आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

श्री आर. के. पांडा, लेखा सदस्य एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.817,818 1577, 1578, 1961 & 1962 /PUN/2013
निर्धारण वर्ष / Assessment Years : 2007-08 to 2012-13

Vodafone Cellular Limited,
(Formerly Known as Vodafone
Essar Cellular Ltd.),
F.P.No.27, S.No.21,
The Metropolitan,
Old Mumbai Pune Highway,
Shivajinagar, Pune – 411 -019
PAN : AAACB8614L

……. अपीलार्थी /Appellant

बनाम v/s

Dy.CIT (TDS-1), Pune

……. प्रत्यर्थी /Respondent

अपीलार्थी की ओर से / Appellant by : Shri Salil Kapoor, Shri Rohit Verma and Shri Rajat Soni
प्रत्यर्थी की ओर से / Respondent by : Shri D.S. Benupani, CIT

सुनवाई की तारीख / Date of Hearing :18.10.2016		घोषणा की तारीख / Date of Pronouncement: 04.01.2017

आदेश / ORDER

PER R.K.PANDA, AM :

The above batch of appeals filed by the assessee are directed against the separate orders of the CIT(A)-V, Pune relating to Assessment Years 2007-08 to 2012-13 respectively. Since common issues are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order.

ITA Nos. 817 & 818/PUN/2013 (A.Y. 2007-08 and 2008-09) :

2. First we take up ITA No.817/PUN/2013 for A.Y. 2007-08 as the lead case.

2.1 Facts of the case, in brief, are that the assessee company, is a subsidiary of Vodafone India Ltd. (Formerly known as Vodafone Essar Cellular Ltd.) and was incorporated on 30-03-1995 under the Companies Act, 1956 having its registered office at Coimbatore and its present circle office at Shivajinagar, Pune. The assessee company is engaged in the business of providing cellular mobile phone services for Maharashtra and Goa Circle excluding Mumbai. The company provides prepaid and postpaid services. The prepaid services are in the form of recharge coupons and SIM cards. In postpaid connection, the SIM card is given free of cost and activated later on and the bill is charged as per usage of the customer. The prepaid services are provided through distributors and franchises.

3. A survey action u/s.133A of the I.T. Act was conducted on 23-04-2008 in the case of the above company for verification of the compliance of the TDS provisions. During the course of the survey, the statement of Mr. R. Narayanan, Manager (Accounts) was recorded on oath and several other documents were also submitted by the assessee. During the said survey, it was submitted that the assessee company was paying commission to all dealers except distributors. It was explained that the sale is made to the distributors at MRP less trade margin and target based incentives are given to them in the form of top-up. The trade margin in respect of prepaid SIM cards and coupons was 20%, recharge coupons and E-topup at 4%, PCO SIM cards and coupons at 3% and WCC at 7%. The total amount of trade discount given in F.Y. 2006-07 was quantified at Rs.12,15,77,927/- and for F.Y. 2007-08 the same was

calculated at Rs.26,11,89,668/-. It was explained that invoices raised on distributors and franchises are at MRP minus the applicable trade margin and inclusive of the applicable taxes. The above trade margin is not reflected in the invoice as the billing was done on the net amounts.

4. During the course of TDS assessment, the DCIT (TDS) observed that the survey team, after going through the distributors agreements at the time of survey had found that the relationship between the company and distributors was that of a principal and an agent. He, therefore, confronted the assessee on this issue. It was submitted by the assessee that the relationship between the assessee and the distributors was principal to principal basis. It was also submitted that service tax was recovered from the distributors and that the trade discount was not in the nature of commission which attracted TDS u/s.194H of the I.T. Act. It was also explained that the percentage of the trade margin of the retailer was 2.5% of the total 4% trade margin and the decision is taken by the top authorities of the company. The assessee submitted that the distributors have the permission to charge any price from the retailers not exceeding MRP and it was purely a purchase and sale transaction in which no services was rendered by the distributors to the assessee company. Referring to the provisions of Indian Contract Act, 1872 the assessee tried to explain its position from the definition of terms “Agent”, “Commission” and “Discount”. The assessee also relied on the following decisions:

1. Gordon Woodroffe & Co. Vs. M.A. Majid reported in AIR 1967 SC 181
2. Bhopal Sugar Industries Vs. STO reported in 1977 AIR 1275
3. Ahmedabad Stamp Vendors Agency Vs. UOI reported in 257 ITR 202 (Guj.)
4. Foster’s India Pvt. Ltd. Vs. ITO reported in 117 TTJ 346

4.1 Alternatively, it was submitted that the assessee receives the purchase order from distributors and the distributors are liable to pay the assessee the discounted price immediately in advance upon the delivery of the products to them. Thus, there was no case of the assessee either paying or grouping the account of distributors. Further, it was not possible to quantify the exact amount of income in the hands of distributors. Relying on the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. reported in 293 ITR 226 it was submitted that no tax u/s.201(1) can be charged when the tax has been paid by the distributors.

5. However, the DCIT (TDS-1), Pune did not accept the arguments advanced by the assessee. Relying on the decision of Hon'ble Delhi High Court in the case of Idea Cellular Ltd. vide order dated 19-02-2010 he came to the conclusion that supply and delivery of SIM cards did not constitute sale and purchase but provision of services. He also relied on the decision of Hon'ble Kerala High Court in the case of BPL Mobile Cellular Ltd. The DCIT(TDS-1) accordingly passed a combined order for A.Yrs. 2007-08 and 2008-09 by raising the following demand :

F.Y.	TDS demand u/s.201(1)	Interest u/s.201(1A)	Total
2006-07	68,81,311/-	41,28,787/-	1,10,10,098/-
2007-08	2,71,24,546/-	1,30,19,782/-	4,04,11,328/-
Total	3,40,05,857/-	1,71,48,569/-	5,11,54,426/-

Similar demands u/s.201(1) and 201(1A) have been raised by the TDS Officer for A.Yrs. 2009-10 to 2012-13.

6. Before CIT(A) apart from making submissions on merit, the assessee raised an additional ground stating that the order passed u/s.201(1) of the Act on 22-03-2011 is barred by limitation and therefore the same should be quashed. The assessee submitted the following sequence of events :

Date	Particulars
23-04-2008	Survey conducted u/s.133A of Income-tax Act.
24-04-2008	Calling for information in pursuance of Action u/s.133A of Income-tax Act in respect of details of discount given for F.Y. 2006-07 & 2007-08, inter alia other details
30-04-2008	Details filed by Appellant. During hearing before TDS Officer pending details for F.Y. 2006-07 & 2007-08 were asked to be filed
02-05-2008	Partial details filed
08-05-2008	Balance details filed

7. The assessee submitted that all details were available before the TDS Officer to pass the requisite order in May 2008 itself. However, in the fag-end of the next Financial Year, i.e. 2009-10, show cause notice u/s.201(1) and 201(1A) were issued on 21-01-2010 by the Addl.CIT (TDS), Pune for F.Y. 2007-08 for which detailed reply was filed on 25-02-2010. Even then no order was passed by the TDS Officer before 31-3-2010. Referring to the decision of the Special Bench of the Tribunal in the case of Mahindra & Mahindra Ltd. Vs. DCIT reported in 122 TTJ (M)(SB) 577 it was argued that the proceedings u/s.201 of the Act are required to be completed within one year from the end of the financial year in which such proceedings are initiated. Similar show cause notice was also issued on 10-09-2010 for A.Y. 2008-09 to which similar reply was filed and the Assessing Officer has passed a combined order on 22-03-2011. It was accordingly submitted that since the proceedings were initiated in F.Y. 2007-08 the TDS Officer was supposed to pass the order u/s.201(1)/201(1A) by 31-03-2010 in view of the decision of the Special Bench of the Tribunal in the case of Mahindra and Mahindra Limited (supra). Since, the same has not been passed, therefore, the order passed by the Addl.CIT (TDS) being barred by limitation should be quashed.

8. It was also submitted that proviso to section 201(3) of the I.T. Act introduced through Finance Act (No.2) 2009 w.e.f. 01-04-2010 will not rescue the situation in favour of the TDS Officer as the proceedings got

barred by limitation of time on 31-03-2010 itself and the said proviso cannot extend the inherent time limit or revalidate an action which is already barred by limitation.

9. It was further argued that since there was no show cause notice issued for F.Y. 2006-07, therefore, the order passed for F.Y. 2006-07 was against the principles of natural justice and therefore void. It was accordingly argued that since the proceedings u/s.201 of the Act were initiated on 23-04-2008, i.e. the date of survey and the submissions were duly filed during F.Y. 2008-09, therefore, the order should have been passed within a reasonable time and the insertion of section 201(3) of the Act, w.e.f., 01-04-2010 will not come to the rescue of the Department.

10. Based on the arguments advanced by the assessee the Ld.CIT(A) called for a remand report from the Assessing Officer. After considering such remand report and the submission of the assessee to such remand report he dismissed the additional ground raised by the assessee by observing as under :

> "14. I have carefully considered the facts of the case as well as reply of the appellant. It is seen that the concept of time barring in respect of TDS order u/s.201(1) of Income-tax Act was brought into the statute through Finance (No.2) Act, 2009 by insertion of sec.201(3) of the Act w.e.f., 01-04-2010. For the sake of clarify sec.201(3) is reproduced as under :
>
> > "16[3] No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of –
> >
> > (i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed :
> > (ii) 16a[six] years from the end of the financial year in which payment is made or credit is given, in any other case"
> >
> > Provided that such order for a financial year commencing on or before the Ist day of April, 2007 may be passed at any time on or before the 31st day of March, 2011.
> > ---
> >
> > 16. Inserted by the Finance (No.s) Act, 2009, w.e.f. 01-04-2010
> > 16a Submitted for "four" by the Finance Act, 2012 w.e.f. 01-04-2010."

15. Before insertion of sec.201(3), there was no time limit for passing order u/s.201(1) of Income-tax Act, 1961 which resulted into controversies on the issue. The issue was addressed was addressed by the Hon'ble Special Bench of Mumbai Tribunal in the case of Mahindra & Mahindra Ltd. reported in 122 TTJ (Mumbai) Special Bench) 577. In that case, the Hon'ble Special Bench in its order dated 09-04-2009 held that proceedings u/s.201(1) can be initiated within a period of six years from the end of the relevant Assessment Year if the income chargeable to tax in the hands of payee by virtue of sum paid within TDS is equal to or more than Rs.1 lac, and four years if such amount is less than Rs.1 lac and order u/s.201(1) has to be passed within one year from the end of the Financial Year in which proceedings u/s.201(1) are initiated.

16. In this case, the appellant claims that due to survey action in April, 2008, the proceedings were initiated in F.Y. 2008-09 and therefore as per the ratio of Hon'ble Special Bench decision in the case of Mahindra & Mahindra Ltd. (Supra), the TDS Officer was required to pass order u/s.201(1) of Income-tax Act by 31-03-2010. This contention of the appellant is not correct as survey action is carried out to collect the information relevant for the purpose of assessment and for other proceedings under the Act. Survey action u/s.133A is itself a proceeding which gets completed after verification is completed at the premises and survey team leaves the premises. In post-survey enquiry also, certain information is called for which the appellant is not able to furnish during the course of survey action. This information is analysed and based upon the above information, the TDS Officer proceeds to pass order u/s.201(1) of Income-tax Act. Before doing so, as per principles of natural justice due opportunity is given to the appellant for which show cause notice u/s.201(1) is issued to the appellant. This show cause notice unlike notice u/s.143(1) of Income-tax Act is not statutory and it is issued to the appellant only for the purpose of giving opportunity to explain its position. Therefore, proceedings u/s.201(1) of the Income-tax Act starts with show cause notice u/s.201(1)/201(1A) of Income-tax Act was issued for F.Y. 2007-08 for the first time on 21-01-2010. It is true that in the show cause notice there is no mention of F.Y. 2006-07, but this will not make much difference in the sense that the appellant was made aware of the default for F.Y. 2006-07 and accordingly, details of discount was provided by the appellant for F.Y. 2006-07. Therefore, for A.Y. 2006-07, too, due opportunity was provided by the TDS Officer before passing the order u/s.201(1) for F.Y. 2006-07 too. I also find sufficient merit in the argument of the TDS Officer in his report dated 20-07-2012 that liability to pay TDS u/s.201(1) arises out of default u/s.192 to sec.196D and not by order u/s.201(1) of Income-tax Act. In this case, since the default for both the financial years were examined by TDS Officer by virtue of show cause notice u/s.201(1), it can be safely concluded that proceedings for F.Y. 2006-07 were started with showcause notice dated 21-01-2010 simultaneously and since order u/s.201(1) was passed on 22-03-2011, it is clear that order u/s.201(1) was passed within one year and therefore, there is no merit in the claim of the appellant that order passed u/s.201(1) is barred by limitation. Further, the order passed u/s.201(1)/201(1A) is also in conformity with sec.201(3) of Income-tax Act. Therefore, I don't find any substance in the

argument of the appellant in this regard. Thus, additional ground is dismissed."

11. So far as the action of the TDS Officer in treating the discount offered by the assessee to their distributors as Commission and accordingly treating the assessee as an assessee in default u/s.201(1) r.w.s. 194H of the I.T. Act is concerned it was argued that discount allowed to the distributors by the assessee company is on account of principal to principal basis and not that of principal to agent. It was argued that under this arrangement, the transaction in all substantial respects is akin to sale and purchase of goods as it happens in FMCG sector. The discount extended represents the difference between the MRP of the talk time and prepaid connections and the price at which these are transferred to the prepaid distributors. Since no payment is made by the assessee to its prepaid distributors, the discount extended to the prepaid distributors is in the nature of trade margin and such discount cannot be termed as commission so as to attract the provisions of section 194H of the Income Tax Act. It was further argued that the mechanism of TDS is not workable on the facts and the circumstances of the case. Relying on the decision of Hon'ble Kerala High Court in the case of M.S. Hameed and others vs. Director of State Lotteries and others reported in 249 ITR 186 and various other decisions it was argued that the assessee company was not an assessee in default and demand u/s.201(1) and 201(1A) of the Income Tax Act was not justified.

12. However, the Ld.CIT(A) was not satisfied with the explanation given by the assessee. Rejecting the arguments advanced by the assessee and following the decision of Hon'ble Delhi High Court in the case of CIT Vs. Idea Cellular Ltd. reported in 325 ITR 148 the decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. Vs. ACIT reported in 332 ITR 255 and the decision of Hon'ble Kolkata High

Court in the case of Bharti Cellular Ltd. reported in 244 CTR 185 where it has been held that discount allowed by the assessee company to the distributors for selling the prepaid SIM cards constituted Commission and the assessee was liable to deduct tax at source for such payments u/s.194H of the I.T. Act he upheld the action of the Assessing Officer.

13. Aggrieved with such order of the CIT(A) the assessee is in appeal before us with the following grounds :

> "On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - V, Pune ('learned CIT (A)') has erred in passing the order under section 250 of the Income Tax Act, 1961 (' Act '), confirming the allegation of the Deputy Commissioner of Income Tax, TDS -1, Pune ('learned TDS Officer') that the Appellant is liable to deduct tax at source on discount extended to its distributors of pre-paid SIM cards/talktime.
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> Each of the ground is referred to separately, which may kindly be considered independent of each other.
>
> 1. Ground No.1 - "Order passed under section 201(1) of the Act on March 22, 2011 is bad in law.
>
> 1.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that the order passed under section 201(1)/20 1 (1 A) of the Act for the subject Assessment Year is barred by limitation and hence, is bad in law.
>
> 1.2 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that the order passed under section 201 (1)/20 1 (1 A) of the Act for the subject financial year is void-ab-initio- and bad in law since no show cause notice under section 201 of the Act was issued to the Appellant.
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> Ground No.2 - Without prejudice to Ground No.1, the Appellant is not liable to deduct tax on discount extended to its pre-paid distributors on distribution of pre-paid SIM cards/ talktime.
>
> 2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee in default' for non deduction of tax at source on discount extended by the Appellant to the distributors of its pre-paid SIM cards/ talktime and thus, holding the Appellant to be liable to pay tax under section 201 (1) and interest under section 201(1A) of the Act.
>
> 2.2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the relationship between the Appellant and the distributors of pre-paid SIM cards/talk time is not that of 'Principal to Principal' and the discount allowed to the distributors is in nature of commission liable for deduction of tax as envisaged under section 194H of the Act.

2.3. On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the provisions of section 194H of the Act would be applicable to the Appellant's case without taking cognizance of the fact that the Appellant is not responsible to make any payment/ credit to the prepaid distributors towards the discount extended to them and responsibility/ obligation to make payment is a condition precedent for application of section 194H of the Act, which is absent in the present case.

2.4. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that discount allowed by the Appellant is not income in the hands of its distributors and that income, if any, arises only when the pre-paid SIM cards/talktime is further distributed by the distributors.

2.5. On the facts and circumstances of the case and in law, the learned TDS Officer has erred in not appreciating the fact that there is no flow of monies from the Appellant to the distributor of pre-paid SIM card/ talktime but rather from the distributor to the Appellant, and hence, the provisions of section 194H of the Act fail to apply.

Hereinafter all the grounds are without prejudice to Ground No.1 and 2 above.

3. Ground No. 3 - Appellant has discharged its onus by submitting sufficient information to enable the learned TDS officer to verify whether the taxes have been paid by the payee on discount

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not directing the learned TDS officer to verify whether requisite taxes were paid by the pre-paid distributors.

4. Ground No.4 - No interest under section 201(IA) of the Act can be charged

4.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the learned TDS officer in charging interest under section 201 (1A) of the Act.

The Appellant craves for leave to add, amend, vary, omit or substitute any of the aforesaid grounds at any time before or at the time of hearing of the matter."

14. The Ld. Counsel for the assessee strongly opposed the order of the CIT(A). Referring to para 7 of the order of Ld. CIT(A) the Ld. Counsel for the assessee drew the attention of the Bench to the sequence of events according to which the survey was conducted on 23-04-2008. He submitted that the survey was conducted for the purpose of TDS payment. At that time no time limit was prescribed for completion of the TDS assessment. Referring to the decision of the

Special Bench of the Tribunal in the case of Mahindra and Mahindra Ltd. Vs. DCIT reported in 122 ITD 216 (Mum.) (SB) he submitted that the Special Bench of the Tribunal in the said decision has held that the maximum time limit for passing the order u/s.201(1) or 201(1A) is the same as prescribed u/s.153(2) being one year from the end of the financial year in which proceedings u/s.201(1) are initiated. Referring to the decision of the Hon'ble Bombay High Court in the case of Director of Income Tax (IT) Vs. Mahindra and Mahindra reported in 365 ITR 560 he submitted that the Hon'ble High Court has upheld the order of the Special Bench of the Tribunal and dismissed the appeal filed by the revenue. Therefore, the orders passed by the TDS Officer for the A.Y. 2007-08 is barred by limitation.

15. Referring to the statement of R. Narayanan, Manager (Accounts) of Vodafone Essar Cellular Ltd. recorded during the course of survey u/s.133A of the I.T. Act. on 23-04-2008, the Ld. Counsel for the assessee drew the attention of the Bench to the answer to Question No.13 wherein the assessee replied as under :

> "Q.No.13 On going through the agreement and undertaking taken from the distributor it appears that you are having full control over the distributor regarding stock, terms of sale and terms of payment moreover you are also paying service tax on behalf of distributors, similar is the situation in respect of transaction whatsoever may be with the franchise as you have stated that no separate and different agreement is made with the franchise with whom you are dealing as per you sale with trade margin. Considering the circumstances distributor is getting nothing from this activities except trade margin and therefore the said distributors or the franchise to the extent of recharge coupons are your agents and therefore trade margin is nothing but a sort of commission eligible for deduction of tax under section 194H of I.T. Act, 1961. Accordingly the trade margin which you have stated amount to Rs.26,11,89,668/- is eligible for deduction of tax for 07-08. Please explain your say in this behalf and also for F.Y.06-07.
>
> Ans. The agreement with distributors is on principal to principal basis, it has been clearly set out in clause 2.1 in the agreement. Service tax as applicable is recovered from the ultimate subscribers who receive the service of the company. The service tax collected from Distributor is ultimately borne by the subscriber. Hence the trade margin is not in the nature of commission. Distributors are entitled to target based incentive on achievement of targets as decide

> by the company from time to time. The same applies to Franchise as well, with regard to prepaid products."

16. He submitted that the Ld.CIT(A) while dismissing the additional ground raised by the assessee on the issue of limitation has held that the survey was conducted for gathering information and the proceedings were initiated by issue of show cause notice. However, for the A.Y. 2007-08, no show cause notice was issued by the Assessing Officer. The first show cause notice was issued on 21-01-2010 for A.Y. 2008-09. However, the Ld.CIT(A) states that the show cause notice issued for A.Y. 2008-09 covers the A.Y. 2007-08. He submitted that when there is no show cause notice for A.Y. 2007-08, then the order passed u/s.201(1)/201(1A) is void ab-initio. He submitted that the proceedings were initiated due to survey for both the years. The survey was conducted for the very same purpose. Specific questions were asked and notices u/s.131 were issued. The assessee furnished relevant details by May 2008. Therefore, when no show cause notice was issued for A.Y. 2007-08 and the order was not passed within the specified time of one year from the end of the financial year in which the proceeding u/s.201(1) is initiated, therefore, the order should be held as void ab-initio.

17. He submitted that for applicability of section 201(3) of the I.T. Act as inserted by the Finance Act, 2009 w.e.f. 01-04-2010, the law as on date of issue of notice has to be applied and in case the proceedings have become barred by limitation before 01-04-2010 then the proviso cannot come to the rescue of the Assessing Officer to save such limitation. For the above proposition the Ld. Counsel for the assessee relied on the decision of the Delhi Bench of the Tribunal in the case of ACIT Vs. M/s. Catholic Relief Services vide ITA No. 2742 and 2744/Del/2011 order dated 13-01-2012. He submitted that where no time

limit is provided for passing/completion of the order then such order should be passed/completed within a reasonable time and incase the order is delayed beyond a reasonable time then such order is liable to be quashed.

18. Referring to the decision of Hon'ble Supreme Court in the case of S.S. Gadgil Vs. Lal and Company reported in 53 ITR 231 he submitted that the words in an amending Act which enable the department to make an assessment or reassessment in respect of years which were over when the amending Act began, are not to be construed as authorizing action in respect of the year for which action was already time-barred at the date when the amending Act came into force.

19. He submitted that the TDS officer has passed the order u/s.201 of the Act thereby raising significant demand against the assessee without giving any finding whatsoever on failure of the recipient distributors to pay taxes on the income earned by them from distribution of prepaid talk time/connections transferred by the assessee.

20. Referring to the decision of Hon'ble Allahabad High Court in the case of DCIT (TDS) Vs. Vs. Jagran Prakashan Limited reported in 251 ITR 65 he submitted that the Hon'ble High Court in the said decision has not only held that no demand u/s.201 of the Act can be raised where the recipient has paid the taxes, but also has held that the deductor cannot be treated as assessee in default till it is found that the recipient has also failed to pay such tax directly. He submitted that the above proposition has been followed by the Kolkata Bench of the Tribunal in the case of Ramakrishna Vedanta Math Vs. ITO reported in 55 SOT 417.

21. So far as the merit of the case is concerned he submitted that no payment or credit to the account of the distributors has been made by the assessee towards discount extended to them. Therefore, in absence of a

payment/credit towards the discount extended by the assessee, provisions of section 194H of the Act cannot be applied. Since there is neither payment nor any credit of any commission by the assessee, there was no occasion for the assessee to deduct tax at source and hence, the assessee cannot be held responsible for non-deduction of tax at source from the discount extended to its pre-paid distributors. He submitted that the distributorship arrangement entered into between the assessee and its prepaid distributors clearly brings out the fact that the relationship between the assessee and distributors of its prepaid talktime/ connections is on 'Principal to Principal' basis. Hence discount extended to the prepaid distributors constitutes trade margin and not 'commission or brokerage' to attract the provisions of section 194H of the Act. The margin is earned by the distributors in their independent capacity and not for acting for and on behalf of the assessee. He submitted that the discount allowed by the assessee is not income in the hands of its distributors and that income, if any, arises only when the prepaid talktime/ connections are further distributed by the distributors. Therefore, provisions of section 194H of the Act which require tax deduction at source from any income by way of commission, cannot be held applicable to the facts of the case.

22. The Ld. Counsel for the assessee further submitted that the entire discount allowed by the assessee to the distributor cannot be considered as an income in the hands of the distributor since a part of discount is always passed down at each level of the distribution chain and hence the whole of the discount amount does not automatically become the income of the prepaid distributors. Therefore, tax deduction at source on the entire discount amount would be against the principles of law.

23. Referring to the decision of Hon'ble Karnataka High Court in the case of the sister concern of the assessee namely Vodafone Essar South

Ltd. Vs. DCIT reported in 372 ITR 33 he submitted that the Hon'ble High Court in the said decision has held that sale of SIM cards/recharge coupons at discounted rate of distributors is not commission and therefore not liable to TDS u/s.194H. He submitted that the TDS officer as well as the CIT(A) have relied on the decision of Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) the decision of the Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd.(supra) and the decision of the Hon'ble Calcutta High Court in the case of Bharti Cellular Ltd. Vs. ACIT (supra) and held that the supply and delivery of prepaid SIM cards/vouchers did not constitute sales but provision of services. He submitted that the Hon'ble Karnataka High Court has distinguished the above judgments and has held that what is being sold by the Telecom operators to the distributors of prepaid talktime is the "right to service" on a "principal to principal basis" and hence the question of applicability of section 194H of the Act does not arise.

24. Without prejudice to the above, he submitted that explanation to section 191 of the Act clearly provides that an assessee cannot be treated as an assessee in default u/s.201(1) of the Act where although taxes were not deducted at source as required but has been paid directly by the recipient. For the above proposition he relied on the CBDT Instruction No.275/201/95–IT(B) dated 29-01-1997 and the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. reported in 293 ITR 226.

25. So far as the levy of interest u/s.201(1A) of the Act is concerned he submitted that it is settled proposition of law that interest u/s.201(1A) is compensatory in nature and hence can be charged for the period for which the tax department was deprived of such tax dues. He submitted that in the instant case all the distributors have been discharging their tax liability by way of advance tax, self assessment taxes and other prepaid

taxes. He accordingly submitted that the period for which interest may be levied should be computed from the due date of payment of withholding tax by the assessee to the date of payment of taxes by the payee/recipient of such discount.

26. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A) both on the issue of limitation as well as on merit. He submitted that survey is a different proceeding from assessment proceeding. Any survey u/s.133A is to collect evidence. Therefore, merely filing of the details cannot be considered as filing of all the details for all the years. He submitted that the Ld.CIT(A) has categorically observed that show cause notice u/s.201(1) and 201(1A) of the Act was issued for F.Y. 2007-08 for the first time on 20-01-2010. Although in the said show cause notice there is no mention of F.Y. 2006-07 but this will not make much difference in the sense that the assessee was made aware of the default in F.Y. 2006-07. Therefore, opportunity was provided by the TDS officer for A.Y. 2006-07 before passing the order for A.Y. 2007-08.

27. So far as the merit of the issue is concerned the Ld. Departmental Representative heavily relied on the order of the CIT(A).

28. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case is engaged in the business of providing cellular mobile phone services for Maharashtra and Goa circle excluding Mumbai. The assessee company provides prepaid and postpaid services. The prepaid services are in the form of recharge coupons and SIM cards. Since the assessee has not deducted TDS from the discount offered by the assessee to their distributors the

Assessing Officer treated such discount offered by the assessee to their distributors as “commission” and treated the assessee as an assessee in default u/s.201(1) r.w.s. 194H of the I.T. Act. While doing so, the Assessing Officer rejected the contention of the assessee that the relationship between the assessee and the distributors was principle to principal and not that of principal to agent. We find before the CIT(A) the assessee apart from arguing the case on merit for all the years also took an additional ground for A.Y. 2007-08 that the order passed by the TDS officer is barred by limitation. We find the Ld.CIT(A) dismissed the additional ground raised by the assessee on the ground that the order u/s.201(1) was passed on 22-03-2011 is within one year since the show cause notice was issued on 21-01-2010.

29. So far as the merit of the case is concerned the Ld.CIT(A) following the decision of the Hon’ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. reported in 332 ITR 255 the decision of Hon’ble Delhi High Court in the case of CIT Vs. Idea Cellular Ltd. reported in 325 ITR 148 and the decision of Hon’ble Calcutta High Court in the case of Bharti Cellular Ltd. Vs. ACIT reported in 354 ITR 507 decided the issue against the assessee by upholding the action of the Assessing Officer in treating the assessee to be an assessee in default.

