

No commission involved on sale of prepaid mobile vouchers to distributors below their face value; no sec. 194H TDS

Summary – The Ahmedabad ITAT in a recent case of Vodafone Essar Gujarat Ltd., (the Assessee) held that where assessee engaged in business of providing mobile telephone services, sold prepaid vouchers to its distributors at a rate lower than its face value, difference between face value and selling price of prepaid voucher could not be regarded as commission requiring deduction of tax at source under section 194H

Facts

- The assessee-company was engaged in the business of providing mobile telephone services. During the course of survey, Assessing Officer noted that the assessee sold prepaid vouchers of various face value, to its distributors, at a rate lower than its face value.
- The Assessing Officer took a view that there existed relationship of principal and agents between assessee and distributors and therefore, difference between the face value and the price at which prepaid vouchers were sold, was nothing but commission on which tax was to be deducted under section 194H.
- In view of assessee's failure to deduct tax at source, the Assessing Officer proceeded to hold the assessee as an assessee in default for not deducting tax at source from commission on sale of prepaid air time, under section 201.
- The Commissioner (Appeals) confirmed said disallowance.
- On second appeal:

Held

- There is no dispute that the factual matrix of all the cases before the non jurisdictional High Courts in different cases were materially the same as in this case, and in conformity with the esteemed views of Karnataka High Court in *Bharti Airtel Ltd. v. Dy. CIT* [\[2015\] 372 ITR 33/228 Taxman 219 \(Mag.\)/\[2014\] 52 taxmann.com 31](#), it is held that:

(a) On the facts of the case, and as is evident from a reading of the agreements, the assessee has sold, by way of prepaid vouchers, e-top ups and prepaid SIM cards, the 'right to service' on principal to principal basis to its distributors. As evident from the terms and conditions for sale placed on record not only that the sale was final and the assessee was not responsible for any post-delivery defects in the services, it was specifically agreed that 'no request of refund of any money shall be entertained by GL (*i.e.* the assessee) under any circumstances'.

(b) The fact that there are certain conditions and stipulations attached to the sale of this right of service by the assessee to its distributors does not affect the character of sale on principal to principal basis.

(c) Section 194 H comes into play only in a situation in which 'any person, responsible for payingto a resident, any income by way of commission' pays or credits such 'income by way of commission'. However, since at the time of the assessee selling these rights for a consideration to the distributor, the distributor does not earn any income, the provisions of section 194 H do not come into play on the transaction of sale of the right to service by the assessee to his distributors. The condition precedent for attracting section 194H is that there should be an income payable by the assessee to the distributor.

(d) So far as the transaction of sale of 'right to service' by the assessee to its distributor is concerned, while it has income potential at a future points of time (*i.e.* when this right to service is sold at a profit by the distributor), rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Therefore, at the time of the assessee selling these prepaid cards, he is not in possession of any income belonging to the distributor. Accordingly, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise.

(e) In a situation in which the assessee has credited the sale proceeds at the transaction value (in contrast with the transaction being shown at face value and the difference between face value and the transaction value credited to the distributor), the tax deduction liability under section 194H does not arise. While the assessee has stated that the sale proceeds are credited at the transaction value, this aspect of the matter is to be verified by the Assessing Officer, and in case the sales is accounted for at the face value, to that extent, the tax withholding liability is to be sustained.

- The assessee's appeal is allowed in the terms indicated above.