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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 446/2019

**VODAFONE IDEA LIMITED (FORMERLY KNOWN AS
IDEA CELLULAR LIMITED)** Appellant

Through: Mr. Sachit Jolly, Ms. Sayaree
Basu Mallik, Ms. Mansha
Anand and Mr. Aryabn R.,
Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Sanjeev Menon, Jr.
Standing Counsel for Mr.
Zoheb Hossain, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

05.03.2024

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1. The assessee, Vodafone Idea Limited assails the correctness of the judgment rendered by the Income Tax Appellate Tribunal [‘ITAT’] dated 30 October 2018 and has proposed the following questions for our consideration:-

“a) Whether on the facts and circumstances of the case, the Tribunal while passing the Impugned Judgment and Order, erred in disregarding the contentions of Appellant and solely relying on this Hon'ble Court's decision in appellant's own case titled CIT vs Idea Cellular Ltd reported in 189 Taxmann 118(Del) for AY 2003-04 and 2004-05, without appreciating that the facts in the present case being completely distinct from the case of the Assessee in AY 2003-04 and 2004-05, conclusion of such decision cannot be applied in the present case, in isolation of the relevant facts?

b) Whether on the facts and circumstances of the case, the Tribunal erred in law in holding the Assessee to be an Assessee-in-default for non-deduction of tax under Section 194H of Act.



c) Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that Section 194 H of the Act is applicable to the transaction between the Appellant and the distributors in respect of sale of the SIM Card/Recharge Voucher?

d) Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the relationship between the Appellant and distributors is that of principal and agent, attracting the obligation of deduction of tax at source under section 194H of the Act?

e) Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the discount allowed to distributors was in the nature of commission out of which tax was deductible under section 194H of the Act?

f) Whether on the facts and circumstances of the case, the Tribunal erred in law in holding the Appellant liable for recovery of amount of tax not deducted as also interest under section 201(1A) of the Act.”

2. Upon hearing Mr. Jolly, learned counsel appearing for the appellant, we note that the solitary question which appears to arise for consideration is whether the ITAT was correct in holding the assessee to be in default for non-deduction of tax under Section 194H of the Income Tax Act [‘Act’].

3. A reading of the impugned judgment would indicate that the ITAT had rested its conclusions on the decision rendered by the Court in **Commissioner of Income Tax vs. Idea Cellular Ltd.** [2010 SCC OnLine Del 757], which has since then been overruled by the Supreme Court in its decision rendered in **Bharti Cellular Limited vs. Assistant Commissioner of Income Tax, Circle-57, Kolkata** [2024 SCC OnLine SC 198].

4. Dealing with the question which stands posited, the Supreme Court had held as follows:-

“7. It is settled by a series of judgments of this Court that the expression ‘acting on behalf of another person’ postulates the



existence of a legal relationship of principal and agent, between the payer and the recipient/payee. The law of agency is technical. Whether in law the relationship between the parties is that of principal-agent is answered by applying Section 182 of the Contract Act, 1872. Therefore, the obligation to deduct tax at source in terms of Section 194-H of the Act arises when the legal relationship of principal-agent is established. It is necessary to clarify this position, as in day to day life, the expression ‘agency’ is used to include a vast number of relationships, which are strictly, not relationships between a principal and agent.

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33. It is not the case of the Revenue that the tax at source under Section 194-H of the Act is to be deducted on the difference between the printed price and the discounted price. This cannot be the case as the Revenue cannot insist that the franchisee/distributor must sell the products at the printed price and not at a figure or price below the printed price. The obligation to deduct tax at source is fixed by the statute itself, that is, on the date of actual payment by any mode, or at the time when income is credited to the account of the franchisee/distributor, whichever is earlier. In the context of the present case, the income of the franchisee/distributor, being the difference between the sale price received by the franchisee/distributor and the discounted price, is paid or credited to the account of the franchisee/distributor when he sells the prepaid product to the retailer/end-user/customer. The sale price and accordingly the income of the franchisee/distributor is determined by the franchisee/distributor and the third parties. Accordingly, the assessee does not, at any stage, either pay or credit the account of the franchisee/distributor with the income by way of commission or brokerage on which tax at source under Section 194-H of the Act is to be deducted.

34. Faced with the above situation, the Revenue has relied upon the use of the expression “payment received or receivable directly or indirectly by a person acting on behalf of the other person”, that is, ‘the principal’. It is argued that even if the franchisee/distributor receives payment in the form of income from the retailer/end-user/customer, it would require deduction of tax at source as payment received or receivable, directly or indirectly, is to be subjected to deduction of tax. In support of the argument, reliance is placed upon decision in the case of Singapore Airlines Limited (supra).

35. The decision in Singapore Airlines Limited (supra) is required to be understood in the context of the contract in the said case, which was in terms of the rules/agreement set up by the International Airport Transport Association. IATA would fix a



ceiling price, and the price an airline could charge from its customers with a discretion to the airlines to sell their tickets at a net fare lower than the base fare but not higher. The air carriers were required to furnish a fare list to the Director General of Civil Aviation. The arrangement between the airlines and travel agents was covered by the Passenger Sales Agency Agreement²⁵, which would set out the conditions under which the travel agent carried out sale of tickets along with other ancillary services. The travel agents were entitled to 7% commission on sale of the tickets for its services as the standard commission based on the price bar set by the IATA. The airlines were deducting tax at source under Section 194-H of the Act on the 7% commission. In addition to the 7% commission, the travel agents were also entitled to additional/supplementary commission on the tickets sold by them. The additional/supplementary commission and the amount at which the tickets were sold were computed by the travel agents and transmitted to the billing and settlement plan (BSP). The BSP, functioning under the aegis of the IATA, managed, inter alia, logistics vis-à-vis payments, and acted as a forum for agents and airlines to examine details pertaining to the sale of the flight tickets.