30. It is the submission of the Ld. Counsel for the assessee that for the A.Y. 2007-08 no show cause notice has been issued and the order has been passed beyond the stipulated period of one year from the end of the financial year in which proceedings u/s.201 are initiated. It is also his argument on merit that the Hon’ble Karnataka High Court in the case of Bharti Airtel Ltd. Vs. DCIT reported in 372 ITR 33 has distinguished the 3 decisions relied on by the CIT(A) and held that sale of SIM cards/recharge coupons at discounted rates to distributors is not

commission and therefore not liable to TDS u/s.194H of the Act, therefore, the same should be followed.

31. We find merit in the arguments of the assessee. So far as A.Y. 2007-08 is concerned, we find it is an undisputed fact that show cause notice has not been issued to the assessee for the F.Y. 2006-07 relevant to A.Y. 2007-08. The finding given by the Ld.CIT(A) at page 14 of the order itself clarifies the same. The relevant observation of the CIT(A) reads as under :

> "16. .....
> .....
> In this case, it is seen that show cause notice u/s.201(1)/201(1A) of income-tax Act was issued for F.Y. 2007-08 for the first time on 21-01-2010. It is true that in the show cause notice there is no mention of F.Y. 2006-07, but this will not make much difference in the sense that the appellant was made aware of the default for F.Y. 2006-07 and accordingly, details of discount was provided by the appellant for F.Y. 2006-07....."

32. Merely because the assessee has filed certain details for A.Y. 2006-07 it cannot be said that non issue of such notice will not make any difference. Issue of a notice is mandatory before charging any assessee for its liability. Therefore, in absence of issue of any notice, the order passed u/s.201(1) and 201(1A) for A.Y. 2007-08 has to be held as void and illegal.

32.1 Further, as per the chronology of events reproduced at page 7 of the order of the CIT(A) which has already been reproduced at para 6 of this order, we find the assessee has filed all the requisite details on 08-05-2008. We find the Special Bench of the Tribunal in the case of Mahindra and Mahindra Ltd. (supra) has held that the maximum time limit for passing the order u/s.201(1) or 201(1A) is the same as prescribed u/s.153(2), i.e. one year from the end of the financial year in which proceedings u/s.201(1) are initiated. The decision of the Special Bench of the Tribunal has been upheld by the Hon'ble High Court

reported in 365 ITR 560. Therefore, we are of the considered opinion that the order for A.Y. 2007-08 has got barred by limitation. Therefore, due to non issue of statutory notice for passing the order u/s.201(1) and 201(1A) and due to bar by limitation, the order passed by the Assessing Officer for A.Y. 2007-08 has become illegal and void. We hold accordingly.

33. Now coming to the merit of the case, we find the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. Vs. DCIT reported in 372 ITR 33 has held that sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s.194H. While holding so, the Hon'ble High Court has distinguished the decision of the Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. (supra), the decision of Hon'ble Delhi High Court in the case of Idea Cellular Ltd.(supra) and the decision of Hon'ble Kolkata High Court in the case of Bharti Cellular Ltd. (supra). The relevant observation of the Hon'ble High Court reads as under :

> "56. In the Idea Cellular Ltd. case (supra), the Delhi High Court proceeded on the footing that the assessee is providing the mobile phone service. It is the ultimate owner of the service system. The service is meant for public at large. They had appointed distributors to make available the pre-paid products to the public and look after the documentation and other statutory requirements regarding the mobile phone connection and, therefore, the essence of service rendered by the distributor is not the sale of any product or goods and, therefore, it was held that all the distributors are always acting for and on behalf of the assessee company.
>
> 57. Similar is the view expressed by the Kerala High Court in the Vodafone Essar Cellular Ltd's case (Supra), where it was held that, the distributor is only rendering services to the assessee and the distributor commits the assessee to the subscribers to whom assessee is accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee. In that context it was held that, discount is nothing but a margin given by the assessee to the distributor at the time of delivery of SIM Cards or Recharge Coupons against advance payment made by the distributor.
>
> 58. In both the aforesaid cases, the Court proceeded on the basis that service cannot be sold. It has to be rendered. But, they did not go into the question whether right to service can be sold.

59. The telephone service is nothing but service. SIM cards, have no intrinsic sale value: It is supplied to the customers. for providing mobile services to them. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or title of the goods from the assessee-company to. the distributor or from the distributor to the ultimate consumer. Therefore, the SIM card, on its own but without service would hardly have any value. A customer, who wants to have its service initially, has to purchase a sim-card. When he pays for the sim-card, he gets the mobile service activated. Service can only be rendered and cannot be sold. However, right to service can be sold. What is sold by the service provider to the distributor is the right to service. Once the distributor pays for the service, and the service provider, delivers the Sim Card or Recharge Coupons, the distributor acquires a right to demand service. Once such a right is acquired the distributor may use it by himself. He may also sell the right to sub-distributors who in turn may sell into retailers. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the distributor at the time of the delivery then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent. The seller may have fixed the MRP and the price at which they sell the products to the distributors but the products are sold and ownership vests and is transferred to the distributors. However, who ever ultimately sells the said right to customers is not entitled to charge more than the MRP: The income of these middlemen would be the difference in the sale price and the MRP, which they have to share as per the agreement between them. The said income accrues to them only when they sell this right to service and not when they purchase this right to service. The assessee is not concerned with quantum and time of accrual of income to the distributors by reselling the prepaid cards to the sub-distributors/retailers. As at the time of sale of prepaid card by the assessee to the distributor, income has not accrued or arisen to the distributor, there is no. primary liability to tax on the Distributor. In the absence of primary liability on the distributor at such point of time, there is no liability on the assessee to deduct tax at source. The difference between the sale price to retailer and the price which the distributor pays to the assessee is his income from business. It cannot be categorized as commission. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship.

