IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA Nos.306 to 309/CTK/2019
Assessment Years : 2009-2010 to 2012-13

Vodafone Idea Limited (formerly known as Vodafone Mobile Services Limited), Unit-41, E-52, Infocity Chandaka Industrial Estate, Chandrasekharpur, Bhubaneswar.	Vs.	ACIT -TDS, Bhubaneswar.
PAN/GIR No.AAACB 2100 P		
(Appellant)	..	(Respondent)

Assessee by : Shri Salil Kapoor, Ms Soumya Singh & Nirod Patade
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 19 /02/ 2020
Date of Pronouncement : 5 /06/2020

ORDER

Per L.P.Sahu, AM

These are bunch of four appeals filed by the assessee against the separate orders of the CIT(A),1, Bhubaneswar, all dated 20.8.2019 for the assessment years 2009-10 to 2012-13, respectively.

2. In all these appeals, the assessee has raised various common grounds. Hence, we proceed to adjudicate the appeal in ITA No.306/CTK/2019 for A.Y. 2009-10 and the decision will apply mutatis-mutandis to other appeals. For the sake of convenience and brevity, we reproduce grounds taken by the assessee for assessment year 2009-10 as under:

" GROUND I:

1. On the facts and in the circumstances of the case and in law, the order of the TDS officer u/s 201(1)/201(1 A) of the Act for Financial year 2008-09 was passed beyond time limit prescribed u/s 201(3) of the Act.

2. The CIT(A) failed to appreciate and ought to have held that any order passed beyond reasonable period is barred by limitation and thus void-ab-initio.

3. The Appellant prays that the TDS officer be directed to consider it invalid and same be quashed.

Without Prejudice to Ground I, GROUND II:

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the order passed by the TDS officer of holding the Appellant as 'assessee-in-default on non-deduction of tax at source on discount allowed to the prepaid distributors u/s 194H of the Act on distribution of 'right to prepaid service* and not appreciating the submissions made by the Appellant on net accounting in its books of accounts as directed by the Hon'ble Tribunal while remitting the matter back to his office.

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

- The relationship between the Appellant and the prepaid distributors is on 'Principal to Principal' basis and therefore no liability of deducting tax at source u/s 194H of the Act.
- The prepaid distributors generates income on further sale of rights and not on distribution of 'right to prepaid service' by the Appellant to them and therefore the question of deduction of tax by the Appellant does not arise.
- In the transaction with the prepaid distributors, there is no payment/credit being made by the Appellant which is a precondition for operation of section 194H of the Act.
- Further, there is flow of money from the prepaid distributors to Appellant on sale of rights and not vice-versa and therefore the TDS mechanism fails.
- The Appellant records the transactions with prepaid distributors on net basis in the books of accounts and therefore liability to deduct tax at source does not exist.

2. Therefore, the Appellant prays that it be held that there is no liability of deduction of tax at source from the discount allowed to

the prepaid distributors and therefore the Appellant is not a 'assessee-in-default' u/s 201(1) of the Act and also the AO be directed to delete the impugned demand.

Without Prejudice to Ground I, GROUND III:

1. On the facts and in the circumstances of the case and in law, the C1T(A) erred in upholding the order passed by the TDS officer of holding the Appellant as 'assessee-in-default' for non-deduction of tax at source u/s 194J of the Act on roaming charges paid to other telecom operators.

2. The C1T(A) further erred in not appreciating that the TDS officer has not taken cognizance of the submissions made by the Appellant on issues of' Human intervention' in the roaming process as directed by the Hon'ble Tribunal while remitting the matter back to his office.

3. The C1T(A) failed to appreciate that the roaming charges paid to various operators are standard automated services which do not require any human intervention which is an essential condition to qualify as a technical service and therefore, it cannot be construed as Fees for Technical Service ('FTS') for the purposes of applicability of section 194J of the Act.

4. The Appellant prays that it be held that the Appellant cannot be an 'assessee-in-default' u/s 201(1) of the Act and the impugned demand be deleted.

Ground No.IV

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the order of TDS officer in not appreciating the fact that taxes on the impugned transactions has been paid by the recipient parties (i.e. distributors and the telecom operators) by filing their return of income.

2. The CIT(A) further erred in not appreciating that the appellant has submitted all the relevant details/documents evidencing payment of taxes to the TDS Officer.

3. The appellant therefore prays that the impugned demand on the said transactions be deleted.

GROUND No.V

""1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the order of the TDS Officer of treating appellant as an assessee-in-default u/s.201(1) of the Act and thereby levying interest u/s.201(1A) of the Act.

2. The CIT(A) erred in not appreciating that the interest u/s.201(1A) is only compensatory in nature and that it can be levied only when there is default in payment of the taxes.

3. The CIT(A) erred in not appreciating that where the appellant had no liability of deducting tax at source, the issue of deposit of taxes and consequential interest u/s.201(1A) of the Act does not arise.

4. Without prejudice to the above, the appellant prays that the interest levied u/s.201(1A) of the Act be deleted as the taxes payable on the discount and roaming charges would have been duly paid by the recipient parties.

5. Without prejudice to above, interest u/s.201(1A) of the Act be calculated from the due date of payment to the date of payment by the recipient or filing of their return of income, whichever is earlier."

3. As is emerged from the grounds of appeal, the sole grievance of the assessee consists of two folds i.e. confirmation of addition of Rs.17.62.920/- u/s.201(1) and interest of Rs.6,34,651/-u/s. 201(1A) r.w.section 194H and also confirmation of addition of Rs.69,440/- u/s.201(1) and Rs.24,998/- u/s.201(1A) r.w.s 194J of the Act treating the assessee as the assessee in default u/s.201(1) of the Act.

4. Facts, as emerged from the assessment order, are that the assessee company is in the business of providing telecommunication services in various parts of India. A survey under section 133A of the Act was conducted on 29.9.2011 in the premises of the assessee and it was found that the assessee has violated the provisions of TDS in non-deducting TDS in respect of

payments. The Assessing Officer issued show cause notice to the assessee requiring to explain as to why tax is not liable to be withheld under section 194J of the Act on roaming charges paid and under section 194H of the Act on discount extended to the pre-paid distributors by the assessee. The assessee filed its reply but did not find favour with the Assessing Officer. The AO observed that the assessee offers services to its subscribers in both post and prepaid categories and TDS has to be made on discount/commission paid u/s.194 of the Act, whereas in case of prepaid services, SIM cards or recharge vouchers are sold to the customers through network of distributors and agents who remit the sale proceeds back to the telecom companies after retaining a fixed amount which is commonly termed as discount. The AO was of the opinion that TDS has to be deducted in respect of prepaid SIM cards and commission is paid for services rendered by the network of distributors and the terminology of discount as claimed by the distributors is nothing but the commission payment services rendered by the distributors, therefore, provisions of section 194H are applicable and, therefore, calculated TDS at 10% under the provisions of section 194H of the Act.

5. Similarly, the assessee has not deducted TDS on roaming charges, where there is inter-connectivity charges in respect of roaming from one state to another state of the country and, therefore, provisions of section 194J of the Act are applicable. As the assessee has not deducted TDS, therefore, the assessee is held as the assessee in default in respect of non-deduction of TDS u/s.194H and 194J of the Act on payment of commission and fees for

professional or technical services and passed order u/s.201(1) & 201(1A) of the Act.

6. The above action of the AO was confirmed by the ld CIT(A). The matter was travelled upto the Tribunal and on considering the submissions of both the sides, the matter was remitted back to the file of the AO for verification of evidences filed by the assessee and passed a fresh order.

7. In pursuance to the direction of the Tribunal, the ACIT (TDS) proceeded to pass order on the basis of evidences furnished by the assessee. The Assessing Officer observed that the assessee having failed to deduct tax as required under section 194H is a defaulter within the meaning of section 201(1) of the Act and created a demand of 17,62,920/- and interest of Rs.6,34,651/- u/s.201(1A) on discount on the prepaid SIM cards and under section 194J on roaming charges of Rs.69,440/- under section 201(1) and interest u/s.201(1A) of Rs.24,998/-, which was upheld by the ld CIT(A). Hence, the assessee has come in appeal before the Tribunal once again.

