आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य के समक्ष

BEFORE: SHRI VIJAY PAL RAO, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 821/JP/2016
निर्धारण वर्ष/Assessment Year : 2011-12

M/s Chocopack Enterprises, 7, Jai Ambay Colony, ESI Hospital, Ajmer Road, Jaipur.	बनाम Vs.	Income Tax Officer, Ward 2(3), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADFC1995R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri S.L. Poddar (Adv.)
राजस्व की ओर से/ Revenue by : Shri Raj Mehara (J.CIT)

सुनवाई की तारीख/ Date of Hearing : 04/10/2017
उदघोषणा की तारीख/ Date of Pronouncement : 13/10/2017

आदेश/ ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order of ld. CIT(A) dated 19.05.2016 for the A.Y. 2011-12.

2. There is delay of 38 days in filing the present appeal the assessee has filed a petition for condonation of delay which is supported by an affidavit.

3. I have heard the ld. AR as well as ld. DR on condonation of delay of 38 days in filing the present appeal. The ld. AR of the assessee has submitted that in the month of May, 2016 wife of the brother of the assessee expired and therefore, the assessee was out of station during the period when the limitation for filing the present appeal was to expire. The ld. AR of the assessee has submitted that the delay in filing the appeal is neither intentional nor willful but due to the circumstances which were beyond control of the assessee. Hence, he pleaded that the delay of 38 days may be condoned and the appeal of the assessee may be decided on merits. On the other hand, ld. DR has objected to the condonation of delay.

4. Having considered the rival submissions and careful perused of contents of the petition for condonation of delay as well as of the affidavit I am satisfied that the assessee was having a reasonable cause in not presenting the present appeal within the period of limitation. Accordingly, in the facts and circumstances of the case as well as in the interest of just the delay of 38 days in filing the appeal is condoned.

5. The assessee has raised the following grounds of appeal as under:-

> "*1. That under the facts and circumstances of the case the learned CIT(A) has erred in confirming the addition of Rs. 7,51,543/- on account of disallowance of commission expenses whereas there was*

no liability of the assessee to deduct the TDS as the payment made was only discount."

The solitary issue raised in this appeal of the assessee is regarding disallowance made by the AO under section 40(a)(ia) for want of deduction of tax at sources in respect of the commission/discount to the retailers of recharge cards. The assessee is a partnership firm and in the business of distributorship of idea recharge cards during the year under consideration. The assessee has debited the expenses to the tune of Rs. 48,94,323/- on account of discount on online scheme. The AO proposed to disallowance this claim of deduction as the assessee has not deducted tax as per provisions of section 194H. Accordingly, the AO made disallowance of Rs. 7,51,543/- on account of commission expenses u/s 40(a)(ia). The assessee challenged the action of the AO before the ld. CIT(A) and contended that the assessee has not made any payment towards discount of Rs. 7,51,543/- debited in the P &L account but the discount was allowed by the service provider and the transaction is routed through the assessee company being a distributor. Therefore, the assessee has only made the entries in the books of accounts without having any direct role in allowing discount or commission to the retailer. It was also contended that the assesse has no discretion in fixing percentage of discount/ commission on recharge coupons but the service provider

company has sole power in fixing the discount on sale of recharge coupons as it launched scheme time to time. Thus the assessee has forcefully contended that the payment of discount is made by the company directly to the retailer and the assessee was under no obligation to pay discount or deduct tax u/s 194H. The ld. CIT(A) was not impressed with the contention of the assessee and upheld the disallowance made by the AO.

6. Before the Tribunal the ld. AR of the assessee has submitted that the assessee has no discretion in fixing percentage of discount in recharge coupons on sale by retaliators as the company has sole powers in fixing the above discount on sale as per the scheme from time to time. He has reiterated the contentions raised before the authorities below. The ld. AR of the assessee has relied upon the decision of Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. vs. CIT 372 ITR 33 and submitted that the Hon'ble High Court while dealing with identical issue has held that the distributors does not earn any income at the time of selling recharge cards/vouchers rather the distributor incurred expenditure for purchase of these cards and only after resale of those recharge cards the distributor would derive income at the time of selling these prepared cards. The ld. AR of the assessee has submitted that by applying the same analogy no income is earned by the retailers at the time these vouchers/ cards are

sold to the retailers but the retailers incurred the expenditure at the time of purchase.

7. He has further submitted that the income earned by the retailers would depend upon the time of sale and the scheme prevailing at that point of time. Therefore, the ld. AR has submitted the deduction of tax at source being a various responsibility and when there is no direct payment or income at the time of sale of these cards to the retailer then the assessee has no obligation to deduct the tax at source. The Ld. AR of the assessee has submitted that when the assessee is not fixing any discount or commission or making the payment of same to the retailer then, the assessee is under no obligation to deduct tax at source.

8. On the other hand, the ld. DR has submitted that in the tax audit report, the Auditor of the assessee has stated that the assessee has not complied with the provisions of chapter XVII-B as no TDS has been deducted by the assessee for commission paid to the retailers either own account or through company under section 194H. He has further contended that even the auditor of the assessee has stated that the payment under consideration is commission and not discount as claimed by the assessee, therefore, the provisions of section 194H are applicable in respect of the amount in question for which the assessee has not deducted tax at source. The ld. CIT(A) has followed the decision of

Chandigarh Benches Tribunal in case of ITO vs. Smart Distributors (2013) 36 CCH 0466 as well as the decision of Hon'ble Karala High Court in case of Vodafone Essar Cellular Ltd. vs. ACIT. He has also relied on the decision of Hon'ble Calcutta High in case of Hutchison Telecom East Ltd. vs. CIT 232 taxman 665 and submitted that the Hon'ble High Court after considering the decision of Hon'ble karnatka High Court in case Bharti Airtel Ltd. Vs. CIT (supra) has decided this issue in favour of the Revenue by holding that the assessee was responsible person for paying commission and therefore, the provisions of section 194H are attracted. He has relied upon the orders of the authority below.

9. I have considered the rival submissions as well as relevant material available on record. The assessee's firm engaged in the business of distributorship of Idea recharge cards. The issue involved in case of the assessee is in respect of sale of recharge coupons and not the sale of sim cards. Therefore to the extent the issue of sale of sim cards by the service provider it is held by the Hon'ble Karnatka High Court in the case of Bharati Airtel Ltd. vs. CIT (supra) that the assessee is the service provider had no obligation to deduct TDS and accordingly when the service provider has is under no obligation to deduct tax, the distributor would also not under obligation to deduct TDS. However, the said decision is only on the issue of sale Sim cards and therefore, will not applicable in the case

of the assessee. The Hon'ble Supreme Court in case of Bharat Sanchar Nigam Ltd. vs. Union of India 282 ITR 273 as also observed in paras 85 and 86 which are reproduced as under:-

> *"85. In that case Escotal was admittedly engaged in selling cellular telephone instruments, SIM cards and other accessories and was also paying Central sales tax and sales tax under the Kerala General Sales Tax Act, 1963, as applicable. The question was one of the valuation of these goods. The State sales tax authorities had sought to include the activation charges in the cost of the SIM card. It is contended by Escotal that the activation was part of the service on which service tax was being paid and could not be included within the purview of the sale. The Kerala High Court also dealt with the case of BPL, a service provider. According to BPL, it did not sell cellular telephones. As far as SIM cards were concerned, it was submitted that they had no sale value. A SIM card merely represented a means of the access and identified the subscribers. This was part of the service of a telephone connection. The court rejected this submission finding that the SIM card was "goods" within the definition of the word in the State sales tax act.*
>
> *86. It is not possible for this court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles : If the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales tax authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However, we emphasise that if the sale of a SIM card is merely incidental to the service being*

provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel and Restaurant Association of India v. Union of India [1989] 3 SCC 634—"subjects which in one aspect and for one purpose fall within the power of a particular Legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping ; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects". No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction."

Therefore, as the issue of sale of sim cards is concerned the Hon'ble Supreme Court has clearly held that the sale of sim cards merely incidental to the service being provided and only facilitates the identification of subscribers their credit and other details it would not be assessable to sale tax. As regards the sale of recharge coupons it is clearly a transaction of sale of goods as held by the Hon'ble Supreme Court that the telephone is nothing but a service. However, since the service is provided by the company which is the service provider and assessee is only a distributor and intermediatetory, therefore, the tax liability for paying the commission,

if any, is attracted u/s 194H only against the person responsible for paying the commission. In case in hand the assessee is not paying any commission to the retailers but this commission or so called discount is allowed and paid by the service provider. The assessee is an intermediatetory and only recording this transaction in the books of account for the purpose of completeness. Hence, when the assessee is neither competent nor responsible nor actually paying any commission to the retailer on sale of recharge coupons to the retailers then the obligation for deduct tax u/s 194 H is attracted only against the service provider and not against the assessee who is only a distributor and receiving its share of the commission/ margins provided by the service provider. The determination of sale price of recharge coupons is in the sole domain of the service provider and the assessee is no role in determining the retail price at which the retailer is selling the recharge coupons to the customer or end user of the service. Therefore, in the facts and circumstances of the case when the assessee's role is only an intermediatetory and passing the services from one hand to the other hand then merely because the assessee is showing an amount of commission/discount in the books of account for completeness of accounts and transactions will not impute any liability of deducting tax at source. The decisions relied upon by the ld. DR are also on the point

where the service provider is allowing or paying the commission to the distributors or retailers and sale of sim cards as well as recharge coupons, therefore, even for the sake of arguments if it is accepted that the benefit allowed by the service provider to the distributors and retailers is commission it is service provider who is responsible for paying the said commission and therefore, the provisions of section 194H are not attracted against the distributor. Accordingly, when the assessee is not directly and indirectly in deciding the quantum of alleged commission/discount as well as determining the retail price at which the recharge coupons is sold to the customer then the provisions of section 194H cannot be applied on the assessee. Consequently disallowance made by the AO u/s 40 (a)(ia) is deleted.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 13/10/2017.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य /Judicial Member

जयपुर/Jaipur
दिनांक/Dated:- 13/10/2017
*Santosh
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:
1. अपीलार्थी/The Appellant- M/s Chocopack Enterprises, 7, Jai Ambay Colony, ESI Hospital, Ajmer Road, Jaipur.

2. प्रत्यथी / The Respondent- The ITO, Ward 2(3), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 821/JP/16)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar