

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

ITA No. 43/2013

c/w

ITA No. 44/2013

ITA No. 45/2013

ITA No. 46/2013

ITA No. 47/2013

ITA No. 43/2013

M/s Bharti Airtel Ltd,
Circle Office, B-2 3rd Floor Bahu Plaza
South Block Gandhi Nagar, Jammu
Through Birinder Singh Mohindru, age 39
(Manager Legal and Regulatory)
S/o Sh. Kulwant Singh Mohindru
R/o H.No. 1193 Sunny Enclave
Sector 125, Greater Mohali, Punjab

....Petitioner(s)/Appellant(s)

Through :- Mr. Pranav Kohli, Sr. Advocate with
Mr. Farhan Mirza, Advocate,
Mr. Muddassir Zubair, Advocate &
Mr. Vastav Sharma, Advocate

V/s

Income Tax Officer (TDS)
Aayakar Bhawan, Rail Head Complex,
Jammu

....Respondent(s)

Through :- Mr. Suraj Singh Wazir, Advocate

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CORAM: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

ORDER

03.04.2024

1. These appeals (five in number) have been filed by the appellant against the common order dated 22.04.2013 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar, praying for setting aside the same, whereby the ITAT has held that the distributor of the appellant act as an agent of the appellant and the discounts offered by the appellant on starter packs and recharge coupons to the distributor amount to Commission, on which tax is liable to be deducted under section 194-H of the Income Tax, 1961.

2. Similar issue came up before Hon'ble the Supreme Court in Civil Appeal No. 7257/2011 titled "*Bharti Cellular Ltd. (Now Bharti Airtel Limited) vs. Assistant Commissioner of Income Tax, Circle 57, Kolkata and another*", which relates to the liability to deduct tax at Source under section 194-H of the Income Tax Act, 1961 on the amount which as per the Revenue, is a commission payable to the agent by the assesses under the franchise/distributorship agreement between the assesses and the franchisees/distributors and as per the assesses, neither are they paying a commission or brokerage to the franchisees/distributors nor are the franchisees/distributors their agents. The issue has been addressed by the Supreme Court vide its judgment dated 28.02.2024. Relevant paras 29, 34, 39 & 42 of the said judgment are reproduced herein below:-

29.....

..... The contractual obligations of the distributors/franchisees, do not reflect a fiduciary character of the relationship, or the business being done on the principal's account.

34. We have already expounded on the main provision of Section 194-H of the Act, which fixes the liability to deduct tax at source on the 'person responsible to pay' – an expression which is a term of art – as defined in Section 204 of the Act and the liability to deduct tax at source arises when the income is credited or paid by the person responsible for paying. The expression "direct or indirect" used in Explanation (i) to Section 194-H of the Act is no doubt meant to ensure that "the person responsible for paying" does not dodge the obligation to deduct tax at source, even when the payment is indirectly made by the principal-payer to the agent payee. However, deduction of tax at source in terms of Section 194-H of the Act is not to be extended and widened in ambit to apply to true/genuine business transactions, where the assessee is not the person responsible for paying or crediting income. In the present case, the assessee neither pay nor credit any income to the person with whom he has contracted. Explanation (i) to Section 194-H of the Act, by using the word "indirectly", does not regulate or curtail the manner in which the assessee can conduct business and enter into commercial relationships. Neither does the word "indirectly" create an obligation where the main provision does not apply. The tax legislation recognises diverse relationships and modes in which commerce and trade are conducted, albeit obligation to tax at source arises only if the conditions as mentioned in Section 194-H of the Act are met and not otherwise. This principle does not negate the compliance required by law.

39. Coming back to the legal position of a distributor, it is to be generally regarded as different form that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as sui generis, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services. There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement. Franchise agreements are extremely

detailed and complex. They may relate to distribution franchises, service franchises and production franchises. Notwithstanding the strict restrictions placed on the franchisees – which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices – the relationship may in a given case be that of an independent contractor. Facts of each case and the authority given by ‘principal’ to the franchisees matter and are determinative.

42. In view of the aforesaid discussion, we hold that the assessee would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors. Section 194-H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeals filed by the assessee – cellular mobile service providers, challenging the judgments of the High Courts of Delhi and Calcutta are allowed and these judgments are set aside. The appeals filed by the Revenue challenging the judgments of High Courts of Rajasthan, Karnataka and Bombay are dismissed. There would be no orders as to cost. Pending applications, if any, shall stand disposed of.”

3. After careful examination of the judgment dated 28th February, 2024 passed by the Supreme Court, we are of the view that the issue raised by the appellant herein is squarely covered by the aforesaid judgment. Therefore, nothing survives to adjudicate in these appeals, the same are accordingly, **disposed of**. The appellant is at liberty to approach the respondent/revenue authorities by filing representation for seeking refund of the amount already deposited along with interest, within a week’s time from today and the respondent/revenue authorities shall consider and decide such representation within two weeks from the date of receipt of the same, in accordance with admissible rules.

Jammu:
03.04.2024
Pawan Angotra

(Puneet Gupta)
Judge

(Tashi Rabstan)
Judge

Whether the order is speaking: No
Whether the order is reportable: No