8. At the time of hearing, ld. Counsel for the assessee submitted that section 194H of the Act is not applicable as neither the assessee is responsible for paying any income nor has it made any payment of income by way of commission. He submitted that the sale of right to prepaid services is accounted on net basis and the discount is not credited to the account of the distributor. He submitted that the ACIT (TDS) has negated the claim of the assessee that the assessee has failed to furnish any corroborative evidences in

the support of the claim, which is not a fact in this case. The assessee has furnished all necessary evidence. He submitted that the first requirement of section 194H is that there should be payment made of commission or brokerage by any person other than individual or HUF to a resident, any income by way of commission, not being insurance commission. He submitted that in this case, the assessee is receiving the amount from the distributor below MRP amount of SIM cards and prepaid cards, so there is no payment of any amount to the distributor by the assessee as commission.

9. Ld A.R. relied on the following decisions to support its claim:

i) Bharti Airtel ltd vs DCIT, 372 ITR 33 (Kar)
ii) Tata Teleservices Ltd vs ITO 42 ITR (Trib) 121
iii) Hindustan Coca Cola Beverages Pvt ltd vs CIT, 402 ITR 5139(Raj)
iv) Vodafone Cellular Limited vs DCIT, ITA No.817/Pun/2013
v) DCIT (TDS) vs Idea Cellular Ltd, ITA No.953/JP/2016
vi) CIT (TDS) VS Idea Cellular Ltd. ITA No.90/2018(Raj)
vii) Vodafone Spacetel Ltd vs ACIT (TDS) ITA No.76-77/Pat/2012
viii) Fodafone East Ltd vs DCIT (tds) ITA No.1499-1502/Kol/2015
ix) DCIT (TDS) vs Vodafone West Ltd., ITA No.1317 & 1318/Ahd/2016
x) CIT vs Kotak Securities Ltd, 383 ITR 1 (SC)
xi) CIT vs Delhi Transco Ltd., 69 taxmann.com 231(SC)
xii) CIT vs Delhi Transco Ltd, 380 ITR 398(Del)

He further submitted that TDS provisions are not applicable in cases where there is no payment made by the assessee and it is not relevant whether the assessee was engaged in the business selling of goods or rendering services.

10. The ld. Counsel further submitted that the difference between the sale price to retailer and the discounted price which the distributor pays to

assessee cannot be categorised as commission for the purpose of section 194H of the Act or otherwise. That though Explanation (i) to section 194H of the Act inter alia states that "commission or brokerage" includes any payment received or receivable directly or indirectly the said section makes it clear that payment has to be of income by way of commission. That in the present case the assessee has not made any such payment.

11. Ld A.R. also relied on the recent judgment of Hon'ble Bombay High Court in the case of CIT(TDS) vs Vodafone Cellular Ltd in ITA No.1152 of 2017 and others order dated 27.1.2020, wherein, before the Hon'ble High Court, the issue for consideration was whether the ITAT was justified in holding that TDS provisions under section 194H of the Income tax Act, 1961, are not attracted on discounts given by the assessee to the distributors of prepaid SIM cards and the Hon'ble High Court has confirmed the decision of the Tribunal that the provisions of section 194H of the Act was not applicable on discounts given by the assessee to the distributors of prepaid SIM cards. Hence, it was his contention that facts being similar in the present case the decision of Hon'ble Bombay High Court is also applicable.

12. As regards to provisions of section 194J, ld counsel submitted that roaming charges paid by one service provider to another are not liable for deduction of tax at source. He submitted that National roaming charge is a specific charge paid by a subscriber of a cellular network to gain access to services of any other network operator in their licensed area of operation. He

