

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR
श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1029/JP/2018
निर्धारण वर्ष / Assessment Year :2014-15

Shri Rahul Singhal, Prop.- Rahul Singhal, Near Nijam House, Sanghpura, Purani Tonk.	बनाम Vs.	Income Tax Officer Ward- Tonk.
TAN/PAN No.: BLDPS 9341 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya &
Shri Devang Gargieya (Adv)
राजस्व की ओर से / Revenue by : Shri Ashok Khanna (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/12/2018
उदघोषणा की तारीख / Date of Pronouncement : 20/12/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 02/07/2018 of Id. CIT (A)-3, Jaipur for the A.Y. 2014-14. The assessee has raised following grounds of appeal:

- "1. The impugned additions and disallowances made in the order U/s 143(3) of the Act dated 29/12/2016 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.*
- 2. The Id. CIT(A) erred in law as well as on the facts of the case in passing the impugned order in a haste without affording adequate and reasonable opportunity of being heard. The impugned order*

having been framed in gross breach of natural justice, kindly be quashed or alternatively be restored to the file of the Id. CIT(A).

3. *Rs. 7,04,430:- In the facts and circumstances of the case and in the law the Id. A.O. has erred in disallowing a sum of Rs. 7,04,430/- U/s 40(a)(ia) of the Income Tax Act, 1961. The action of the Id A.O. is illegal, unjustified, arbitrary and against the facts of case. Relief may please be granted by quashing the said disallowance of Rs. 7,04,430/- U/s 40(a)(ia) of the Income Tax Act, 1961.*
4. *The appellant prays your honours to add amend or alter all or any of the grounds of the appeal on or before the date of hearing."*

2. The assessee is individual and proprietor of M/s Rajesh & Sons. The assessee is deriving income from distributorship of Idea Cellular Limited for sale of SIM cards and mobile recharge coupons. During the course of assessment proceedings, the Assessing Officer noted that in the P&L account, the assessee has shown commission income of Rs. 16,03,103/- which has been received from the principal, Idea Cellular Limited. The assessee has also accounted other expenses in the P&L account which includes commission of Rs. 7,04,430/- paid to the retailers/dealers. The Assessing Officer held that the payment of commissioner of the retailers/dealers was liable to TDS U/s 194H of the Income Tax Act, 1961 (in short the Act), however, the assessee has not made the deduction of TDS in respect of the payment of the said amount to the retailers/dealers. Accordingly, the Assessing Officer invoked the provisions of Section

40(a)(ia) of the Act and disallowed the claim of deduction of Rs. 07,04,430/-.

3. On appeal, the Id. CIT(A) has dismissed the appeal of the assessee ex parte on the reason that despite over the notices issued to the assessee, nobody has attended the hearing nor any adjournment application was filed.

4. Before us, the Id AR of the assessee has submitted that though the Id. CIT(A) has stated in the order that various notices were issued, however, the assessee did not receive any of the alleged notice due to the reason that there was a change of address and the assessee has duly mentioned the current address of the assessee in the Form No. 35 but the Id. CIT(A) appears to have issued the notice at the old address. The Id AR has further submitted that the Id. CIT(A) for the A.Y. 2012-13 and 2013-14 vide orders dated 29/08/2018 and 01/08/2018 respectively deleted the identical addition made by the Assessing Officer U/s 40(a)(ia) of the Act. Thus, the issue was found by the Id. CIT(A) as covered in favour of the assessee by the various decisions including the decisions of this Tribunal. Hence, the Id. AR has submitted that the disallowance made by the Assessing Officer may be deleted.

5. On the other hand, the Id DR has relied upon the orders of the authorities below.

6. Having considered the rival submissions as well as relevant material on record we note that the commission of Rs. 16,03,103/- was received by the assessee from Idea Cellular Limited. It is also not in dispute that the said commission amount was subjected to TDS as the Idea Cellular Limited has already deducted TDS at the time of payment of the said commission. The assessee has shared the said commission with the dealers/retailers to the tune of Rs. 7,04,430/-, thus the Assessing Officer has not disputed the fact of commission received by the assessee was shared with the dealers/retailers as per the agreement between the Idea Cellular Limited and the assessee as well as the dealers/retailers. It is also not in dispute that the amount of total commission of Rs. 16,03,103/- has already suffered TDS at the time of payment. Thus, it is not a commission payment by the assessee in the capacity of principal to the retailers/dealers as an agent of the assessee but the commission is originally paid by the Idea Cellular Limited who is acting as a principal and all other parties being distributor, dealers and retailers are receiving the commission from Idea Cellular Limited. It is only for the sake of completeness of the entries in the books, the commission is rooted

through the assessee's books of account. We further note that the Id. CIT(A) for the A.Y. 2012-13 and 2013-14 has considered an identical issue and decided the same in favour of the assessee. For the A.Y. 2012-13, the Id. CIT(A) has dealt this issue in para 4 as under:

*"4. **Ground No. 1** This ground is related to the addition of Rs. 16,00,697/- u/s 40(a)(ia) of the I.T. Act. This issue dealt by the Assessing officer in assessment order as under:-*

4.1 This reply has been perused and found general in nature. It is admitted facts that the assessee has not deducted TDS on payment of commission more than Rs.5000/- to the retailers. The submission of the assessee that M/s Idea Cellular Ltd. have already deducted TDS as per the provisions of section 19411 on behalf of the assessee on commission' paid to the retailers to the tune of Rs. 16,00,697/- and once TDS stands deducted then there is no reason left for assessee to further deduct TDS on the same amount again. This would amount to double deduction and not permissible under the provisions of law. The submission of the assessee is not found convincing. The telecom companies have deducted TDS on the payment made by them to the assessee. The company have deducted TDS of Rs.2,40,036/- on total commission payment of Rs.24,80,718/-. The assessee was liable to deduct TDS on the payment of commission made by him. Therefore, there would be no double deduction on payment of commission. Moreover, the argument of the assessee that if the assessee and the principal telecom company was to deduct TDS of the retailers on the same amount then it would be deemed to be double income received in the hands of the retailers whereas the income is only received once and hence it would lead to an absurd proposition. This argument of the assessee has no force. The telecom companies were not under any legal

obligation to deduct TDS on payment to the retailers as they have paid commission only to the assessee. Further, the assessee has for his own convenience allowed to these companies to pay part of the commission on his behalf directly to the retailers appointed by him.

The assessee has not deducted TDS on payment of Rs. 16,00,697/- as per provisions of section 194H. Therefore, as per provisions of section 40(a)(ia) the amount of the payment on which tax is deductible at source under chapter XII-B and Sales Rules, 1987, for surrender of Stamp Papers to Government - Provision would not render stamp Vendors Agents - Transaction amount to sale-Discout on sale of stamp paper does not attract section 194H - Income Tax Act, 1961, S. 194H.

13.3 *CIT(TDS) Vs. United Breweries Ltd [2017] 80 taxmann.com 123 (Andhra Pradesh and Telangana)*

Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Commission or brokerage etc. (Trade incentives) - Assessment years 2008-09 to 2010-11 - There being no relationship of a principal and agent between assessee and retailers, trade incentives paid by assessee to retailers through del-credere agents in order to boost its sale could not be treated as commission for purpose of section 194H [In favour of assessee]

7. *Various cases have already been cited. In any case however, if a different view is noticed, the issue being debatable, the view favourable to the assessee should be adopted as held in the case of Vegetable Products 88 ITR 192 (SC).*

Further the A/R relied upon the case law of Hon'ble ITAT Jaipur Bench where in the above directly cover in the case of M/s Chocopack Enterprises ITA No. 821/JP/2016 held that:-

"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."

The service provider may be any one whether it is BSNL or Idea, etc. and the position of the assessee is also of an intermediary who is not responsible for making payment to the ultimate retailer & hence S. 194H is not applicable.

Also kindly refer again a recent ITAT order dated 24.05.2018 in the case of Virendra Kumar Verma in IT A No.970/JP/2017 wherein the decision of M/s Chocopack (Supra) has been followed on identical facts."

I perused the record I find that there is force in the submission of the A/R of the appellant that the alleged payment of commission was not paid by the assessee to the retailers but it was directly paid by the mobile operator whose SIM card and pre-paid coupons were sold by the assessee. Therefore, the assessee was not under obligation to deduct TDS on such amount. He has further contended that since the assessee is a dealer, only for accounting purposes the assessee has made contra entries in respect of the said amount being receipts as well as payments whereas there is no actual payment by the assessee but it was paid by the company.

For this ratio the A/R of the appellant relied upon various case laws as discuss above. Therefore considering the above observation and following the case laws discuss as above and decision of the Hon'ble ITAT Jaipur Bench in the case of M/s Chocopank Enterprises in ITA No.821/JP/2016 and in the case of Virendra Kumar Verma ITA No. 970/JP/2017. I am the view that appellant is not liable to deduct the Tax at source. Therefore the action of the Assessing officer is not as per law to disallow Rs.8,15,665/- u/s 40(a)(ia) of the I.T. Act. Hence I direct the Assessing officer to delete the addition of Rs. 815665/-. This ground is allowed. "

The facts of this assessment year are totally similar. Therefore following the above decision I am the view that appellant is not liable to deduct the tax at source. Therefore the action of the Assessing officer is not as per law to disallow of RS. 16,00,697/- u/s 40(a)(ia) of the I.T. Act. Hence I direct the Assessing officer to delete the addition of Rs. 16,00,697/-. This ground is allowed."

Similarly for the A.Y. 2013-14, the issue was decided by the Id. CIT(A) in favour of the assessee. Once the issue was decided in favour of the assessee in the earlier assessment years then even if there was no appearance on behalf of the assessee, the Id. CIT(A) was supposed to have taken a consistent view. Accordingly, we delete the addition made by the Assessing Officer U/s 40(a)(ia) of the Act.

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

Order pronounced in the open court on 20th December, 2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

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

जयपुर / Jaipur

दिनांक / Dated:- 20th December, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Shri Rahul Singhal, Tonk.
2. प्रत्यर्थी / The Respondent- The ITO Ward-Tonk.
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. 1029/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar