IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Date of Decision: 13.02.2013

**ITA No.261 of 2012**

The Commissioner of Income Tax (TDS), Chandigarh …Appellant

Vs.

M/s Bharat Sanchar Nigam Limited …Respondent

**ITA No.262 of 2012**

The Commissioner of Income Tax (TDS), Chandigarh …Appellant

Vs.

M/s Bharat Sanchar Nigam Limited …Respondent

**ITA No.263 of 2012**

The Commissioner of Income Tax (TDS), Chandigarh …Appellant

Vs.

M/s Bharat Sanchar Nigam Limited …Respondent

**ITA No.264 of 2012**

The Commissioner of Income Tax (TDS), Chandigarh …Appellant

Vs.

M/s Bharat Sanchar Nigam Limited …Respondent

**ITA No.265 of 2012**

The Commissioner of Income Tax (TDS), Chandigarh …Appellant

Vs.

M/s Bharat Sanchar Nigam Limited …Respondent

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present: Mr. Yogesh Putney, Advocate for the appellant.

***HEMANT GUPTA, J. (ORAL)***

This order shall dispose aforementioned five appeals i.e. I.T.A Nos.261, 262, 263, 264 & 265 of 2012 arising out of an order passed by the Income Tax Appellate Tribunal on 23.03.2012 (Annexure A-III) pertaining to the assessment years prior to the insertion of second proviso to Section 194 H of the Income Tax Act, 1961 w.e.f. 01.06.2007 vide Finance Act, 2007. The Income Tax Appellate Tribunal has held that the amendment carried out is clarificatory in nature and is applicable even in respect of assessment years prior to insertion of the said proviso.

The Revenue has claimed the following substantial questions of law:

i. "Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal, Delhi Bench, New Delhi has erred in law by reversing the order of Ld. CIT (A) and Assessing Officer, ignoring the fact that third provision of section 164H of the Income Tax Act has been inserted w.e.f. 01.06.2007 and not from the retrospective effect."

ii. "Whether on the facts and in the circumstances of the case, the Hon'ble Income Tax Appellate Tribunal, Delhi Bench, New Delhi has erred in law by the deleting he demand of Rs.1,12,11,262/- created on a/c of short deduction of tax from the payment of commission paid by BSNL/MTNL to their public call office franchises during the period 01.04.2002 to 31.05.2007."

The assessee has paid commission to Subscribers Trunk Dialing (STD) / Public Call Office (PCO) granted by the assessee. In terms of Section 194H, any person not being an individual or a Hindu Undivided

family, who is responsible for paying any income by way of commission or brokerage is to deduct income tax at ther ate of 10% 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.

The assessee, a Government of India undertaking, has paid commission to STD/PCO franchises during the years under consideration without deduction of tax. The Assessing Officer found that the assessee has violated the mandate of Section 194H of the Act by not deducting tax at source. Consequently, the Assessing Officer made the assessee liable to pay the amount of tax as well as interest thereon. Such order was affirmed by the Commissioner of Income Tax (Appeals).

The Tribunal examined the proviso inserted to Section 194H vide Finance Act, 2007 w.e.f. 01.06.2007. The said proviso reads as under:

> "**194H**. xx xx
>
> Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees."

The Tribunal granted the benefit of such amendment to the assessee holding the same to be clarificatory in nature. Such order of the Tribunal is based upon the Income Tax Appellate Tribunal, Pune Bench in ITA No.71 to 77/PN/2009 for the assessment year 2002-2003 and 2008-09 in respect of the assessee herein. Considering the circular dated 12.03.2008 and the instructions dated 08.05.2009, the Tribunal has recorded the following findings:

"7. While the aforesaid amendment was stated to be prospective i.e. with effect from 1st June, 2007, it cannot be inferred that so far as prior period is concerned, the stand taken by the Central Board of Direct Taxes is that recoveries for non deduction under Section 194 H r.w.s. 201 are to be made for the same. The above extracts from the Board circular would show that the amendment in the Section 194 H was brought about because, as admitted by the CBDT itself, very few of the recipients had a tax liability. It is well settled in law that a tax withholding liability is a vicarious liability, as a part of tax collection mechanism, in the sense that when there is no primary liability of the taxpayer, proxy liability of the tax deductor also does not survive. In a situation like the one, we are *in seisin* of, in which the CBDT itself accepts that there is hardly any primary tax liability of the recipients of income. It is highly contentious an issue whether or not vicarious tax withholding liability can be invoked. As a matter of fact, the Central Board of Taxes has taken a stand that the demands are not to be enforced on BSNL and MTNL offices except in the cases where taxes have been deducted at source but not paid over to the revenue…..

8. The stand taken by the authorities below is thus contrary to the stand taken by the Central Board of Direct Taxes. While authorities below have taken a stand that the prospective amendment in Section 194 H, by itself, demonstrates that the taxes were required to be deducted at source in respect of PCO commission for earlier years, the Central Board of Direct Taxes is of the view that except in cases where BSNL or MTNL has deducted the taxes, but not paid over the same to the treasury, demands are not to be enforced till the matter is sorted out by the Board. When such is the stand taken by the CBDT itself, it cannot be said that in view of the insertion of proviso to Section 194 H with effect from 1st June, 22007. It is beyond doubt or controversy that so far as the period prior to this amendment is concerned, the tax deduction at source requirements under Section 194 H applied on payments of commission to PCO franchisees. Learned Commissioner (Appeals) did not, therefore, have any good reasons to disregard the binding judicial precedent. It cannot be open to a subordinate or coordinate judicial forum to disregard the decision of this Tribunal, in assessee's own case, merely on the ground that the later amendment in law, with effect from 1st June, 2007, must be inferred to be clarifying the position prior to the said amendment. The distinction made out by the learned CIT(A), therefore, does not meet our approval. Having regard to the discussions about the impact of CBDT circulars, we may also add that it is only elementary that the circulars issued by the Central Board of Direct Taxes

> are binding on the assessee only to the limited extent of these circulars being beneficial in nature. In other words, an assessee cannot be saddled with a liability only on the ground that the circular issued by the CBDT holds so. Such a liability has to be supported by the clear provisions of statute. Revenue thus cannot derive any support from reliance on the circulars passed by the CBDT."

Such order was followed by Pune Bench of the Tribunal in the assessment years 2006-07 and 2007-08 vide order dated 07.12.2011 as well. Similar view was taken by New Delhi Bench of the Tribunal in respect of assessee's own case for the assessment year 2002-03 in ITA No.3996/D/2004.

We do not find that any substantial question of law arises for consideration, inter alia, for the reason that the Central Board of Direct Taxes vide circular dated 12.03.2008 has taken a stand that the demands are not to be enforced on BSNL and MTNL offices except in the cases where taxes have been deducted at source but not paid over to the revenue. The proviso is clarificatory in nature though it was inserted by the Finance Act, 2007 w.e.f. 01.06.2007. The nature of the amendment and the purpose which it seeks to achieve make it abundantly clear that it is a clarificatory amendment and would be applicable even in respect of assessment years prior to insertion of the said amendment.

Consequently, we do not find that any substantial question of law arises for consideration in the present appeals.

The same are accordingly dismissed.

**(HEMANT GUPTA)**
**JUDGE**

**13.02.2013** **(TEJINDER SINGH DHINDSA)**
**harjeet/Vimal** **JUDGE**