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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 97/2020**

BHARTI AIRTEL LTD

..... Appellant

Through: Ms. Kavita Jha, Mr. Vaibhav
Kulkarni, Mr. Udit Naresh,
Advs.

versus

JOINT COMMISSIONER OF INCOME TAX Respondent

Through: Mr. Abhishek Maratha, SSC
with Mr. Parth Semwal, Ms.
Nupur Sharma, Mr. Apoorv
Agarwal, Mr. M. Goyal, Ms.
Divya Varma, Mr. Gaurav
Singh, Mr. B. Singh Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR

KAURAV

ORDER

09.05.2024

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1. Having heard Ms. Jha, learned counsel appearing for the appellant and Mr. Maratha, learned counsel who represents the respondents, we admit this appeal on the following questions of law:-

“a) Whether the Tribunal erred in not appreciating that the relationship between the Appellant and the distributors is on a principal to principal basis and does not constitute an agency in law and therefore, section 194H of the Act was not attracted in the instant case?

b) Whether on the facts and circumstances of the case, 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?



c) Whether the lower authorities failed to appreciate that the essential conditions for attracting Section 194H of the Act, namely:

- i. There has to be a "payment by a payer to a payee;
- ii. The "payment" should be of the nature of "income"; and
- iii. Such income should be by way of commission or brokerage, were not satisfied in the instant case and Section 194H ought not to have been invoked?

d) Whether the lower authorities ought to have appreciated that the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd. v. CIT: (2010) 10 SCC 29 has held that the tax is required to be deducted only on a sum which is treated as income and in the present case the discounts offered do not constitute income of the franchisee?

e) Whether on the facts and circumstances of the case, the free air time provided 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 appellant was liable for deduction of tax at source under section 194H of the Act on free air time provided to the distributors and on failure to deduct the same disallowance made under section 40(a)(ia) of the Act was sustainable in law?"

2. The solitary dispute which appears to survive is the facility of free airtime which was provided by the appellant to its various distributors. The Income Tax Appellate Tribunal ["ITAT"] has while considering the aforesaid issue essentially restricted relief by virtue of Section 40(a)(ia) of the Income Tax Act, 1961 ["Act"].

3. We note that the ITAT while dealing with the aforesaid issue has observed as follows:-

"13. During the year the assessee had provided free airtime to distributors amounting to Rs. 1110,24,93,098/-. The Assessing Officer held that this free airtime is being given as a discount or margin to the distributors on the retail price of prepaid products and thus, this amount was to be treated in the nature of commission expenses on which TDS was liable to be made u/s 194H of the Act.

14. Before the AO the assessee vide written submission 04.03.2013, explained that the transactions between the assessee



and the distributors were carried out on principal-to-principal basis and thus were beyond the purview of provisions of Section 194H and thereby Section 40(a)(ia) of the Act. However, the AO based on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Idea Cellular Ltd. (2010) TIOL 139, wherein the relationship between the assessee, who was also a telecom service provider like the assessee in the present case, and the distributors was held to be one of principal to agent held that the discounts offered to distributors were in the nature of commission and thereby liable to TDS u/s 194H of the Act.

15. In this regard, the Coordinate Bench of the ITAT New Delhi in the case of the assessee held as under:-

“The first contention of the assessee that Hon'ble Bombay High Court in the case of CIT vs. Kotak Securities Ltd 340 ITR 333 has held that disallowance u/s 40(a)(ia) of the Act was not at all warranted as the assessee was under bona fide belief that tax was not deductible at source was allowed by modifying paragraph 15 of the order dated 24.10.2016 as under:-

