is wrong in disallowing the expenditure.

6. For the foregoing reasons and for the grounds that may be raised at the time of hearing the appellant humbly prays the Hon'ble Income Tax Appellate Tribunal to delete the entire addition as unjust and thus render justice."

3. Brief facts of the case are that the assessee is engaged in the business of distributor of M/s. Aircel Cellullar Services Ltd. SIM cards & recharge coupons filed his return of income for the assessment year 2011-12 on 24.09.2011 declaring total income of Rs.18,05,510/-, which consists of income from business and loss from house property. The assessee is a distributor of SIM cards & recharge coupons of M/s. Aircel Cellular Services Ltd. The assessee purchases SIM cards & recharge coupons from Aircel and sells to dealers. There is an agreement between Aircel services Ltd. setting out terms and conditions for distribution of aircel products and as per which

the assessee is getting fixed percentage of margin on various products. The assessee has received commission from aircel for rendering distribution services and such commission has been paid to the assessee after deducting necessary TDS applicable as per section 194H of the Income Tax Act, 1961. The assessee had also received commission from aircel at Rs,1,83,86,858/- and same has been passed to dealers. M/s. Aircel has deducted TDS on commission paid to the assessee. The assessee had also deducted TDS u/s.194H of the Act in respect of part of commission passed on to dealers, however, remaining part of commission paid to dealers was not subjected to TDS. The Assessing Officer called upon the assessee to justify non-deduction of TDS on commission payment to dealers, for which the assessee claimed that he had paid commission to number of dealers, which is less than Rs.5,000/- during the year and thus, same is outside scope of provisions of section 194H of the Income Tax Act, 1961.

4. The Assessing Officer, on the basis of information furnished by the assessee and also taken note of provisions of section 194H of the Act, observed that the assessee ought to

have deducted TDS u/s.194H of the Act in respect of commission payment to dealers when the assessee has deducted TDS on part payments of commission to dealers. Therefore, he opined that expenses on which TDS was not deducted cannot be allowed u/s.40(a)(ia) of the Act and thus, made addition of Rs.68,94,591/- to total income. The relevant findings of the Assessing Officer are as under:-

“2.3 The issue involved in the case is as under:

A) Whether the payments received of Rs. 1,83,86,858/- by the assessee in the name of different names of incentives from Aircel and subsequent payment to the dealers are in the nature of commission as per section 194H of Income Tax Act,1961 or not?

B) Whether the assessee is correct in deducting TDS @10% on the sum of Rs.1,13,34,693/- and not deducting the TDS on the remaining sum of Rs. 68,94,551/- or not?

C) Whether the provisions of section 40(a)(ia) is applicable for payment made of Rs. 68,94,551/-as commission to the dealers on which there was no TDS deducted or not?

To examine the above issues, the relevant portions of section 194H is analysed vis a viz with that of assessee. It is reproduced for the sake of immediate reference .

[Commission or brokerage—.

194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after (he 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other

mode, whichever is earlier, deduct income-tax thereon at the rate of--[ten] per cent:

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of or to, the payee, does not exceed "[five thousand rupees] :

[Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts -or turnover from the business or profession carried on by him exceed the monetary limits specified under clause a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:]

Explanation —for the purposes of this section,—

(i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

In the instant case, the assessee is an individual falling u/s 44AB of the IT Act hence he is liable to deduct the tax as per the section 194H. The payments are made to the dealers for the purpose of their services rendered to the assessee while selling the SIM cards and recharge coupons such as documentation for the sale of SIM and activation of the SIM cards. Hence the "payments made by the assessee to the dealers are in the nature of commission as explained in the Section 194H of IT Act. 1961. Further to substantiate this, the assessee himself had deducted TDS on the sum of Rs. 1,13,34,6937- @10% by treating it as commission payments to dealers whereas he had not deducted TDS on the remaining sum of Rs. 68,94,5517- The assessee cannot take dual stand on the similar payments made to the dealers. From this it is clear that the payments made to the dealers are in the nature of commission only. Since the assessee had failed to deduct tax at source, it is in

contravention to the provisions of section 40(a)(ia) of the Act which states that where the commission payments are made without TDS are not allowed as deduction and added to the total income of the assessee.

2.4 In this regard, reliance of Income Tax Officer Vs Smart Distributors ((2013) 40 taxmann.com 129 (Chandigarh- Trib.) is placed, where in the Hon'ble Tribunal held in the similar case of that of the assessee (distributor) paid certain sum to dealers in connection with sale of SIM cards are in the nature of commission as per Section 194H on which the assessee is liable to deduct the TDS. Further reliance is also placed on the following case laws where in the Hon'ble High courts held that the nature of payments made to distributors of SIMI card and recharge coupons are in the nature of commission and subject to TDS u/s.194 of the IT Act.”

5. Being aggrieved by assessment order, the assessee preferred an appeal before the learned CIT(A). Before the learned CIT(A), the assessee contended that commission passed on to dealers is not liable for TDS u/s.194H of the Income Tax Act, 1961, because there is no principal and agent relationship between the assessee and dealers.

6. The learned CIT(A) after considering relevant submissions of the assessee and also by relied upon decision of the ITAT., Chennai in the case of M/s.Cellular Mobile Telecom Services vs. ITO in ITA No.1560 & 1561/Mds/2011 dated 30.10.2012 sustained additions made by the Assessing

Officer towards disallowance of commission u/s.40(a)(ia) of the Act for non-deduction of TDS u/s.194H of the Income Tax Act, 1961. The relevant findings of the learned CIT(A) are as under:-

“6. The matter is considered. The default of the appellant is apparent. Out of the total amount of Rs.1,83,86,850/- the appellant himself has deducted tax on the payment to 15 parties of Rs.1,13,34,6931-. On what ground can the non deduction to the extent of Rs.68,94,551/- be justified? On the issue of liability to deduct TDS under section 194H of the Act on account of selling SIM cards and recharge coupons, the matter has been dealt by the Chennai Tribunal 1) Bench in the case of Cellular Mobile Telecom Services versus ITO in ITA No.1560& 1561/Mds/2011. In its ruling dated 30.10.2012, the Id. Chennai Tribunal held as under:

“When the TDS is to be made for a transaction between assessee company and payee, those provisions are only to be reckoned i.e. the moment commission is paid to franchisees, relevant TDS provisions are only applicable but not what will happen subsequent to payment to franchisee. Subsequent TDS payment by franchisee is the issue to be adjudicated in the case of a franchisee and not in this case. For example, if a person awards a contract to one person, Act says that 2% of that amount is to be deducted, even though the contractor again gives it as subcontractor to other person. When, a contractor gives the same as sub-contract 1% of TDS is to be made by him again and the original person who awards the contract cannot say that he will deduct only 1% of the receipts as TDS because the contractor is further giving it as sub-contract. The two transactions are separate and independent and hence the Assessing Officer is correct in applying section 194H for the entire amount. In this connection, I rely on commission paid by travel agent to its agent selling airlines tickets on his behalf but also as an agent discount and special commission passed on to them. Thus TDS to be deducted on whole amount. CIT vs Dex Travel (P) Limited 172 TM 142 Del). While assessee company is giving Sim cards/recharge coupons to various franchisees at reduced rate and correctly treated it as “commission”.

The Id. Chennai Tribunal has concluded as under:

“We have heard both the sides, perused the records and gone through the order [the authorities below]. The assessee is a cellular company selling IM cards and recharge coupons. The assessee has deducted TDS on both the sale i.e. SIM cards as well as recharge coupons upto the financial year 2007-08. Thereafter TDS was deducted only on SIM cards and no TDS was deducted insofar as the recharge coupons are concerned. It was explained before the Assessing Officer that because of change of policy deduction TDS was not deducted. The amount paid on selling of recharge coupons was not commission but only a discount. This argument was considered elaborately by the Learned CIT(Appeals) by considering various decisions of the High Courts and the Tribunal. The learned CIT(Appeals) accordingly confirmed the order passed by the Assessing Officer. We are not able to agree with the submissions of the learned counsel for the assessee that the amount paid to the dealers for the recharge coupons was to commission but only discount. It was not explained how the same payment in earlier year is commission and subsequent year it is discount. Further we are unable to agree with the submission of the learned counsel for the assessee that no income has been accrued to the assessee at the time of purchase of recharge coupons. Under very similar set of facts the Hon'ble Delhi High; Court considered the issue in the case of CIT Vs Idea Cellular Limited [2010] 325 ITR 148 and held in the head note as under:

“TDS — Under section 194H — Commission or discount to distributors of SIM cards/ recharge coupons — assessee a cellular operator provides prepaid connection to the subscribers through distributors called prepaid market associates (PMAs) appointed by it — it offers discount for prepaid calling services to its distributors — Legal relationship is established between the assessee and the ultimate consumer/subscriber, who is sold the SIM card by the agents further appointed by the PMAs with the consent of the assessee — Fact that the PMA is supposed to make the payment in advance as per the agreement does not make any difference to the nature of the transaction in view of the other terms of the agreement — Even though advance payment is made by the PMA qua SIM cards, it does not amount to ‘sale’

of goods in as much as unsold Sim Cards are to be returned to the assessee and it is required to make payment against them - This is an antithesis of 'sale' - Therefore, the discount offered by the assessee to the distributors on payments made by the latter for the SIM cards/recharge coupons which are eventually sold to the subscribers at the listed price is commission and it is subject to TDS under section 194H - Contention of the assessee that section 194H is not applicable as there is no 'payment or credit' by the assessee to the distributor cannot be accepted."

7. In view of the facts and circumstances of the case, and the decision of Id. Jurisdictional Tribunal as above, it is held that the Assessing Officer has correctly applied the provisions of section 40(a)(ia) of the Act in disallowing the impugned sum of Rs.68,9&551/-.. As such, the addition made on this account to the total income of the appellant is sustained."

7. The learned AR for the assessee submitted that the learned CIT(A) erred in not appreciating fact that Commission paid by the assessee to dealers does not come under the purview of section 194H of the Income Tax Act, 1961, because there is no principal & agent relationship between the assessee and dealers to attract provisions of section 194H of the Income Tax Act, 1961. The AR further submitted that appellant was only agent of M/s. Aircel Cellular Ltd and whatever commission paid to dealers was routed through the assessee and he has not incurred any expenditure. Therefore, the AR submitted that even though the issue was decided against the assessee by the ITAT., Chennai in the case of M/s.Cellular Mobile Telecom

Services Vs. ITO (2015) 153 ITD 278. But, facts of the case are distinguishable in light of certain subsequent judgements of various courts and tribunals, including decision of the ITAT., Delhi in the case of Rakesh Kumar Vs CIT in ITA No.3386/Del/2014, where it was held that when the assessee has distributed SIM cards and recharge coupons to dealers on behalf of telecom service providers, then it cannot be said that there is agency relationship between the assessee and sub-dealers. Therefore, she argued that the assessee is not liable to deduct TDS u/s.194H of the Income Tax Act, 1961, and thus, expenses cannot be disallowed u/s.40(a)(ia) of the Income Tax Act, 1961.

8. The learned DR, on the other hand, submitted that the issue had been considered by the co-ordinate Bench of the ITAT., Chennai in the case of M/s.Cellular Mobile Telecom Services Vs. ITO (supra), where the issue had been considered and held that when the assessee offered discount to dealers for selling SIM cards and recharge coupons, which is in the nature of commission and it is subjected to TDS u/s.194H of the Income Tax Act, 1961. The learned CIT(A),

after considering relevant facts has rightly confirmed additions made by the Assessing Officer and his order should be upheld.

9. We have heard both the parties, perused material available on record and gone through orders of the authorities below. Admittedly, the very same issue has come up before coordinate Bench of the ITAT., Chennai in the case of M/s. Cellular Mobile Telecom Services Vs. ITO in ITA No.1560 & 1561/Mds/2011, where under identical set of facts, the Tribunal held that commission paid by the assessee to dealers for distribution of SIM cards and recharge coupons for telecom providers is liable for TDS u/s.194H of the Income Tax Act, 1961. We further noted that the Tribunal has considered agreement between the assessee and telecom provider and also nature of services rendered by the assessee to dealers by distribution of SIM cards and recharge coupons and also considered relevant facts and rightly held that discount offered by the assessee to dealers for distribution of SIM cards and recharge coupons is in the nature of commission which is liable for TDS u/s.194H of the Income Tax Act, 1961. The learned CIT(A) after considering relevant facts and also by

following decision of the ITAT., Chennai in the case of M/s.Cellular Mobile Telecom Services Vs. ITO (supra), has sustained additions made by the Assessing Officer towards disallowance of commission expenses u/s.40(a)(ia) of the Act, for non-deduction of TDS u/s.194H of the Income Tax Act,1961. Therefore, we are of the considered view that reasons given by the learned CIT(A) is in consonance with reasoning given by the ITAT., Chennai in the case of M/s.Cellular Mobile Telecom Services Vs. ITO (supra), and thus, we are inclined to uphold findings of the learned CIT(A) and reject arguments taken by the assessee.

10. Insofar as various case laws relied upon by the assessee, including decision of the Hon'ble Karnataka High Court in the case of Bharathi Airtel Vs. DCIT (2015) 372 ITR 33 and decision of the ITAT., Delhi Benches in the case of Rajesh Kumar vs.CIT (supra), we find that although the Hon'ble High Court and ITAT., Delhi Benches has taken a different view on the issue, but because the co-ordinate Bench of ITAT., Chennai has taken a view against the assessee, we prefer to follow decision of the ITAT., Chennai on this issue.

11. In this view of the matter, and consistent with the view taken by the co-ordinate Bench in the case of M/s.Cellular Mobile Telecom Services Vs. ITO (supra), we are of the considered view that the assessee ought to have deducted TDS u/s.194H of the Act, in respect of commission payment to dealers for distribution of SIM cards and recharge coupons of telecom service providers and thus, for non-deduction of TDS u/s.194H of the Income Tax Act, 1961, expenses claimed by the assessee cannot be allowed as deduction u/s.40(a)(ia) of the Act. The Assessing Officer, after considering relevant facts has rightly disallowed commission expenditure u/s.40(a)(ia) of the Act. The learned CIT(A), after considering relevant facts has rightly sustained additions made by the Assessing Officer. Hence, we are inclined to uphold findings of the learned CIT(A) and reject grounds taken by the assessee.

12. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 23rd February, 2022

Sd/-
(वी.दुर्गा राव)
(V.Durga Rao)
न्यायिक सदस्य /Judicial Member
चेन्नई/Chennai,
दिनांक/Dated 23rd February, 2022
DS

Sd/-
(जी. मंजुनाथ)
(G.Manjunatha)
लेखा सदस्य / Accountant Member

आदेश की प्रतिलिपि अद्येषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.