(2011) 05 CAL CK 0064

Calcutta High Court

Case No: IT Appeal No. 222 of 2006

Bharti Cellular Ltd.		APPELLANT
	Vs	
Assistant Commissioner of Income Tax		RESPONDENT

Date of Decision: May 19, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 194H(D), 201(1)(A)
- Securities Contracts (Regulation) Act, 1956 - Section 2

Citation: (2011) 244 CTR 185 : (2011) 200 TAXMAN 254

Hon'ble Judges: Kanchan Chakraborty, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Judgement

Kalyan Jyoti Sengupta, J.
The above appeal was decided to be heard by an order dated 17-8-2006 passed by the Division Bench of this Court against the judgment and order dated 4-4-2006 passed by the income tax Appellate Tribunal, "B" Bench in two appeals being ITA 1678 and 1679 of 2005 relating to assessment years 2003-04 and 2004-05. At the time of admission though No. substantial questions of law was formulated at the hearing of the appeal this Court formulated the following substantial question of law:

Whether on the facts and in the circumstances of the case and on a true and proper construction of the agreement between the Assessee and the franchisee, the learned Tribunal was justified in law in holding that there exists relation of the principal and agent between Assessee and franchisee and that the discount which is allowed by the Assessee is a commission and Section 194H of income tax Act, 1961 is attracted to such payment?

2. The facts of this case leading to preferring the present appeal is summarized as follows:

The Appellant-Assessee is engaged in the business of providing cellular mobile telephone services in Kolkata under the brand name "Airtel". The Assessee provides such services through its distributors by selling to them Starter Pack and Rechargeable Coupons which is commonly known as Subscriber Identification Mobile Card (hereinafter in short "SIM Card" and pre-paid card). These Sim cards and rechargeable coupons were purchased by the distributors/ franchisees engaged by the Assessee at a rate below the market price on such Sim card and the same are sold to the retailers by whom the same are ultimately sold to the customers. The Assessing Officer while going through the records namely the TDS return filed by the Assessee-Appellant found that Assessee had paid commission on starter pack and rechargeable coupons to 16 parties herein called "Franchisees" and though the Assessee had deducted TDS on commission and deposited the same during the period from April 2002 to July 2002, such deduction of tax at source however was discontinued by the Assessee treating such payment to the franchisee not as commission but discount which was outside the ambit of TDS u/s 194H.

3. Noticing above discontinuance of deduction of tax at source the Assessing Officer issued show cause notice to the Assessee and after considering detailed explanation filed by the Assessee along with sample copy of the agreement entered into with such franchisees he observed that these franchisees and the Assessee maintained principal and agent relationship and therefore, any payment made to such franchisee was liable for deduction of tax at source u/s 194H. The Assessing Officer also observed that on perusal of process of selling these Sim and pre-paid cards to respective customers, it was evident that these franchisees were only collecting information for passing on the same to the Assessee and therefore, these franchisees were only agents of the Assessee for which they were getting fixed percentage of commission in the name of discount in such sale from the Assessee.

4. The Assessing Officer thereafter found that the Assessee-company had paid commission of Rs. 3,08,00,435 in between 2nd August to 31-3-2003 on sale of starter packs and rechargeable coupons to 16 franchisees and such commission in the financial year 2003-04 was Rs. 5,66,76,134. The Assessing Officer has, therefore, treated the Assessee a defaulter for not deducting TDS and has accordingly computed the quantum of such undeducted Tax u/s 201(1) and interest chargeable thereon u/s 201(1A) at Rs. 20,09,151 in the financial year 2002-03 and 32,60,471 in the financial year 2003-04.

5. The Assessee being aggrieved by the said order of the Assessing Officer preferred appeal before the Commissioner of income tax (Appeals) who allowed the appeal and held that there was No. principal and agent relationship between the Assessee and its distributors, and their business activities and entities are independent. The Revenue being aggrieved by the said decision preferred appeal before the learned Tribunal and the learned Tribunal reversed the judgment and decision of the Commissioner of income tax (Appeals) and restored the decision of the Assessing Officer.

6. Dr. Pal, learned Senior Counsel appearing for the Appellant elaborating the fact relating to the transaction taken place in terms of the agreement between the Assessee-Appellant and franchisees, contends that the relationship between the Appellant and its franchisees are not of principal and agent and it is in substance that of principal to principal in connection with the services rendered to the ultimate customers through scheme of the pre-paid Sim card and recharge coupons. He has drawn our attention to various sub-clauses under Clause (16) of the model agreement particularly Clause (16.2) submits that the nature of the relationship is clearly that of a principal to principal. He relying on judgment of the Supreme Court in case of Bhopal Sugar Industry Ltd. v. STO 40 STC 42 and also Division Bench judgment of the Gujarat High Court in case of Ahmedabad Stamp Vendors Association Vs. Union of India (UOI), contends that when it is established the relationship is between principal to principal the question of payment of commission in any form by the Assessee does not and cannot arise so as to invoke the provisions of Section 194H of the income tax Act, 1961.