"15. It is also been submitted by the Ld. AR that in all past years no such disallowances have been made or it has been held by the revenue that tax is required to be deducted on such discount on prepaid products sold to its distributors. In view of the divergent views of the Hon'ble High Courts and coordinate benches we are of the view that no fault can be found with the assessee in not deducting the tax at source on the above discount as held by the Hon'ble Bombay High Court. Hon'ble Bombay High Court also held so for the reason that there is no loss to the revenue as presumably the recipient of income has discharged its tax liability. Therefore respectfully following the decision of the Hon'ble Bombay High Court in CIT versus Kotak Securities (supra) we also hold that disallowance under section 40(a)(ia) cannot be made in this case in view of the old practice of deducting tax at source which has been accepted by the revenue and existence of bonafide belief of the assessee for non-deductibility of tax at source on such payments. The other argument of the assessee was that- if the payee has included the above sum and discharged the tax liability no disallowance should be made in the hands of the assessee in view of the amendment made by the finance act 2012 by Insertion of the 2nd proviso to the provisions of section 40(a)(ia) of the act. The coordinate bench in the Shri Kumar Roy versus income tax officer in 68 taxmann.com 129 has held that above proviso inserted by the finance act, 2012 can be said to be declaratory and curative in nature and therefore, should be given retrospective effect from 1-4-2005. No other contrary decision was pointed out by the learned departmental representative. In view of this we accept the argument of the assessee that the 2nd proviso inserted by the



finance act 2012 should be given retrospective effect from 01/04/2005. Therefore this argument of the appellant is also set aside to the file of the Id. Assessing officer with a direction to give the benefit of the above proviso to the appellant in case the 1st contention of bonafide belief of the assessee does not survive on any amount."

12. However, it has now come to our notice that similar plea was also raised by the assessee vide MA No. 28/Del/2011 in ITA No 5816/Del/2012 for Assessment Year 2008-09 vide ground of appeal no. 74 to 76. This plea was also inadvertently not adjudicated in the order passed in the original appeal and therefore assessee preferred above miscellaneous application which could not be decided vide order dated on 11/5/2017 for that assessment year despite mentioning it In the title of the order. Therefore this corrigendum is necessary. For AY 2007-08 this plea was already adjudicated vide paragraph 21 of order dated 24.10.2016.

16. The order was further modified paragraph 21 of the order dated 24.10.2016 shall be read as under:

"27. The above issues are similar to the ground No. 6.7 to 6.9 of the appeal of the assessee for assessment year 2007-08. The parties before us submitted, that there is no change in the facts and circumstances of the case compared to the assessment year 2007-08 for the present assessment year. The parties have also rendered same arguments on these grounds. We've already disposed of the appeal of the assessee for assessment year 2007-08 wherein relying upon the decision of the Hon'ble Bombay High Court -we have allowed the contention of the assessee that when there is a bonafide belief about non deduction of tax then if the payee has discharged its liability no disallowance is called for under section 40(a)(ia) of the Income tax Act. We have further held that the 2nd proviso inserted in the above section effect from Finance Act 2012 applies retrospectively and directed the learned assessing officer to grant benefit of the same. In view of this we accordingly hold that there is a bonafide belief for non-deduction of tax at source on discount on prepaid SIM cards to the dealers and therefore no disallowance can be made in the hands of the assessee for nondeduction of tax at source. The Ld. Assessing officer is further directed to grant benefit of 2nd proviso to the above section while calculating the disallowance. He is further directed that in case the deduction of tax has been made by the assessee in subsequent year then the claim of the assessee for deduction of these expenses is also allowable in the subsequent year."

17. Hence Keeping in view the order of the Tribunal in the assessee's own case for the assessment year 2008-09, we hold that owing to the insertion of the second provision to section 40(a)(ia)



the Id. AO is hereby directed to grant the benefit of the inserted provision.

4. The issue of free airtime and the extension of that facility for further distribution by agents arose directly for consideration of the Supreme Court in **Bharti Cellular Ltd. v. CIT** [2024 SCC OnLine SC 198] where after dealing with the aforesaid aspect, the Supreme Court held as follows: -

“ **39.** Coming back to the legal position of a distributor, it is to be generally regarded as different from 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 manufacturer, 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. The facts of each case and the authority given by the “principal” to the franchisees matter and are determinative.

40. 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 the accounts of the business, as it belongs to him and not his employer.

41. 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 194H of the Act.

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 prepaid coupons or starter-kits to the distributors. Section 194H 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 the 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. In view of the aforesaid, we allow the instant appeal and set aside the order of the ITAT to the extent that it held that the same would be governed by Section 40(a)(ia).



6. The respondents would have to now undertake a re-computation bearing in mind the principles laid by the Supreme Court in *Bharti Cellular*.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 09, 2024/neha