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.1041, 1042 &
ITA Nos.1953 to 1955/PUN 2013,
निर्धारण वर्ष / Assessment Years : 2007-08 to 2011-12,

Idea Cellular Limited,
11/1, Sharada Centre,
Erandwane,
Pune 411 004
PAN :AAACB2100P

..... अपीलार्थी /
Appellant

बनाम v/s

Dy.CIT (TDS-1), Pune

..... प्रत्यर्थी /
Respondent

आयकर अपील सं. / ITA Nos.1867 to 1870/PUN/2014
निर्धारण वर्ष / Assessment Years : 2007-08 to 2010-11

Idea Cellular Limited,
11/1, Sharada Centre,
off karve Road,
Erandwane,
Pune 411 004
PAN :AAACB2100P

..... अपीलार्थी /
Appellant

बनाम v/s

Addl.CIT (TDS), Pune

..... प्रत्यर्थी /
Respondent

अपीलार्थी की ओर से / Appellant by : Shri Madhur Agarwal,
Shri Ronak Doshi
प्रत्यर्थी की ओर से / Respondent by : Shri D.S. Benupani

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 :

ITA Nos. 1041 & 1042/PUN/2013 filed by the assessee are directed against the common order dated 28-02-2013 of the CIT(A)-V, Pune relating to Assessment Years 2007-08 and 2008-09. ITA Nos. 1953 to 1955/PUN/2013 filed by the assessee are directed against the common order dated 21-08-2013 of the CIT(A)-V, Pune relating to Assessment Years 2009-10 to 2011-12. In these appeals, 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 u/s.201(1) of the I.T. Act read with section 194H of the Act. ITA Nos. 1867 to 1970/PUN/2014 filed by the assessee are directed against the common order dated 22-08-2014 of the CIT(A)-V, Pune relating to Assessment Years 2007-08 to 2010-11 confirming the levy of penalty u/s.271C of the I.T. Act. For the sake of convenience, all these appeals were heard together and are being disposed of by this common order.

2. First we take up ITA No.1041/PUN/2013 as the lead case. Facts of the case, in brief, are that the assessee is a company engaged in the business of providing Telecom Services all over India. However, in the present appeals, the issue is in relation to its operation in Maharashtra & Goa (except Mumbai). The assessee's Pune office was visited by TDS Officers *u/s* 133A of Income-tax Act on 23-04-2008 to verify compliance regarding various TDS provisions. During the course of survey, it was noticed that the assessee company was not deducting TDS u/s. 194H in respect of discount allowed to pre-paid Distributors. Accordingly, a show cause notice was issued to the assessee company on 21-12-2009, calling for details regarding trade discount passed on to prepaid distributors and the assessee was asked to explain its position.

3. The assessee submitted that it is a Cellular service provider and distributors were appointed who purchase the products in bulk and then sell the same to sub-dealers or retailers. These products are sold to distributors at discounted price (i.e.MRP - Discount) and such items are sold by distributors to the retailers and /ultimate consumers at any price which the Distributors deem fit at his discretion subject to the MRP. The assessee submitted that distributors were required to pay the company the net discounted price immediately irrespective of whether the products purchased are sold or remained with the distributors. The assessee argued that the terms and conditions between the Distributors and the Retailers are settled by them mutually and the assessee had no role to pay in that. Accordingly, it was argued that the relationship between the assessee company and Distributors was that of principal to principal as each Distributor was an independent principal. The assessee also made reference to clause 4 of the Agreement between the company and the Distributors which governed the relationship between the two. Taking assistance from clause 4 of the Agreement, the assessee emphasized that in principal to agent relationship, the agents stock the goods, sell the same, gets the consideration, retains his commission and thereafter remits the net consideration to the Principal. However, in the present case the entire sales consideration was required to be paid before hand by the distributors. Secondly, it was stressed that no risks are borne by the company which is entirely borne by the Distributors, unlike in the case of Principal to Agent relationship, as it was purely a purchase and sale transaction and the distributors do not render any service to the company. Relying on various decisions, the assessee tried to explain it's position from the definition of term "Agent", "Commission" and "Discount" provided in Indian Contract Act 1872.

4. Alternatively it was submitted that the assessee receives the purchase order from distributors who are required to pay the assessee at discounted price. Thus, there was no case of the assessee either paying or crediting 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., 293 ITR 226 it was argued that no tax u/s. 201(1) can be charged, when the tax has been paid by the distributors.

5. However, the DCIT(TDS)-I, Pune did not accept the contention of the assessee. Relying upon the decision of Hon'ble Delhi High Court in the case of idea Cellular, Limited dated 19-02-2010 and the decision of Hon'ble Kerala High Court in the case of BPL Mobile Cellular Ltd., the Assessing Officer came to the conclusion that supply and delivery of SIM cards did not constitute sale & purchase but provision of services. Accordingly, combined order for A.Y. 2007-08 & 2008-09 was passed raising the following demand.

Total sales made of prepaid cards/recharge coupons (in Rs.)	MRP of the products sold	4% commission /discount	Amount of non deduction of tax u/s.194H	Tax effect	Int. u/s.201 (1A)	Total
1214,11.52,291	223,03,66.969	8,92,14,678	8,92,14,678	50,49,551	30,29.731	80,79,282
186,79,78,009	194,47,68,759	7,77,90,750	7,77,90,750	80,78,569	38,77,713	1,19,56,282
TOTAL				1,31,28,120	69,07,444	2,00,35,564

6. Before CIT(A) the assessee challenged the action of the Assessing Officer in treating the discount offered by the assessee to their distributors as commission and accordingly treating the assessee as an assessee in default. It was argued that the relationship between the assessee and distributors was principal to principal and not that of principal to agent. It was submitted 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 and the talktime and prepaid connections and the price on which these are transferred to the prepaid distributors. Since no demand 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 I.T. Act.

7. The assessee further submitted that the mechanism of TDS is not workable on the facts and circumstances of the case and once the mechanism fails, the assessee cannot be held responsible for failure to deduct TDS. It was argued that in order to attract provisions of section 194H of the I.T. Act to the discount allowed to its prepaid distributors the following pre-conditions need to be satisfied :

i. The assessee should be responsible for paying an income to the distributor by way of commission.

ii. There should be a payment or credit of such income to the distributor.

iii. Tax is to be deducted at the time of payment or credit thereof.

7.1 It was accordingly submitted that since none of the conditions mentioned above are satisfied in this case, provisions of section 194H are not applicable. The decision of Hon'ble Kerala High Court in the case of M.S. Hameed and others Vs. Director of State Lotteries reported in 249 ITR 186 was cited for the proposition that responsibility for deduction of TDS arises at the time of credit or payment of such income. It was further argued that the distributors did not act as agent of the assessee. Referring to the provisions of section 194H it was argued that the term commission or brokerage is defined to include payment to a person acting on behalf of another (a) For Services rendered, (b) For the

Services in the course of buying and selling of goods, and (c) in relation to any transaction relating to any asset, valuable article or thing, not being securities. It was accordingly argued that in order to attract the provisions of section 194H of the I.T. Act the relationship of agency between the parties is a pre-requisite which is absent in the present case as it is based upon principal to principal basis. It was accordingly submitted that the TDS officer was not justified in concluding that the assessee company was in default u/s.194H of the I.T. Act in respect of the discount allowed to distributors in respect of prepaid SIM cards and therefore raising demand u/s.201(1) and 201(1A) of the I.T. Act was not justified.

8. The assessee further submitted that in respect of taxes paid by the recipient demand u/s.201(1) of the I.T. Act cannot be raised. The assessee filed confirmations from certain distributors and requested for admission of additional evidence stating that the same could not be done at the time of passing the order u/s.201(1)/201(1A) of the I.T. Act. Relying on the decision of Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. Vs. DCIT reported in 345 ITR 288 it was argued that until and unless the department proves that the recipient had not paid taxes the assessee cannot be held to be an assessee in default. The assessee also challenged the levy of interest u/s.201(1A) on the ground that when the recipient has paid income tax on their income by way of advance tax and/or self assessment tax then there was no question of levying any interest on the assessee as the amount which was payable to the income-tax department have been duly paid by the distributors. Further, where the recipients who have claimed refund of taxes paid by them or who have filed loss return of income there was no justification for charging of interest u/s.201(1A) of the Act as the interest is to compensate the revenue for the loss. Various decisions were also brought to the notice of the Ld.CIT(A).

9. However, the Ld.CIT(A) was not satisfied with the arguments advanced by the assessee. Relying on the decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. Vs. ACIT reported in 332 ITR 255, 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 Kolkata High Court in the case of Bharti Cellular Ltd. Vs. CIT reported in 354 ITR 507 he held that the discount allowed by the assessee to the distributors for selling prepaid SIM cards constituted commission and the assessee was liable to deduct tax at source on such payments u/s.194H of the I.T. Act.

10. So far as the argument of the assessee that until and unless the department proves that the recipient had not paid taxes, the assessee cannot be held to an assessee in default is concerned, the Ld.CIT(A) distinguished the decisions cited before him in the case of Jagran Prakashan Ltd. (supra) on the ground that the said order of the Hon'ble Allahabad High Court has been passed in the context of writ petition and in a Writ matter the ratio of the decision is limited to the specific case as no law can be said to be laid down by the Hon'ble Court. He, however, observed that the assessee is entitled to get relief where it is proved that the recipients have paid the taxes in the light of the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. reported in 293 ITR 226. He accordingly directed the Assessing Officer to examine the declarations and modify the demand in respect of the demand raised u/s.201(1) in respect of the proof/confirmations filed by the assessee in respect of various distributors.

11. So far as the levy of interest u/s.201(1A) is concerned he observed that same is consequential in nature. However, in respect of parties where proof of the tax paid/confirmations are provided by the assessee he directed the Assessing Officer to modify the interest u/s.201(1A) from the date of

payment of TDS by the assessee to the date of payment of tax by the respective recipients.

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

"Ground No.I.

1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in upholding the action of the Assessing Officer ('AO'') in treating the Appellant as 'assessee in default' ufs.201(1) r.w.s. 194H of the Act, without ascertaining and coming to the conclusion that the pre-paid distributor (the recipient) has not offered for tax the discount availed by them from the Appellant.

2. The Appellant prays that it be held that in the absence of the aforesaid conclusion, the Appellant cannot be treated as an assessee in default ufs.201(1) r.w.s. 194H of the Act.

With Prejudice to Ground No.1 :
Ground No.II.

1. On the facts and in circumstances of the case and in law, the Learned CIT(A) erred in upholding the action of the AO in treating discount offered by the Appellant to the Distributors in the nature of 'commission' within the meaning of section 194H of the Act and accordingly, erred in holding the Appellant as an "assessee in default" for alleged non-deduction of tax at source u/s. 201 r.w.s 194H of the Act.

2. He failed to appreciate and ought to have held that a Principal to Agent relationship is a sine quo non to invoke section 194H of the Act. However, on the facts the relationship between the Appellant and distributors is on Principal to Principal basis.

3. The Appellant thus prays that the discount offered to the Distributors cannot be regarded as 'commission' as envisaged u/s. 194H of the Act and accordingly the order passed u/s. 201 r.w.s 194H of the Act ought to be quashed/ set aside.

Without prejudice to Ground Nos. I & II :
Ground No. III.

1. On the facts and in circumstances of the case and in law, the Learned CIT(A) erred in upholding the action of the AO without appreciating the fact that where mechanism to deduct tax fails , the Appellant cannot be held to be "assessee in default" u/s. 201 of the Act.

2. He failed to appreciate and ought to have held that:

- Admittedly, there was no payment no credit of any sum to the distributors;

- Appellant was not responsible for paying any income by way commission to the Distributors.

3. The Appellant thus prays that it cannot be regarded as 'assessee in default' for alleged non deduction of tax u/s. 194H of the Act.

Ground No.4 :

The Appellant craves leave to add, to alter and *j* or amend, withdraw all or any of the foregoing grounds of appeal.

Identical grounds have been raised for A.Yrs. 2008-09 to 2010-11.

13. The Ld. Counsel for the assessee strongly opposed the order of the CIT(A). He submitted that when the assessee is not paying anything to the distributors the provisions of section 194H cannot be applied to the assessee treating the assessee as an assessee in default. Referring to the decision of Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. (supra) he submitted that the Hon'ble High Court has held that until and unless the revenue proves that the recipient had not paid the taxes the assessee cannot be held to be an assessee in default. He submitted that there is no such finding that the recipient has not paid the taxes. Therefore, on the basis of this very issue itself, the order of the CIT(A) upholding the action of the Assessing Officer is erroneous and has to be set aside.

14. So far as the merit of the case is concerned, the Ld. Counsel for the assessee referring to the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. Vs. DCIT reported in 372 ITR 33 submitted that the Hon'ble High Court in the said decision has held that sale of prepaid SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s.194H. He submitted that the Hon'ble Karnataka High Court has passed the order after distinguishing all the 3

decisions relied on by the CIT(A) namely; the decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd., decision of Hon'ble Delhi High Court in the case of Idea Cellular Ltd. and the decision of Hon'ble Kolkata High Court in the case of Bharti Cellular Ltd.

15. Referring to the decision of Hon'ble Bombay High Court in the case of CIT Vs. Qatar Airways reported in 332 ITR 253 he submitted that the Hon'ble High Court in the said decision has held that where agents of an airline had been given discretion to sell tickets at any rate between fixed minimum commercial price and published price, amount which agent earned over and above fixed minimum commercial price would neither amount to commission nor brokerage at hands of agent, and, therefore, tax at source was not deductible on that amount u/s.194H.

16. Referring to the decision of Mumbai Bench of the Tribunal in the case of Piramal Healthcare Ltd. Vs. ACIT reported in 53 SOT 253 he submitted that the Tribunal in the said decision has held that section 194J is not applicable to stockist appointed by drug manufacturer for sale of drugs on commission basis. Referring to the decision of Hon'ble Bombay High Court in ITA No.1427/2012 and batch of other appeals order dated 16-01-2013 he submitted that the Hon'ble High Court has upheld the order of the Tribunal and dismissed the appeal filed by the revenue. He submitted that there are conflicting decisions on this issue and the Hon'ble Karnataka High Court after considering various decisions relied on by the CIT(A) has taken the view in favour of the assessee. Therefore, the view which is in favour of the assessee has to be adopted. For the above proposition he relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. M/s. Vegetable Products Ltd. reported in 88 ITR 192.

17. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

18. 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 postpaid as well as prepaid services. In respect of postpaid services the company was treating the distributors as agents and was deducting TDS on commission paid to them u/s.194H of the I.T. Act. However, in respect of the prepaid services the assessee has not deducted TDS on the payments made to the distributors. We find the Assessing Officer rejecting the claim of the assessee that the discount allowed to the distributors by the assessee company is on account of principal to principal relationship and not that of principal to agent held that the discount allowed by the assessee constituted commission and therefore the assessee was liable to deduct tax at source on such payment u/s.194H. Since the assessee failed to deduct TDS, the Assessing Officer treated the assessee as an assessee in default and accordingly raised demand u/s.201(1) and 201(1A). For the above proposition, the Assessing Officer relied on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Idea Cellular Ltd. (supra). We find in appeal the Ld.CIT(A) upheld the action of the Assessing Officer.

19. It is the submission of the Ld. Counsel for the assessee that in view of the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. (supra) where it has been 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, the assessee cannot be held as an assessee in default. It is also his submission that the Hon'ble Karnataka High Court has considered all the 3 decisions which have been relied on by the Ld.CIT(A).

20. We find merit in the above submission of the Ld. Counsel for the assessee. We find the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. (supra) after considering the 3 decisions relied on by the Ld.CIT(A) 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. 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.
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> 57. Similar is the view expressed by the Kerala High Court in the Vodafone Essar Cellular Ltd' 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.
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> 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."

21. No decision of the jurisdictional High Court on this issue brought to our notice. Since the facts of the instant case are identical to the case before the 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.

22. Identical grounds have been raised by the assessee for the remaining years wherein it 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.

23. 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 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.

ITA Nos. 1867 to 1870/PUN/2014 (A.Yrs. 2007-08 to 2010-11) :

24. The assessee in all these appeals has challenged the order of the CIT(A) in confirming the levy of penalty u/s.271C of the I.T. Act as follows :

A.Y.2007-08	50,49,551
A.Y. 2008-09	80,78,569
A.Y. 2009-10	6,35,25,863
A.Y. 2010-11	6,43,36,230

25. After hearing both the sides, we find since the assessee has not deducted TDS in respect of commission paid to prepaid subscribers the Assessing Officer treated the assessee as an assessee in default and levied tax u/s.201(1) and interest u/s.201(1A) of the I.T. Act. Thereafter, the TDS officer initiated penalty u/s.271C of the I.T. Act. Rejecting the various contentions of the assessee and holding that there was no reasonable cause for non-compliance of TDS provisions the Assessing Officer levied penalty u/s.271C of the I.T. Act, the details of which are already given above. While deciding the quantum appeal we have already held that discount offered by the assessee to the distributors is not in the nature of commission within the

meaning of section 194H of the I.T. Act and accordingly the assessee is not an assessee in default for non-deduction of tax at source u/s.201 r.w.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 in the case of Bharti Cellular Ltd. (supra). Therefore, in the above circumstances, we restore the matter to the file of the Assessing Officer for deciding the issue afresh. We hold and direct accordingly.

26. In the result, all the appeals filed by the assessee are 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,

//**सत्यापित प्रति** / True Copy//

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