



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA No. 399/2010

% Date of Order : 6<sup>th</sup> January, 2011

**THE COMMISSIONER OF INCOME TAX** ...APPELLANT

*Through:* Ms. Rashmi Chopra, Advocate.

*Versus*

**JAI DRINKS PVT. LTD.** ...RESPONDENT

*Through:* None.

**CORAM:**

**HON'BLE MR. JUSTICE A.K.SIKRI**

**HON'BLE MR. JUSTICE M.L.MEHTA**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not?  | Yes |
| 3. Whether the judgment should be reported in the Digest?                    | Yes |

**M.L.MEHTA, J. (Oral)**

1. This appeal has been preferred under Section 260A of the Income Tax Act (hereinafter referred to as 'the Act') against order dated 28th November, 2008 passed by the Income Tax Appellate Tribunal ('ITAT') for the assessment year 2004-2005.



2. The assessee company is engaged in business of manufacture and sale of soft drinks under the brand name i.e. Pepsi, Miranda, 7Up, etc. The assessee had appointed M/s Tirupati Drinks Pvt. Limited (hereinafter referred to as 'Distributor') as C&F Agent cum distributor for the purpose of distribution and sale of its products vide an Agreement dated 23<sup>rd</sup> December, 2002.
3. A survey was conducted under Section 133A of the Act and the Assessing Officer passed an order holding that the payment made by the assessee to the distributor constituted commission under Section 194H of the Act. The Assessing Officer held that the assessee defaulted in not deducting the tax at source on the amount of commission paid to the distributor and consequently, determined the total tax liability of Rs.40,06,679/- under Section 201(1) & 201(1A) of the Act. Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'CIT(A)'] which was allowed. The CIT(A) held the payments made by the Assessee as incentives in the normal course of buying and selling. The revenue preferred an appeal against this order before the ITAT which was dismissed holding that the nature of



transaction between the assessee and the distributor is not that of principal-agent, but principal-to-principal and that the payment given by assessee to the distributor is nothing but a discount and did not have the characteristics of commission.

4. The present appeal is preferred against the impugned order of the ITAT. The admitted facts, as noted above are not in dispute. The only question that arise for consideration is as to whether as per the agreement entered into between the assessee and the distributor and the payments made by the assessee to the distributor constitute commission as envisaged under Section 194H, and whether the assessee was liable to deduct TDS. The entire dispute centered around the interpretation of the agreement entered between the assessee and distributor. The CIT(A) has opined that, a sum allowed to a servant or agent who manages the affairs of others in recompense for his services is compensation. It is generally calculated at a certain percentage on the amount of transaction or on the profit to the principal. As a matter of fact, generally a person earning commission would be selling goods not on his own account but on behalf of another, commonly



known as the principal. In order to attract the provision of 194H, commission must have been received by a person who is acting on behalf of another. In other words, he must be acting as an agent to another person. The CIT(A) had also noticed that the assessee as well as the distributor are showing their respective sale invoices and are assessed to sales tax, which was evidenced by the respective sales bills and sales tax orders. With these observations, and in the light of each and every clause of the agreement, the CIT(A) held that the arrangement between the assessee and the distributor was that of principal-to-principal and not of principal-agent.

5. ITAT has also on its part examined each and every term and condition of the aforesaid agreement and held that it was the case where two parties to a contract have taken a conscious decision to transact between each other on principal-to-principal basis and it would not be open to the Revenue to read into such contract and treat the same as being on principal-agent basis.
6. The learned counsel appearing for the revenue relied upon the case of ***CIT v. Idea Cellular Ltd.*** 2010-TIOL-193-HC-DEL-IT. That was the case relating to the distributorship



of prepaid cellular telephones by the assessee through distributors called Prepaid Market Associates. Since in that case the overall control and also the ownership of the SIM cards remained with the assessee and the transaction in question was not that of sale and purchase, the Court held that keeping in mind the nature of service provided by the assessee to the ultimate consumer, a relationship is established between the assessee and the ultimate consumer. Distinguishing the legal positions, the Court in para 24 of its judgment opined as under:-

“24. In contrast, the legal position when the goods are sold by principal to its distributors creating “principal and principal” relationship would be entirely different. On the sale of goods, the ownership passes between the manufacturer and the distributors. It is the responsibility of the distributor thereafter to sell those goods further to the consumers – the ultimate users. The principal/manufacturer does not come in picture at all. Of course, he may be liable for some action by the consumer because of defective goods, etc., which is the result of other enactments conferring certain rights on the consumer or common law rights in his favour as against the manufacturer...”

7. The facts of ***CIT v. Idea Cellular Ltd.*** (supra) are entirely distinguishable from the facts of the present case.
8. A perusal of the agreement shows that the assessee had permitted the distributor to sell its products in a specified



area. The distributor was to exclusively deal in the products of assessee in a specified territory. The products were to be purchased by the distributor from the assessee against 100% advance payment, though decision rested with the assessee to give the products on credit to the distributor. The distributor was to maintain at all times the minimum stock and was to deal only in the products of the assessee. The distributor was to maintain its operational infrastructure including requisite staff under its employment with liability of PF contribution, ESI contribution, etc. as per the laws. It was specifically stated in clause 16 that the arrangements under this agreement are on principal-to-principal basis and nothing in this agreement shall be construed to confer the authority of an agent to bind the assessee. In clause 17 it was specifically mentioned that the distributor was to purchase the products of the assessee and was to be allowed discount per case on the printed MRP. In case of any breakage, leakage, etc., it was the distributor who was liable and not the assessee. Not only this, even all the approvals, consents, registrations, licenses, etc whatever



may be required from departments or authorities were to be obtained by the distributor.

9. From all that has been noted above, it is evident that the distributor was to purchase products at pre-determined price from the assessee for selling the same within specified area. The products were to be purchased by the distributor against 100% advance payment or may be some times on credit at the discretion of the assessee. Both the assessee and the distributor have been collecting and paying their sales tax separately. Both the parties have clearly understood and accepted the agreement between them. That being the arrangement between the assessee and the distributor, it could not be said that the relation between them was that of principal-agent. On the other hand it was clearly stipulated to be an agreement between them on principal-to-principal basis. Both the CIT(A) and also the ITAT rightly held that the payments being made by the assessee to the distributor were incentives and discounts and not commissions. We find no infirmity in the findings of the CIT(A) and also ITAT.



10. Keeping in view the abovementioned facts and circumstances of the case, the present appeal has no merits and is hereby, dismissed.

**M.L.MEHTA  
(JUDGE)**

JANUARY 6, 2011  
*AK*

**A.K.SIKRI  
(JUDGE)**