IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

ITA No.3857/Mum/2016

(**निर्धारण वर्ष** / Assessment Years:2011-12)

Dy. Commissioner of Income Tax-8(3)(1), Room No. 615, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai 400020.	**बनाम**/ Vs.	M/s Tata Tele Services (Mah) Ltd., D-26, TTC Indl Aria MIDC, Sanpada, P.O. Turbhe, Navi Mumbai- 400703
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACH1458C		
(अपीलार्थी /**Revenue)**	**:**	**(**प्रत्यर्थी / **Assessee)**

अपीलार्थी की ओर से / **Revenue by**	:	Shri B. Sriniwas, D.R
प्रत्यर्थी की ओर से**/Assessee by**	:	Shri Sanjay Chopra, A.R

सुनवाई की तारीख / **Date of Hearing**	**:**	04.04.2018
घोषणा की तारीख **/** **Date of Pronouncement**	**:**	08.06.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-14, Mumbai dated 04.03.2016, which in itself arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 21.03.2014. The revenue assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> *"(i) The Learned CIT(A) has erred on facts and in law, in deleting the disallowance of Rs.66,03,56,590/- made under section 40(a)(ia) of Income Tax Act, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.*

(ii) The Learned CIT(A) has erred on facts and in law, in deleting the disallowance made under section 40(a)(ia) of the Income-Tax Act, despite the fact that assessee failed to deduct TDS and that the provision of the section 40(a)(ia) is very clear and there is no ambiguity which call for any judicial interpretation.

2. The Ld. CIT(A)'s order is contrary in law and on facts and deserves to be set aside.

3. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary.

4. The appellant prays that the order of CIT(A) on above be set aside and that of the A.O restored."

2. Briefly stated, the facts of the case are that the assessee company which is engaged in the business of a telecom operator had e-filed its return of income for A.Y 2011-12 on 27.09.2011, declaring a loss of Rs. 147,59,88,666/-. The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. The case of the assessee was thereafter taken up for scrutiny assessment under Sec.143(2).

3. During the course of the assessment proceedings, the AO observed that the assessee had though extended discounts of Rs.66,03,56,590/- to its prepaid distributors for selling of its prepaid recharge vouchers and starter kits, but no TDS was deducted on the said discounts. The AO being of the view that as the discount on sale of SIM/RCV were in the nature of commission, hence the assessee was liable to deduct tax at source on the same under Sec.194H of the Act. The explanation of the assessee that as its relation with the distributors was on a principal-to-principal basis, thus the discount given to the distributors constituted the latters margin and could not be held to be commission or brokerage liable for deduction of tax at source under Sec. 194H of the Act, however did not find favour with the AO. The A.O holding a conviction that as the assessee had failed to deduct tax at source on the amount of commission/discount extended to the prepaid distributors under Sec. 194H of the Act, thus concluded that the amount of Rs.66,03,56,590/- was liable to be disallowed under Sec. 40(a)(ia) of the Act. On the basis of his aforesaid deliberations the A.O disallowed the amount of Rs.66,03,56,590/- and vide his order dated 21.03.2014 assessed the income of the assessee company at Rs.247,65,56,980/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee in the backdrop of the facts of the case observed, that his predecessor while disposing off the appeals in the case of the assessee for the immediately preceding years i.e. A.Y 2009-10 and A.Y 2010-11 had deleted similar disallowances made by the A.O under Sec. 40(a)(ia) by relying on the judgment of the High Court of Karnataka in the case of Bharti Airtel Ltd. and Ors. Vs. DCIT (ITA Nos. 637 & 644 of 2013, dated 14.08.2014). The CIT(A) observing that as the disallowance under Sec. 40(a)(ia) was made by the A.O on similar lines as in A.Y 2009-10, therefore, followed the decision of his predecessor and deleted the addition/disallowance of Rs. 66,03,56,590/- made by the A.O.

5. The revenue being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that the issue involved in the present case was squarely covered by a consolidate order passed in the assessee's own case by a coordinate bench of the Tribunal viz. ITAT "D" Bench, Mumbai in M/s Tata Tele Services (Maharashtra) Ltd. Vs. ACIT, TDS-3(1), Mumbai, (ITA No. 2043-2046/Mum/2014) for A.Ys 2009-10 to 2012-13. It was submitted by the ld. A.R that the Tribunal in its aforesaid order, while disposing off the appeals of the assessee (including that for the year under consideration i.e. A.Y 2011-12) followed the judgment of the Hon'ble High Court of Karnataka in Bharti Airtel Ltd. and Ors. Vs. DCIT (ITA Nos. 637 & 644 of 2013, dated 14.08.2014) and had concluded that as the sale of starter kits/sim cards was purely a purchase/sale transaction on principal-to-principal basis and there was no relationship of agency, thus the discount given by the assessee on sale of prepaid starter kits/sim cards to the distributors would not be liable for deduction of tax at source under Sec. 194H of the Act. It was averred by the ld. A.R that the Tribunal on the basis of its aforesaid observations had concluded that the assessee could not be held to be in default under Sec.201(1) and 201(1A) of the Act, by observing as under:

"7. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon by the learned Authorised Representative and the learned Departmental Representative. As could be seen, the Assessing Officer has treated the assessee as assessee in default alleging non-deduction of tax at source under section 194H, on the reasoning that it has paid commission to the distributors for selling the pre-paid sim card / starter kit and recharge vouchers. However, on a perusal of the facts on records, it is noticed that though the assessee has fixed an MRP on the starter kits/pre-paid sim card and recharge vouchers but that is only for the purpose of allowing margin to the distributors. The assessee does not sell the starter kit pre-paid sim card to the distributor at the MRP but at a lesser price. The distributor is permitted to sell the starter kit / pre-paid sim card to the retailer/consumers after retaining his margin but under no circumstances, the distributor can charge over and above the MRP. For example, if the MRP of the starter kit is Rs 100, the assessee sells it to the distributor at Rs.80 and the distributor can sell it to the retailer or customer for a price ranging from Rs.80 to Rs 100. However, as far as the assessee is concerned, it raises the invoice for 80 only to the distributer and also the same amount is reflected in the books of account towards the sale price. The assessee never credits the amount of Rs.100 towards the sale price and allows discount of Rs.20 in its books of account. Thus, as far as the assessee is concerned, sale price of the starter kit /sim card is Rs. 80. Furthermore, as per the terms and conditions, once the sim card/starter kits are sold to the distributor, the sale is complete and under no circumstances, they can be returned back to the assessee. From the aforesaid facts, it is clearly evident that as far as sale of starter kit/sim card is concerned, it is purely a purchase/sale transaction on principal-to-principal basis and there is no relationship of agency. That being the case, the provisions of section 194H are not applicable. The Hon'ble Karnataka High Court after examining in detail the aforesaid factors have decided the issue in favour of the assessee by reversing the order of the Tribunal. In view of the changed scenario, after the order of the Hon'ble Karnataka High Court as referred to above, the decision of the learned Commissioner (Appeals) cannot be sustained. In fact, ITAT, Jaipur Bench, in case of M/s. Tata Teleservices Ltd. V/s ITO, ITA no.309/Jp./2012 and others, dated 13th March 2015, following the decision of Hon'ble Karnataka High Court (supra), held that provisions of section 194H is not attracted on the discount given on sale of pre—paid starter kit and accordingly, following the decisions referred to above, we set aside the impugned order of the learned Commissioner (Appeals) and quash the demand raised by the Assessing Officer under sections 201(1) and 201(1A)."

6. We have perused the order of the coordinate bench of the Tribunal, i.e. ITAT "D", Bench Mumbai, in the assessee's own case viz. M/s Tata Tele Services (Maharashtra) Ltd, Navi Mumbai, Vs. ACIT-TDS-3(1), Mumbai (ITA No. 2043 to 2046/Mum/2014; dated 27.05.2016) for A.Ys 2009-10 to 2012-13. We are of the considered view that the Tribunal had after deliberating at length on the issue as to whether the assessee remained under any statutory obligation to deduct tax at source on the discounts allowed to the distributors on the sale of starter kits/pre-paid sim cards and recharge vouchers, had answered in the negative, and concluded that as the assessee remained under no obligation to deduct tax at source on the said discounts, thus it could not be held as being in default under Sec. 201(1) and 201(1A) of the Act. We find ourselves to be in agreement with the view taken by the Tribunal that as the sale of starter kits/sim cards is purely a purchase/sale transaction on principal-to-principal basis and there is no relationship of agency, hence no obligation was cast upon the assessee to have deducted tax at source under Sec. 194H in respect of the discounts given to the distributors on the sale of the same. We thus, are of the considered view that as observed by us hereinabove, in the absence of any obligation cast upon the assessee to have deducted tax at source in respect of the discounts given to the distributors on the sale of the prepaid starter kits/sim cards, no disallowance under Sec.40(a)(ia) of Rs.66,03,56,590/- was called for in the hands of the assessee. We thus finding no infirmity with the order of the CIT(A), uphold the same.

7. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 08.06.2018

Sd/-	Sd/-
(Shamim Yahya)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 08.06.2018
Ps. Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**