7. He further contends that it is settled principle of law that merely because some terms and conditions and restrictions having been imposed in the agreement, the relationship between principal to principal is not changed and varied. He complains that the learned Tribunal as well as Assessing Authority have failed to take into consideration of all the sub-clauses under the heading Clause (16) of the said agreement.

8. He advances legal plea with the support of Supreme Court decision in Union of India and Another Vs. Azadi Bachao Andolan and Another, and Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar, that merely because the tax bur Jen will be reduced, the true and basic terms and conditions of the written agreement and document cannot be doubted and/or questioned in absence of any specific challenge to the same. In other words it is not open to the Revenue Authorities in absence of such challenge to rewrite the agreement between the parties.

9. He concludes urging that in this case the Appellant-Assessee has No. obligation legally to deduct tax as Assessee has never paid any commission or brokerage at any point of time to the franchisees.

10. Mr. Nizamuddin, learned Counsel for the Revenue while supporting the findings of the learned Tribunal and the Assessing Officer contends that if all the terms and conditions of the agreement between the Assessee and franchisees are read carefully it would appear that the relationship between the Appellant and the franchisees are not principal to principal and the same is principal and agent. The learned Tribunal on interpretation of the relevant clauses have found the relationship between the Assessee and the franchisee is that of a principal and agent and such interpretation are neither absurd nor illogical hence this Court will not re-interpret the same. Therefore, the difference of the listed price of the Sim cards and pre-paid coupons, and the price under the agreement required to be paid by the franchisee, is indirect payment of commission in case of a pre-paid Sim card and recharge coupons.

11. He contends that this issue has already been decided by the Delhi High Court in case of CIT v. Idea Cellular Ltd[2010] 325 ITR 128: 189 Taxman 118 and also by the Kerala High Court in case of Vodafone Essar Cellular Ltd. v. Asstt. CIT [2010] 194 Taxman 518.

12. Under these circumstances this Court will not interfere with the judgment and order of the learned Tribunal.

13. On hearing of the learned Counsel for the parties and considering their respective contentions and going through the materials placed before us the precise point is in order to hold the Assessee is liable for deducting tax at source u/s 194H, whether the relationship between the Appellants and their franchisees created by the agreement is of a principal and agent or not, in other words whether the basic and cardinal character of the agreement intend to create the relationship of the principal to principal.

14. The test has been well explained by the Supreme Court when the relationship of principal to principal can be found, in the judgment of the Bhopal Sugar Industry Ltd"s case (supra). It is held in that case at page 49 of the report that true relationship of the parties has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship.

15. The Supreme Court in the said judgment observed at page 47 of the report as follows:

Thus the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens the buyer becomes the owner of the property and the seller has No. vestige on title left in the property.

16. The Gujarat High Court in case of Ahmedabad Stamp Vendors Association (supra) while relying on the said Supreme Court judgment in Bhopal Sugar Industry Ltd. "s case (supra) has reiterated legal principle that once it is established that the property in the good passes on to the vendor buyer and without having any control or title of the seller in it such transaction is called principal to principal.

17. On study of the aforesaid pronouncement of High Judicial Authorities we think that the Court is to examine whether after delivery of the goods to the buyer seller has retained control or right of Regulation in any form with regard to the mode of dealings of the buyer, in other words, whether the buyer has substantially unfettered choice to deal with the property purchased in any manner he likes or not. It is true some times the seller, under the contract or enactment prescribes certain regulatory measures to prevent abuse of the rare articles and goods even after sale but such measure cannot be ascribed to be attributes of the relationship of principal and agent.

18. In this case, while agreeing with the contention of the learned Counsel for the Revenue, reading one of the standard agreements produced before this Court it does not appear that the same intends to create relationship in the nature of principal to principal.

Dr. Pal, of course has emphasized placing clauses 16.1, 16.2, 16.3 that the dealings of transaction embodied in the agreement is in the nature of principal to principal.

19. We are of the view that the above clauses viz 16, and Ors. cannot be read in isolation of other clauses of the said agreement. True intention of the parties has to be gathered on careful reading of the entire agreement. In the process we see the recital of the said agreement which exposit basic purpose and it reads as follows:

Whereas on the aforesaid representation made by franchisee to BML, the Parties hereby enter into agreement whereby the franchisee is to provide the agreed services on the terms and conditions appearing hereinafter. [Emphasis supplied]

20. Clause 4 of the said agreement provides obligation of the franchisee.

4.1 The franchisee shall maintain a suitable establishment for the conduct of its business and the performance of its obligations under this Agreement. The franchisee shall use its best efforts to actively provide effective ways to market and promote the Pre Paid Services and shall always act in the interest of both BML and the subscribers to the Services of BML.

4.3 The franchisee shall treat as confidential and secret all verbal and written communications, lists and circulars of BML in respect of operational and marketing policies and strategies of BML that are communicated by BML to the franchisee. The franchisee shall adopt and implement security procedures acceptable to BML for determining the persons to whom such information is authorized to be disclosed based upon such person''s need to know the same for the purpose of fulfilling the franchisee''s obligations and responsibilities under this Agreement. Confidential and trade secret information of BML shall remain the property of BML and shall be returned to BML upon termination of this Agreement in the manner prescribed by BML. The franchisee hereby undertakes and agrees not to retain and make any copies of the entrusted confidential information.

4.4 The franchisee shall, in the conduct of its business and performing its obligations under this Agreement conform and adhere to the policies of BML communicated to the franchisee from time to time. The franchisee shall not charge the customers of the BML for the services anything more than the rates specified by the BML from time to time.

4.7 The franchisee agrees and undertakes to maintain proper and sufficient quantities of the Pre-paid Start-up Packs and recharge coupons in respect of the Pre-Paid Service in order to meet the market requirements at all times and in accordance with the guidelines and instructions issued by BML from time to time.

4.8 The Franchisee shall use its best efforts and endeavors to market and promote the Pre-Paid Services to meet the growing demands of the Subscribers. At No. point of time shall any right, title or interest pass to the franchisee in respect of the Pre-Paid Cards for

the Pre-Paid Services given to the subscribers for connection to the Service and all right, title, ownership and property rights in the such cards shall at all times vest with BML.

8.1 The franchisee"s price and payment for services will be specified by BML from time to time. The rates are subject to variation during the term of this Agreement at the sole discretion of BML, and shall be intimated to the Distributor from time to time.

(Emphasis supplied)

21. On reading of the aforesaid relevant and salient clauses of the said agreement following features are to be found:

(i) Property in the start up pack, pre-paid coupons after even after transfer and delivery to franchisee remains with the Appellant Assessee,

(ii) the franchisee really act as a facilitator and/or instrumentality of providing services by the Assessee to the ultimate subscriber,

(iii) the franchisee has No. free choice to sell it and everything is being regulated and guided by the Assessee,

(iv) the rate at which the franchisee will sell to retailers and that at which is realized by the Assessee to the franchisee, is also regulated and fixed by the Appellant-Assessee.

22. As we read above conditions with the clauses 16, 16.1, 16.2 and 16.3 of agreement to our comprehension it emerges though nomenclature has been used franchisee the agreement is essentially that of the principal and agent albeit the stipulation in Clause 16.2. In real sense the franchisee acts on behalf of the Assessee for selling start up pack, pre-paid recharge coupons to the customer of Assessee and it will be clear from clauses 4.1, 4.3, 4.4 of the agreement.

23. Section 194H of the income tax Act, 1961 provides as follows:

194H. Commission or brokerage.--Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in Section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate of "[five] per cent:

**At relevant period rate was 5 per cent

Provided that No. deduction shall be made under this section in a case where the amount of such income or; as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of,

or to, the payee, does not exceed two thousand five hundred rupees;

Explanation.--For the purposes of this section.-

(i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

(ii) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of Section 44AA;

(iii) the expression "securities" shall have the meaning assigned to it in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iv) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. [Emphasis supplied]

24. In Explanation (1) of the said section provides inclusive definition of commission or brokerage and the same may be received or receivable indirectly also by person acting on behalf of another person or service rendered.

25. In usual business transaction commission is paid by the principal to agent after services is rendered. But by aforesaid Explanation, commission which is receivable in future is within its sweep.

26. It appears from the records in this case that the transaction in case of prepaid Sim cards, and rechargeable Coupons, sufficient stocks are to be kept by franchisee, and then the same are to be sold to the retailers at a rate stipulated by the Assessee, say at Rs. 324 and the retailer is allowed to sell it to the ultimate customer at the maximum price again fixed by the Assessee, say at Rs. 330. The Assessee is to realize lesser rate say at Rs. 317 per Sim card from franchisee. Thus discount of Rs. 7 is given. Therefore after selling all the Sim cards and Prepaid Coupons to the retailers the franchisee is to make payment of sale proceeds to the Assessee after deducting a discount of Rs. 7 per Sim card. Thus this receipt of discount at the rate of 7 is in real sense commission paid to the franchisees. Hence all the trappings of liability as agent, of the franchisee towards Assessee subsists.

27. We conclude thus that there has been indirect payment by the Assessee to the franchisee of the commission and the same is attractable u/s 194H. The decision of the

Gujarat High Court in case of Ahmedabad Stamp Vendors Association (supra) is of No. assistance in this case as on analysis of fact and interpreting the various provision of law it could be found in that case that it was a transaction of principal to principal and No. element of agency was to be found.

28. We are of the view that the decision rendered by the Kerala High Court and Delhi High Court (supra) relied on by Mr. Nizamuddin have come to exact conclusion which we have arrived at and we also respectfully agree to the same.

29. Thus there is No. merit in the appeal. The judgment and order of the learned Appellate Tribunal is hereby affirmed. However, we direct the Assessing Officer to examine whether all the franchisees whose income tax has not been deducted at source by the Assessee has already been assessed entire tax payable is recovered in regular basis or not. If it is not by this time then this action will be taken, and if it is already realised and recovered then the principal amount of taxes to the extent of deductible at source shall not be recovered from this Assessee however, interest payable under the law has to be levied. Thus the appeal is disposed of.