submitted that the service provider's role is limited to collecting the roaming charges from its subscriber and pass it on to the other service provider whose facility is used by the subscriber. Therefore, the service provider is not required to deduct tax. Ld counsel submitted that in this case the assessee company had made agreements with other cellular service providers for roaming facilities, where its network is not functioning. He submitted that the assessee company is only a facilitator between the subscriber and the other service providers, enabling the subscriber to make a roaming call. Taxpayer's job is confined to collecting the roaming charges from the subscriber and transfer it to the other service provider. In such a case the tax payer does not use the equipment involved in providing the roaming facility. He, he pleaded that the assessee is not required to deduct TDS u/s.194J of the Act and, accordingly, is not in default under section 201(1) and under section 201(1A) of the Act. For this proposition, ld A.R. relied on various judicial pronouncements including the judgement of Hon'ble Delhi High Court in the case of CIT vs. Bharti Cellular Ltd and others, 185 taxmann 583, which was pronounced in the context of interconnection charges paid by one telecom operator to another under the interconnect arrangement.

13. On the other hand, ld CIT DR supported the orders of lower authorities. Ld DR relied on the judgment of Hon'ble Calcutta High Court in the case of Hutchison Telecom East Ltd vs CIT, (2015) 59 taxmann.com 176 (Cal). Ld D.R. also relied on the decision of ITAT Chennai Bench 'A ' in the case of ITO vs

Vodafone Essar Cellular Ltd(2011) 12 taxmann.com 45 (Chennai), wherein, it was held that the discount given was nothing but commission within the meaning of explanation (i) of Section 194H on which tax was deducible and since the assessee did not deduct tax under section 194H of the Act, the assessee was held defaulter within the meaning of section 201(1) of the Act.

14. We have heard the rival submissions and perused the records of the case as well as plethora of judgments cited by ld counsel for the assessee. In the present case, the assessee is engaged in business of providing telecommunication services in various parts of India. The assessee, under prepaid arrangement, has extended discount to prepaid cards to distributors. The arrangement between the assessee and the prepaid distributors for distributor of right to prepaid service is on a 'principal to principal' basis. Under this arrangement, at each level of the distribution chain, the party distributing the right to prepaid service retains a margin for its efforts and risks assumed, while the telecom operator, being the service provider assumes the responsibility for provision of services to the subscriber. The distributors are free to distribute the right to prepaid service to the retailers/eligible subscribers once they have acquired the same from the assessee on payment of consideration. Hence, the discount extended to the prepaid distributors is in the nature of margin for such distribution of right to prepaid services and such discount does not qualify as commission with the meaning of section 194H of the Act.

15. Similarly, in order to enable its subscribers to make or receive calls when they move out of the licensed territory, has entered into roaming arrangements with other telecom operators and, according to which, they can enjoy the service facility outside the territory. Service in respect of roaming charges are standard automated services and require no human interaction or skill. Accordingly, roaming charges are not paid for rendering any managerial, technical or consultancy services and hence, do not fall under the category of ' fee for technical services. Therefore, the assessee is not required to deduct tax on such roaming charges under section 194J of the Act.

16. In this factual scenario the Assessing Officer has held the assessee to be in default as per section 201(1) of the Act for non deduction of tax at source u/s.194H in respect of the discount offered to distributor and consequently making the assessee liable for interest u/s. 201(1A) of the Act.

17. We may refer to paras 28 to 30 of the judgment of Hon'ble Karnataka High Court in the case of Bharati Airtel Ltd (supra), wherein, it was held as under:

> " 28. Reliance is placed on the judgment of the Delhi High Court in the case of Commissioner of Income Tax Vs. Idea Cellular Limited reported in (2010) 325 ITR 148, while dealing with the commission / brokerage to the distributor on the sim cards / recharge coupons under Section 194 H of the Act, it was held as under:
>
> > "51. It is obvious that a service can only be rendered and cannot be sold. The owner of the SIM Cards and recharge coupons is the assessee-company, M/s. Vodafone Essar Cellular Ltd. This is because the assessee-company is operating under the right of a

licence agreement entered into with the Government of India. Nobody else can be given the right to operate as Cellular telephone service providers. The ultimate service is provided by the assessee-company to everyone and everywhere. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or title of the goods from the assessee-company to the distributor or from the distributor to the ultimate consumer. The distributors are acting only as a link in the chain of service providers. The assessee-company is providing the mobile phone service. It is the ultimate owner of the service system. The service is meant for public at large. In between providing of that service, it is necessary for the company to appoint distributors to make available the prepaid products to the public as well as to look after the documentation and other statutory matters regarding the mobile phone connection. So, what is the essence of service provided by the distributors? The essence of service rendered by the distributors is not the sale of any product or goods. The distributors are providing facilities and services to the general public for the availability of devices like SIM Cards to have access to the mobile phone network of the assessee-company. Therefore, it is beyond doubt that all the distributors are always acting for and on behalf of the assessee-company. Only for the reason that the distributors are making advance payment for the delivery of SIM Cards and other products and distributors are responsible for the stock and account of those cards, it is not possible to hold that the distributors are not acting for the assessee-company but the distributors are acting on their own behalf. Such a proposition is inconceivable in the facts of the present case. It is always possible for the telephone company itself to provide all these services directly to the consumers as the Department of Telecom was doing; but such a direct service is not feasible now-a-days. Therefore, the assessee has made out a business solution to appoint distributors to take care of the operational activities of the company for providing service. The distributor is one of the important links in that chain of service."

29. Reliance is also placed on the judgment of the High Court of Kerala in the case of Vodafone Essar Cellular Ltd. Vs. Assistant Commissioner of Income Tax reported in (2011) 332 ITR 255, where the Cochin Bench held that the service can only be rendered and cannot be sold. The judgment at Para Nos.4 to 6, reads as under:

4. The main question to be considered is whether Section 194H is applicable for the "discount" given by the assessee to the distributors in the course of selling Sim Cards and Recharge coupons under prepaid scheme against advance payment received from the distributors. We have to necessarily examine this contention with reference to the statutory provisions namely, Section 194H ....

"What is clear from Explanation (i) of the definition clause is that commission or brokerage includes any payment received or receivable directly or indirectly by a person acting on behalf of another person for the services rendered. We have already taken note of our finding in BPL Cellular's case (supra) abovereferred that a customer can have access to mobile phone service only by inserting Sim Card in his hand set (mobile phone) and on assessee activating it. Besides getting connection to the mobile network, the Sim Card has no value or use for the subscriber. In other words, Sim Card is what links the mobile subscriber to the assessee's network. Therefore, supply of Sim Card, whether it is treated as sale by the assessee or not, is only for the purpose of rendering continued services by the assessee to the subscriber of the mobile phone. Besides the purpose of retaining a mobile phone connection with a service provider, the subscriber has no use or value for the Sim Card purchased by him from assessee's distributor. The position is same so far as Recharge coupons or E Topups are concerned which are only air time charges collected from the subscribers in advance. We have to necessarily hold that our findings based on the observations of the Supreme Court in BSNL's case (supra) in the context of sales tax in the case of BPL Cellular Ltd. (supra) squarely apply to the assessee which is nothing but the successor company which has taken over the business of BPL Cellular Ltd. in Kerala. So much so, there is no sale of any goods involved as claimed by the assessee and the entire charges collected by the assessee at the time of delivery of Sim Cards or Recharge coupons is only for rendering services to ultimate subscribers and the distributor is only the middleman arranging customers or subscribers for the assessee. The terms of distribution agreement clearly indicate that it is for the distributor to enroll the subscribers with proper identification and documentation which responsibility is entrusted by the assessee on the distributors under the agreement. It is pertinent to note that besides the discount given at the time of supply of Sim Cards and Recharge coupons, the assessee is not paying any amount to the distributors for the services rendered by them like getting the subscribers identified, doing the documentation work and enrolling them as mobile subscribers to the service provider namely, the

assessee. Even though the assessee has contended that the relationship between the assessee and the distributors is principal to principal basis, we are unable to accept this contention because the role of the distributors as explained above is that of a middleman between the service provider namely, the assessee, and the consumers. The essence of a contract of agency is the agent's authority to commit the principal. In this case the distributors actually canvass business for the assesssee and only through distributors and retailers appointed by them assessee gets subscribers for the mobile service. Assessee renders services to the subscribers based on contracts entered into between distributors and subscribers. We have already noticed that the distributor is only rendering services to the assessee and the distributor commits the assessee to the subscribers to whom assessee is accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee. The terminology used by the assessee for the payment to the distributors, in our view, is immaterial and in substance the discount given at the time of sale of Sim Cards or Recharge coupons by the assessee to the distributors is a payment received or receivable by the distributor for the services to be rendered to the assessee and so much so, it falls within the definition of commission or brokerage under Explanation (i) of Section 194H of the Act. The test to be applied to find out whether Explanation (i) of Section 194H is applicable or not is to see whether assessee has made any payment and if so, whether it is for services rendered by the payee to the assessee. In this case there can be no dispute that discount is nothing but a margin given by the assessee to the distributor at the time of delivery of Sim Cards or Recharge coupons against advance payment made by the distributor. The distributor undoubtedly charges over and above what is paid to the assessee and the only limitation is that the distributor cannot charge anything more than the MRP shown in the product namely, Sim Card or Recharge coupon. Distributor directly or indirectly gets customers for the assessee and Sim Cards are only used for giving connection to the customers procured by the distributor for the assessee. The assessee is accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor for the assessee. Therefore, the distributor acts on behalf of the assessee for procuring and retaining customers and, therefore, the discount given is nothing but commission within the meaning of Explanation (i) on which tax is deductible under Section 194H of the Act. The contention of the assessee that discount is not paid by the assessee to the distributor but is reduced from the price and so much so, deduction under Section 194H is not possible also does

not apply because it was the duty of the assessee to deduct tax at source at the time of passing on the discount benefit to the distributors and the assessee could have given discount net of the tax amount or given full discount and recovered tax amount thereon from the distributors to remit the same in terms of Section 194H of the Act.

30. Following the said judgment, the Calcutta High Court in the case of Bharti Cellular Limited Vs. Assistant Commissioner of Income Tax and Another reported in (2013) 354 ITR 507, has taken the same view. The Delhi High Court also has affirmed the said view. It is in the background of this legal position we have to consider the substantial question of law framed in this case. However, before that it is useful to take note of the first principles governing levying of tax which equally applies to telecommunication service also."

Further, Hon'ble High Court in paras 59 to 64, held as under:

" 59. The telephone service is nothing but service. SIM cards, have no intrinsic sale value. It is supplied to the customers for providing mobile services to them. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or title of the goods from the assessee-company to the distributor or from the distributor to the ultimate consumer. Therefore, the SIM card, on its own but without service would hardly have any value. A customer, who wants to have its service initially, has to purchase a sim-card. When he pays for the sim-card, he gets the mobile service activated. Service can only be rendered and cannot be sold. However, right to service can be sold. What is sold by the service provider to the distributor is the right to service. Once the distributor pays for the service, and the service provider, delivers the Sim Card or Recharge Coupons, the distributor acquires a right to demand service. Once such a right is acquired the distributor may use it by himself. He may also sell the right to sub-distributors who in turn may sell it to retailers. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the distributor at the time of the delivery then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent. The seller may have fixed the MRP and the price at which they sell the products to the distributors but the products are sold and ownership vests and is transferred to the distributors. However, who ever ultimately sells the said right to customers is not entitled to charge more than the MRP. The income of these middlemen would be the

difference in the sale price and the MRP, which they have to share as per the agreement between them. The said income accrues to them only when they sell this right to service and not when they purchase this right to service. The assessee is not concerned with quantum and time of accrual of income to the distributors by reselling the prepaid cards to the sub-distributors/retailers. As at the time of sale of prepaid card by the assessee to the distributor, income has not accrued or arisen to the distributor, there is no primary liability to tax on the Distributor. In the absence of primary liability on the distributor at such point of time, there is no liability on the assessee to deduct tax at source. The difference between the sale price to retailer and the price which the distributor pays to the assessee is his income from business. It cannot be categorized as commission. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship.

60. The following illustration makes the point clear:

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

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

62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any

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

63. It was contended by the revenue that, in the event of the assessee deducting the amount and paying into the department, ultimately if the dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at

source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.

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

3) We may also refer to the decision of the Hon'ble Karnataka High Court in the case of *M/s. Bharti Airtel Limited vs. DIT* (in ITA Nos. 637-644 of 2013 vide order dated 14.08.2014, where similar issue was considered by the Hon'ble High Court as under:

> 62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur [expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of lime of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor. In other words the income accrued or belonging m the distributor should be in the hands of the assessees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributer. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards

to a sub-distributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow m so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and. therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is riot under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.

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

18. On similar issue, the ITAT Jaipur Tribunal in the case of Tata Teleservices Ltd (supra) has followed the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd (supra).

19. We also find that the judgment of Hon'ble Bombay High Court in the case of Vodafone Cellular Ltd (supra) is squarely covered in the present case as regards to non-applicable of provisions of section 194H of the Act.

20. Further, we also note that the issue of provisions of section 194H in the case of Bharati Airtel Ltd vs ACIT (TDS) in ITA No.185/CTK/2009 vide order dated 23.9.2011 was decided by this Bench of the Tribunal against the assessee and the assessee was required to deduct TDS and since the assessee did not deduct tax, the assessee was held as the assessee in default under section 201(1) of the Act. We also note that against the decision of the Tribunal, the assessee had preferred appeal before the Hon'ble Jurisdictional High Court

and the Hon'ble High Court in ITA No.009/2012 order dated 20.2.2019 has reversed the decision of the Tribunal following the decision of Hon'ble Rajasthan High Court in the case of CIT (TDS) Jaipur vs M/s. Idea Cellular Ltd in ITA No.205 of 2005, wherein, it has been held that the assessee is not in default under section 201(1) of the Act for non-deduction of tax u/s.194H of the Act in respect of discount allowed on prepaid SIM cards, has answered in favour of the assessee.

22. In view of above, respectfully following the decision of Hon'ble Karnataka High Court and Hon'ble Jurisdictional High Court in the case of Bharati Airtel Ltd (supra), we hold that the assessee is not required to deduct tax under section 194H of the Act on the prepaid SIM Cards and hence, the assessee is not in default as per provisions of section 201(1) of the Act.

23. Similar, with regards to provisions of section 194J of the Act in respect of roaming charges, we find that this issue is squarely covered in favour of the assessee by the judgment of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd (supra) and respectfully following the same, we hold that the assessee is not required to deduct tax u/s.194J of the Act and consequently, the assessee shall not be treated as an assessee in default u/s 201(1) of the Act. Once, the assessee is treated as assessee not in default u/s.201(1), the interest u/s.201(1A) is not required to be charged. We, accordingly, allow the grounds of appeal raised by the assessee.

25. Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 7.2.2020, however, this order is being pronounced much after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income tax Appellate Tribunal Rules, 1962, which envisages the procedure for pronouncement orders, provides as follows: (5) The pronouncement may be in any of the following manners: -(a) The Bench may pronounce the order immediately upon the conclusion of hearing (b) in case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date of pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, "ordinarily", the order on an appeal should be pronounced by the Bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble High Court in the case of Shivsagar Veg Restaurant vs ACIT (2009) 319 ITR 433 (Bom), wherein, it was, inter alia, observed as under:

> " We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".

In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

26. We find that the aforesaid issue after exhaustive deliberations had been anwered by a coordinate Bench of the Tribunal viz; ITAT, Mumbai 'F' Bench in DCIT, Central Circle-3(2), Mumbai vs JSW Limited & ors (ITA No.6264/Mum/18 dated 14.5.2020, wherein, it was observed as under:

> " 9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an

unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice

> delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time- bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. "

27. We have given a thoughtful consideration to the aforesaid observations of the Tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockout was in force shall stand excluded for the purpose of working out the time limit for pronouncement of orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963."

28. In the result, all four appeals of the assessee are allowed.

Order pronounced on 5/06/2020.

Sd/-	sd/-
(Chandra Mohan Garg)	(Laxmi Prasad Sahu)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Cuttack; Dated 5 /06/2020
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Vodafone Idea Limited (formerly known as Vodafone Mobile Services Limited), Unit-41, E-52, Infocity Chandaka Industrial Estate, Chandrasekharpur, Bhubaneswar.

2. The Respondent. ACIT -TDS, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT- 1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack