

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&  
SHRI O. P. KANT, ACCOUNTANT MEMBER**

I.T.A. No.3386/DEL/2014  
Assessment Year: 2009-10

Rakesh Kumar, C/o Ravi Gupta, Advocate, E-6A, Kailash Colony, New Delhi.	v.	CIT, Ghaziabad.
TAN/PAN: AXMPK 7608P		
(Appellant)		(Respondent)

Appellant by:	Shri P.C. Yadav, Adv.		
Respondent by:	Smt. Deepali Chandra, CIT-DR		
Date of hearing:	17	05	2018
Date of pronouncement:	13	08	2018

**ORDER**

**PER AMIT SHUKLA, J.M.:**

The aforesaid appeal has been filed by the assessee against the impugned order dated 30.03.2014 passed by Ld. Commissioner of Income Tax, Ghaziabad u/s.263 for the Assessment Year 2009-10. In various grounds of appeal, the assessee has challenged the impugned order passed u/s.263 on the ground that, *firstly*, the assessment order passed by the Assessing Officer is not erroneous and prejudicial to the interest of the revenue within the meaning of Section 263; *secondly*, Assessing Officer has adopted one course permissible in law and has taken a view, therefore, CIT cannot exercise jurisdiction u/s.263 with his own view

directing the Assessing Officer to reframe fresh assessment order; and *lastly*, ld. CIT(A) has failed to appreciate that the payment made to various bills were less than Rs.5,000/- per party in around 70% transactions, and therefore, there was no question of deducting any TDS u/s.194.

2. The facts in brief are that the assessee is engaged in the business of wholesale dealer of recharge vouchers/ coupons and SIM of Idea Cellular & Tata Teleservices Ltd. Original return of income was filed on 22.03.2010 declaring net income of Rs.2,71,650/- and said return of income was selected for scrutiny and assessment was completed u/s.143(3) vide order dated 18.11.2011, after detailed scrutiny of books of account and necessary details as was required from time to time by the Assessing Officer. In the assessment order, the Assessing Officer has made addition of Rs.1,23,000/- on account of disallowance of expenses debited under the head 'incentive/commission' on *ad hoc* basis of 10% on the ground that some of the expenses under these heads has only been passed through book entries which were not verifiable. Accordingly, assessment was completed at an income of Rs.3,94,650/-.

3. Later on, ld. CIT in his revisionary jurisdiction u/s.263 after examining the assessment records observed that assessee had debited sum of Rs.12,31,580/- on account of commission payment on which he has not deducted TDS u/s.194H, and therefore, *prima facie* the assessment order

is erroneous and prejudicial to the interest of revenue. In response to the show cause notice, the assessee submitted that he was having more than 200 dealers/retailers at various places, who do not represent the assessee for rendering any services, and therefore, they are not entitled to any commission. The sale transactions with the dealers/sub-dealers are direct and are made at arm's length basis and the relationship is between principal to principal basis and there is no agency agreement between the assessee and the dealers/sub-dealers. The property of goods, i.e., SIM cards including all risks and liabilities are transferred to the dealers/sub-dealers upon the delivery of goods by the assessee and any further dealing with the goods is on the risk and at the expense of concern dealers. Thus, such transactions are not covered u/s.194H. It was further submitted that the incentive given in most of the cases was less than Rs.5,000/-, therefore, the provisions of Section 194H was not applicable.

4. Ld. CIT after considering the entire material on record, first of all observed that in case where a distributor is transferring a goods to its dealers and sub-dealers, then undisputedly the transaction is in the nature of principal to principal basis and discount by the former to the latter cannot be treated to be in the nature of commission. However, in the case of the assessee the nature of transaction is different because the transaction involved

recharge vouchers/prepaid vouchers/ SIM cards, etc. which products do not have any intrinsic value but are only in the nature of prepayment/commitment for payment for entitlement to avail the services which are being provided exclusively by the telecom entities. The franchisees can be considered as an intermediary between the service providers, the assessee and the ultimate consumer, and therefore, assessee becomes an agent of the telecom entity and there is a principal-agent relationship between telecom entity and the assessee. In similar manner, the assessee becomes the principal and the dealer and sub-dealers becomes an agent. Even if it is presumed that the transaction between the assessee and the dealers/sub-dealers contain the essential element of sale, to view such transaction without considering the commitment of the distributor and in turn, the service provider to provide the services for ultimate consumers to commit payment, either in advance or subsequent to the utilization of services, and therefore, in lieu of such entitlement, it would amount to ignoring the substance of transaction. He has also took note of distributorship agreement entered by the assessee with various telecom entities and noted that obligation of distributor has been laid down in detail and the distributor has to exercise substantial control over its retailers. Similarly, he noted that the agreement with Tata Teleservices Ltd., wherein the channel partner was having

absolute control over the detailers functioning in terms of guidelines and instruction of Tata Teleservices Ltd. Thus, there is a symbiotic relationship between service provider and the distributor. The dealers/sub-dealers and the ultimate consumer which though is forged in consequence of the sale of products but the discount offered by its assessee to his dealers and sub-dealers has to be treated in the nature of commission. Ld. CIT has also referred to the judgment of Hon'ble Delhi High Court in the case of **CIT vs. Idea Cellular, reported in (2010) 325 ITR 148** and also ITAT Chennai Bench decision in the case of **Vodafone Essar Cellular Ltd., reported in 141 TTJ 461**. He further noted that assessee himself labeled the payment as incentive/commission while debiting the amount in the P&L account, and therefore, provision of Section 194H is clearly applicable and since assessee is not deducted TDS the disallowance has to be made u/s.40(a)(ia). Accordingly, the Assessing Officer has to work out the disallowance if any and recomputed the income of the assessee.

5. Before us, the learned counsel for the assessee submitted that the issue of commission/incentive has already been examined by the Assessing Officer who has made disallowance on this score and therefore, to make further disallowance u/s. 40(a)(ia) amounts to take a different view and also it cannot be held that Assessing Officer has not carried out any inquiry or applied his mind.

Thus, on such change of view revisionary jurisdiction u/s.263 is not permissible.

6. On the other hand, ld. CIT-DR submitted that the ld. CIT is empowered u/s.263 to revise/review any assessment order where the Assessing Officer has passed the order without making inquiry or verification which should have been made or has been passed allowing any relief without inquiring into the claim etc. and now in view of the insertion of *Explanation-II* to Section 263 with retrospective effect, such an assessment order without carrying out any proper inquiry or verification is deemed to be prejudicial to the interest of the revenue. Ld. CIT-DR in her written submission has referred to various decisions about the scope and power of the ld. CIT in the revisionary jurisdiction u/s.263, which though on principle are not rebutted, because we find that it has not much relevance for the issue in hand.

7. After considering the rival submissions and on perusal of the impugned order, we find that it is not in dispute that assessee is a wholesale dealer of recharge vouchers, coupons, SIM cards for telecom entities, like, Idea Cellular Ltd. and Tata Teleservices. The assessee has debited a sum of Rs.12,31,580/- under the head 'incentive/commission' which in the original assessment order passed u/s.143(3), Assessing Officer has made *ad hoc* disallowance of 10% on the ground that entire expenditure are not subject to full