60. The following illustration makes the point clear: On delivery of the prepaid card, the assessee raises invoices and updates the accounts. In the first instance, sale is accounted for Rs.100/-, which is the first account and Rs.80/- is the second account and the third account is Rs.20/-. It shows that the sales is for Rs.100/-, commission is given at Rs.20/- to the distributors and net value is Rs.80/-. The assessee's sale is accounted at the gross value of Rs.100/- and thereafter, the commission paid at Rs.20/- is accounted. Therefore, in those circumstances of the case, the essence of the contract of the assessee and distributor is that of service and therefore, Section 194H of the Act is attracted.

61. However, in the first instance, if the assessee accounted for only Rs.80/- and on payment of Rs.80/-, he hands over the prepaid card prescribing the MRP as Rs.100/-, then at the time of sale, the assessee is not making any payment. Consequently, the distributor is not earning any income. This discount of Rs.20/- if not reflected anywhere in the books of accounts, in such circumstances, Section 194H of the Act is not attracted.

62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors: incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor. In other words the income accrued or belonging to the distributor should be in the hands of the assessees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a sub distributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.

63. It was contended by the revenue that; in the event of the assessee deducting the amount and paying into the department, ultimately if the "dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that

Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.

64. In the case of *Vodafone Essar Celluar Ltd., (supra)* it is necessary to look into the accounts before granting any relief to them as set out above. They have accounted the entire price of the prepaid card at Rs.100/- in their books of accounts and showing the discount of Rs.20/- to the dealer. Only if they are showing Rs.80/- as the sale price and not reflecting in their accounts a credit of Rs.20/- to the distributor, then there is no liability to deduct tax under Section 194H of the Act. This exercise has to be done by the assessing authority before granting any relief. The same exercise can be done even in respect of other assessees also. "

65. In the light of the aforesaid discussions, we are of the view that the order passed by the authorities holding that Section 194H of the Act is attracted to the facts of the case is unsustainable. Therefore, the substantial question of law is answered in favour of the" assessee and against the Revenue. Hence, we pass the following order:

ORDER

1. Appeals are allowed.
2. The impugned orders passed by the authorities are hereby set aside.

3. The matter is remitted back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above, in para 60, Section 194H of the Act is not attracted.

Ordered accordingly."

34. No decision of the jurisdictional High Court on this issue was brought to our notice. Since the facts of the instant case are identical to the case before Hon'ble Karnataka High Court, therefore, respectfully, following the decision of Hon'ble Karnataka High Court we hold that sale of SIM cards/recharge coupons at discounted rate to distributors is not

commission and therefore not liable to TDS u/s.194H of the I.T. Act. However, the Hon'ble High Court while holding so has remitted the matter back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above in para 60 of the order, section `194H is not attracted. Therefore, in line of the above observation of the Hon'ble High Court we restore the matter to the file of the Assessing Officer for necessary verification. The grounds raised by the assessee are accordingly allowed for statistical purposes.

35. Identical grounds have been raised by the assessee for the remaining years wherein the assessee has challenged the order of the CIT(A) in upholding the action of the Assessing Officer in treating the assessee as an assessee in default for non deduction of tax at source on discount extended by the assessee to the distributors and its prepaid SIM cards/talktime and therefore liable to pay tax u/s.201(1) and interest u/s.201(1A) of the I.T. Act.

36. In view of our discussion in the preceding paragraphs we hold that the sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s.194H of the I.T. Act. However, we have restored the issue to the file of the Assessing Officer for necessary verification in the light of the decision of Hon'ble Karnataka High Court (supra). Therefore, the grounds for the other years on the issue of liability u/s.194H are allowed for statistical purposes. We hold and direct accordingly.

37. So far as the ground relating to validity of the orders for other years, the Ld. Counsel for the assessee could not substantiate as to how the orders for other years are bad in law or void or barred by limitation.

Therefore, the ground relating to validity of the assessment being barred by limitation or void for the remaining years are dismissed.

38. In the result, the appeal filed by the assessee for A.Y. 2007-08 is allowed and the appeals for the remaining assessment years are partly allowed for statistical purposes.

Pronounced in the open court on 04-01-2017.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.K. PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 04th January, 2017.
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-V, Pune
4. CIT (TDS), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B Bench" पुणे / DR, ITAT, "B Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune