IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA.No.1189/H/2014 (Assessment Year 2010-2011)
ITA No.1401/H/2015 (Assessment Year 2011-2012)
ITA No.1402/H/2015 (Assessment Year 2012-2013)
ITA No.1403/H/2015 (Assessment Year 2013-2014)
ITA No.1404/H/2015 (Assessment Year 2014-2015)
ITA No.1405/H/2015 (Assessment Year 2015-2016)

Vodafone Mobile Services Limited (Formerly known as Vodafone South Limited), Hyderabad. PAN: AAACS4457Q	vs.	DCIT-(TDS), Circle-15(2), Hyderabad.
(Appellant)		(Respondent)

ITA.No.193/H/2016 (Assessment Year 2010-2011)
ITA No.194/H/2016 (Assessment Year 2011-2012)
ITA No.195/H/2016 (Assessment Year 2012-2013)
ITA No.196/H/2016 (Assessment Year 2013-2014)
ITA No.197/H/2016 (Assessment Year 2014-2015)

Vodafone Mobile Services Limited (Formerly known as Vodafone South Limited which now stands amalgamated with Vodafone Mobile Services Limited), Hyderabad. PAN: AAACS4457Q	vs.	Addl. CIT (TDS), Range-2, Hyderabad.
(Appellant)		(Respondent)

For Assessee:	Shri Tarun Gulati & Ishita Farsaiya
For Revenue :	Shri P. Chandra Sekhar, CIT-DR

Date of Hearing :	02.08.2017
Date of Pronouncement :	29.09.2017

ORDER

PER BENCH:

1. These group of appeals, filed by assessee-company, are directed against the orders passed by Ld. CIT(A), Hyderabad. Six appeals, pertaining to Assessment Years

2010-11 to 2015-16, are referable to the demand raised u/s 201(1) and 201(1A) of the Act i.e., concerning justification of treating assessee as defaulter and charging interest thereon. Other set of 5 appeals pertain to penalty levied u/s 271C of the Income Tax Act, 1961.

1.1. Since factual matrix of the case are identical in all these appeals, we proceed to dispose of these appeals by a combined order, for the sake of convenience. We shall first briefly narrate the facts pertaining to initiation of the proceedings u/s 201(1) as well as levy of interest u/s 201(1A) of the Act.

2. Assessee is engaged in the business of providing cellular mobile telephone services to its customers in Andhra Pradesh through a network of distributors which was run in the same and style of M/s. Vodafone Essar South Limited, now known as Vodafone Mobile Services Limited. Assessee was offering two types of services to the public i.e., post-paid and pre-paid mobile services.

2.1. In so far as the post-paid mobile services are concerned, the customers make payment on monthly basis against the bills issued by assessee-company. In otherwords, assessee has to provide services to its customers and thereafter issues bills and realises the proceeds. For carrying out its post-paid mobile services effectively, assessee-company appointed number of distributors who manage distribution business by identifying customers and proper documentation of the party, on behalf of assessee, and attend to the complaints of the customers, account for the air time consumed by the customers as well as carrying out the work of raising bills and collection of the proceeds. Since distributors manage the distribution business, a commission is paid for the services so rendered and on the said commission tax was deducted at source as per the provisions of section 194H of the Act.

2.2. Assessee is also having second segment of business i.e., pre-paid mobile services. In the second segment, assessee offers pre-paid mobile services through distributors; the starter kits, starter packs, SIM Cards, recharge vouchers etc., are provided through distributors. Customers pay in advance and use starter kits, starter packs etc., for activating mobile connection provided by assessee-company. In view of development in modern technology, there are number of products and services available in the market which are provided to consumers at large. Assessee-company appoints State-wide distributors for identifying customers and for distributing pre-paid products to customers. In this segment, distributors are paying in advance to assessee-company and consumers in turn pay in advance to distributors.

2.3. In the case of post-paid cellular services, customers are paying after availing services and distributors, upon calculating the amount, pass on the proceeds to assessee-company after ensuring that services have been rendered. There is no dispute with regard to post-paid services since assessee had been deducting tax at source on the said amount.

2.4. However, in the case of pre-paid cellular services, assessee is of the opinion that there is principal to principal relationship between the assessee and its various distributors and hence, provisions of section 194H do not come into play. According to assessee, it merely appoints number of distributors on the basis of agreements and passes on starter kits etc., upon receiving advance amount from distributors. Maximum Retail Price (MRP) is mentioned on every product. Distributors / retailers are not permitted to sell the products to ultimate consumers beyond the MRP whereas they have discretion to sell at any price lower than MRP rate. For example, assessee-company may deliver starter kits etc., to distributors at Rs. 96/-, and dealers in turn

may sell the product at any price not above the MRP printed thereon i.e., if MRP is assumed as Rs. 100/-, distributors / retailers can at best sell the product at Rs. 100/- and not more. Distributors do not have discretion to refund the products, which were already supplied by assessee-company, and distributors may make use of the vouchers, starter kits etc., either for it's own consumption or it can sell to the ultimate consumers which can at best be considered as a cash discount in the assessee's books of account. Based on the reasoning the assessee has not deducted tax at source on these payments.

2.5. A.O. extracted some of the clauses in the distribution agreement which are specifically connected to pre-paid services. Distributor is responsible for sale of service tickets exclusively for and on behalf of the Vodafone. The obligation on the part of the agent is to strictly adhere and comply with brand image guidelines set out in the Annexures. Assessee is under an obligation to provide the distributor with such marketing and technical assistance which may be considered necessary to assist distributors for the promotion of service tickets. VESL agreed to provide its expertise and to guide the distributors for using the latest techniques and skills and, if necessary, to train in the use, installation and rendering of after sales services in respect of the service tickets provided to the distributors and its personnel. Assessee-company has right to terminate the agreement with immediate effect in its sole and absolute discretion under certain conditions. As per the agreement, the distributor has to fully indemnify and keep the assessee-company harmless and against any claim, action, cost and consequences. Vide clause 18.2 all Intellectual Property Rights in or relating to the service tickets are and shall remain the property of VESL or its licensors. Clause (b) speaks of the burden on the distributor to notify the VESL if the distributor becomes

aware of any illegal or unauthorised use of any of service ticket or the service ticket documentation or any of the intellectual property rights.

3. As per Annexure-I, VESL shall sell service tickets to distributor subject to the following terms:-

> "*(e) Return & Replacement:*
>
> *VESL shall not be responsible for any post delivery defect in the Service Tickets. However, VESL may, at its sole discretion and after making verification as it may deem fit, replace any unused non-working refill slips (physical or electronic Stock)."*

4. Distributor has to give proper assistance to the customers on handset servicing and replacement of hands sets under warranty, bill collection etc., and also provide consumers information about new products, services, schemes and promotions.

5. Assessing Officer observed that as per the distribution agreement, distributors are appointed for distributing the products of the assessee in a defined geographical area. Distributor can purchase products at discounted rate fixed by the assessee and the assessee can also offer other incentives based on sales performance. Distributor cannot sell the products at a profit beyond the MRP. Distributors have to adhere to certain brand image guidelines and inform stock movement and permit authorised agent of the assessee to inspect the stock, which clearly shows that distributors are acting as agents of assessee-company.

6. Under these circumstances, A.O. was of the opinion that there exists 'principal to agent relationship' and it cannot be termed as 'principal to principal relationship'. In his opinion, the "cash discount" allowed to the distributor has to be treated as "commission" paid / allowed by the assessee-deductor to the distributors on which assessee is responsible for deduction of tax at source, u/s 194H of the Act.

7. When the same was put to assessee, in the proceedings u/s 201(1) / 201(1A) of the Act, the Assistant Manager, Finance of assessee-company appeared from time to time and contended that the relationship between the assessee and distributors is on a principal to principal basis and it is not in the nature of commission so as to attract provisions of section 194H of the Act. It was also contended (without prejudice to the above contention) that no demand u/s 201(1) of the Act can be raised on the assessee if the excess dues have been paid by the payer / recipient and consequential interest, if any, u/s 201(1A) of the Act should be computed from the date of withholding of taxes by VESL-AP to the date of payment of taxes by the payee / recipient.

8. Assessing Officer referred to the gist of the assessee's letter dated 21.1.2011, wherein it was stated that mobile telephone services offered by VESL-AP are either post-paid or pre-paid. Under the post-paid model, the telecom services are provided directly to the subscriber and post utilization of the services subscriber is billed for "talk time" utilised during a particular period. There is no dispute that assessee deducted tax at source on post-paid earnings.

9. Under pre-paid model, subscriber is required to pay "talk time" in advance. For making the pre-paid talk time available to its subscribers, the VESL-AP entered into agreements with pre-paid distributors who acquire pre-paid talk time from assessee for onward distribution to subscribers. According to the assessee, acquisition in the form of recharge voucher / e-top ups, through internet or other modules - either physical or electronic - is on 'principal to principal' basis. The distributor is responsible in all respects i.e., distributors obtain the recharge vouchers etc., at discount which in turn are transferred to ultimate subscribers at a price which should not exceed the

MRP; distributors retain a margin for its efforts and risks assumed whereas VESL-AP, being the service provider, assumes the responsibility for providing services to the subscribers which is similar to what a manufacturer does by assuming product liability towards the consumers. It was strongly submitted that no commission is being paid by the assessee to the distributors for its pre-paid SIM cards and talk time and hence there is no need to deduct tax at source.

10. The representative of the assessee referred to key terms of the agreement to submit that the distributors entered into independent arrangements with retailers / subscribers for onward distribution of pre-paid talk time and there is no mention of payment of any commission to the distributor since the payment is made by the distributor to the assessee and not *vice versa*. In other words, the case of assessee is that section 194H obligates the assessee to deduct tax at source in a case where he is referred to as "payee" or a recipient of any income by way of commission, brokerage etc., whereas in the instant case VESL-AP is not responsible for paying any income to the distributor by way of commission and other conditions are also not satisfied so as to bring it within the ken of the provisions of section 194H of the Act. Reliance was placed on the decision of the Hon'ble Kerala High Court in the case of M.S. Hameed and Others vs. Director of State Lotteries and others (249 ITR 186) wherein it was observed that deduction is to be at the time of credit of such income to the account of the payee or at the time of payment of such income by cash whereas in the instant case there is neither payment of cash or by cheque and on the contrary it only receives the sale consideration from distributors. Therefore, provisions of section 194H do not come into play. In fact, the distributor cannot be said to be acting as an agent of VESL-AP. It was also submitted that the ownership in the talk time

passes to the distributors the moment they take delivery of the recharge coupons or the e-top-up is credited to their account; having taken delivery, the distributors are free to use the same for their own consumption and it is not necessary to trade in the same by providing it at a margin to retailers / subscribers. In a pre-paid business module, the significant risks and rewards are transferred to the pre-paid distributors on transfer of pre-paid talk time and thus the arrangement between assessee and pre-paid distributors is on "principal to principal" basis.

11. The talk time is transferred to the distributors on payment of upfront consideration paid by the distributors. The fact that the assessee fixes MRP and imposes certain restrictions on the distributors would not make the relationship a "principal to agent" relationship. Such clauses are only to save the assessee-company from any third party claims which may arise in future and such stipulations are found in most distributorship agreements. In short, on any 'principal to principal' relationship, the distributor is the owner of the goods whereas in 'principal to agent' relationship, agent is not the owner of the goods and he would be indemnified if he incurs any loss while acting on behalf of the principal.

12. The focus of the submissions of the assessee was that VESL-AP does not give warranty or guarantee, either express or implied, in respect of SIM cards and talk time transferred to distributors. It was also submitted that the agreement takes its colour from underlying terms and conditions between the parties and if the understanding between the parties as a whole is analysed, it cannot be said that there is 'principle to agent' relationship. Reliance was placed upon the decision of the Hon'ble Gujarat High Court in the case of Ahmedabad Stamp Vendors Asociation vs. Union of India [2002] (257 ITR 202) wherein the court observed that *section 194H is not so wide to include*

any payment received / receivable for services in the course of buying or selling of goods. It was also emphasised that an element of agency has to be there in case of all services contemplated u/s 194H of the Act. Similarly, assessee also relied upon the following decisions to support / strengthen it's submissions viz.,

(i) the decision of Hon'ble Kerala High Court in the case of Kerala Stamp Vendors Association vs. Office of the Accountant General and Ors (282 ITR 7);
(ii) the decision of the ITAT, Hyderabad Bench in the case of ACIT vs. Idea Cellular Ltd (317 ITR 176);
(iii) decision of the Hon'ble Supreme Court in the case of Bhopal Sugar Industries AIR 1977 SC 1275;
(iv) decision of the ITAT, Pune Bench in the case of Foster's India Pvt Ltd (117 TTJ 346);
(v) decision of the Hon'ble Supreme Court in the case of Gordon Woodroffe and Co. vs. Sheikh M.A. Majid and Co. (AIR 1967 SC 181); and
(vi) In re Vevil [(1871) 6 Ch. 397] T & Co.,

13. The Hon'ble Kerala High Court in the case of M.S. Hameed and others vs. Director of State Lotteries (249 ITR 189) (Ker.) observed that lottery ticket distributor cannot be considered to have earned income for the purpose of deduction of tax at source.

14. Reliance was also placed on the decisions of the Hon'ble Karnataka High Court in the case of Hyderabad Industries Limited (188 ITR 749) & Hon'ble High Court in CIT vs. Qutar Airways (332 ITR 253) (Bom); The assessee also relied upon several decisions in support of the stand that tax cannot be demanded from the payer when taxes have also been paid by the payee.

15. The Assessing Officer summarized the issue in dispute by stating that the main issue is as to whether transactions between assessee and it's distributors are to be treated as a contract of sale as claimed by the assessee; if it is to be treated as contract of sale, as a necessary corollary it cannot be assumed that the relationship between the assessee and the distributor is on 'principal to agent' basis. It has to be assumed

that there is 'principal to principal' relationship. At any rate whether the applicability of provisions of section 194H is debatable.

16. It is not in dispute that the assessee equated the pre-paid services with that of sale of products or commodity and, on that premise, it was argued that the supply of starter kits and recharge coupon / vouchers are in the nature of products / commodities. The A.O. observed that the assessee cannot take different stand i.e., deductibility of TDS for post-paid and non-deductibility of TDS for pre-paid services, since in both the cases the underlying purpose is to pass some consideration to distributors. In this regard, he highlighted that the most important feature which separates the assessee-company from other assessees is that it is not a manufacturer or trader and it is not dealing with the commodity or goods but it is essentially a service provider through a medium of distributor. Both the distributors and retailers are merely links in the chain of providing talk time facility either through SIM Cards or e-mode which is again to provide services. In paras 7 and 8 of the assessment order, the A.O. observed as under:-

> *"7. The nature of the assessee's service is different from sale of ordinary physical goods / commodities. A SIM card (Subscriber Identification Module) is only a device used for accessing or availing of the prepaid cellular, mobile telephony service. The Starter Kits and Recharge Coupon Vouchers are not mere physical commodities but are means to avail of certain services, viz., cellular mobile service. What are being traded in the form of starter kits / recharge coupon vouchers are only token elements. The actual items involved are services that include access to the cellular mobile telephony network. While there may be a physical commodity in the form of SIM Card or recharge coupons / slips etc., the actual product is the non-physical goods / services involved, such as access to the cellular network e-topup / recharge. The distributors are acting all the times on behalf of the assessee to facilitate transmission of this service from assessee-company to end consumer.*
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> *8. In the case of electronic recharge, though the amounts are realized from the consumers, there are no physical goods at all. The entire transaction is carried out by means of computer software employed by the assessee company and the retailer merely keys in the mobile number of the consumer and the amount to be charged from the retailer's mobile phone which is connected to the network. Not even a coupon or symbolic goods is there which is being sold in the e-recharge category."*

17. Based on the said premise, the A.O. concluded that a service can only be rendered and it cannot be sold and the defacto owner of the starter kits, recharge coupons etc., is the assessee-company since they are in the nature of a key to the consumer to have the talk time facility but it has to be activated by the assessee-company. Under these circumstances, it cannot be said that the assessee-company passed on any ownership or title of the goods to the distributors or to the retailers since those persons are only acting as a link in the chain of providing services by the assessee-company.

18. A.O. exhaustively dealt with the agreement between the assessee and the distributor as well as the case law relied upon by the assessee and sought to distinguish the case law on the ground that the facts in the above referred cases are not applicable to the peculiar set of facts and circumstances involved herein. Emphasis was made on the fact that the liability of the distributor to pay the price of starter kits, recharge vouchers etc., is fully dependent and contingent on the sale of such cards to the retailers. The distributors are also governed by a complex set of guidelines, in the form of agreement, before the process of handing over of starter kits etc., and from that perspective it cannot be said that they are independent entities who can take any decision without prior approval with regard to sale of cards. He further stated that in case of a discount sale, there would be no control of one principal on other principal soon after sale of goods and it cannot be determined as to how and where to sell the goods. In the assessee's case, the distributors agreement clearly denote a geographical area of operation in the manner in which the SIM cards have to be supplied to the retailers / ultimate consumers which is a complex process of verifying their identity etc. In otherwords in case of purchase on discount, there cannot be any

restriction on the manner in which the stock purchased by the principal is to be kept, nor is there any right for one principal to inspect the stocks or call for reports of stock movements. This not true in the assessee's case.

19. In a contract of sale, revenue is recognised once goods are handed over in pursuance of payments received whereas in the instant case the assessee recognised the revenue only when the end user spends the air time and not at the time when the sale is effected by the assessee-company to its distributors. In otherwords, the distributor is merely an agent who facilitates the relationship and the argument of the assessee that it is a contract of sale, in the light of the facts stated above, is fallacious.

20. The A.O. observed that the SIM cards etc., provided to the distributors and, in turn, passed on to the retailers and ultimate consumers, cannot on its own be utilised and will have no value since they are inextricably linked to a set of services, which are identified and sold under brand name and in this manner it cannot be said that the distributor sells the starter kits by treating it as his own property; the sale is with clear understanding that the ultimate consumer is benefited upon activation by the assessee-company which impliedly shows that even if it is treated as a property it is that of a company. What is being delivered is not a mere physical item but an access to the cellular network which is the property of the assessee for all times. Therefore, circumstances have to be taken into consideration rather giving importance to the form and looking from that perspective mere existence of price flexibility given to the distributor alone is not a determinative factor to decide as to whether the assessee-company and its distributors have a principal-to-principal relationship.

21. The clauses in the agreement predominantly prove a principal-to-agency relationship since the distributors are merely conduits who facilitate the connection of

the services of the assessee-company to the end user. It was re-emphasised that in a case of 'principal to principal' sale transaction, distributors become owner of goods and exert full control over the operations whereas, in the instant case, various restrictions and conditions were imposed on the distributors which shows that the distributors are mere agents and not independent principals; Though the nomenclature used by the assessee is "discount", in sum and substance it is only "commission" in nature.

22. The claim of the assessee is that only upon payment by the assessee-company to its distributors there would be a need to deduct tax u/s 194H. In otherwords, assessee-company is not making any payment and hence the provisions of section 194H do not come into play. This argument was countered by the A.O. by observing that by way of conscious wordings of the terms of agreement, the occasion of payment by the assessee is removed though the assessee-company can collect the net sale proceeds along with the TDS amount from the distributors while distributing the pre-paid products. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Singapore Airlines & Other Airlines (213 Taxation 441), wherein it was held that supplementary commission retained by the travel agent should be treated as 'commission' within the meaning of section 194H of the Act. In the aforementioned case, the travel agent is at liberty to receive, over and above the net fare, which is declared as profit in the hands of the travel agent. The case of the assessee therein is that sums received over and above the net fare, for which the company has issued tickets to travel agent, should not be treated as income in the hands of the assessee-company for the purpose of invoking the provisions of section 194H of the Act. The Hon'ble Delhi High Court negated the contention of the assessee

by observing that even the supplementary commission earned by the travel agent is an extended part of the contract agreement and hence the assessee is duty bound to deduct tax at source.

23. The A.O. observed that the distributors are acting akin to the position of a franchisee and need constant supervision of the assessee in which event it has to be treated as a 'principal to agent' transaction thereby the assessee is liable to deduct tax u/s 194H of the Act.

24. Apart from distinguishing the case law relied upon by the assessee, the A.O. relied upon the decision of the ITAT, Kolkata Bench in the case of ACIT vs. Bharati Cellular Limited 294 ITR 283 (A.T) wherein, under identical circumstances, it was held that the relationship is on 'principal to agent' basis and the assessee is liable to deduct tax at source u/s 194H on the commission payment to the franchisees. It may be noted that this decision of the ITAT is now upheld by the Hon'ble Kolkata High Court. He further noted that the Hon'ble Kerala High Court (Writ Petition No.29202 of 2005) in the case of M/s. BPL Mobile Cellular Ltd vs. State of Kerala and Others, had an occasion to consider a matter arising under Sales Tax on similar set of facts and the court observed that SIM Cards as well as recharge coupons delivered by M/s. BPL Mobile Cellular Ltd is not liable for KVAT / Sales Tax as the transaction between the service provider and distributor is only that of service and not sale and purchase of any goods or merchandise. Under Income Tax Act also the Hon'ble Kerala High Court in the case of M/s. Vodafone Essar Cellular Ltd vs. ACIT [2010] 7 taxmann.com 43 (Ker) decided against the assessee company on the premise that there is no sale or purchase of goods and the recharge coupons etc., delivered by the assessee to its distributors / retailers / ultimate consumers served the purpose of enabling the

ultimate retailer to obtain proper service in the form of talk time etc., from the assessee-company.

25. In essence, service can only be rendered and cannot be sold through the medium of supply of starter kits to the distributors. In fact, carrying on the business of providing services is subject to so many statutory compliances and upon supplying the starter kits etc., to the consumer the assessee company is under an obligation to prepaid consumers to provide hassle-free services, even though the direct deal is between the distributor and the consumer, in view of the fact that the distributor does not have licence to provide "service" to the consumer. The assessee-company is operating under the right of licence agreement entered into with Government of India. Nobody else can be given the right to operate as cellular service provider. The peculiar facts thus indicate that the entire transaction has necessary ingredients of agency relationship.

26. In essence, the A.O. relied upon the following decisions to arrive at a conclusion that the deal between the assessee and distributor can only be treated as deal between 'principal and agent'.

(i) CIT Vs M/s. Idea Cellular Ltd. (2010) 325 ITR 0148 [Del];

(ii) (ii) M/s. Vodafone Essar Cellular Ltd. Vs ACIT [2010] 7 taxmann.com 43 (Ker) and

(iii) The decision of ITAT, Kolkata Bench in the case of ACIT vs. Bharati Cellular Limited 294 ITR 283 (AT) and ITAT Cochin Bench decision in the case of Vodafone Essar Ltd (ITA No.106 to 113/Cochin/2009, dated 30.04.2009).

27. As regards the alternative claim that no TDS can be demanded from the payer when the taxes have already been paid by the payee and no interest u/s 201(1A) can be charged when the tax has already been paid, the A.O declined to accept the contention on the ground that the assessee has not furnished any proof in support of its claim that the payees have paid taxes and filed their returns. Since, no proof was furnished, the contention of the assessee was rejected.

28. Case of the assessee is that agreement between the assessee and distributors is on 'principal to principal' basis and therefore, provisions of section 194H of the Act are not applicable. Extending further - based on the same logic - the assessee is also not liable to pay interest u/s 201(1A) of the Act.

29. Vide para 37, the A.O. observed that there is no proof with regard to the admission of the commission in question by the distributors concerned. He further observed that though the assessee has requested not to treat it as an assessee in default, vide its letter dated 21.2.2011, when called upon to furnish proof of payment by the distributors, no information could be furnished despite pointing out that in the absence of any proof, the assessee cannot gain any benefit. The assessee could not furnish any proof with regard to the admission of the commission by the distributors. Under these circumstances, the A.O. treated the assessee as a defaulter u/s 201(1) of the Act and also charged corresponding interest u/s 201(1A) of the Act.

30. Facts were culled out from the assessment order for the assessment year 2010-2011. In respect of the subsequent assessment years also issue is identical, and A.O. had the benefit of the view taken by Hon'ble Andhra Pradesh High Court in the case of f M/s. Vodafone Essar South Limited, which was also followed by the ITAT,

Hyderabad Bench in the assessee's own case for the subsequent years i.e., A.Y. 2007-08 to 2009-2010.

31. Consequent to the order passed u/s 201(1) and 201(1A) of the Act, A.O. initiated penalty proceedings u/s 271C of the Act. In response thereof, vide letter dated 11.12.2014 the assessee merely requested the Assessing Officer to keep the penalty proceedings in abeyance till disposal of the appeal before the ITAT. The Assessing Officer observed that in the assessee's own case, in SLP (Civil) No.35062 and 35063 of 2013, the Apex Court made it clear that the Department is entitled to proceed with regard to levy of penalty and if it is leviable it can quantify the same. Therefore, the request of the assessee to keep the matter in abeyance was rejected.

32. We are concerned with A.Y. 2010-11 and onwards. The case of the Assessing Officer is that the assessee-company was made aware of its liability much before the beginning of the Financial Year relevant to the Assessment Year 2010-2011 since a survey action was conducted on 20.03.2009 on the assessee. During survey proceedings assessee was appraised about the applicability of TDS provisions. In fact, on 28.01.2010 the A.O. raised demand u/s 201(1) and 201(1A) for the AYs 2007-08 to 2009-2010 and the same were confirmed by the Ld. CIT(A) and thereafter by the ITAT, Hyderabad Bench. Even the Hon'ble High Court of Andhra Pradesh has approved the order of the ITAT, Hyderabad Bench.

33. Despite this factual matrix, the assessee merely submitted that there is no case for levy of penalty and also requested the Assessing Officer to keep the matter in abeyance, instead of furnishing a reasonable cause for non-compliance to TDS provisions, as enshrined u/s 273B of the Act. It appears that the case of the assessee is that it was under bonafide belief that pre-paid distributor is not subject to TDS u/s

194H and hence it is not required to deduct any tax on such discount. It was further contended that the transfer of talk time by assessee to pre-paid distributors does not result into income in the hands of distributors. Income, if any, arises only at the time of subsequent distribution of talk time by such distributors to the retailers / subscribers and hence, there is no occasion for assessee to withhold taxes.

34. A.O. referred to the fact that the assessee was informed about the applicability of the TDS provisions, on discount offered to the distributors, during the course of survey action conducted on 20.3.2009 and thus for the subsequent period the assessee cannot still continue to remain steadfast by not deducting tax merely on the basis of belief / unilateral view of the assessee. Under these circumstances, the explanation of the assessee was not accepted as a reasonable cause u/s 273B of the Act.

35. It was also contended that non-deduction of tax does not emanate from any malafide intention on the part of the assessee to evade tax or to circumvent the law and hence, the case does not justify levy of penalty u/s 271C of the Act. The assessee states that there are contrary decisions of the court on this issue which makes the issue debatable and hence the levy of penalty is untenable.

36. The A.O. observed that the assessee has not made out any case as to how the issue is debatable and, in fact, it has not relied upon any judgment to prove that the issue is debatable, particularly in the wake of the fact that the ITAT, Hyderabad Bench, in the case of Idea Cellular Ltd (supra), held that provisions of section 194H are applicable on the discount offered to distributors on pre-paid cards etc.

37. The assessee has also raised an alternative contention that no penalty should be levied when taxes were paid by the payee. However, the assessee himself was not sure as to whether the distributors have paid taxes; therefore, the claim was not

accepted by the A.O. At any rate, the ITAT Delhi Bench, in the case of Kanha Vanaspati (17 SOT 160) considered an identical issue wherein it was observed that payment of taxes by the payees will not absolve the assessee from the responsibility of deducting tax at source as otherwise the provisions relating to collection of taxes by way of TDS would become redundant. He also relied upon the Circular issued by the CBDT dated 29.01.1997 wherein the CBDT clarified that merely because the taxes have been paid by the deductee-assessee, it will not alter the liability to charge interest u/s 201(1A) of the Act till the date of payment of taxes by deductee-assessee or liability for penalty u/s 271C of the Act and this Circular was upheld by the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage P. Ltd (293 ITR 226).

38. Having regard to the circumstances of the case, the A.O. levied penalty u/s 271C of the Act, for the failure to deduct tax at source, for all the years under consideration i.e., for the AYs 2010-2011 to 2014-2015.

39. The order for the A.Y. 2010-2011 u/s 201(1) and 201(1A) of the Act was passed on 15.03.2011 whereas for the subsequent years orders were passed on 14.11.2014 including for the A.Y. 2015-16; For A.Y. 2015-16, the default under consideration was only up to 30.9.2014.

40. Aggrieved by the orders passed by the Assessing Officer, appeals were preferred before the Ld. CIT(A); for the Assessment Year 2010-2011, appeal was filed on 19.04.2011 whereas for other years, appeals were filed on 10.12.2014. In so far as levy of penalty is concerned, appeals were instituted on 28.01.2015.

41. In the statement of facts and grounds of appeal for the Assessment Year 2010-2011, it was contended that under pre-paid model, the subscriber pays upfront and obtains demarcated talk time which is made available by assessee-company by way of

recharge vouchers and in order to ensure maximum coverage and reach of it's services, assessee-company appoints distributors and enters into agreements. Under an arrangement, assessee transfers its pre-paid SIM cards / talk time to a distributor and the distributor in turn distributes the same to the retailers. The retailers distribute the same to the consumer. At each level of distribution the party distributes the talk time and retains a margin for its efforts and risks assumed. The distribution of talk time by the assessee to its distributors is on discount a part of which, in turn, passed on by the distributors to the retailers. Thus, the transactions between the assessee and the pre-paid distributors is 'principal to principal' basis.

42. According to the assessee the transaction, in all substantial respects, is akin to pay and purchase of goods as it happens in FMCG sector. Distributors become liable to the assessee as "debtor" for the price to be paid for the SIM cards / talk time and not as an "agent". Any loss suffered by the distributor on account of use of SIM cards / talk time or non-payment by the retailers / subscribers is not made good by the assessee and thus, the relationship is significantly different from a typical "principal to agent" relationship wherein the agent is not the owner of the goods and he is indemnified if he incurs any loss while acting on behalf of the principal. It was also contended that in order to invoke the provisions of section 194H of the Act it has been shown that there is a relationship of agency between the parties whereas in this case it is on 'principal to principal' basis. The discount extended to the distributor constitutes "trade margin" and not "commission or brokerage". Margin is earned by the distributors in their independent capacity and not for acting for and on behalf of the assessee. It was also contended that the TDS Officer has wrongly applied the decision of the Hon'ble Kerala High Court (in the case of Vodafone), Hon'ble Delhi High

Court (in the case Idea Cellular Limited) and the decision of the ITAT, Kolkata Bench in the case of Bharati Cellular Limited by assuming that an appellant who is engaged in providing services cannot sell its services on 'principal to principal' basis overlooking the fact that the underlying transaction involves actual transfer of the talk time which, though not "goods", is a product that has been digitized and commoditized by the assessee for free trade in open market and thus the transaction has all the necessary ingredients required to make it a transaction between two people on a 'principal to principal' basis.

43. It was also submitted that no demand can be raised when taxes have already been paid by distributors. Similarly no interest can be charged, when the tax due has already been paid by the payee. The issues raised herein are summarised as under:-

(a) (i) the assessee is not liable to deduct tax on discount extended to its pre-paid distributors since the actual transfer of talk-time can also be treated as product which was made available to the distributor for free trade in the open market, making it a transaction on a 'principal to principal' basis;

(ii) discount allowed by the assessee is not income in the hands of its distributors and that income, if any, arises only when the pre-paid SIM cards are further distributed by distributors.

(iii) There is no flow of money from the assessee to the distributor of pre-paid talk time but rather from the distributor and hence provisions of section 194H are not applicable.

(iv) The TDS Officer did not appreciate the difference between transfer of service vis-à-vis retention of service; when there is a transfer of service it is on 'principal to principal' basis.

(b) No TDS demand can be raised when tax was already paid by the payees since it amounts to double recovery of taxes and

(c) No interest u/s 201(1A) can be charged since the tax due would have been paid by the distributors on the discount allowed to them. At any rate, the consequential interest should be computed from the due date of payment of withholding tax by the assessee to the date of payment of tax by the payee / recipient of such income.

44. In respect of other years, it was contended that TDS Officers erred in treating the assessee as an "assessee in default" in view of the provisions of section 201(1) read with section 201(1A) and the judgment of the Hon'ble Allahabad High Court in the case of M/s. Jagaran Prakashan (345 ITR 288); as there is no finding of the TDS Officer with respect to failure of the pre-paid distributor to pay taxes directly. Without prejudice it was contended that as per the settled principle enunciated by the Hon'ble Allahabad High Court (supra) a payer cannot be held liable for payment of tax in cases involving non-deduction of tax at source and only interest u/s 201(1A), if any, can be levied in such cases. In addition to the grounds urged in the appeal for the A.Y. 2010-2011, the assessee contended that the TDS Officer erred in placing reliance on the decision of the Hon'ble Andhra Pradesh High Court in the assessee's own case for the earlier assessment years as well as the decisions of the Hon'ble Kerala High Court, Hon'ble Delhi High Court and Hon'ble Kolkata High Court. It was also contended that

the computation of interest u/s 201(1A) was wrong inasmuch as the correct rate of interest should have been 1% per month.

45. The Ld. CIT(A) passed separate orders for the assessment years under consideration. In the assessment year 2010-2011, the Ld. CIT(A) observed that identical issue having been decided by the ITAT in the assessee's own case for the assessment years 2007-2008 to 2009-10 vide order dated 31.9.2013, assessee is liable to TDS u/s 194H of the Act. Regarding the claim that payees have made the payment, the Ld. CIT(A) directed the A.O. to verify and take action accordingly with a rider that if the income is already admitted by payee there is no need to treat the assessee as defaulter u/s 201(1) though the interest liability still holds good from the due date to deduct tax by the assessee till the actual date of payment by distributors. For the assessment year 2010-2011, CIT(A)-II, Hyderabad was the incharge of the appeals arising out of the order passed by the TDS Officer and accordingly Smt. G.V. Hemalatha Devi, CIT (A) passed the abovementioned order. However, from the assessment year 2011-2012 onwards, CIT(A)-8, Hyderabad had the jurisdiction and accordingly the appeals were disposed of by Shri D. Srinivas, CIT (A) wherein he extracted the reasons given by Hon'ble High Court of Andhra Pradesh in the case of Vodafone Essar Limited (ITA No.291 of 2013) to hold that the issue stands covered against the assessee by the decision of the jurisdictional High Court. It was also stated that the Ld Counsel for the assessee took a hyper technical view which is contrary to the various decisions already rendered by different High Courts and accordingly dismissed grounds raised before him.

46. Aggrieved by the orders of first appellate authority, assessee preferred appeals before the Tribunal contending, *inter alia,* that the assessee is not liable to deduct tax

at source on discount extended to its pre-paid distributors and even if it is treated as transaction between 'principal to agent', in the absence of any finding by the TDS Officer in respect of the failure of the deductees to pay taxes directly , the assessee could not have been treated as an 'assessee in default' in the light of the judgment of Allahabad High Court in the case of Jagaranak Prakasam Limited (supra). It was also contended that no interest u/s 201(1A) could have been charged in the facts and circumstances of the case.

47. As regards the penalty levied by the Assessing Officer u/s 271C of the Act the case of the assessee is that the orders are *void ab initio* and liable to the set aside since Addl Commissioner conducted the proceedings in a prejudicial and malafide manner and has not considered the submissions of the assessee in its entirety. It was also contended that the assessee was under a bonafide belief that there is no need to deduct tax at source and that constitutes a reasonable cause for non-deduction of tax u/s 194H of the Act and thereby it is not a fit case for levy of penalty u/s 271C of the Act. In the opinion of assessee-company, whether tax is deductible at source or not is a debatable issue and hence levy of penalty is not warranted.

48. Ld. CIT(A) rejected the contention of the assessee and confirmed the action of the TDS Officer. Further aggrieved, assessee preferred appeals before us.

49. As already indicated herein above, group of six appeals are relatable to failure to deduct tax at source u/s 194H of the Act and consequent invocation of the provisions of section 201(1) and 201(1A) of the Act. Ld Counsel for the assessee, at the outset, admitted that the decisions of the Hon'ble Jurisdictional High Court, Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Kolkata High Court are against the assessee; however, his contention is based on the limited issue that important facet

of the argument was overlooked by all these High Courts which was recognised by the Hon'ble Andhra Pradesh High Court in a later decision, while considering the matter of collection of outstanding demand. He relied upon the decision of Hon'ble Karnataka High Court in the case of Vodafone Essar South Ltd (372 ITR 33) wherein the Hon'ble High Court observed that a right to service can be sold and once the distributor pays for the service and the service provider, in turn, delivers the SIM cards / recharge coupons, the distributor acquires the right to demand service; the property in the goods is transferred and gets vested in the distributor at the time of delivery and the understanding between the distributors and retailers / ultimate consumers is altogether different and assessee is not concerned with quantum and actual earning of income by the distributors and, as such, it was held that the relationship between the assessee and distributor is that of 'principal to principal'. The moment assessee sells the SIM cards to the distributor assessee receives income and it is not obligated to pay any commission.

50. Ld Counsel for the assessee vehemently argued that this aspect having not been considered by either the earlier judgments of the High Courts or subsequent judgment of Calcutta High Court, principle of *res judicata* does not apply merely because there is a decision of the Hon'ble jurisdictional High Court holding that section 194H is attracted. It was also contended that under Income Tax Act, each year is independent and the same issue can be contested by the parties independently though there is a valid precedent since the ratio of the judgment has to be applied and understood only to the extent of the issue that was argued before the Hon'ble Court and with respect to certain aspects which were not projected / argued / considered, the assessee can still challenge the conclusions and it need not be deterred by any precedent. Ld

Counsel for the assessee submitted that short point for consideration here is whether the service can be sold on 'principal to principal' basis or it is sale of goods.

51. It deserves to be noticed that the assessee filed several sets of paper books (some are unsigned) which include material paper book and case law and each paper book starts from page 1 onwards, instead of giving the continuation page numbers and hence, the Bench had to take up the task of numbering the paper books i.e., paper books 1 to 5. In addition thereto, several loose papers were also filed by the assessee as well as by the Revenue.

52. Ld Counsel for the assessee adverted our attention to page 12 of paper book – 5 to submit that in the case of Idea Cellular Limited (317 ITR (A.T.) 176), the ITAT, Hyderabad Bench had an occasion to consider an identical issue concerning the applicability of provisions of section 194H of the Act wherein the Bench observed in para 13 as under:-

> *"13…….The term "commission or brokerage" has been defined in Explanation (1) and includes any payment received or receivable directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or a thing not being securities. The definition of expression "commission or brokerage" as contained in clause (i) of the Explanation to section 194H, is not so wide that it would include any payment receivable, directly or indirectly for services in the course of buying or selling of goods. To fall within the said Explanation, the payment received or receivable, directly or indirectly, by a person acting on behalf of another person (i) for services rendered (not being professional), or (ii) for any services in the course of buying or selling goods (iii) in relation to any transaction relating to any asset, valuable article or thing, the element of agency is not to be there in case of all services or transactions contemplated by Explanation (i) to section 194H of the Act."*

53. The Bench was of the opinion that in order to consider as to whether distributor is acting as an agent of assessee or they are outright purchasers of goods supplied by the assessee, the contract of agency has to be looked into. The essence of contract of sale is transfer of title to the goods for price paid or to be paid. The transferee, in such case, becomes liable to the transferor of goods as a debtor for the price to be

paid and not as the agent to the proceeds of the sale. They have also distinguished the case law placed before them, including the decision of the ITAT Kolkata Bench in the case of Bharati Cellular Limited (294 ITR (A.T) 283) by stating that in the aforecited decision, the agreement between the assessee and the distributors showed that the rights with the pre-paid card, at all times, vested in the assessee before they were finally sold to the customers and hence, the invocation of section 194H was justified. Similarly, the ITAT Jaipur Bench in the case of Coca Cola Beverages (98 TTJ 1) was concerned with the sale of goods to its distributors to operate in specified territories only at fixed margin under supervision and control of the assessee in which event the transaction between the said assessee and the distributor was held to be on 'principal and agent' basis. The Bench observed that the decision of the ITAT Pune Bench in the case Foster's India Pvt Ltd (117 TTJ 346) considered all the aforementioned judgments to hold that the discounts allowed on transactions resulting in outright purchases cannot be treated as brokerage or commission but it should be treated as a transaction on 'principal to principal' basis; Accordingly it was concluded that the assessee cannot be treated as a defaulter attracting the provisions of section 201(1) and 201(1A) of the Act. Ld Counsel for the assessee submitted that the ITAT Hyderabad Bench considered the matter in detail to come to a conclusion, under identical facts and circumstances, that a transaction between the assessee and the distributor is on a 'principal to principal' basis.

54. But this decision was not accepted by a later Bench of the ITAT Hyderabad (in the case of Vodafone Essar South Limited, 31.1.2013) wherein the Bench observed that the AR did not bring any arguments to distinguish the decisions of the Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Kolkata High Court in the

cases of Idea Cellular Limited, Vodafone Essar South Limited and Bharati Cellular Limited respectively. Since similarity of facts and method of accounting being same, in the aforecited cases, the Tribunal was of the opinion that the view taken by the Hon'ble High Courts deserve to be accepted. It was also stated that the said decisions cited by the AR were not exactly on this issue. In other words, independent decision was not rendered in the aforecited order except following the decisions of various High Courts and this decision was rendered without following the rule of consistency i.e., a decision of the ITAT Hyderabad Bench in the case of Idea Cellular Limited was not followed and the Bench did not chose to refer the matter to Special Bench but merely overlooked the aforecited judgment on the premise that the decisions of other High Courts are on the same set of facts. If the same logic has to be applied, Ld Counsel for the assessee contends, the ITAT Hyderabad Bench can always take upon itself a new facet of the argument which was not considered by the Hon'ble High Court of Andhra Pradesh. Page 26 of the paper book refers to unreported judgment of the Hon'ble High Court of Andhra Pradesh in Tax Appeal No. 291 of 2013, dated 17.07.2013 wherein the Court did not go into the merits of the case; in particular a new line of argument which was sought to be placed by the Ld Counsel for the assessee. The Court merely observed that no arguments were advanced by the assessee to distinguish the cases referred to in the order of the Tribunal and since the assessee accepted that facts and method of accounting are similar, as has been considered in the cases before the Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Kolkata High Court, it concluded that no question of law / fact arises.

55. Ld Counsel for the assessee also referred to page no. 40 of the paper book (interim order of Andhra Pradesh High Court in the case of Vodafone in W.P. No.2456

& batch, dated 25.08.2015) wherein the Hon'ble High Court had taken note of a later decision of Hon'ble Karnataka High Court and also observed that the Hon'ble Supreme Court treated it as a substantial question of law fit for their consideration and thus reiterated the assessee's stand that the issue is debatable. In other words the earlier judgment of the Hon'ble Andhra Pradesh High Court was doubted by a later Bench while dealing with the Writ Petition. The Ld Counsel for the assessee also referred to a decision of the ITAT Hyderabad SMC Bench in the case of ITO vs. G.M, BSNL (42 ITR (Trib.) 669) to highlight that despite the decision of the Hon'ble Andhra Pradesh High Court, the SMC Bench held that the latest decision of the Hon'ble Karnataka High Court requires to be considered and accordingly held that provisions of section 194H are not applicable in respect of the sale made to the franchisees at a concessional price.

56. Ld. Counsel for the assessee adverted our attention to pages 14-17 of the assessment order to submit that even as per the Key terms of the agreement, there is no mention of any payment in the form of commission to the distributor and, as per the accounting treatment given by the assessee, it cannot be said that the discount provided by the assessee to the distributor deserves to be treated as commission. Ld. Counsel for the assessee adverted our attention to the decision of the Hon'ble Karnataka High Court in the case of Vodafone Essar South Ltd and others (372 ITR 33) to submit that under identical circumstances, Hon'ble Karnataka High Court held that upon handing over SIM cards etc., to the distributor it can be said that there is a transfer of service by the assessee to the distributor and such transaction has to be treated as "on principal to principal" basis. In the aforecited decision, it was the plea of the assessees that an invoice is raised which contains the unit price, discount and

net value of the unit after such discount and the Sales Tax is paid on that net value though the distributor could sell the said units at any price which cannot exceed MRP. The distributors pay to the assessee the net value of the unit.

57. Hon'ble Karnataka High Court considered the decisions of various High Courts / Supreme Court, under identical circumstances – both in favour and against the assessees - and observed that the mere word "agent" or "agency" used in the agreement is not sufficient to lead to irresistible inference that the parties did, in fact, intend that the said status would be conferred. While interpreting the terms of agreement, the Court has to look to the substance rather than form. In other words, the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows otherwise; if the property in the goods is transferred and gets vested in the concessionaire at the time of 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. In order to invoke the provisions of section 194H of the Act it has to be shown that the discount / benefit given by the assessee is in nature of commission or brokerage. The Court further referred to distribution agreement to highlight that for the promotion of marketing and distribution of the products / services, the assessee availed services of distributors wherein each distributor has to provide services mentioned in the agreement and the assessee is no way liable to the customers. Therefore, the distributors agreement is on 'principal to principal' basis. According to the Hon'ble High Court the distributor purchases material from the assessee and sells the same to the customer in the form of handsets, SIM cards / recharge coupons and other products. Sales tax liability on the products sold by the distributor solely vests with the distributor. The insurance liability for the entire stock-in-trade will be of the

distributor and the liability for any loss or damage of SIM cards etc., or any loss or damage due to burglary / theft etc., will be on the distributor. The Court further observed that the distributor, in the instant case, carried on the business as an independently owned business entity and agreement does not make the distributor, its employees, associates or agents as employees for any purpose whatsoever. The distributor has no express or implied right to undertake any obligation for and on behalf of the assessee. The distributor has to pay consideration for the products supplied and thus it has to be treated as sale consideration. The Court also highlighted that there is specific clause in the agreement that after sale of the products, the distributor cannot return the goods to the assessee and it is the distributor who has to insure the products at godowns at their own cost.

58. The Hon'ble High Court however accepted the contention of the Revenue that the telephone service is nothing but service and SIM card on its own, without service, would hardly have any intrinsic value. According to Judges a right to service can be sold. The distributor acquires a right to demand service from the assessee at the time when assessee sells these pre-paid cards for consideration to the distributor. The distributor does not earn any income; in fact, rather than earning income, distributors incur expenditure for the purchase of pre-paid cards. It is only upon sale of those pre-paid cards, distributors derive income. At the time of sale of these pre-paid cards by the assessee, he is not in a position to earn any income belonging to the distributor and therefore, the question of any income accruing / arising to a distributor, does not arise. In short, section 194H gets attracted in a case where there is income payable by the assessee to a distributor. The profit earned by distributor, sub-distributor and a retailer would be determined on the agreement between them and all of them would

have to share the different amounts between the price for which it was sold to the distributor and the ultimate price fixed by the middleman, which can only be considered as discount by the assessee to the distributor. Under the terms of agreement several obligations flow so far as the services to be rendered by the assessee to the customers are concerned. Therefore it cannot be said that there exists a relationship of 'principal and agent' and thus it was concluded that it is a sale of right to service and consequently the relationship between the assessee and distributor is that of 'principal to principal'. Ld. Counsel for the assessee submitted that this aspect of the matter was not looked into by other High Courts including the Hon'ble Andhra Pradesh High Court.

59. It was also submitted that the Hon'ble Karnataka High Court's decision was referred to in the written submissions filed before the Ld. CIT(A) in so far as the AYs 2011-2012 and others are concerned but the same was not referred to in the order of the Ld. CIT(A). He referred to pages 195 and 196 of paper book-2 in this regard and submitted that in the light of the decision of the Hon'ble Karnataka High Court it can be said that there is no other decision on this aspect by any other High Court and hence the ratio of the decision of the Hon'ble Karnataka High Court deserves to be preferred.

60. As regards penalty levied u/s 271C of the Act, Ld Counsel for the assessee submitted that in the light of the later decision of the Hon'ble Karnataka High Court it can be said that the issue is highly debatable in which event non-deduction of tax is supported by a reasonable cause for which penalty is not leviable. Ld Counsel for the assessee relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Eli Lilly (312 ITR 225) wherein the court observed that if non-deduction of tax at source

took place on account of controversial addition and if the tax deductor was under genuine and bonafide belief that it was not under any obligation to deduct tax it amounts to 'reasonable cause' and penalty u/s 271C is not leviable. Ld Counsel for the assessee also relied upon the decision of the Hon'ble Delhi High Court in the case of Woodward Governors India Private Limited (253 ITR 745 at page 748) to submit that no penalty is imposable if an assessee proves that there was a reasonable cause based on it's understanding of a particular provision. The Court further observed that "reasonable cause", as applied to human action, is that which would constrain a person of average intelligence and ordinary prudence. It means an honest belief founded upon reasonable grounds. Ld Counsel for the assessee thus strongly submitted that the assessee was under bona fide belief that there is no need to deduct tax at source since the transaction is on 'principal to principal' basis as the service was sold to the distributor; In fact this aspect was not considered by any of the earlier or later judgments and thus opinion formed by assessee constitutes a reasonable cause. Ld Counsel for the assessee also placed reliance upon decision of the Hon'ble Delhi High Court in the case of CIT vs. Pradeep Agencies Joint Venture 349 ITR 477 to submit that even in a case where a later judgment is in favour of the assessee which matches the line of thinking of the assessee it can be considered as a 'reasonable cause'. The Hon'ble High Court, in this regard, observed as under:-

> "*9. Having considered the arguments advanced by the Counsel for the parties, we are of the view that the submissions made by the learned counsel for the assessee cannot be brushed aside that there were two views possible inasmuch as the Tribunal itself was in doubt as to which of the two views were to be preferred. And it is for this very reason that the Tribunal had passed the referral order dated 04.04.2007 requiring the matter to be considered by a Special Bench. The fact that the referral order came into being much after the returns were filed would be of no help to the revenue inasmuch as all that the referral order indicates is that a doubt existed with regard to which of the views were possible. It cannot be said that prior to that date, the assessee could not have had such a doubt in its mind when it had indeed filed its return.*"

61. On behalf of the Revenue Ld CIT-DR Shri C. Chandra Sekhar contended that there is no change in the factual matrix of the case right from the AY 2007-2008 onwards. Neither the AR nor the assessee pointed out any distinguishing features in the AYs under consideration, before any of the authorities below. Under such circumstances, the view taken in the case of the assessee in the earlier years requires to be followed and in this regard he relied upon the decision of Nagpur Bench of High Court in the case of Tejmal Bhojraj vs. CIT [1952] 22 ITR 208 (Nagpur) wherein the court observed as under:

> *"We respectfully agree with this statement of the law. The propositions are :-*
>
> *(i) The doctrine of res judicata or estoppel by record does not apply to the decisions of Income Tax authorities;*
>
> *(ii) A previous finding or decision of such an authority may however be reopened and departed from in subsequent years in the following circumstances, namely:-*
>
> *(a) The previous decision is not arrived at after due enquiry;*
>
> *(b) The previous decision is arbitrary; or*
>
> *(c) If fresh facts come to light which on investigation would entitle the officer to come to a conclusion different from the one previously reached;*
>
> *(iii) In the absence of such circumstances, the Income Tax Officer cannot arbitrarily depart from the finding reached after due enquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings."*

62. Ld DR had taken us through the orders passed by the ITAT in the earlier years as well as the decision of the Hon'ble High Court in the assessee's own case for the earlier years to submit that there is no change in the facts even in the years under consideration. Ld DR also relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More [1971] (82 ITR 540) (SC) wherein the court observed that though the principle of *res judicata /* rule of *estopple* is not applicable to Income Tax proceedings but the rule of consistency has to be applied. In that case the court observed that the asessee included the income of the premises in his return

for several years and, in the absence of any satisfactory explanation, the fact that the assessee had included the income for the earlier years can be taken as a circumstance for completing the assessment. In this background Ld CIT-DR referred to pages 23-24 of paper book-5 to highlight that the facts in the year under consideration are akin to the facts considered by the ITAT Hyderabad "B" Bench in the assessee's own case for the AYs 2007-08 to 2009-2010 i.e., regarding the liability of the assessee to deduct tax at source in respect of amounts passed on to the distributors as cash discounts in respect of SIM cards and other services rendered. It was also highlighted that with respect to 'post-paid' connection, assessee agreed that it is only a service rendered by the distributors for and on behalf of the assessee-company and accordingly chose to deduct tax at source whereas for similar services, in pre-paid category, assessee had taken a diametrically opposite stand that no tax need to be deducted u/s 194H of the Act. It was further pointed out that in the immediately preceding years, the assessee agreed that only SIM cards and other accessories were transferred to the distributors.

63. Even though an additional ground was raised before the Appellate Tribunal, the issues were limited; that there is no claim by the AO as to the failure of the deductees to pay tax in which event the assessee cannot be said to be an "assessee in default", based on the judgment of the Allahabad High Court (supra).

64. Before going into the main issue in dispute Ld CIT-DR pointed out that in respect of the appeal arising out of the order passed u/s 201(1) and 201(1A) of the Act though the assessee-company raised three grounds, at the time of hearing, no arguments were advanced with respect to Ground no.1 and Ground no.3 and therefore, we have to confine to Ground no.2 only. Ground no.1 is with regard to claim that in the absence of finding by the TDS Officer regarding failure of deductees

to deduct tax directly, the assessee cannot be said to be in default u/s 201(1) of the Act. Ground no.3 is with regard to correctness of charging of interest u/s 201(1A) of the Act. Ld Counsel for the assessee has not advanced any argument, in reply, on these points and therefore, we confine ourselves to Ground no.2 only.

65. Ground no.2 is segmented into 8 parts wherein it was submitted that the assessee had only given discount to the distributors upon selling pre-paid SIM cards / talk time and the relationship between assessee and it's distributors is on 'principal to principal' basis. There is no payment / credit to the account of distributors by the assessee towards discount extended to them and therefore provisions of section 194H do not apply on such discount particularly because a discount allowed by the assessee is not income in the hands of distributors and the income, if any, arises only when the pre-paid SIM cards / talk time is further distributed by the distributors. In other words, there is no flow of moneys from the assessee to the distributors but rather payment was made by the distributor to the assessee and therefore, section 194H is not applicable.

66. Ld CIT-DR submitted that all the aspects that were contested before the TDS Officer / Ld CIT (A), as well as before the Tribunal in the form of Grounds of Appeal, were already considered by the Tribunal as well as by the Hon'ble Andhra Pradesh High Court in the assessee's own case in the earlier years and therefore, the rule of consistency comes into play because the nature of service is same in all the years. In the case of pre-paid customers, the payment is made by the distributor before services were rendered whereas in the post-paid connections, assessee receives payment after rendering of services. He also submitted that except the decision of the Hon'ble Karnataka High Court in the case of Vodafone Essar South Ltd and others (372 ITR

33) all the other decisions of various High Courts, including jurisdictional High Court, are in favour of the Revenue holding that the transaction is not on 'principal to principal' basis and consequently the assessee is liable to deduct tax at source u/s 194H of the Act. In particular, he has referred to the latest decision of the Calcutta High Court in the case of Hutchison Telecom East Ltd vs CIT [2015] (375 ITR 566) wherein the Court referred to the decision of the Hon'ble Karnataka High Court in the case of Bharati Airtel but followed it's earlier view by holding that the nature of transaction between the assessee and the distributor can only be said to be a transaction between 'principal and agent'. In the aforecited decision, the service provider shall not assume or create any obligation on the assessee or would not accept any contract binding upon assessee without the assessee's prior consent. No such clause was required in case of "sale". Ld CIT-DR thereafter referred to the decision of the Hon'ble Andhra Pradesh High Court (page 26 of paper book-5) (page no.1 is missing in the paper book filed by the assessee which was supplemented by the Ld CIT-DR) and in particular adverted our attention to internal pages 3 and 4 of the said judgment wherein the court specifically observed that almost all the suggested questions relate to questions of fact and not law and, in addition thereto, it was further observed that the only point for consideration is that whether discount to the dealers on SIM Cards and recharge coupons will attract the provisions of section 194H of the Act. It had taken note of earlier decisions of the Hon'ble Delhi High Court in the case of Bharati Cellular and recorded a finding of fact that in all those cases the facts are identical to the facts emerging in the instant case and the AR did not bring in any arguments to distinguish the above cases in so far as the similarity of facts and method

of accounting are concerned and thus even on merits the order of the ITAT was affirmed by the Tribunal.

67. Even now the assessee admits that the facts are similar and the method of accounting followed by the assessee is identical in which event the assessee cannot be allowed to challenge the order of the Hon'ble Andhra Pradesh High Court merely on the basis of an observation of the Hon'ble Karnataka High Court. He referred to the order of the TDS Officer (see Pages 1, 2, 10, 11, 12, 29 onwards) for the AYs 2010-11 as well as other AYs to highlight that there is no dispute with regard to the facts. It was pointed out that a survey action u/s 133A was conducted on 20.03.2009 to verify the liability of the assessee to deduct TDS on the alleged discount given to the distributors on pre-paid card business and thereafter another survey was conducted on 15.12.2010. Even in 2014, third enquiry was conducted and assessee accepted that there is no difference in the facts. Page 1 of the order passed u/s 201(1) of the Act refers to the fact that the assessee-company has been paying commission to the distributors for the service rendered by the distributors in connection with post-paid service and it had deducted tax at source as per the provisions of section 194H of the Act. The nature of activity broadly remains the same even in the pre-paid service mode. Starter kits etc., are provided by the assessee to distributors who in turn supply to retailers / ultimate consumers but the service of activation etc., is being done by the assessee; The only difference is that in post-paid connections payment is received after the service is rendered by assessee whereas in pre-paid mode money is collected in advance by assessee from distributors and by distributors from retailers and so on.

68. The TDS Officer referred to distributorship agreement which speaks of appointing distributors for the limited purpose of distributing the Starter Kits etc., in a defined geographical area and adhere to certain guidelines fixed by the assessee such as information with regard to stock movement, permitting the authorized agents of the assessee to inspect the stock, taking up of the responsibility of ensuring proper identity and verification of customers for sale of pre-paid cards. TDS Officer therefore arrived at a conclusion that there exists 'principal to agent' relationship, though the nomenclature used is "cash discount". At page 30 of the order of the TDS Officer, after referring to various clauses etc., as well as arguments advanced by the assessee, it was concluded that the nature of assessee's service is different from sale of ordinary physical goods since SIM card / voucher etc., is only a device used for availing pre-paid cellular services. The starter kits / recharge coupons are not mere physical commodities; they are means to avail certain services and thus they are only token elements which are being supplied by the assessee to the distributors but the actual items involved are services that include access to the cellular mobile telephony network. In other words, the actual product is non-physical i.e., service involved and from that direction the distributor can be said to be acting at all times on behalf of the assessee to facilitate transmission of these services from assessee-company to end consumers.

69. Ld. CIT-DR submitted that in case of electronic recharge, though the amount is collected from distributor, they are not physical goods at all. In fact entire transaction is carried out by means of computer software employed by the assessee-company and retailer merely Keys-in the mobile number of the customer and the amount to be charged from the retailer's mobile phone which is connected to the

network. Not even a symbolic coupon / goods are transferred to distributors which can be sold in recharge category. In other words, the property in the starter kits, coupons etc., do not pass from the assessee-company to distributors since the ultimate service is being rendered by the assessee-company and the distributors cannot provide any service on their own capacity. Ld. CIT-DR referred to para 7 onwards of A.O.'s order to highlight that there is not even a symbolic sale.

70. Ld DR submits that a careful perusal of the agreement indicates that the distributors are merely conduits who facilitate the connection or service of the company with the end user though the title / ownership to the SIM Cards, for all times, vests with the assessee with the permission to the distributors to market - on behalf of the assessee - starter kits, SIM Cards, recharge coupons etc., and maintenance of records. In a 'principal to principal' sale transaction the distributors become owners of goods and exerts control over the operations thereon whereas in the instant case various restrictions and conditions are imposed on the distribution which makes them mere agents and not independent principals. The starter kits, recharge coupons etc., stocked by the distributors can still be considered as the property of the service provider since the distributor has a right to use the starter kits, recharge coupons only upon assessee giving access through network to the ultimate consumer and thus there is no case of any purchase and sale of prepaid starter kits, recharge coupons etc.

71. The Ld CIT-DR referred to the other findings of the TDS Officer to buttress his argument that the distribution agreement as well as other facts of the case were already taken into consideration by the TDS Officer; He applied the ratio laid down in various case law while coming to the conclusion that the transaction is on 'principal to agent' basis and hence the provisions of section 194H are attracted on such

transaction. Ld. CIT-DR submitted that facts in assessee's case are also identical. TDS Officer having considered all the facts thread bare, in the earlier years as well as in this year, the decision taken in the assessee's own case for the earlier years should be followed in this year also and in fact same grounds were urged before the A.O. and the Ld. CIT(A) as well as before the Tribunal.

72. Ld. CIT-DR submits that there cannot be any transfer of service so as to treat it as a transaction on 'principal to principal' basis. He has also referred to the decisions of other High Courts i.e., Hon'ble Delhi High Court, Hon'ble Kerala High Court as well as Hon'ble Kolkata High Court, wherein it was consistently held that in the case of giving discounts at the time of delivery of starter kits, recharge coupons etc., to the distributors it cannot be said to be a transfer since the ultimate service, in the form of activation of talk time to the consumer, is retained by the assessee-company. Hence the distributor can only be treated as an agent of the assessee-company.

73. He then referred to the observations made by the Hon'ble Andhra Pradesh High Court (while disposing of stay petition vide judgment dated 25.8.2015) wherein the Court directed the assessee to pay 40% of the tax demand and balance was stayed. While granting partial stay it referred to the decision of Hon'ble Karnataka High Court in the case of Bharati Airtel and noted that under similar circumstances the High Court delivered an elaborate judgment holding that the discounts cannot be equated to commission and hence section 194H has no application and further observed that it is a debatable issue. According to Ld Counsel it implies that the earlier decision of the Hon'ble Andhra Pradesh High Court was doubted by the very court in a later decision. In this connection, the Ld. CIT-DR submitted that the order passed in Writ Petition Nos. 2456 and batch are not on merits since the Hon'ble Court was concerned with

the petition seeking collection of stay of outstanding demand and thus the said observations therein cannot be said to be binding particularly when there is a direct judgment of the Hon'ble Andhra Pradesh High Court on the issue. In fact, the court was referring to the admission of SLP and the decision of the Hon'ble Karnataka High Court to state that it is a fit case for granting partial stay; if the earlier decision of the Hon'ble High Court is doubted or not followed, they could have granted absolute stay which was not done and this implies that there is no ratio laid down in the aforecited decision which can be binding on the Tribunal in which event the earlier decision of the Hon'ble Andhra Pradesh High Court has to be preferred / followed.

74. Ld. CIT-DR strongly relied upon the decision of the Hon'ble Bombay High Court in the case of Thane Electricity Supply Limited (206 ITR 727) which refers to the binding nature of precedents wherein the court observed that a decision of the Hon'ble Supreme Court is binding on all courts under Article 141 of the Constitution of India and though there is no such provision specifically with regard to the decisions of High Courts, the well accepted legal position is that a decision of the High Court is not only binding on Coordinate Bench of the same Court but also on the other forums functioning within the jurisdiction of the High Court. In this regard the court referred to the decision of the Apex Court in the case of East India Commercial Company Ltd AIR 1962 SC 1893 wherein it was observed that the law declared by the highest court in the State is binding on the authorities under its superintendence and they cannot ignore the binding decision. The Hon'ble Bombay High Court also mentioned about the judicial decorum and the need for certainty to emphasise that a decision of the High Court should be followed by the Tribunals functioning within it's jurisdiction.

75. In the aforecited decision it was urged that when two views are possible a view which is in favour of the assessee should be adopted; so long as there is no decision of a jurisdictional High Court, a decision of any other High Court is binding on the Tribunal and other bodies. In that regard, the Court observed that if for the sake of uniformity a decision of another High Court is accepted as a binding precedent, the very distinction between the precedent value of the Supreme Court decisions and High Court decisions will be obliterated and such situation is neither contemplated by the constitution nor is it in consonance with the principles laid down by the supreme Court and the doctrine of *stare decisis*. As regards the contention that when there are two views possible, the one which is in favour of assessee has to be adopted, the court observed that the expression "two views" has to be understood in a practical sense i.e., if the authority, which is called upon to decide the issue, is satisfied that two views are reasonably possible then only one of them being favourable to the assessee can be adopted; the mere fact that a base less claim was raised by some over enthusiastic assessees which is accepted by some authorities is not sufficient to attribute any ambiguity or doubt true scope of a provision. Thus a court interpreting a taxing provision should give a finding that it is capable of more meanings than is necessary, to prefer a view which is very favourable to the assessee.

76. Ld DR relied upon the decision of the Hon'ble Delhi High Court in the case of DLF Universal Ltd vs. CIT (2008) [306 ITR 271] (Del.) to submit that when one Bench of a Tribunal takes a particular view, another Bench of a Tribunal cannot pass a contrary order and if it wishes to disagree, the matter has to be referred to a larger Bench. Further he submitted that in the case on hand the matter is covered by the decision of Hon'ble jurisdictional High Court and hence Tribunal cannot overlook the

ratio laid down therein on certain assumptions particularly when the Hon'ble High Court categorically stated that the applicability of provisions of section 194H is considered based on the facts. He also relied upon the decision of Hon'ble Calcutta High Court in the case of CIT vs. Oberoi Hotels (P.) Ltd (2011) [334 ITR 293] (Calcutta) on the issue of precedence value. He also referred to the decision of the Hon'ble Andhra Pradesh High Court - passed while disposing the Writ Petition - and highlighted that the decision is not rendered on merits and in fact High Court has no jurisdiction to overlook the earlier decision of the same High Court and at best it could have referred the matter to Full Bench. In fact there was no such decision on merits and hence certain observations made therein cannot be taken as binding precedent overlooking the earlier judgment of the Hon'ble Andhra Pradesh High Court. It was also submitted despite decision of the Hon'ble Karnataka High Court, the same issue was taken up for consideration by the Hon'ble Kolkata High Court in the case of Hutchison Telecom East Ltd vs CIT [2015] (375 ITR 566) wherein the Hon'ble High Court observed that in essence / substance it cannot be said that dealings and transactions between the assessee and the service provider were on 'principal to principal' basis, since ultimate Key to make the SIM cards functional and to provide talk time is with the assessee and thus, in substance, the distributor has a limited role of supplying the starter kits, recharge coupons etc., but the ultimate service has to be provided by the assessee.

77. With regard to the penalty levied u/s 271C of the Act, Ld CIT-DR submitted that initial burden is upon the assessee to prove a reasonable cause for non-deduction of tax at source. Further, the assessee merely claimed that he was of the opinion that there is no liability to deduct tax, which cannot be said to be a reasonable cause. The

concept of reasonable cause depends on facts and circumstances of each case if it is a nascent issue and if the assessee forms one opinion which is based on certain reasonable parameters it can always be argued that the assessee had a bona fide belief that there is no necessity to deduct tax at source whereas in the years under consideration assessee was fully aware of the stand taken by Revenue by virtue of survey / search conducted from time to time and even the Appellate Authority had taken a stand that the relationship between the assessee and the distributors is that of 'principal and agent' and in fact all the case law, except the decision of Hon'ble Karnataka High Court, have followed a unanimous approach that the transaction is not on 'principal to principal' basis whereas the Hon'ble Karnataka High Court assumed that service can be transferred, overlooking the fact that no service was transferred by the assessee to the distributors. Therefore, the assessee cannot take unilateral stand, despite the decisions of various High Courts, to claim that it has a reasonable cause in not deducting tax at source. Ld CIT- DR referred to pages 2 to 6 and 7 of the paper book 4 to highlight that the aforecited order was rendered having regard to the fact that the issue involved therein was a nascent issue, unlike in the present case. Similarly, in the case of Woodward Governors India Limited (page 24 of the paper book-4) TDS in respect of only one expatriate employee was short deducted and in the given facts of the case, the court observed that reasonable cause may encompass the human action which may constrain a person of average intelligence and ordinary prudence to commit such errors whereas, in the case on hand, the assessee was fully aware of the stand taken by the Assessing Officer from 2009 and thus the assessee cannot take a stand that it was of a bonafide opinion that no tax need be deducted at source. In the case of Alkali India Limited as well as L & F John Degree Ltd (supra) a

confusion arose in the mind of the assessees on account of the fact that the issue is at nascent stage and a person of ordinary prudence could have a reasonable belief and thus the aforecited decisions are distinguishable on facts. Similarly, he has referred to other judgments relied upon by the assessee to submit that penalty was not levied in those cases because there was a reasonable cause whereas, in the instant case, the assessee has merely taken a stubborn view and did not deduct tax at source which cannot be said to be a reasonable cause. In fact for the assessment years 2008-2009 and 2009-2010, Hon'ble Supreme Court directed the AO to consider levy of penalty and for the assessment years 2007-2008 to 2009-2010 the main issue was decided on merits having regard to Hon'ble Delhi High Court and Hon'ble Kolkata High Court judgments. It was also contended that there is no bar to levy penalty even if payee had paid the taxes, in the light of the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Ltd (293 ITR 223). He thus submitted it is a fit case for levy of penalty and accordingly strongly supported the orders passed by the tax authorities.

78. Joining the issue, Ld Counsel for the assessee submitted that the main plea of the assessee is that a right to avail service can be traded and in the instant case the distributors having been given a right, upon collecting an advance payment, transactions between the assessee and the distributors can be said to be on 'principal to principal' basis. Since the Hon'ble High Court of Andhra Pradesh has not decided this issue, it cannot be said that this aspect of the matter stands covered by the decision of the Hon'ble High Court in which event the lone decision of the Hon'ble Karnataka High Court has to be taken into consideration which expressly dealt with the fact that the assessee has traded in service. Facts also support the stand of the

assessee in view of the fact that the agreement between the parties suggest that even if SIM cards, recharge coupons etc., are not utilised by the distributor, the assessee is not at loss and thus it can be treated as tradable commodity and the assessee has limited option of activating the recharge coupons etc., which amounts to transfer of service to the distributors. It was also contended that this aspect was raised before the Ld CIT (A), in para 2.1 and para 2.4 of the statement of facts, and also referred to in page 44 of paper book-1 [submissions before Ld (CIT (A)] wherein it was submitted as under:-

> *"A transaction for provision of service, just like provision / sale of any other commodity, can either be sold through a supply agent or distributed to an agent for ultimate consumption. For eg, a cinema owner may sell the movie tickets on a bulk basis to the distributors at a discount over the printed price for further sale to the cinemagoers, subject to the price not exceeding the printed price of the ticket. The distributor would sell the tickets on his own account and also any risk on his inability to sell the tickets would be borne by him, even though the service of showing the movie may continue to remain with the cinema owner. In such a case, the arrangement would that be of a principal to principal between the cinema owner and the distributor even though what is being transacted is a service (of watching a movie) through distribution of the movie tickets. Alternatively, the cinema owner may appoint the distributor as an agent for distribution of movie tickets on its behalf for a commission. Therefore, the nature of arrangement between the parties shall be governed by the terms of the contractual arrangement between them and not by the fact whether a physical commodity or a service is being provided.*
>
> *In the instant case, as submitted and discussed above, the principal to principal relation between the appellant and the distributors is the main character of the agreements, and its terms and conditions inter-alia provide that (1) the SIM card / recharge vouchers once obtained by the distributor from the appellant cannot be returned to the appellant, (2) the distributors have complete liberty to further distribute SIM card / recharge vouchers at any price that they may choose but not exceeding the MRP, (3) the distributor is entirely responsible for all its losses or costs whether the same are associated with paying the price to the company or in distributing to retailers and the distributor has no right to claim any such costs or loses from the appellant, (4) the distributor transacts business as an independent principal in its own rights both at the time of paying the consideration to the appellant and at the time of realising the monies from the retailers or end user, as the case may be, on distributors own account, etc.*
>
> *Thus, having regard to the relationship between parties i.e., the appellant and its distributors, it is evident from the agreement and the conduct that the nature of the relationship is of 'principal to principal' to which provision of section 194H does not apply."*

79. Ld Counsel for the assessee also referred to page 6 of the order passed by TDS Officer to highlight that distributors have agreed to fully indemnify and keep VESL

harmless at all times against all claims, actions etc., by a third party or misuse of any of their employees or tampering of online data connectivity. It was also submitted that the Hon'ble High Court of Andhra Pradesh while dealing with this matter merely referred to the questions before it and observed that almost all the suggested questions relate to questions of fact and not law, they have not formulated any other question, particularly relating to right to avail service. Ld Counsel for the assessee referred to the observations made by Hon'ble Supreme Court in the case of Kunhayammed and others vs. State of Kerala and Another (2000) [6 SCC 359 at page 384] to submit that doctrine of merger is not a doctrine of universal or unlimited application. It depends on the content or subject matter of the challenge laid before an authority. An order refusing Special Leave to appeal does not attract the doctrine of merger since it cannot be said that there is a declaration of law. The contention of Ld Counsel is that in assessee's own case for the earlier years Hon'ble High Court merely dismissed the appeal on the ground that there is no substantial question of law and it did not render any decision on merits. Thus decision of Hon'ble Andhra Pradesh High Court in assessee's own case for the earlier years would not give rise to constructive *res judicata* more particularly with regard to the issue of 'sale of service'. He also referred to a decision of Hon'ble Supreme Court in the case of Union of India vs. Chajjau Ram (Dead) by Lrs and others (2003) [5 SCC 568] wherein the Court observed that a decision of higher forum is an authority for what is decided and not what can be logically deduced therefrom. If additional facts lead to a different conclusion or if there is a little difference in facts the same can always be considered afresh despite a decision of a superior forum. Reliance was also placed on another decision of Hon'ble Supreme Court in the case of Collector of Central Excise, Calcutta

vs. Alnoori Tobaco Products and Another (2004) [6 SCC 186] wherein the Court held that observations in judgments should be read in the context in which stated and they should not be construed as statutes. In otherwords each case depends on its own facts and additional or different fact may make a difference between the conclusions in two cases. It was thus submitted that the earlier decision of Jurisdictional High Court should not be treated as a binding precedent. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd and Another vs. Union of India (2006) [3 SCC 1] (page 18 para 11) wherein the Court observed that in tax proceedings earlier decision of a High Court may not operate as *res judicata* against assessee for a subsequent year. On the contrary, the issue as to whether services can be traded or not was considered by Hon'ble Karnataka High Court and in the absence of any other High Court's decision the same requires to be followed instead of referring to a Larger Bench. Similarly, the decision of Hon'ble Andhra Pradesh High Court is silent on the issue as to whether services can be traded. It was also contended that when there is a lone judgment of one High Court on a particular issue, it is binding on all the Benches of the Tribunal irrespective of the fact that the Bench of the Tribunal falls outside the jurisdiction of that High Court. In this regard Ld Counsel for the assessee relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs. Godavaridevi Saraf (1978) (113 ITR 589) (Bom) wherein the Court observed that so long as there is no contrary decision of any other High Court on that question the Tribunals should respect the law laid down by High Court, though of a different State. He adverted our attention to a full Bench judgment of Hon'ble Andhra Pradesh High Court in the case of CIT vs. B.R. Constructions (1993)

[202 ITR 222 at page 242] to submit that a precedent ceases to be a binding precedent when it is sub silentio.

80. Whether services can be sold on principal to principal basis or it is a package of transfer of goods is a subject matter of consideration on which Hon'ble Karnataka High Court in the case of Vodafone Essar South Ltd and others (2015) [372 ITR 33] (Karn.) accepted the claim of the assessee by holding that SIM cards had no intrinsic sale value but the fact remains that services were sold. Distributor is only rendering services to the assessee and the distributor connects the assessee to the subscribers to whom assessee is accountable under service contract. The Court further observed that right to service can be sold and assessee sold services to distributors. Once the distributor pays for the service, the distributor acquires a right to demand service. In fact the distributor may use it by himself and may also sell the right to sub-distributors who in turn may sell it to retailers. However, the assessee is not concerned with quantum and time of accrual of income to the distributors. Since there was no accrual of income to the distributor, there is no income to the distributor upon purchase of SIM cards etc. There is no primary liability to tax the distributor and consequently there is no liability to deduct tax at source. The discount given by assessee to the distributors cannot be categorised as 'commission'. Though the sale is subject to conditions and stipulations it does not establish principal agent relationship. Hon'ble Karnataka High Court thus concluded that (a) It is a sale of right to service; (b) Relationship between assessee and the distributor is 'principal to principal' when the assessee sells SIM cards to the distributor he is not in fact 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; (c) Deduction of tax

at source being a vicarious liability, when there is no primary responsibility, the assessee has no obligation to deduct TDS. With these observations the matter was remitted back to the file of the A.O with certain directions.

81. Ld Counsel for the assessee submitted that Hon'ble Karnataka High Court gave a categorical finding with regard to sale of service and this was the subject matter of consideration by Hon'ble High Court of Andhra Pradesh, while granting partial stay to the assessee, wherein the Court took note of the later judgment of Hon'ble Karnataka High Court and observed that having regard to the latest judgment it can be considered as a debatable issue in which event a decision in favour of the assessee has to be taken. Ld Counsel for the assessee submits that the observations of Jurisdictional High Court, in the aforecited case, supports the new contention that the assessee-company is only a service provider and such service can be traded on principal to principal basis. As regards the decision of Hon'ble Calcutta High Court in the case of Hutchison Telecom East Ltd vs. CIT (2015) [375 ITR 566] (Cal.) the agreement clearly demonstrates that the relationship between the service provider and the assessee was that of an agent and principal. Service provider had been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers. However, facts in the instant case are different.

82. In reply to the contention of the Revenue that one has to see the essence and not the form, Ld Counsel for the assessee submits that in the instant case the form and essence are same and it is a clear case of sale of service on principal to principal basis.

83. As regards the penalty levied u/s 271C of the Act, Ld Counsel for the assessee submitted there are several decisions in favour of the assessee and they are subsequent to the default committed by the assessee but the fact remains that a view taken in favour of assessee in other matters proves bonafides. Section 271C of the Act does not speak of "reasonable cause". It was thus contended that a mere confirmation of quantum in assessee's own case does not mean that levy of penalty is automatic. In fact section 271C of the Act has to be read in conjunction with other penal provisions and so long as a view taken by assessee is bonafide penalty should not be levied.

84. We have carefully considered the rival submissions and perused record. It is not in dispute that Hon'ble Andhra Pradesh High Court in the case of M/s. Vodafone Essar South Ltd (ITTA No.291 of 2013) followed decisions of Hon'ble Delhi High Court (325 ITR 147), Hon'ble Kerala High Court (332 ITR 255) and Hon'ble Calcutta High Court (244 CTR 185) by observing that facts of the case in all those reported judgments are identical to the case of assessee and the assessee could not distinguish the above cases in so far as the similarity of the facts and method of accounting are concerned. In otherwords it can be considered as a decision rendered on merits. The issue as to whether payment to be made by the assessee is mandatory in order to invoke provisions of section 194H, or whether sale price at the end of distributor is ascertainable, was already taken into consideration in detailed judgments rendered by Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court. It cannot be said that the decision of Andhra Pradesh High Court is not on merits. When the facts are identical there is no need for another High Court to pass a detailed order. In fact Hon'ble High Court of Andhra Pradesh categorically observed that there is no illegality

or infirmity in the order passed by ITAT, Hyderabad Bench, which in turn is based upon the decisions referred to above.

85. As against this, Hon'ble Karnataka High Court had taken a diametrically opposite view with regard to need for payment to be made by assessee to distributor and the fact that computation is not possible since distributor can sell at any price subject to the maximum limit of MRP. Since Hon'ble Jurisdictional High Court had already rendered a decision on these points, we cannot reconsider the matter on those issues. Suffice to say that on the aforementioned issues we are bound by the decision of Hon'ble Andhra Pradesh High Court.

86. In fact Ld Counsel mainly focused on one issue i.e., on the aspect of "sale of service". According to Ld Counsel for the assessee this aspect of the matter was not considered either by Hon'ble Andhra Pradesh High Court or other High Courts which, in turn were referred to by Andhra Pradesh High Court. We shall now, therefore, refer to the order passed by Hon'ble Delhi High Court since Hon'ble Andhra Pradesh High Court has followed the said decision. In the case of CIT vs. Idea Cellular Ltd (supra) it was observed that connections are provided to subscribers through distributors, called "pre-paid market associates", appointed by assessee and such PMAs are not allowed to remove, obscure or delete any marks placed on prepaid SIM cards / recharge coupons and distributors are not allowed to sell similar products offered by other companies, which are in the similar line of business. Assessee reserved it's right to terminate the agreement unilaterally. If there are natural calamities or circumstances beyond the control of either party by which SIM cards / recharge coupons are destroyed, assessee agreed to replace the SIM cards / recharge coupons. Other clauses were also taken into consideration and the Court observed that cellular

company has full legal and equitable title in respect of SIM cards / recharge coupons delivered to subscribers and distributors have to store the SIM cards etc., in such a way to clearly indicate at all times that pre-paid SIM cards / recharge coupons are owned by assessee. Even retailers cannot be appointed without prior approval of assessee. In fact no sales tax was even paid on the ground that there is no transfer of property to the distributor. It was always treated as service, for acting as a live link between subscriber and assessee. Therefore, the relationship between assessee and distributor can only be considered as a relationship of "principal to agent". The Court further observed that the pricing freedom – permitting distributor to sell at any price - would not come in the way of determining the relationship between assessee and distributor so long as agent is obliged to render services for and on behalf of assessee on certain parameters and in this regard Hon'ble Delhi High Court relied upon a decision of the Apex Court in the case of Bhopal Sugar Industries Ltd vs. STO (1977) [40 STC 42] (SC). The Court also took note of the fact that legal relationship is established between assessee and the ultimate consumer / subscriber since activation of SIM cards by assessee is in the name of subscriber / consumer and service is provided to the subscriber. Merely because advance payment is received from distributor, it does not amount to 'sale of goods' since unsold SIM cards can be taken back by assessee under certain circumstances. The Court further observed that this is antithesis of "sale". The Court also observed that *a service can only be rendered and it cannot be sold particularly when assessee-company is operating under the right of licence agreement entered into with the Government of India; nobody else can be given the right to operate as cellular service provider*. It was thus concluded that the ultimate service is provided by assessee-company and not by distributor. SIM card /

other module is only in the nature of a key to the consumer to have access to the telephone network.

87. Before parting the Court also took note of the fact that concerned distributor can always file return of income and claim credit for the payments already made on their behalf by the assessee. On the other hand, such a provision serves public purpose inasmuch as any distributor who is liable to pay tax but rather evading tax, would come under the Income Tax net and assessee is in no way affected by this.

88. Andhra Pradesh High Court also referred to decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd (supra) wherein Court observed that terminology used by the assessee for receiving the amount payable by distributors is immaterial since the discount given to distributor is for the services to be rendered to assessee in which event it falls within the definition of 'commission' u/s 194H of the Act. The discount is nothing but a margin given by assessee to distributor at the time of delivery of SIM cards / recharge coupons. Distributor acts as an agent on behalf of assessee for procuring and retaining customers. The Court observed that essence of contract between assessee and distributor is that of service and distributors are acting as agents of assessee-company. Here also the Court noticed that the relationship between assessee and distributor is not on 'principal to principal' basis because the distributor is only a middleman between service provider and ultimate consumer. The Court further observed that the **essence of a contract of agency is the agent's authority to commit the principal.** According to the Court, distributor commits assessee to subscribers to whom assessee is accountable under the service contract which is the subscriber since connection is arranged by distributor on behalf of assessee. Therefore, it was concluded that the terminology used by assessee for

payment by distributors is immaterial and in substance the discount given at the time of sale of SIM cards / recharge coupons is a payment received or receivable by distributors for the services to be rendered to assessee and it falls within the definition of 'commission' u/s 194H of the Act.

89. The Court also mentioned about the scheme of deduction of tax at source and observed that the grievance, if any, against recovery of tax by assessee, should be on distributors and not on assessee / cellular operators.

90. On careful perusal of the aforecited two judgments, which in turn were followed by Hon'ble jurisdictional High Court, indicate that the essence of contract was treated as a contract between 'principal and agent' and distributor in his capacity as an agent may exercise his authority to commit the principal to render services to subscribers and this in itself cannot be termed as contract between 'principal to principal'. In otherwords the issue is as to whether there was a sale of service or not was impliedly considered by Hon'ble High Court of Kerala which in turn was followed by Hon'ble Andhra Pradesh High Court. Thus it may be difficult for us to take a different view, merely because Hon'ble Karnataka High Court had taken a different stand under identical circumstances.

91. At this juncture, we may state that in the case of CIT vs. Thana Electricity Supply Ltd (supra) Hon'ble Bombay High Court observed that the expression "two views" should be understood in the sense that the Court, which is called upon to consider the issue, should be of the opinion that the other view is reasonable. With due respect we are of the view that the only reasonable interpretation is that of the view taken by Hon'ble Andhra Pradesh High Court by following decisions of Hon'ble Delhi High Court, Kerala High Court as well as Calcutta High Court. In otherwords,

the issue as to whether the agent's right to commit assessee to render service to subscribers would change the nature of contract from 'principal to agent' to 'principal to principal', was impliedly considered by the aforementioned High Courts which, in our view is most appropriate, in the circumstances of the case. Therefore, we prefer to follow the decisions of Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court.

92. Ld Counsel for the assessee referred to an order passed by SMC Bench of ITAT Hyderabad in the case of Bharat Sanchar Nigam Ltd (2015) [42 ITR (Trib) 669]. On careful perusal of the said order it indicates that the decision is essentially rendered in the light of the Circular issued by CBDT. It is well settled that the language used by the Tribunal, while disposing of the matter, particularly when it is essentially based on a Circular issued by CBDT, cannot be equated to a language used in a Statute. At any rate in the aforementioned case none appeared for the assessee. Ld DR had agreed that it is covered by the Circular as well as the latest decision of Hon'ble Karnataka High Court and thus there was no need for the Single Member to go in depth as to the nitty-gritties of the contract and the essential difference between the decision rendered by Hon'ble Andhra Pradesh High Court on one hand and the view taken by the Hon'ble Karnataka High Court on the other hand.

93. However, while giving a finding in the case on hand we have also carefully gone through the distributorship agreements. We are unable to accept the contention of the assessee that the distributor has complete right and control over the matter of providing talk-time to ultimate subscribers; distributor can of course insist upon assessee while making a request to provide talk-time through e-module etc., but the final decision has to be taken by assessee, only upon verification of consumer details

which in turn has to be provided by distributor. Assessee can terminate the contract at any time by giving thirty days time without assigning any reason and distributor has to return all equipment and furniture supplied by the VESL upon termination of such contract. Other conditions such as maintaining the confidentiality and limitation of assigning rights or obligations to third party by distributor would also indicate that distributor is merely acting as an agent i.e., as a connecting link between assessee and ultimate subscriber.

94. We therefore prefer to follow the decision of Hon'ble jurisdictional High Court by holding that though distributor commits assessee to subscribers and exercise his authority to ensure arranging connection to subscriber, it will not alter the situation since the overall context in which such power is given to distributor has to be looked into in the circumstances of the case and the role of distributor can only be said to be a middleman between service provider on one hand (assessee herein) and ultimate consumer on the other hand. In otherwords the distributor can only be termed as an agent of assessee in which event providing service to ultimate consumer through the medium of distributor cannot be said to be a sale of service by assessee to the distributor.

95. Now we shall refer to the observations of jurisdictional High Court (order dated 25.08.2015) in W.P. Nos. 2456 and batch of 2015. In the aforementioned case, the Court was concerned with granting of stay and the very fact that it has granted partial stay indicates that the decision rendered by Hon'ble Karnataka High Court was not followed. In otherwords the observations made therein are only in the context of considering balance of convenience while granting stay and such observations need not be considered as a decision doubting the correctness of the judgment delivered

by earlier Bench of High Court. In fact, even in the aforecited judgment, it was admitted that the earlier Bench affirmed the order of the Tribunal by following judgments of Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court and because a similar issue is pending before Hon'ble Supreme Court, apart from the fact that there is a favourable decision of Hon'ble Karnataka High Court, Hon'ble Andhra Pradesh High Court thought fit to grant conditional stay. Therefore, observations made by Andhra Pradesh High Court in W.P. Nos. 2456 and others cannot be termed as an order doubting the correctness of earlier judgment of the same High Court.

96. The ITAT Hyderabad Bench is bound to follow the order passed Hon'ble jurisdictional High Court on merits rather than interpreting / reconsidering the issue based upon certain observations made by a later Bench while granting partial stay. We already noticed that earlier decisions of Hon'ble Delhi High Court and Kerala High Court are on the premise that distributor is merely a link between assessee and ultimate consumer / subscriber and distributor can at best enforce obligation on the part of assessee to provide connection / talk-time to subscriber which itself would not change the characteristic of transaction from 'principal to agent' to 'principal to principal'. We therefore hold that the order passed by Assessing Officer, as confirmed by Ld CIT (A), by holding that assessee is a defaulter u/s 201(1) and consequently liable to pay interest u/s 201(1A) of the Act, subject to certain conditions as prescribed by Hon'ble Supreme Court (Hindustan Coca Cola Beverage P. Ltd), is in accordance with law.

97. In the result, appeals filed by the assessee (ITA Nos.1189/H/2014 and 1401 to 1405/H/2015) are hereby dismissed.

98. This takes us to the penalty levied by TDS Officer u/s 271C of the Act. The case of assessee is that under similar circumstances the ITAT Hyderabad Bench (2009) [317 ITR (A.T.) 176] vide its order dated 26.02.2009 had taken a view that the relationship between a cellular operator and distributor is on 'principal to principal' basis and 'discount' given by the assessee cannot be considered as 'brokerage' or 'commission'. It had also taken support of an earlier decision of the ITAT Delhi Bench passed on 28.03.2008 [313 ITR (A.T.) 55] whereby it was concluded that the provisions of section 201(1) and 201(1A) are not applicable, under identical circumstances. In such an event of matter - since the decision of ITAT Delhi Bench was already available before the commencement of Previous Year relevant to Assessment Year 2010-2011 - the assessee's stand that it need not deduct tax at source can be taken as a 'reasonable cause'. Hon'ble Supreme Court, in the case of in the case of CIT vs. Eli Lilly (312 ITR 225), observed that if non-deduction of tax at source took place on account of controversial addition and if the tax deductor was under genuine and bonafide belief that it was not under any obligation to deduct tax it amounts to 'reasonable cause' and penalty u/s 271C is not leviable. Hon'ble Delhi High Court in the case of Woodward Governors India Private Limited (supra) observed that the expression "reasonable cause" has to be understood in the backdrop of the circumstances of each case and if an assessee does not deduct tax, based on its understanding of a particular provision, the same may constitute a 'reasonable cause'. Similarly, Hon'ble Delhi High Court, in the case of Pradeep Agencies Joint Venture (supra), observed that when a later judgment is in favour of the assessee, which matches the line of thinking of the assessee it can be considered as a 'reasonable cause'.

99. No doubt assessee has not specifically submitted before the Tax Authorities that non-deduction of tax at source was based on it's understanding of provisions of section 194H of the Act, which in turn constitutes a 'reasonable cause'. But the fact remains that by the time the assessee was under obligation to deduct tax at source for the AYs under consideration, there were judgments in favour of assessee and even after the decisions of Hon'ble Delhi High Court and Kerala High Court, Hon'ble Karnataka High Court had taken a different view of the matter which implies that non-deduction of tax was based on such understanding of relevant provisions of the Act in which event penalty is not imposable u/s 271C of the Act. We therefore set aside the order passed by AO as well as Ld CIT (A) on this aspect and hold that penalty u/s 271C is not imposable**,** in the circumstances of the case.

100. In the result, six appeals referable to the demand raised u/s 201(1) and 201(1A) of the Act are dismissed whereas the appeals referable to penalty imposed u/s 271C of the Act are allowed.

Pronounced in the open court on 29th September, 2017.

Sd/-	**Sd/-**
(S. RIFAUR RAHMAN)	**(D. MANMOHAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Hyderabad, Dated: 29th September, 2017
OKK, Sr.PS
Copy to

1.	Vodafone Mobile Services Limited (VSML-Hyd), H.No.1-10-178, Varun Towers-II, 6th Floor, Begumpet, Hyderabad-500016.
2.	Dy. CIT-(TDS), Circle -15(2), Hyderabad.
3.	CIT(A)-II, CIT(A)-8 Hyderabad.
4.	CIT (TDS), Hyderabad.
5.	D.R. ITAT "A" Bench, Hyderabad.
6.	Guard File