verification and it appears to be excessive and unreasonable. Ld. CIT has exercised his revisionary jurisdiction u/s.263 to hold that the commission/incentive paid to the dealers/sub-dealers amounting to Rs.12,31,580/- is arising out of a transaction wherein there is a principal-agent relationship and there is no sale of goods. In support of his contention, he relied upon the judgment of Hon'ble Delhi High Court in the case of **CIT vs. Idea Cellular Ltd. (supra)**. First of all, it is noted that the assessee is a wholesale dealer who is having distribution agreement with various telecom entities. Ld. CIT has inferred that it is a relationship between the service providers, i.e., the telecom entities and the assessee-company and there exists 'principal-agent relationship' between the assessee and the telecom entities. Since there is a principal-agent relationship between the assessee and the telecom entity, therefore, there is a similar agency relationship between the assessee who is a wholesale dealer with dealers/sub-dealers. A cellular operator provides prepaid connection through recharge vouchers or prepaid SIM cards to the subscribers through distributors. A discount is offered by the cellular operators to its distributors who sell the SIM cards to the customers/ultimate consumers. Hon'ble Delhi High Court in the case of Idea Cellular (supra) while interpreting the transaction between the cellular operator and the

distributor have held that the nature of transaction does not amount to sale of goods inasmuch as unsold SIM cards which is returned to the assessee, i.e., the cellular operator, who is required to make payment against them. This transaction cannot be treated as sale and therefore, the discount offered by the cellular entities/cellular operators to the distributors on the payments made for the SIM cards /recharge vouchers/ coupons which are eventually sold to the subscribers at the listed price is commission and hence it is subjected to TDS u/s.194H. The principal-agent relationship of the transaction between the cellular operator and dealers has been treated to be commission. Nowhere has it been held that similar relationship exists between the wholesale dealer, dealers and sub-dealers. The assessee who is a wholesale dealer gives incentives to his sub-dealers depending upon the advance and the promptness of the payment of the sale consideration received for selling the prepaid vouchers/SIM cards to the customers. There is no agency agreement between the assessee and his dealers/sub-dealers. The agency relationship between the assessee and the cellular operators cannot be inferred or presumed in the transaction between the assessee and his sub-dealers. The reason being the SIM cards, vouchers belonged to the cellular operators/cellular entities and these cellular operators/telecom entities ensure that payment is received in respect of those prepaid vouchers



and SIM cards which are sold to the subscribers and unsold SIM cards are returned back to them and even if such SIM cards are returned, then these cellular/telecom entities are required to be made payment against them and the SIM card stocked with the distributors are the property of service provider, i.e., the telecom/cellular entities. The permissive right to use the SIM cards to get access to the phone network of the telecom companies is given only to the ultimate customers who have activated the connections. Thus, in the case of the telecom company, it is the owner of the prepaid voucher/SIM card and not the wholesale dealer. It is the telecom companies who are providing the services to the distributors on prepaid package. If at all, there is an agency relationship on which TDS is required to be deducted on the commission paid to the dealers is *qua* the cellular operator and the wholesale dealer. The same agency relationship cannot be inferred between the assessee being a wholesale dealer and sub-dealers. In the case, before the Hon'ble Delhi High Court, one important fact which weighed heavily their Lordships that in the postpaid SIMs the telecom company was deducting TDS u/s.194H and Hon'ble Court found that there is no difference in the case of prepaid SIM card also and therefore, all the essential feature of agency relationship exists between the dealer and the telecom operator. Thus, here in this case, it cannot be held that similar relationship

exists between the assessee and his sub-dealers; therefore, we hold that nature of payment in the form of incentive to various sub-dealers cannot be equated with commission as stipulated u/s.194H. Accordingly, we hold that there is no requirement for deducting TDS. Thus, in view of our aforesaid reasoning, we hold that the assessment order is not prejudicial to the interest of revenue. Since one of the limb of exercising jurisdiction u/s.263 is missing, i.e., it is not prejudicial to the interest of the revenue; therefore, such a revisionary jurisdiction u/s.263 cannot be sustained. Hence, the order of the ld. CIT is set aside and the grounds raised by the assessee are allowed.

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

**Order pronounced in the open Court on 13<sup>th</sup> August, 2018.**

Sd/-  
**[O.P. KANT]**  
**ACCOUNTANT MEMBER**

Sd/-  
**[AMIT SHUKLA]**  
**JUDICIAL MEMBER**

DATED: 13<sup>th</sup> August, 2018

PKK: