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IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH MUMBAI

BEFORE: SHRI MAHAVIR SINGH, VP
&
SHRI M.BALAGANESH, AM

ITA No.5862 & 5863/Mum/2018
(**Assessment Years :2016-17 & 2017-18 respectively**)

M/s. Uber India Systems Private Limited Unit 41/46, Floor 3 Paragaon, Phoenix Market City, LBS Marg, Kurla (W), Mumbai – 400 070	Vs.	Jt. CIT (TDS)(OSD) -2(3), Mumbai Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Road Mumbai – 400 002
PAN/GIR No.AABCU6223H **TAN: MUMU07023C**		
(Appellant)	..	**(Respondent)**

Assessee by	hri Jehangir Mistry & Shri Hiten Chande
Revenue by	Shri Sushil Kumar Poddar and Shri Akhtar Ansari
Date of Hearing	**19/11/2019 , 06/03/2020 & 24/02/2021**
Date of Pronouncement	**04/03/2021**

□□□□/ORDER

***PER M. BALAGANESH (A.M)*:**

These appeals in ITA No.5862/Mum/2018 & 5863/Mum/2018 for A.Yrs.2016-17 & 2017-18 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-60, Mumbai in appeal No.CIT(A)-60/IT-

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10039/JCIT(TDS)(OSD)-2(3)/2018-19 dated 12/09/2016 (ld. CIT(A) in short) against the order of assessment passed u/s.201(1)/ 201(1A) of the Income Tax Act, 1961 (hereinafter referred to as Act).

1.1. As identical issues are involved in both the appeals, they are taken up together and disposed of by this common order for the sake of convenience. With the consent of both the parties, Asst Year 2016-17 is taken as the lead year and the decision rendered thereon would apply with equal force for Asst Year 2017-18 also except with variance in figures.

2. The assessee had raised the following grounds of appeal :-

> *"Based on the facts and circumstances of the case and in law, Uber India Systems Private Limited ('the Appellant"), respectfully craves leave to prefer an appeal against the order dated 11 September 2018 passed by the Learned Commissioner of Income Tax (ppeals) - 60 [' Learned CIT(A)"] (received by the Appellant on 15 September 2018) under section 201(1) / 201(1A) of the Income-tax Act. 1961 ('Act") on the following grounds which are separate and without prejudice to each other:*
>
> *On the facts and in the circumstances of the case and in law, the Learned CIT(A) has:*
>
> *General*
>
> *1. Erred in treating the Appellant as an 'assessee in default' under section 201(1) of the Act for non-deduction of tax at source under section 194C of the Act amounting to Rs.19,65,61,979 with respect to disbursements made to Driver-Partners on behalf of Uber B.V;*
>
> *2. Erred in arbitrarily rejecting the submissions and explanation of the Appellant and that too on assumptions, presumptions, surmises and conjectures and hence the impugned order is unsustainable and liable to be quashed;*
>
> *3. Erred in determining a sum of Rs.24,92,16,591 (including interest under section 201(1 A) of the Act amounting to Rs.5,26,54,612) as demand payable by the Appellant;*

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Principles of natural justice

4. Erred in not appreciating that the Learned Assessing Officer ('Learned AO') has not provided sufficient opportunity of being heard before passing the order under section 201/201(1A) of the Act;

Enhancement of assessment in violation of law

5. Erred in not giving an opportunity (reasonable or otherwise) of being heard in terms of section 251(2) of the Act, before giving directions to the Learned AO to enhance the assessment after taking into consideration provisions of Section 206AA of the Act, which is completely bad in law and against the principles of natural justice;

Preliminary jurisdiction

6. Erred in not disposing off the preliminary jurisdiction issue as to who is the 'person responsible to pay' which is against the ratio laid down by the Hon'ble Supreme Court in various judicial precedents;

7. Erred in misinterpreting Section 204 of the Act and thereby, treating the Appellant as a 'person responsible for paying under section 204 of the Act without it being a party to any work/ service contract (implied or otherwise) with either the Driver-Partners or the Users;*

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8. Erred in holding that the Appellant is an 'Aggregator rather than Uber B.V. and the Appellant is soliciting Driver-Partners and the Users on its platform; and in not appreciating that the Appellant is a support entity and as pan of its support services to Uber B.V. and was appointed to collect and remit payments on behalf of and under the instructions of Uber B.V. only on account of regulatory requirements:

9. Erred in not appreciating the legal agreements entered into between the Appellant and Uber B.V., Uber B.V. and the Driver-Partners and Uber B.V. and Users outlining the roles, responsibilities and obligations of respective parties, and alleging such legally enforceable agreements as camouflaged, deceptive and without any substance and evidence;

10. Erred in re-characterising the business of Uber B.V. from a mere marketplace / e-commerce platform company to a transportation company

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providing services to end consumers, rather than providing lead generation services to Driver-Partners who provides transportation services to end consumer facilitated through Uber BV application.

11. Erred in completely ignoring that all the contracts with Driver-Partners shall be governed by and construed in accordance with the laws of The Netherlands and therefore due recognition should be given to the interpretation under the laws of The Netherlands, before recharacterization of contractual relationships;

12. Erred in holding that "web / app based aggregator" business model recognized by service tax law cannot be applied for income tax purposes, thereby disregarding the settled law of consistency to be followed for all Central Acts;

13. Erred in leading to a conclusion that the support activities provided by the Appellant to Uber S V. makes Appellant the actual face operating for Uber B.V. in India, though all contractual arrangements with Driver-Partners and Users are with Uber B.V.;

Non-applicability of section 194C of the Act

14. Erred in holding that the Appellant is liable to deduct tax as per the provisions of section 194C of the Act from ride fare and incentive remittances to Driver-Partners;

15. Erred in concluding that Driver-Partners have carried out 'work' for the Appellant;

16. Erred in not appreciating that there is no contract (implied or otherwise) of the Appellant with Driver-Partners / Users and therefore, question of Section 194C of the Act does not arise at all;

17. Erred in misinterpreting the Central Board of Direct Taxes (CBDT) Circular No. 715 dated 18 August 1995 and thereby concluding that the principles outlined therein in the context of payments made to travel agents does not apply to the fact pattern of Appellant;

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18. Erred in relying on Circular No 558 dated 28 March 1990 issued by the CBDT which in fact does not apply in Appellant's fact pattern;

19. Erred in not considering the exemption thresholds provided under the Act for applicability of section 194C of the Act;

20. Erred in including the collections in cash by the Driver-Partners while computing liability under section 194C of the Act, which is paid directly by the Users to the Driver-Partner;

21. Erred in not appreciating that the Driver-Partners are independent small scale business entrepreneurs engaged in provision of transportation services and income earned from such business operations is not subject to tax as per the provisions of section 44AD of the Act;

22. Erred in not appreciating that the liability to deduct tax is a vicarious liability and the Appellant cannot be treated as an 'assessee in default' without establishing/ ascertaining that the Driver-Partners (all who are residents of India), have any tax liability or have already discharged/ paid applicable taxes on their income;

23 Erred in upholding levy of interest amounting to Rs 5,26,54,612under section 201 (1 A) of the Act;

24. Erred in upholding that the Appellant has failed to deduct taxes as required under the law and initiation of penalty proceedings under section 271C of the Act.

Any consequential relief, to which the Appellant may be entitled under the law in pursuance of the aforesaid grounds of appeal, or otherwise, may thus be granted.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the

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appeal, so as to enable the Hon'ble Tribunal to decide this appeal according to law."

3. We have heard the rival submissions and perused the materials available on record including various judicial pronouncements that were referred to at the time of hearing by both the parties. The following primary facts would be relevant to be considered for the purpose of better appreciation of the issues in dispute before us.