36. This Court examined the operation of the BSP where the financial data regarding sale of tickets was stored. The BSP agglomerated the data from multiple transactions. Thereupon, this data was transmitted either bimonthly or twice a month to the airlines. It is on the basis of this data that the airlines/air carriers were required to pay the additional commission to the travel agents. These are the striking distinguishing features in Singapore Airlines Limited (supra) case.

37. Having considered the aforesaid mechanism and the nature of relationship between a principal and an agent, this Court found considerable merit in the argument of the Revenue that the airlines/air carriers utilised the BSP to discern the amount earned as additional/supplementary commission and accordingly arrive at the income earned by the agent to deduct tax at source, in accordance with the provisions of Section 194-H of the Act. If the aforesaid mechanism is understood, then it is not difficult to appreciate and understand the conclusion arrived at by this Court in the said case.

38. Thus, the question whether there was relationship of principal and agent was not in dispute, but nevertheless the assessee in the said case disputed liability to deduct tax at source on the additional/supplementary commission. However, the judgment does refer to the difference between the legal relationship of master and servant, principal and agent, and between principal and principal. In this context, reference is made to the statement of law in Halsbury's Law of England, which reads:



“The difference between the relations of master and servant and of principal and agent may be said to be this : a principal has the right to direct what work the agent has to do : but a master has the further right to direct how the work is to be done.”

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“An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant.”

39. 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.

40. Deduction of tax at source is a substantial source of the direct tax revenue. The ease of collection and recovery is obvious. Deduction and deposit of tax at source checks evasion and non-payment of tax. It expands the tax base. However, the assessee as a deductor is not paying tax on his/her income, and collects and pays tax otherwise payable by the third party. Liability of the third party to pay tax when not deducted remains unaffected. Failure to deduct tax at source has serious and quasi-penal consequences for an assessee. The deduction of tax provisions should be programmatically and realistically construed, and not as enmeshes or by adopting catch-as-catch-can approach. In case of a legal or factual doubt in a given case, the assessee can rely on the doctrine of presumption against doubtful penalisation.²⁹ Whether or not the said doctrine should be applied³⁰, will depend on facts and circumstances of the case, including the past practice followed by the assessee and accepted by the department. When there is apparent divergence of opinion, to avoid litigation and pitfalls associated, it may be advisable for the Central Board of Direct Taxes to clarify doubts by issuing appropriate instruction/circular after ascertaining view of the assesses and stakeholders.³¹ In addition to enhancing revenue and ensuring tax compliance, an equally important aim/objective of the Revenue is to reduce litigation. The instructions/circular, if and when issued, should be clear, and when justified - require the obligation to be made prospective.

41. Notably, the Delhi High Court in Commissioner of Income Tax v. Singapore Airlines Ltd. had held that tax under Section 194-H of the Act is not required to be deducted on the discounted tickets sold by the airlines/air carriers through travel agents. Revenue did not challenge the decision of the Delhi High Court to this extent and therefore, this dictum attained finality. As noted, it is not the case of the Revenue that tax is to be deducted when payment is made by the distributors/franchisees to the mobile service providers. It is also not the case of the revenue that tax is to be deducted under Section 194-H of the Act on the difference between the maximum retail price income of the distributors/franchisees and the price paid by the distributors/franchisees to the assesseees. The assesseees are not privy to the transactions between distributors/franchisees and third parties. It is, therefore, impossible for the assesseees to deduct tax at source and comply with Section 194-H of the Act, on the difference between the total/sum consideration received by the distributors/franchisees from third parties and the amount paid by the distributors/franchisees to them.



42. The argument of the Revenue that assesseees should periodically ask for this information/data and thereupon deduct tax at source should be rejected as far-fetched, imposing unfair obligation and inconveniencing the assesseees, beyond the statutory mandate. Further, it will be willy-nilly impossible to deduct, as well as make payment of the tax deducted, within the timelines prescribed by law, as these begin when the amount is credited in the account of the payee by the payer or when payment is received by the payee, whichever is earlier. The payee receives payment when the third party makes the payment. This payment is not the payment received or payable by the assessee as the principal. The distributor/franchisee is not the trustee who is to account for this payment to the assessee as the principal. The payment received is the gross income or profit earned by the distributor/franchisee. It is the income earned by distributor/franchisee as a result of its efforts and work, and not a remuneration paid by the assessee as a cellular mobile telephone service provider.

43. We must, therefore, reject the argument of the Revenue relying upon the decision of this Court in *Singapore Airlines Limited* (supra) that assesseees would be liable to deduct tax at source even if the assesseees are not making payment or crediting the income to the account of the franchisee/distributor. When the obligation, and the time and manner in which the tax is mandated by law to be deducted at source, is fixed by the statute, the same cannot be shifted/altered/modified or postponed on a concession in the court by the Revenue. The concession may be granted, when permissible, by way of a circular issued in accordance with Section 119 of the Act. We do not think that the decision in *Singapore Airlines Limited* (supra) can be read in the manner as suggested by the Revenue.

44. 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.

45. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons. An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer.

46. Thus, the term 'agent' denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term 'agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, *incidentally*, also affect the legal position of his principal in other ways. This can be ascertained by referring to and examining the indicia mentioned in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to Section 194-H of the Act.

47. 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.”

5. Consequently and in view of the above, we allow the instant appeal and set aside the impugned order dated 30 October 2018. As a consequence of our finding that the appellant could not have been treated as an assessee in default bearing in mind the decision of the Supreme Court in *Bharti Cellular*, we also set aside the orders dated 28 March 2013 and 18 May 2015 passed by the AO and CIT(A) respectively.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 05, 2024

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