A) Uber Technologies Inc. is a company incorporated in the United States of America and is the owner of the Uber Application ("Uber App") which provides lead generation services to independent Driver-Partners who are interested in providing transportation services to Riders ("Users"). The phrase "lead generation services" as used above merely means the provision of a digital platform/ marketplace where Driver-Partners (who wish to provide transportation services on their own account) can contract with Users (who wish to avail transportation services that are provided by Driver-Partners) and conclude undertake a contract of transport between themselves. Uber Technologies Inc. has granted a license of the Uber App to a company incorporated in the Netherlands namely, Uber B.V. to operate the Uber App worldwide including in India (excluding USA)'.

B) **Services provided bv Uber B.V. to Driver-Partners through the App:**

(1) Uber B.V. provides lead generation services to those Driver-Partners who wish to availof such services through the Uber App and register

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themselves with the Uber App. As part of the abovementioned service, Uber B.V. encourages potential users to register with it and use the Uber App without any charge. Through the Uber App, Uber B.V. provides the following services:-

a) Informing Driver-Partners about Users who wish to avail of transportation services;

b) Putting Users and Driver-Partners in touch so that they could connect, communicate, exchange data/information with each other in real time which would eventually enable the former to utilize the transportation services provided by the latter;

c) Offering an option to collect fares on behalf of Driver-Partners through a convenient digital mode;

d) Disbursing the collections made on behalf of Driver-Partners from Users to the) Driver-Partners.

(2) The Uber App facilitates a contract between the Driver-Partners and Users for the transportation services offered by the Driver-Partners. This contract is entered into directly between the Driver-Partners and Users with the Uber App acting merely as an intermediary for communication between the parties.

(3) A person intending to use the Uber App must download it and identify himself as either a Driver-Partner or a User. Upon downloading the

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Uber App, the Driver-Partner or User (as the case may be) then goes on to create an account with his details such as his name, phone number, Email ID, bank account details etc. The operator of the Uber App also offers a purely optional further service (if opted for) by the contracting parties (viz the Driver-Partners and the Users) to collect the fare agreed between those two on behalf of the Driver-Partners. This is merely an option as the User at his sole option choose to pay the Driver-Partner directly for the transport contract entered into by them. To enable such receipt payment for the services, while Users enter information such as credit card details or other digital payment methods, the Driver-Partners supply bank account details for disbursement of such payment.

(4) Whenever a User wants to request a ride, he is required to provide the details of his destination and the Uber App sends a request to the Driver-Partners located in the vicinity of the User. The Driver-Partner has an option of either accepting or rejecting the request received through the Uber App. If he accepts the request received from a User, he is given the details of the User like location, mobile number, name etc. After reaching the location of a User, he picks up the User and starts the trip. After dropping the User at the location provided, the User is required to pay the Driver-Partner, the fare agreed by them. The Driver-Partners has authorized the use of software to determine the fare on his behalf taking into account various factors such as demand, time of the day etc and this fare (agreed between the Driver-Partner and the User) may be paid by the User to the Driver-Partner either in cash or by using one of the digital payment modes provided on the App. If the User chooses to pay by one of the digital modes, the fare is collected by Uber B.V. on behalf of the Driver-Partner.

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(5) For providing the aforesaid lead generation services to the Driver-Partners, a percentage (approx. 20%) of the fare for each trip is collected from the Driver-Partners as the fee ("Service Fee") payable to Uber B.V.
Till April 2015, all collections on behalf of Driver-Partners were made directly by Uber B.V.in its bank account in the Netherlands and payment to individual Driver-Partners was made from the same bank account to the bank account of Driver-Partners in India.

(6) Driver-Partners, since they are offering transportation service on their own behalf, are at liberty to choose when to drive and when not to, and whether to accept or reject a request for transportation services received from a User via the Uber App or cancel a trip mid-way. Uber B.V. is neither the employer of the Driver-Partners, nor owner of the vehicles through which the transportation services are provided by the Driver-Partners. Further, Uber B.V. does not engage them as a contractor or an agent. Uber B.V. merely provides lead generation services to the Driver-Partners on a principal to principal basis, for which a service fee is charged by it to the Driver-Partners.

(7) As mentioned above, as a further service, Uber B.V. (through Uber India Systems Private Limited ("UISPL"), acting as its limited payment and collection service provider), also acts as the Driver-Partners' payment and collection agent, solely for the purpose of collecting the fare paid by the Users through digital modes, for the transportation services provided by the Driver-Partners and disbursing the same toDriver-Partner after deducting its Service Fee, if so required on an each trip basis by the User. This enables

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Users to electronically effect payment to the Driver-Partner for the transportation services rendered by the latter to the former. It is pertinent to note here that the Users can equally choose to pay by cash, which is paid directly to the Driver-Partners upon completion of the trip.

(C) Role of assessee company and services provided by it

(1) Uber group had set up a subsidiary namely, Uber India Systems Private Limited (UISPL) in India (i.e. the assessee company) on 16 August 2013 to market and promote the use of the Uber App in India and provide support services in connection with the same.

(2) Uber B.V. has engaged UISPL to provide support services under an Intercompany Service Agreement (as amended from time to time), which is enclosed at Page 1 of the Paper book, and Payment Collection and Remittance Services Agreement, enclosed at Page 37 of Paper book, for an arms" length consideration, i.e.. cost plus 8.5%. This fee has been the subject matter of scrutiny and the assessing officer has not questioned the arm's length basis of the said services provided by UISPL. Evidence in this regard is enclosed in pages 819 &820 of the Paper book filed before us.

(3) The support services provided by UISPL includes *inter-alia* promotion of the Uber App amongst (potential) customers, i.e. Driver-Partners, and

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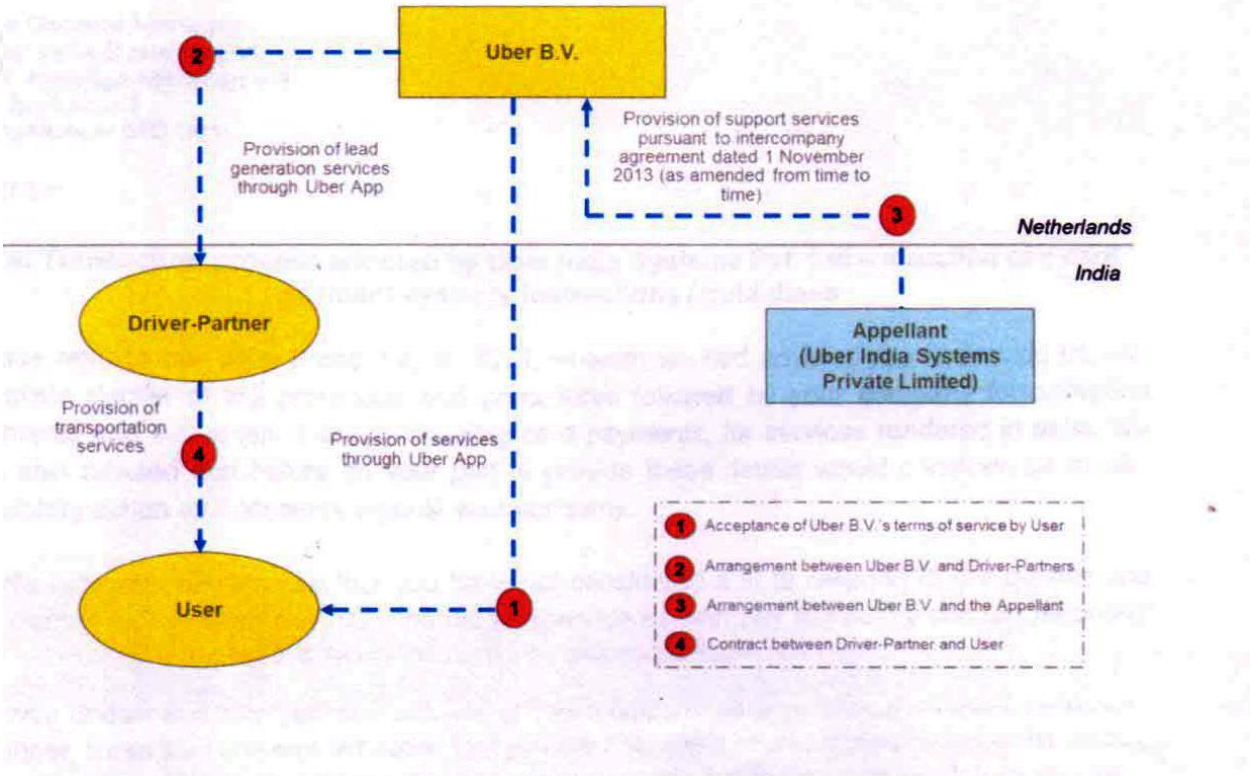
(potential) Users and performing certain business support services such as driver verification, documentation relating to registration of Driver-Partners, and other incidental support services. The said verification services are essentially to ensure that Driver-Partners using the Uber App are lawfully entitled to provide transportation services.

(4) The aforesaid business model of incorporating a local subsidiary, for the purpose of providing support services is followed worldwide by the Uber group. The diagrammatic representation setting out in brief the flow of transactions between various parties is as under:-



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(D)Guidelines from Reserve Bank of India (RBI)

(1) The RBI issued a Circular dated 22 August 2014 which provided that if the transacting parties i.e. Driver-Partner and User are in India, then any payment cannot be collected by Uber B.V. on behalf of Driver-Partners in a bank account outside India i.e. in Netherlands, and it must necessarily be collected and disbursed through a bank account maintained and operated in India. Lot of correspondences in this regard were exchanged with RBI which are enclosed in pages 799 to 816 of the paper book filed before us. Accordingly, an application dated 14.11.2014 was filed by Deutsche bank on behalf of Uber B.V. to permit UISPL to open a bank account in India to undertake the collection and disbursement function on behalf of Uber B.V.

(2) The RBI, after evaluating the business model and the transaction flow outlined, provided its clarification for the use of UISPL's bank account (resident) for collection and disbursement for and on behalf of Uber B.V. (non-resident) and also considered that any disbursement by UISPL to Uber B.V. (i.e. net of amount payable to service providers i.e. Driver-Partners in India) is a permissible current account transaction. A copy of the said RBI clarification is enclosed at Page 50 of the Paper book filed before us.

(3) In this context, Uber B.V. entered into an agreement effective 1.10.2014under which UISPL acts as a payment and collection service provider of Uber B.V. for a fixed monthly consideration of Rs. 5,00,000.

(E) Relevant clauses of the agreement entered into between Uber B.V. and the Driver-Partners:

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All the agreements are admittedly and undisputedly entered into between Uber B.V. and the Driver-Partners and UISPL is not a party to the contract. Relevant clauses of the agreement as entered into between a Driver-Partner and Uber B.V. are captured herein below:-

a) Clause 1.14. - Transportation service is provided by the Driver-Partner to the User

b) Clause 1.17. - Uber B.V. provides lead generation services to the Driver-Partner

c) Clause 2.2. - The Driver-Partner provides transportation services to the User at his own expense and the Driver-Partner is responsible for the transaction between them

d) Clause 2.3. - Transportation service provided by Driver-Partner to a User creates a legal and direct business relationship between them and Uber B.V. is not responsible for any action, inaction or lack of proper services of the Driver-Partner

e) Clause 2.4. - Uber B.V. does not control the Driver-Partner in the performance of his service and the Driver-Partner has full right to accept or reject the request received on the Uber App

f) Clause 2.5. - Driver-Partner is responsible for all obligations and liabilities that arise of providing transportation service to User

g) Clause 2.7.1. - Driver-Partner must use a mobile phone to receive lead generation services from Uber B.V. If required a mobile phone will be provided by Uber B.V. and its cost will be recovered from the Driver-Partner

h) Clause 2.8. - Driver-Partner must provide information regarding his location so as to receive lead generation services from Uber B.V.

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i) Clause 3.1. - It is the Driver-Partner's responsibility to ensure that he holds a valid license, all permits and approvals under the law and possesses necessary skills to provide a transportation service

j) Clause 3.2. - It is the Driver-Partner's responsibility to ensure that the vehicles used for providing service are registered as required by law, maintained in good condition and are lawfully possessed by them

k) Clause 4.4.- Uber B.V. will charge a service fee to the Driver-Partner for providing lead generation services which will be a % of ride fare charged by the Driver-Partner to the User

l) Clause 4.6.- Uber B.V. will issue a receipt, on behalf of the Driver-Partner, for the money collected for transportation service provided by a Driver-Partner to the User

m) Clause 8 - It is the Driver-Partner's responsibility to ensure that insurance is taken for any liability that may arise on account of transportation services and/ or as required by law

n) Clause 13.1. - Uber B.V. acts as an agent of the Driver-Partner for the limited purpose of collecting the payment from the User. The Driver-Partner is not an employee, agent, etc. of Uber B.V. and there is no partnership or Joint venture between Uber B.V. and the Driver-Partner

(F) <u>Relevant clauses of the agreement entered into between Uber B.V. and the Users :</u>

Similarly, it is also admitted and undisputed that the Users wishing to avail of Uber B.V."s services enter into agreements/ contract with Uber B.V. Relevant clauses of the agreement entered into between Uber B.V. and the Users are captured herein below:-

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a) Clause 2- Uber B.V. provides a technology platform to the User and the User agrees that the transportation service is not provided by Uber B.V.. Uber B.V. does not control third party services availed by the User

b) Clause 3 - User must create an account for using the technology platform provided by Uber B.V.

c) Clause 4 - After User receives Services from the third party service providers (i.e. Driver-Partners), Uber B.V. may if so required bythe User, facilitate the payment to be made by the User to the service provider i.e. Driver-Partner.

It is open to the User by exercise of an option at will, not to avail of this facility provided by Uber B.V. and to pay the Driver-Partner directly for the transportation service availed.

d) Clause 5- Uber B.V. has no responsibility or liability related to transportation service provided by the Driver-Partner to the User

3.1. With the aforesaid factual background, let us examine the issue in dispute before us as to whether the assessee company (i.e. UISPL) could be treated as „assessee in default" u/s 201 of the Act.

3.2. **Contentions of the ld. AO**

We find that the ld. AO has held that Uber B.V. is in the business of providing transportation services, therefore provisions of section 194C of the Act are applicable when the payments are made to Driver-Partners. However, according to him, since UISPL (i.e. the assessee company) is the face of Uber B.V. in India, UISPL is the person responsible for making payment and consequently liable to deduct tax at source under section 194C

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of the Act. These conclusions were reached by the ld. AO based on the following points:-

(a) Uber exercises full control over the selection of the Driver-Partners and on determination of ride fare and on issuance of invoices and making payment to the Driver-Partners.

(b) The income earned by Uber is not from use of software application but from the provision of transportation services (despite the Assessing officer accepting that UISPL's income is only 8.5% on cost and Rs. 5,00,000/- per month) and therefore that Uber B.V.'s income is a % of ride fare earned by the Driver-Partner.

(c) Uber recruits Driver-Partners, provides training, sets the quality standard, provides rating and has a right to register and de-register. Therefore, it exercises full control over the Driver-Partners.

(d) Incentives are provided to Driver-Partner to ensure he keeps availing of service of the Uber App.

(e) Agreement with the Driver-Partners cannot be relied upon as the Driver-Partners have no negotiation power.

(f) All the clauses of the agreement show that Uber is actively involved in rendition of transportation service by Driver for Eg. issuing invoices, resolving driver complaints, fixing of price, registering or de-registering driver, conditions of vehicle, etc.

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(g) Relied on three foreign judgments namely:

a) Association professional Elite vs. Uber System Spain (ECJ)

b) Barbara Ann vs. Uber Technologies Inc. (Superior Court of California)

c) Uber BV vs. Y Aslam (Employment Appeal Tribunal) (London)

which in his view held that Uber is a part of the transportation service industry.

(h) The advertisement by Uber and the interview of the CEO of UISPL proves that Uber is transportation service provider

(i) Characterisation of Uber B.V. as an "aggregator" under service tax law is not relevant to decide the liability under section 194C of the Act.

(j) UISPL is the face of Uber B.V. in India as everything outside the App is done by UISPL.

(k) UISPL is the person responsible for making payment and deducting tax at source as the payment is being made from the bank account of UISPL. Further, there is no requirement in law that person responsible for paying should be a part of the agreement.

(l) The payment to be made to the Driver-Partners do not require approval of Uber B.V. and the same is estimated and computed by UISPL, therefore UISPL is liable to deduct TDS.

3.3. **Observations of the ld. CIT(A)**

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We find that the ld. CIT(A) had affirmed the order passed by the ld. AO by observing as under:-

(a) UISPL is the face of Uber B.V. in India as everything outside the App is done by UISPL .

(b) The fact that all agreements are with Uber B.V. cannot be relied upon, as the collection and disbursement function is being done by UISPL.

(c) Characterisation of UberB.V. as an "aggregator' cannot be relied upon as it is from the perspective of service tax which is irrelevant for the purpose of Chapter XVII-B of the Act.

(d) Substance of the transaction rather than the form of the transaction is sought to be looked into for the purpose of taxation. It ia a structured transaction carried out by the assessee company.

(e) UISPL is the person responsible for making payment as the bank account from which the payment is made is in the name of UISPL.

(f) The transaction between the Uber B.V. and the Driver-Partners is specifically covered by Circular No. 558 which provides for deduction of tax at source under section 194C of the Act.

3.4. We should place on record our appreciation to elaborate arguments made by both the sides on each and every aspect of the assessment and the first appellate order. The various arguments of the ld. DR and its rebuttal by the ld. AR could be summarized in the following tabular form :-

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	Contentions of Learned DR	Rebuttal of the Learned AR	Supporting Documents (if any)
	Contentions relating to "person responsible for paying"		
	The provisions of section 194C requires specified person to deduct tax at source and not necessarily the person entering into a contract	a) It is submitted that the provisions of section 194C mandate only the person who has entered into a contract with a contractor for carrying out any work, to deduct tax at source as that person is liable under the contract to make the payment for work being carried out at his instance. Therefore, provisions of section 194C cannot be applied to a person other than the one who has entered into the contract. b) If the argument of the Learned DR is to be accepted then the provisions of section 194C(4) cannot be applied if the payment is being made by a person other than an individual. And, the provisions of section 194C(4) will become otiose. c) Secondly, if the argument of the Learned DR is accepted then the provisions of section 40(a)(ia) will become otiose as the disallowance under section 40(a)(ia) will not be applicable to the person claiming the expenditure merely because the person making the payment is a different person. Such an interpretation will render the provisions of section 40(a)(ia) superfluous and infructuous. d) Therefore, it is submitted that the interpretation put forward by the Learned DR is incorrect and unsustainable within the scheme of the Act.	
	The bank account from which the payment is being made belongs to UISPL and is shown as its bank account in the balance sheet	a) As submitted earlier, the bank account opened in the name of UISPL is operated by Uber B.V. as none of the signatories to the account are employees of UISPL. b) In the Balance sheet, the amount	

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		collected in the bank account of UISPL is shown under the head "liabilities" as it is collected on behalf of Uber B.V. c)Therefore, the argument of the Learned DR is contrary to the facts on record.	
	Section 204(iii) is applicable, as the payer is UISPL who is making the payment to Driver-Partners.	a) Provisions of section 204(iii) do not apply to UISPL because User, not UISPL, is the payer of the sum to the Driver-Partners. b) Secondly, UISPL is not the payer as per the provisions of section 204(iii), it is instead only a "remitter" of money collected on behalf of Uber B.V.	
	The Judgment in the case of Baldeep Singh vs UOI reported in 199 ITR 628 (P&H) has held that the tax is to be deducted at the earliest point of time since in this case, UISPL receives the money first, it is liable to deduct tax at source.	a) The Judgment in the case of Baldeep Singh has clearly held that the person who is liable to pay interest is the person responsible for deducting tax at source and not the person remitting the money. Therefore, applying the same rationale, since UISPL is merely the "'remitter," and not the person responsible for making payment, it cannot be held responsible for deducting tax. b) Secondly, if according to the Learned DR the tax is to be deducted at the earliest point of time then also UISPL cannot be held as the "person responsible for paying" as that would mean the User who pays the money for transportation service is required to deduct tax at source as the User is the "person responsible for paying."	
	Circular No. 715 does not apply as it is distinguishable and Circular No. 558 is applicable to the facts of the case.	a)Circular No. 715 completely covers the instant caseand applying the same logic it can be safely concluded that UISPL is not the person responsible for paying. b) Circular No. 558 does not apply to the instant ease as it contemplates a case where the payer takes the vehicles on hire from the owner and along with it, the owner is under obligation to provide a driver and the vehicles are made available for at least 14 hours a day. In the instant case, UISPL does not own the vehicle, does not have any contract with any vehicle owners for supply of vehicle, etc. Therefore, Circular No. 558 does not apply to the facts of the case.	
	The treatment under the	It is submitted that the distinction drawn by	Notification

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	service tax law is irrelevant as section 194C is concerned with the person responsible for paying however, service tax law is concerned with service provider or receiver.	the Learned DR is incorrect. Service tax law specifically brought the amendment in 2015 to provide that whenever the aggregator is involved in any manner the service tax liability will not be paid by service provider but by the aggregator involved in the transaction which clearly establishes that Uber B.V. is not a transportation service provider but only an intermediary between the service provider (i.e. the Driver-Partner) and service receiver (i.e. the User).	dated 1.3.2015 amending Notification No.30/2012
		Contentions of the DR relating to other issues:	
	According to the Learned DR, the substance of the transactions is to be seen as opposed to the form of the transactions as demonstrated in the agreements by the parties.	a) With regard to the argument of the Learned DR that substance of the transaction is to be seen, it is submitted that the principle substance over form cannot be applied in a way that a conclusion is reached, which is opposite in the understanding of the parties. It is also submitted that the parties to the agreement have understood the agreement in the same way then, the AO cannot read the agreement in a diametrically opposite manner **(CIT** vs. **Arun Dua 186 ITR 494).** b) It is the argument of the Learned DR that the agreements are not to be considered for deciding the nature of transaction is unsustainable in law. The Assessee submits that the entire transaction between the Driver-Partner and Uber B.V is based on and governed by the agreements entered into between the Parties. c) The Driver-Partners are registered on the Uber App based on the agreement, the lead generation service is rendered to the Driver-Partners based on the agreement, the ride fare is collected by Uber B.V. as a limited payment and collection agent based on the agreement. The service fee is paid by the Driver-Partners to Uber B.V. based on the agreement. Therefore, the argument of Learned DR that the agreements are to be ignored is incorrect and fanciful. d) It is also submitted that the TDS officer	

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		or CIT(A) has not brought any contrary material on record to show, even prima facie, that the actual transaction is different than the one contemplated in the agreement.	
	There is a sub-contract of transportation between Uber B.V. and Driver-Partner.	a) It is submitted that the argument of the Learned DR is contrary to the agreement between the parties, the treatment given under service tax law and the proceedings taken in the earlier year. b) Secondly, the argument of the Learned DR is totally incorrect because if there is a sub-contract between Uber B.V. and the Driver -Partner then in the event the vehicle breaks down or the Driver-Partner does not render the service there would be an obligation on Uber B.V. to arrange for another vehicle or Driver-Partner to complete the contract. c) However, that is not so; as in such an event, the User is required to carry out a fresh search on the Uber App or arrange for an alternate transportation on its own which clearly establishes that there is no subcontract between Uber B.V. and the Driver-Partner as there is no obligation on Uber B.V. to complete the contract.	
	User and Driver-Partner don't know each other and they know only Uber B.V.: According to the Learned DR, when a User books a cab from the Uber App, he does not have any information/ details about the Driver-Partner. Similarly, the Driver-Partner also does not have any information/ details about the User. This shows that Uber B.V. exercises control over the Driver-Partner.	a) Even in case of booking a black and yellow cab, the User is not aware about the Driver and similarly, the Driver is also not aware about the User till both of them connect with each other. b)Further, in a case of Uber App, the details of the Driver-Partner and the User are shared with each other only once the Driver-Partner accepts the request. In cases where the Driver-Partner rejects a specific request no details are shared. c) Thus, mere fact that the User and the Driver-Partners does not know each other is not relevant to determine whether Uber B.V. has a control over the Driver-Partner or not.	
	Uber is providing transportation as Uber selects the Driver and the Vehicle and the Rider has no control	a) A request is sent through the App to the Driver-Partner after using various parameters and algorithms coded into the App viz. location of Driver-Partner, how early a Driver-Partner can reach	Refer clause 1.17, 2.2 -2.5 of the agreement between Uber

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	over it: Uber takes the request for the type of vehicle and the type of hire, but the Driver or the vehicle owner is not chosen by the User. User has no discretion as regards the Driver or vehicle which he will get for the ride. So, the rider specifies what he wants and not who he wants for the trip and that proves that the transportation service is received from Uber B.V.	the Rider, what is the shortest route, whether Driver-Partner is in that direction or not, whether Driver-Partner has opted for a trip to another location, etc., connects a rider request to the Driver-Partner, who in turn has an option to accept/reject the ride. Only once the Driver-Partner accepts a trip, notification is sent to the User sharing the Driver-Partner details. In case, where no Driver-Partner accepts the request sent over the App, the User will not be able to book a ride using the Uber App. b) Further, the User has an option to select the type of car which he wants and even after the Driver-Partner has accepted the trip request, the User at his own discretion has the right to cancel a particular trip if the User does not like the Driver-Partner for any reason whatsoever. c) Therefore, the argument of the Learned DR that Uber B.V. selected the Driver-Partner and the vehicle and the User does not have discretion to choose the Driver-Partner is incorrect and contrary to the facts on record.	B.V. and Driver-Partner at Page No 55 - 57 of Paper Book
	Fare is determined by Uber B.V.: The Learned DR has alleged that, since Uber B.V. determines the fare for the ride, Uber B.V. is engaged in the transportation business. Also, the Driver-Partner is not aware about the fare being charged.	a) It is submitted that the base price (comprised of Minimum Fare + Rate per Km. + Rate per Minute) of the ride is known to the User and the Driver-Partner. And, when a request is sent to Driver-Partner on the Uber App, the surge price is shown on the screen. Further, on the Uber App. the Driver-Partner can also see in which area the surge pricing is higher and accordingly, place the car where he is more likely to get a higher fare. Therefore, when a Driver-Partner accepts a ride, he is well aware about the fare that he is to receive for providing the transportation services to the User. b) For instance, even in the case of Taxi service provider . registered with Maharashtra State Road Transport Corporation (MSRTC), the fare to be charged by the taxi service provider is fixed by MSRTC and it is binding on the rider and the service provider, the driver and car is also allotted by MSRTC, a fee is charged by MSRTC for facilitating this service, however, that does not	Refer Page No. 131 of Paperbook Refer Page No. 133-134 of Paperbook

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		in anyway make MSRTC a transportation service provider who is entering into a contract with a rider. It continues to act as a facilitator as against a transportation service provider. c) Secondly, even in the case of a public transport taxis, the fare is fixed by the State Government that would not mean that the transportation service is provided by the State Government. Therefore, the argument of the Learned DR is incorrect and does not make provisions of section 194C applicable to UISPL.	
	Promotions/discounts is given by the Uber to Rider: The fare that appears to the customer is not the same fare that Driver-Partners gets because of the promotion and discounts that the rider gets on the trip. If the rider pays less than what he should be paying for the trip due to promotion and discounts then the contract could not be between the Driver-Partner and User because the driver has not decided that the User would pay less.	a)It is submitted that the promotions and discounts are given to the User so as to increase the usage of Uber App and popularize it as more use by the Users would result in an increase in service fees earned by Uber B.V. Therefore, it's a commercial decision taken by Uber B.V. to promote its business. b) However, this fact will not change the nature of the contacts between a User and Uber B V and between a Driver-partner and Uber B.V. as intermediary. Uber B.V. still functions as an aggregator or digital marketplace. Merely because to promote its marketplace, Uber B.V. gives a User certain promotional offers, and it would not make Uber B.V a transportation service provider.	
	Receipt for the trip is provided bv Uber therefore, service is provided by Uber: In a contract, the receiver of the service makes a payment and it is customary that the service provider acknowledges the same through a receipt. In the case of an Uber ride, the receipt to the passenger is issued by Uber B.V. and not by the Driver. The fact that Uber B.V. is giving the receipt to	c) It is submitted that the invoice for the ride is issued by Uber B.V. ***on behalf of the Driver-Partner.*** The same is specifically mentioned on the invoice. In fact an added service is being provided by Uber B.V. to the Driver-Partner to enable them to issue an e-invoice to the Users and avoid any hassle of issuing manual receipts.	Sample copy of invoices are provided at Page No 77 of Paperbook.

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	the passenger implies that the service of transportation has been provided by Uber B.V. to the Users.		
	Uber sets the Quality standard for Driver and Vehicles: Uber has set the quality standards for the Drivers and the vehicles and that's not the job of a technology company. If it was not the transportation provider, why would it be bothered about the standard of the vehicle or the driver? That's a contract between the driver and the rider/ user and they should be bothered about it.	a) It is submitted that quality standards such as Car has to be clean, Driver-Partner shall be appropriately dressed, Driver-Partner shall drive the car safely, Driver-Partner should conduct himself properly, etc., are the same as the quality standards set under the Motor Vehicles Rules, 1987. Therefore, the clauses in the agreements are a reiteration of rules to which a Driver-Partner is legally bound to follow. Therefore, the argument of the Learned DR that quality standards are set by Uber is factually incorrect and contrary to the facts on record.	
	Switching on the Uber App leads to entering into contingent contract between Uber and Driver-Partner Once the Driver-Partner switches on the Uber App, he automatically enters into a contingent contract with the Uber for rendering the transportation service.	a) Section 31 of the Indian Contract Act, 1872 defines the term 'Contingent Contract' as ' *If two or more parties enter into a conflict to do or not do something, if an event which is collateral to the contract does or does not happen, then it is a contingent contract'.* Based on the reading above, contingent contracts exist where the conclusion of the contract is dependent on certain conditions or terms. However, no such condition is present in the current fact pattern. b) As explained above, once a Driver-Partner switches on Uber App, the request is sent based on the various parameters coded in the App and operates a standard facility. Therefore. Uber B. V. does not exercise any control over the selection of a rider when the request is communicated to the Driver-Partner through the App.	

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		c) It is again submitted that the Driver-Partner can offer the Ride to the Rider/User on terms and conditions acceptable to him. He may, after accepting the request sent through the App, cancel the trip and offer the Ride at a different price and with different terms and conditions which shows that Uber has no control over the Driver-Partner and he is free to offer the Rides to the Users at his own terms and conditions. Therefore, the Learned DR is incorrect in saying that the Driver-Partner cannot offer alternatives to the Users.	
	16Uber earns money as % of Ride fare and the products launched are different type of Rides: The basis of income of Uber is not the number of clicks that are made in its App which would be the number of uses made but the time and distance covered by the driver trips. The product that Uber launches in the market is not the different software applications but the different types of cars and rides	a) It is submitted that Uber BV is a technology company and has created the digital marketplace for the transportation industry. Further, it continuously updates the App through which the digital marketplace is accessed by the Rider and the Driver. It is submitted that the mere fact that the service fee is payable on the basis of fare would not convert Uber B.V. to a transportation service provider from a lead generation provider. b) It is submitted that different types of cars and rides are launched in the App based on the consumer demands (like UberGo, Premier, UberXL, Hire Go, Hire XL, UberMoto, Uber Auto) thereby providing various alternate means of transportation, and meeting the demands of the consumers, This helps Uber increase the overall use of its App, which in turn increases the business and revenue of Uber. c) Therefore, the contention of the Learned DR is incorrect and cannot be the basis of holding that provision of section 194C are applicable.	
	Drivers are recruited by Uber: The recruitment of the driver is another activity that Uber does which is done in the process called "onboarding." The process involves the KYC and police	a) Neither the assessee nor Uber B.V. recruits any Driver-Partner. The Driver-Partners can themselves register on the Uber App for the purpose of availing lead generation services from Uber B.V. The activity of on-boarding involves undertaking the KYC compliance and police verification to ensure that the Driver-Partners are trustworthy and there may not be any lapse in the	

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	verifications. These are not tasks that the technology company performs.	system which can hamper the business operations of Uber B.V. It is also done from the User safety and security perspective as well, which is an utmost necessity for Uber to increase its App usage among the Riders.	
	Uber pays incentives to Drivers to ensure better service is provided by them: The incentives are paid because that would attract drivers for performing trips and initiating others into the same as well and to ensure that the drivers are retained in the pool. The efficiency of the App is not increased by incentivizing drivers but by technological changes in the App by incorporating better maps, etc. and therefore it is clear that the incentives are paid to ensure better transportation service for its consumers and not for App efficiency.	a) The incentives are paid to the Driver-Partners to encourage them to take more trips, which directly results in the increased use of the Uber App and also increases the popularity of the App amongst Users. Therefore, payment of such incentives is directly connected with the increase in revenue by increased use of its App. Hence, the contention of the Learned DR that the payment of incentives proves that Uber is rendering transportation services is incorrect and perverse.	
	Foreign case laws The Learned DR placed reliance on certain foreign case laws which are mentioned hereinabove.	The reliance placed by the Learned DR on the foreign case laws is misplaced and some of the case laws as relied by the Learned DR have been over-ruled or are based on a separate footing as per the local laws in the overseas jurisdictions. a) It is submitted that there are other favourable orders of other authorities which have clearly held that Uber B. V. is just an intermediary and does not control the Driver-Partner. The Judgements are as follows: A) Adonis Biafore vs. Uber Technologies (Commercial Arbitration Tribunal) (California) B) Randolph Scott Dorr vs. Uber Technologies (Arbitrator Award) (California) C) Robert Gollnick vs Uber Technologies Inc. (Superior court of California)	Copy of the Judgments and news article has been handed over during the course of the Hearing

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		D) News article stating that Sao Paulo ruling by lower court considering Uber as an employer has been reversed by the Higher Court	

3.5. **Person responsible for payment**

We find that the ld. AR vide Ground Nos. 6 to 13 had argued on the preliminary jurisdiction point that UISPL is not the "person responsible for payment" as per section 194C read with section 204 of the Act. For the sake of convenience, the relevant extract of section 194C of the Act is reproduced hereinbelow:-

Section 194C

"(1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person... "

3.5.1. Hence it could be evident that on a bare reading of the aforesaid section, the following three conditions are required to be fulfilled in entirety for the department to conclude that UISPL is required to withhold taxes under Section 194C of the Act on disbursements to Driver-Partners:-

(1) UISPL should be the 'person responsible for paying' as per provisions of Section 204 of the Act;

(2) The disbursements to be made to the Driver-Partners should be in pursuance for carrying out any work by the Driver-Partners for UISPL; and

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(3) There is a contract entered into between the Driver-Partners and UISPL for the said work.

3.5.2. We find from the primary facts narrated hereinabove that UISPL does not satisfy any of the 3 conditions prescribed undersection 194C of the Act in view of the following facts:-

a) UISPL makes the payment on behalf of Uber B.V. therefore UISPL is nota personresponsible for paying.

b) The amount paid by UISPL is not for the purpose of carrying out any work for
UISPL.

c) There is no contract between UISPL and a Driver-Partner.

3.5.3. Hence we find that the provisions of section 194C of the Act could not come into operation at all in the instant case. Our view is further fortified by the fact that the User is also entitled to make payments in cash directly to the Driver-Partner. We hold that there cannot be any divergent stand that could be taken for a User who decides to make payment in Cash directly to the Driver-partner and for a User who decides to make digital payments. In respect of digital payments made by the User, UISPL is only a payment and collection service provider which collects the money and makes the payment on behalf of Uber B.V. Moreover, when the User directly makes cash payment to the Driver-Partner, the assessee company is not even made aware of the same. Hence expecting the assessee company i.e. UISPL in such circumstances to implead itself and deduct tax at source

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would only result in impossibility of performance in the hands of assessee company. The famous legal maxim would come to the rescue in this regard – *LEX NON COGUT AD IMPOSSIBLIA – meaning thereby that a law cannot compel a person to perform an act which he could not possibly perform*. This legal maxim has been further approved in the decision of Hon"ble Supreme Court in the case of Krishnaswamy Bros reported in 281 ITR 305 (SC).

3.5.4. We find that the provisions of section 194C of the Act requires the person responsible for paying to a contractor, for "carrying out any work in pursuance of a contract", to deduct tax at source at 1% from the sum payable to individual contractor. We find that the UISPL is not "the person responsible for paying" for the transactions that are facilitated between a User and a Driver-Partner through the Uber App. Since the amount paid in cash is directly paid by user to the Driver-Partner and UISPL is not involved in the transaction at all, UISPL cannot be treated as a person responsible for paying when the amount is directly paid by the user to a Driver-Partner. When UISPL cannot be held as a person responsible for payment when cash is directly paid by the User to the Driver-Partner, then how the very same UISPL could be treated as a person responsible for payment when the User decides to make payments through digital means. We find that the role of UISPL is limited to act as a payment and collection service provider of Uber B.V. whereby the ride fare is collected byUISPL in its bank account on behalf of Uber B.V. and thereafter payments are made, on the instruction of Uber B.V., to Driver-Partners.

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3.5.5. We find that the UISPL was brought in to the picture due to the restriction placed by the RBI vide Circular dated 22.8.2014 as detailed supra which prohibited Uber B.V. from collecting the ride fare on behalf of Driver-Partners through its bank account in the Netherlands, and was mandated to collect and disburse the rider fare to Driver-Partners through an Indian Bank Account. Pursuant to the above circular, an agreement dated 1.10.2014 was entered into between Uber B.V. and UISPL wherein UISPL was appointed as its payment and collection service provider. An application was also made by Deutsche Bank proposing to open a bank account in the name of UISPL (but on behalf of Uber B.V.) wherein ride fare and other charges will be collected by UISPL and thereafter the disbursements will be made by UISPL to Driver-Partners on behalf of Uber B.V.. We find that the ld AR also drew our attention to the relevant page nos. 817 & 818 of the paper book filed before us to prove that the bank account pursuant to the approval of the RBI is operated by Uber B.V. and none of the signatories to the bank account are employees of UISPL.

3.5.6. We find that the provisions of section 204(iii) of the Act which defines "person responsible for paying" is also not applicable in the instant case in view of the fact that - to fall within the scope of section 204(iii) of the Act, it is necessary that a person is the payer of any sum chargeable to tax. In the instant case, UISPL is not a payer of money or liable to pay money but only a remitter of money which is collected from the Users on behalf of Uber B.V. and thereafter remitted/ disbursed at the instructions of Uber B.V. to the Driver-Partner. Hence, in the aforesaid transaction, it is User who is the person responsible for paying, as he enters into a contract with the Driver-Partner pursuant to which the transportation service is

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rendered by the Driver-Partner to the User . Therefore, it is submitted that the User is the person responsible for paying for the purpose of section 194C read with section 204 of the Act.Hence it could be safely concluded that UISPL cannot be treated as a person responsible for paying within the meaning of section 194C read with section 204 of the Act as it has not entered into any agreement with the Driver-Partners as stated supra.

3.5.7. We find that the reliance placed by the ld AR on the following decisions are very well founded and directly supports the view that a person being a mere remitter of money cannot be held to be a person responsible for making payment:-

a) Decision of Hon"ble Punjab and Haryana High Court in the case of Baldeep Singh vs. UOI reported in 199 ITR 628 (P&H).
b) Decision of Hon"ble Delhi High Court in the case of CIT vs. Cargo Linkers reported in 179 Taxman 151 (Del.).
c) Decision of Hon"ble Delhi High Court in the case of CIT vs. Hardarshan Singh reported in 216 Taxman 283 (Del.).
d) Decision of Co-ordinate Bench of this Tribunal in the case of DCIT vs. Movies Stunt Artist reported in 6 SOT 204 (Mum.).
e) Decision of Co-ordinate Bench of Indore Tribunal in the case of Chief medical Officer vs. ITO reported in 40 taxmann.com 156

3.5.8. We also find that the above views and propositions are also supported bv the circulars issued by the Central Board of Direct Taxes clarifying that an intermediary is not required to deduct tax at source. Few circulars issued in this regard are as follows:-

(a) Circular No. 487 dated 8.6.1987 wherein the Board had clarified that workers employed to manufacture bidi through a medium of agency such as Munshis who manufacture bidis and after bringing bidi to factory for quality

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check and get the payments from Munshis, are not required to deduct tax at source while making payment to such workers.

(b) Similar clarification was issued vide Circular No. 715 dated 8 August 1995 (Question No 7), wherein it was clarified that a travel agent issuing tickets on behalf of the airlines is not required to deduct tax at source as he acts on behalf of the Airlines.

(c) Further, the Board vide Circular No.5/2002 dated 30 July 2002 (Question
No 6 & 7)once again clarified that when an individual makes payment to a travel agent for the purchase of a ticket is not subject to tax deduction at source as the privity contract isbetween the Individual passenger and the airline.

3.5.9. It is well settled that the Circulars issued by the CBDT are binding on the tax authorities. Hence taking a view contrary to what is already stated in the CBDT Circulars is not appreciated and accordingly even on this count, the assessee company i.e. UISPL cannot be treated as a person responsible for payment.

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3.5.10. One more excruciating fact that needs to be considered herein is that the learned Assessing Officer while framing the income tax assessment in the hands of UISPL u/s 143(3) of the Act dated 8.12.2018 had treated the assessee company being engaged in the business of providing marketing and support services to Uber and not as a transportation service provider. Admittedly, no disallowance of expenditure u/s 40(a)(ia) of the Act was made in the hands of the assessee company for violation of provisions of Chapter XVII-B of the Act. While this is so, how can the TDS Assessing Officer take a divergent view on the same issue by changing the nature of business carried out by the assessee.

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3.5.11. We further find that the legislature in its wisdom had duly provided for the relevant provisions in the Act by specifically mentioning mere remitter of money to deduct tax at source as is provided in section 204(iv) of the Act, wherein, Drawing and Disbursing Officer (DDO) i.e. the remitter of money for Government, wherever required, need to deduct tax at source being person responsible for paying. The said provision is restricted to payment made by DDO on behalf of the Government and the same cannot be extended to other payments made by outsiders.

3.5.12. Hence UISPL (i.e. the assessee company) being a mere remitter of collections made on behalf of the Driver-Partner at the direction of Uber B.V. cannot be held as the „Person responsible for paying" within the meaning of section 194C read with section 204 of the Act.

3.6. **Applicability of provisions of section 194C of the Act**

We find that the Driver-Partners enter into only one agreement i.e. with UberB.V. for availing the „lead generation service". The relevant clauses of the said agreement which are enclosed in pages 55 to 66 of the paper book filed before us are summarised as under:

a) Clause 1.14 and 1.17 - Transportation service is provided by the Driver-Partner to the User and Uber B.V. merely provides lead generation services to the Driver-Partner.

b) Clause 2.2.- The Driver-Partner provides transportation services to the User at his own expense and the Driver-Partner is responsible for the transaction between them and the User.

c) Clause 2.3.- Transportation service provided by the Driver-Partner to a User creates a legal and direct business relationship between them and Uber

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B.V. is not responsible for any action, inaction or lack of proper services of the Driver-Partner.

d) Clause 2.4. - Uber B.V. does not control the Driver-Partner in the performance of his service and the Driver-Partner has full right to accept or reject the request received on the Uber App.

e) Clause 2.5. - Driver-Partner is responsible for all obligations and liabilities that arise out of providing transportation service to the User.

f) Clause 2.7.1. - Driver-Partner must use a mobile phone to receive lead generation services from Uber B.V..

g) Clause 2.8. - Driver-Partner must provide information regarding his location so as to receive lead generation services from Uber B.V..

h) Clause 3.1.- It is the Driver-Partner's responsibility to ensure that he holds a valid license, all permits and approvals under the law and possesses necessary skills to provide a transportation service.

i) Clause 3.2.- It is the Driver-Partner's responsibility to ensure that the vehicles used for providing service are registered as required by law, maintained in good condition and are lawfully possessed by them.

j) Clause 4.4. - Uber B.V. will charge a service fee to the Driver-Partner for providing lead generation services which will be a percentage of ride fare charged by the Driver-Partner to the User.

k) Clause 4.6. - **Uber B.V. will issue a receipt to the User on behalf of the Driver-Partner, for the money collected for transportation service provided by a Driver-Partner to the User. (emphasis supplied by us)**

1) Clause 8 - It is the Driver-Partner's responsibility to ensure that insurance is taken for any liability that may arise on account of transportation services and/or as required by law.

m) Clause 13.1. - Uber B.V. acts as an agent of the Driver-Partner for the limited purpose of collecting the payment from the User. The Driver-Partner

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is not an employee, agent, etc. of Uber B.V. and there is no partnership or Joint venture between Uber B.V. and the Driver-Partner.

3.6.1. Similarly, the Users wishing to avail of Uber B.V.'s lead generation services enter into agreements/ contract with Uber B.V.. The relevant clauses of the said agreement entered into between Uber B.V. and the Users which are enclosed in pages 69 to 75 of the paper book are summarized as under:-

a) Clause 2 - Uber B.V. provides a technology platform to the User and the User agrees that the transportation service is not provided by Uber B.V.. Uber B.V. does not control third party transportation services availed by the User.

b) Clause 3 - User must create an account for using the technology platform provided by Uber B.V.

c) Clause 4 - After User receives transportation services from the Driver-Partner, Uber B.V. may, if so required by the User, facilitate the payment to be made by the User to the Driver-Partner.

It is open to the User by exercise of an option at will, not to avail of this facility provided by Uber B.V. and to pay the Driver-Partner directly for the transportation service availed by remitting cash payment to the Driver-Partner.

d) Clause 5- Uber B.V. has no responsibility or liability related to transportation service provided by the Driver-Partner to the User.

3.6.2. From the aforesaid clauses in the relevant agreements, it could be safely concluded that Uber B.V. is involved in rendering lead generation service to the Driver-Partner and transportation service is not provided by Uber B.V. or UISPL. The transportation service is provided by the Driver-

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Partner to the User for which the car is arranged by the Driver-Partner, all the expenses are incurred by the Driver-Partner, necessary permits and licenses are obtained by the Driver-Partner and the liability arising out of the transaction of transportation service is assumed by the Driver-Partner.**Uber B.V. is neither responsible for providing transportation service nor any liability arising out of the transportation service provided by the Driver-Partners. The transportation service provided by the Driver-Partner to Users is a contract between them to which Uber B.V. is not a party. For providing lead generation service, the Driver-Partner pays a percentage of the ride fare as a service fee to Uber B.V. Therefore, it is clear that UISPL is not a part of the contract and no payment obligation is imposed either under the agreement with the Driver-Partner or under the agreement with the User**. (emphasis supplied by us)

3.6.3. Hence it could be safely concluded that the provisions of section 194C of the Act are not applicable in the instant case of the assessee as –
a) UISPL is not the person responsible for making payment
b) UISPL has not entered into any contract with the Driver-Partners
c) no „work"is carried out by the Driver-Partners for UISPL.

3.7. We find that the ld. AR drew our attention to the fact that Uber B.V. has been recognized as an „aggregator" under the Service Tax Law. Section 66B of Finance Act, 1994 provides that service tax to be paid at prescribed percentage on the value of services provided in India. Correspondingly, Rule 2(1)(d)(ii) prescribed person **providing service** as a Person liable for paying service tax. Section 68(2) of the Finance Act, 1994 provides that on

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specified services the service tax shall be paid by prescribed person. In March 2015, Central Board of Excise and Customs vide Notification No. 7/2015 dated 1.3.2015 notified that whenever an aggregator is involved in any manner in the transactions, then the **person providing is not liable to pay service tax** but aggregator is the person liable to pay service tax. For this purpose, Rule - 2(1)(d)(i)(AAA) of Service Tax Rules, 1994 was amended to provide that the aggregator liable to pay service tax if he is involved in the transaction in any manner. These documents are enclosed in page 90 of the paper book filed before us.Accordingly, later on, vide letter dated 27.4.2015, Uber B.V. intimated the service tax authorities that Uber B.V. has discharged its liability of service tax as an aggregator. Evidences in this regard are enclosed in Pages 82 and 88 of the Paper book filed before us.

3.7.1. From the above, again it becomes very clear that one wing of the legislature has recognized Uber B.V. as an aggregator and not a service provider which again brings us to the same point that the transportation service is provided by Driver-Partner to Users directly for which User is making the payment and it is the User who is the person responsible for making payment. And, Uber B.V. and UISPL are not a party to the contract of transportation entered into between a User and a Driver-Partner.

3.8. **Principle of Consistency in the assessment made bv the Department**

We find that the ld. AO while passing the assessment order under section 143(3) of the Act for the Asst Year 2016-17 dated 8.12.2018 had duly accepted the fact that UISPL is an entity engaged in the business of

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providing marketing and support services to Uber B.V. and not in the business of providing transportation service. Accordingly, no disallowance u/s 40(a)(ia) of the Act was made thereon.

3.8.1. Further, even for earlier assessment years, i.e., AY 2014-15 and AY 2015-16, when the payment was collected and disbursed directly by Uber B.V. from an account outside India, Department has not invoked provisions of section 194C of the Act for the payments made to Driver-Partners in those years.

3.8.2. Therefore, the Department has been consistently taking a view that the provision of section 194C of the Act are not applicable in the hands of UISPL and has assessed UISPL as a marketing and support service provider to Uber B.V. without making any disallowance under section 40(a)(ia). Hence, in the absence of any change in the facts and circumstances of the case, the department is not permitted to take a different view in the matter for the years under consideration.

3.9. We find lot of force in certain examples quoted by the assessee as under who operate on the similar model as employed by Uber B.V. :-

(a) Similar comparison can be made with a nursing bureau (wherein nursing bureau would also get the background checks done before letting the nurse register on their portal), wherein the person interested in availing the service of a nurse and the nurse willing to render the service are put in touch by the nursing bureau. However, nursing bureau is not and cannot be held liable for deficiency in the service of a nurse.

(b) Similar comparison can be made with matrimony websites apps like shaadi.com. bharat matrimony, wherein the profiles of candidates eligible

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for marriage are being displayed (post background checks). These apps just connects two willing candidates with each other. However, the website/ app is not and cannot be held liable for fault in the marriage of the two.

3.10. Let us now look into the issue in dispute in the context of amendment brought by Finance Act 2020 in section 204 of the Act. The amendment made in section 204 (person responsible for paying) of the Act by way of insertion of clause (v) thereon is as under:-

Section 204 – For the purposes of the foregoing provisions of this Chapter and section 285, the expression "person responsible for paying" means –

(i) .....
(ii) .....
(iii) .....
(iv) .....
(v) in the case of a person not resident in India, the person himself or any person authorized by such person or the agent of such person in India including any person treated as an agent under section 163.

3.10.1. We find that the insertion of clause (v) in section 204 of the Act is effective only from 1.4.2020 i.e. applicable from Asst Year 2020-21 onwards and not earlier. We find that this amendment makes it very clear that any person who is authorized to make payment on behalf of a non-resident will be covered within the purview of section 204 of the Act and will be required to deduct tax at source. It is not the case of the revenue that the assessee company need to be taxed as an agent of non-resident in terms of section 163 of the Act. It is the case of the revenue that UISPL is making payment to Driver-Partners on behalf of Uber B.V. (non-resident entity). This amendment has been specifically brought into the statute only with effect from 1.4.2020 by the Finance Act 2020 and cannot be made applicable for earlier years. This amendment cannot be held to be clarificatory in nature

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thereby holding it retrospective in operation as admittedly the same was not introduced with the expression „ for the removal of doubts". If the version of the revenue is to be accepted by holding that UISPL would be „person responsible for paying" as it was making payment to Driver-Partners on behalf of Uber B.V. (Non-resident) and that the said provision was always there in the statute, then there would be absolutely no necessity for the parliament to even introduce this amendment by way of insertion of clause (v) in section 204 of the Act in the Finance Act 2020 with effect from 1.4.2020. In other words, if the contention of the revenue is to be accepted for the years under consideration before us, then the entire amendment inserted by Finance Act 2020 in section 204 of the Act would become redundant and would be otiose. Hence even the subsequent amendment brought in section 204 of the Act with effect from 1.4.2020 by way of insertion of clause (v) thereon, would strengthen the stand and various contentions taken by the assessee for the years under consideration.

3.11. From the aforesaid elaborate observations in the facts and circumstances of the instant case, it could be safely concluded that UISPL cannot be treated as a „person responsible for paying" for the purpose of section 194C read with section 204 of the Act, for more than one reason and also the provisions of section 194C of the Act cannot be made applicable thereon. Hence the assessee company i.e. UISPL cannot be treated as an „assessee in default" and no order could be passed u/s 201 / 201(1A) of the Act in its hands for the years under consideration.

3.12. The ground raised by the assessee challenging the enhancement made by ld CIT(A) would now be academic in nature as we had already held

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that the assessee cannot be fastened with liability u/s 201 or 201(1A) of the Act in the facts of the instant case.Accordingly, the grounds raised by the assessee are disposed of in the aforesaid manner.

4. The other ground raised by the assessee for levy of interest u/s 201(1A) of the Act is consequential in nature and does not require any specific adjudication.

5. Yet another ground raised by the assessee is with regard to initiation of penalty proceedings u/s 271C of the Act, which would be premature for adjudication at this stage.

6. In the result, the appeals of the assessee are allowed.

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Order pronounced on 04/03/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 04/03/2021

KARUNA, *sr.ps*

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai

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