IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No.118, 119, 120, 2466 & 2467/DEL/2019
Assessment Years 2007-08, 2008-09, 2009-10, 2010-11 & 2011-12

Vodafone Idea Ltd. (earlier known as Vodafone Mobile Services Ltd.) A-19, Vodafone Delhi Office, Mohan Cooperative, Mathura Road, New Delhi.	v.	ITO, TDS, Karnal
TAN/PAN: AAACB2100P		
(Appellant)		(Respondent)

Appellant by:	Shri Deepak Chopra, Adv. & Ms. Manasvini Bajpai, Adv.		
Respondent by:	Ms. Sulekha Verma, CIT-DR		
Date of hearing:	04	12	2020
Date of pronouncement:	20	01	2021

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee company M/s Vodafone Idea Limited as a successor of M/s Vodafone Digilink Limited (which got merged with M/s Vodafone Mobile Services Limited which again got subsequently merged with M/s Idea Cellular Limited and now known as Vodafone Idea Limited) (hereinafter referred to as 'Assessee') against the consolidated Order dated 23.10.2018, passed by the Commissioner of Income Tax (Appeals) for Assessment Years ('AY') 2007-08, 2008-09 and 2009-10 and the order dated 21.01.2019 for assessment years 2010-11 and 2011-12. Since the issue

involved in all the appeals are by and large common arising out of identical set of facts, therefore, were heard together and being disposed of by way of this consolidated order. For the sake of reference, the main issues raised in all the appeals by the assessee are reproduced as under:

ASSESSMENT YEAR 2007-08 to 2011-12 (common grounds)

1. Ground No.1-The Appellant is not liable to deduct tax at source on discount extended to its pre-paid distributors on distribution of pre-paid services.

1.1 On the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the order of the learned TDS Officer in treating the Appellant as 'assessee in default' for non-deduction of tax at source under section 194H of the Act on discount extended of INR 2,10,56,933 by the Appellant to the distributors of its pre-paid services. (for AY 2008-09 the amount is INR 17,18,06,175, for AY 2009-10 amount is INR 19,15,95,051, AY 2010-11 – INR 30,37,20,165 and 2011-12 – INR 29,33,40,558).

1.2 On the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the contention of the learned TDS Officer that the relationship between the Appellant and the pre-paid distributors is not that of 'Principal to Principal' and the discount allowed to them is in nature of commission liable for tax deduction at source as envisaged under section 194H of the Act.

1.3 On the facts and circumstances of the case and in law, the

learned CIT (A)/TDS Officer have erred in not appreciating the fact that there is no payment/credit to the account of distributors by the Appellant towards the discount extended to them and therefore, provisions of section 194H of the Act do not apply on such discount.

1.4 On the facts and circumstances of the case and in law, the learned CIT (A)/TDS Officer have erred in not appreciating that the discount allowed by the Appellant is not income in the hands of its distributors and that income, if any, arises only when the pre-paid services are further distributed by the distributors.

1.5 On the facts and circumstances of the case and in law, the learned CIT (A)/TDS Officer have erred in not appreciating the fact that there is no flow of monies from the Appellant to the distributor of pre-paid services but rather from the distributor to the Appellant, and hence, the provisions of section 194H of the Act fail to apply.

1.6 On the facts and circumstances of the case and in law, the learned CIT (A)/TDS Officer has erred in placing reliance on the decision of Delhi High Court in the case of Idea Cellular and Kolkata Tribunal in the case of Bharti Cellular Limited, without appreciating that the facts in those cases were different from the facts of the Appellant's case.

2. Ground No.2-No TDS demand can be raised under section 201(1) of the Act

2.1 On the facts and circumstances of the case and in law, the order of the learned TDS Officer, as upheld by learned CIT(A), is bad in law in so far as it seeks to recover tax demand under section 201 of the Act in contradiction to the settled principle that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

3. Ground No.3 - No interest under section 201(1A) of the Act can be charged

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

ASSESSMENT YEAR's 2010-11 and 2011-12.

Ground No.1 - The Appellant is not liable to deduct tax at source on discount extended to its pre-paid distributors on distribution of pre-paid services.

1.1 On the facts and circumstances of the case and in law, the learned CIT (A)/TDS Officer has erred in treating the Appellant to be an 'assessee in default' for non-deduction of tax at source under section 194H of the Act on discount extended of INR 30,37,20,165 by the Appellant to the distributors of its pre-paid

services (for AY2011-12 – INR 29,33,40,558).

1.2 On the facts and circumstances of the case and in law, the learned CIT(A)/TDS Officer has erred in upholding that the relationship between the Appellant and the pre-paid distributors is not that of 'Principal to Principal' and the discount allowed to them is in nature of commission liable for tax deduction at source as envisaged under section 194H of the Act.

1.3 On the facts and circumstances of the case and in law, the learned CIT(A)/TDS Officer have erred in not appreciating the fact that there is no payment/credit to the account of distributors by the Appellant towards the discount extended to them and therefore, provisions of section 194H of the Act do not apply on such discount.

1.4 On the facts and circumstances of the case and in law, the learned CIT(A)/TDS Officer have erred in not appreciating that the discount allowed by the Appellant is not the income in the hands of its distributors and that income, if any, arises only when the pre-paid services are further distributed by the distributors.

1.5 On the facts and circumstances of the case and in law, the learned CIT(A)/TDS Officer have erred in not appreciating the fact that there is no flow of monies from the Appellant to the distributor of pre-paid services but rather from the distributor to the Appellant, and hence, the provisions of section 194H of the Act fail to apply.

1.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the judgment rendered by the Hon'ble Rajasthan High Court in the Appellant's own case as

well as other latest favourable orders/judgment.

Ground No.2-Disallowance under section 194J of the Act on account of non-deduction of tax at source on domestic roaming charges paid to other telecom operators.

2.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in summarily rejecting the grounds on the issue of applicability of section 194J of the Act on the roaming charges, without even adjudicating on the same.

Without prejudice to Ground 2.1

2.2 On the facts and in the circumstances of the case and in law, the learned CIT(A)/TDS Officer have erred in not appreciating the fact that roaming services are standard automated services requiring no human intervention which is sine qua non for a service to qualify as a technical service for the purposes of section 194J of the Act.

2.3 On the facts and in the circumstances of the case and in law, the learned CIT(A) have erred in not appreciating that even as per the statement of technical experts, the carriage of calls is an automatic activity and human intervention, if any, is required only at the stage of inter-connect set-up, capacity enhancement, monitoring, maintenance, fault identification, repair, etc.

2.4 On the facts and in the circumstances of the case and in law, the learned CIT(A) have erred in ignoring the statement of technical experts recorded by the income-tax authorities in case of Vodafone Cellular Limited (now merged with Appellant itself), in the context of roaming services, wherein it has been clearly observed that roaming services are automated services requiring no human intervention.

2.5 On the facts and in the circumstances of the case and in law, the learned CIT(A)/TDS Officer has erred in not holding that characterization of a payment must be done having regard to the dominant purpose/intention of the payment.

2.6 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not following the principles laid down in judicial precedents cited by the Appellant and also ignoring the binding Apex Court judgment in the case of CIT vs. Delhi Transco Limited 68 taxmann.com 231 and CIT vs. Kotak Securities Limited 67 taxmann.com 356.

Ground No.3 - No TDS demand can be raised under section 201(1) of the Act.

3.1 On the facts and circumstances of the case and in law, the order of the learned TDS Officer, as upheld by learned CIT(A), is bad in law in so far as it seeks to recover tax demand under section 201 of the Act in contradiction to the settled principle that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in

such cases.

Ground No.4 - No interest under section 201(1A) of the Act can be charged.

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

2. The key issues formulating in all these appeals relating to the assessee being held as an 'assessee in default' within the meaning of Section 201 read with Section 194H of the Income Tax Act, 1961 ('the Act') on account of discount extended to its prepaid distributors (common for assessment years 2007-08, 2008-2009, 2009-10, 2010-11 and 2011-12); and being treated as an 'assessee in default' in terms of Section 201 read with Section 194J of the Act on account of non-deduction of tax at source on domestic roaming charges paid to other telecom operators (for assessment years 2010-11 and 2011-12). Before proceeding to decide the issue as challenged in various appeals, it would be relevant to capture the background and the facts of the case as culled out from records produced before.

3. That a survey was carried out on the premises of the assessee (Vodafone Essar Digilink Limited, Haryana Circle, Karnal) on 14.01.209. During the course of the survey, it was found that M/s Vodafone Essar Digilink Limited, Haryana Circle was providing services of post-paid mobile connections as well as prepaid mobile

connections through its distributors. It was found during the survey that in respect of post-paid mobile services, the assessee was deducting tax at source under Section 194H of the Act while making payments of discount/commission to its distributors. However, the assessee was not deducting any tax in respect of the monetary transactions arising out of providing prepaid mobile services to the consumers. The prepaid mobile services were provided by the assessee by distributing prepaid cards, service tickets, refill slips, SIM cards etc. to the consumers through its distribution network.

4. On the basis of the survey carried out, show cause notices were issued to the Assessee to show cause as to why it should not be treated as an 'assessee in default' in terms of Section 201(1) of the Act for failure to deduct tax at source under Section 194H in respect of the discount/commission allowed to the prepaid distributors. The period under consideration in the show cause notice was from 01.01.2007 to 31.07.2007 and Financial Years 2007-08 and 2008-09. By virtue of the Show Cause Notice in respect of the defaults under Section 194H, the amounts of discount/commission were under:

Financial Year	Amount (INR)
01.01.2007 to 31.07.2007	2,10,56,933
2007-08	17,18,06,175
2008-09	19,15,95,051
2009-10	30,37,20,165
2010-11	29,33,40,558

5. For the assessment years 2010-11 and 2011-12, information was called for under Section 133(6) of the Act regarding tax deducted at source by the assessee. Apart from requiring the assessee to provide the details of discounts offered on prepaid SIM cards, recharge coupons etc., the Assessing Officer also required the assessee to give details of the roaming charges paid to other telecom operators and the TDS deducted thereon.

6. After rejecting the assessee's contention vide order dated 29.03.2011, the Income Tax Officer (TDS), Karnal treated the assessee-in-default under the provisions of Section 194H of the Act on the discount/commission allowed to the distributors for AYs 2007-08, 2008-09 and 2009-10. Similarly, by way of a common order dated 17.02.2012 the assessee was also treated as 'assessee in default' for the same issue for AYs 2010-11 and 2011-

12. We may clarify that the issue of treating the assessee as being in default for non-deduction of tax under Section 194J of the Act in respect of the roaming charges is confined only to AY 2010-11 and 2011-12 and by way of the Order dated 17.12.2012 the assessee was held as an 'assessee in default' in respect of the roaming charges paid to other telecom operators.

7. For treating the assessee as an 'assessee in default' for the discount/commission allowed to its distributors, the AO rejected the discount allowed by the assessee while relying on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ideal Cellular Limited [(2010) 325 ITR 148] and concluded that the assessee was in default for not deducting tax at source under Section 194H of the Act. The AO also relied on the decision of the

Kolkata Bench of the Income Tax Appellate Tribunal ('ITAT') in the case of ACIT v/s Bharti Cellular Limited [(2007) 108 TTJ 38] and the Cochin Bench decision in the case of Vodafone Essar Limited v/s ACIT [(2010) 129 TTJ 222].

8. For AY 2010-11 and 2011-12 also, the AO came to the same conclusion by following the same judgments and held the assessee to be in default in terms of Section 194H read with Section 201 of the Act.

9. As pointed out above, for AY 2010-11 and 2011-12, another issue was on account of non-deduction of tax on the roaming charges paid by the assessee to other telecom operators. The AO in his order dated 17.02.2012 treated the said payments as being in the nature of 'fee for technical services' which required deduction of tax at source under section 194J of the Act. Having rejected the contentions of the assessee, the AO concluded that the assessee was required to deduct tax on an amount of Rs.25,80,15,841 for AY 2010-11 and Rs.32,76,64,361 for AY 2011-12.

10. Aggrieved with the orders passed under section 201, the assessee preferred appeals before the Commissioner of Income Tax (Appeals). The Ld. CIT (A) also rejected the Assessee's arguments while relying on the decisions cited by the AO and primarily the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra). The CIT (A) also confirmed the conclusions of the AO on the issue of the applicability of Section 194J on the roaming charges paid by the assessee to other telecom operators. Aggrieved, the assessee is in appeal before us.

Contentions raised by the learned counsel for the assessee-Section

194H:

11. Before us the Ld. Counsel for the Assessee, Mr. Deepak Chopra, first of all took us through the Order of the AO dated 29.03.2011, passed under Section 201(1) of the Act by virtue of which the assessee was held to be an 'assessee in default' in respect of discount/commission allowed to the distributors for the prepaid SIM cards, service tickets, refill slips etc. (pre-paid services). At the very outset, the learned counsel for the Assessee submitted that the impugned orders under Section 201 of the Act were passed by the TDS Officer in Karnal and as such the jurisdictional High Court was that of the High Court of Punjab & Haryana, which had not rendered any decision in respect of the said issue of whether there arose any obligation on the Assessee to deduct tax under section 194H of the Income Tax Act, 1961 (Act) in respect of discounts granted by the Assessee to its distributors on pre-paid SIM cards etc. He submitted that this issue has come up before several High Courts and there was divergence of judicial opinion on the same. He further submitted that the Hon'ble Delhi, Kolkata, Kerala and Andhra Pradesh High Courts had decided the issue following the judgement of Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra), while the Hon'ble Karnataka High Court in Bharti Airtel Ltd. VS. DCIT (372 ITR 33)]; and Rajasthan High Court in Hindustan Coca-Cola Beverages Vs. CIT (402 ITR 539) had decided the issue in favour of the assessee in the case of Vodafone itself.

12. The Ld. Counsel further submitted that in the absence of any decision of the jurisdictional High Court, Punjab & Haryana, in terms of the settled position of law, a view in favour of the assessee should be taken while following the decisions of

Karnataka and Rajasthan High Courts. He further submitted that a Coordinate Bench of the Delhi Tribunal in the case of Idea Cellular Limited itself has decided the issue in its favour, noting that the decision of the Hon'ble Delhi High Court in the case of Idea Cellular (Supra) itself, was not the jurisdictional High Court as in that case the Income Tax Officer (TDS), Rohtak had framed the Section 201 Orders and the jurisdictional High Court was that of Punjab & Haryana. A copy of the decision dated 01.05.2018 in the case of DCIT, TDS Circle, Gurgaon Vs. Idea Cellular Limited in ITA No. 852/Del/2015 was placed before us vide submissions dated 29.7.2019. He further relied on the decision of the Coordinate Bench of the Tribunal dated 11.06.2018 in the case of Income Tax Officer (TDS), Gurgaon Vs. Idea Cellular Limited, Haryana Circle in ITA No.2299/Del/2015 where the earlier decision dated 01.05.2018 was followed and the Department appeal was dismissed. He also brought to our attention the contentions of para 6 of the Tribunal Order dated 01.05.2018 (in ITA No. 852/Del/2015) where noting the absence of jurisdictional High Court on this issue, relating to Gurgaon), the coordinate bench of this Tribunal followed the decision of the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Limited (88 ITR 192) and decided the issue in favour of the tax payer.

13. The Ld. Counsel further submitted that the period under consideration for which the impugned Orders have been passed was from 01.01.2007 onwards when the commercial relationship between the Assessee and the distributors had undergone a change (given the change of ownership of the Assessee from Hutchison to Vodafone). He further submitted that in the Order u/s 201 itself, it had been pointed out before the AO that during

the period April 2005 to December 2006, the distributors of prepaid starter packs and service tickets acted as agents of the Assessee in Haryana circle and were entitled to commission as per the terms of the agreement entered into with them. He further pointed out that from the Section 201 order itself it was evident that the assessee had submitted copies of agreements prior to January 2007 for the perusal of the AO. However, w.e.f. January 2007, the commercial arrangements between Vodafone Essar Digilink Limited, Haryana Circle and the distributors changed from principal to agent to that of principal to principal. Under the new arrangement, Vodafone Essar Digilink Limited, Haryana circle, transferred its prepaid talk time to the distributors at a discount and the distributors in turn distributed the same to the retailers, the retailers thereafter transfer the same to the ultimate subscribers. At each level of the distribution, the party distributing the prepaid talk time retains a margin for its risk and efforts, while Vodafone Essar Digilink Limited, Haryana circle assumed the responsibility for the provision of services to the subscribers. Accordingly, he submitted that post January 2007, the assessee also accounted for revenues on the basis of consideration received from the distributors, i.e., the price on which the prepaid talk time were transferred to the distributor. As an example he stated that suppose the MRP of prepaid talk time is Rs.100 and the assessee sold the same to the distributor at Rs.96, the assessee accounted for Rs.96 only as its revenue. Thus, it was submitted that no commission was paid by the assessee to its distributors for distribution of its prepaid SIM cards and talk time from January 2007 onwards and there being a change in the commercial arrangement, there was no obligation to withhold any tax on the amount of discount/commission given to the distributors.

14. The Ld. Counsel further submitted that without appreciating the change in the commercial arrangement, the AO simply followed the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra), which was rendered for AY 2003-04 and 2004-05. He further pointed out that the AO reproduced a portion of Hon'ble Delhi High Court judgment without really appreciating the context and without appreciating that the Hon'ble Delhi High Court had rejected the argument of sale of goods in respect of the SIM cards since in that case the SIM cards were to be returned back to Idea Cellular Limited, which the High Court had held was an antithesis of sale. He further submitted that it was in the peculiar facts of that case that the Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra) held that the discount offered was in the nature of commission as the distributor was acting as an agent.

15. Ld. Counsel also submitted that the Hon'ble Karnataka High Court (supra) in the case of the Assessee itself had distinguished the judgment of the Delhi High Court while observing that the Hon'ble Delhi High Court did not consider that services can be bought and sold. The Hon'ble Karnataka High Court held, after considering the decision of Idea Cellular and other decisions referred to by the Ld. DR, that services can be bought and sold. Thus, after analysing clauses of Agreements of various service providers held that the relation between the distributor and service was principal-to-principal and there was no requirement to withhold tax under the provisions of section 194H of the Act on the discounts. He also pointed out that the commercial arrangements as noted by the Karnataka High Court are akin to

the assessment years under consideration.

16. In order to appreciate the contentions in proper perspective we had directed the Assessee to furnish relevant agreements including the agreements relating to the period prior to January 2007 and after January 2007, which was complied with along with detailed written submissions bringing out the distinction between the two agreements as well as the distinction on facts between the judgment of the Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra) and the facts applicable for the relevant AYs.

17. Ld. Counsel submitted that the entire case of the revenue is that under the new agreement also the Appellant is imposing restrictions on the Distributor and the distributor is reporting to the Appellant and the Appellant is also evaluating the its performance. He submitted that the issue of imposition of conditions by a transferee on the transferor is no longer res-integra. This issue was examined by the Hon'ble Supreme Court in the case of Bhopal Sugar Industries (AIR 1977 SC 1275) and the Apex Court had observed that mere imposition of conditions would not convert an agreement of sale into an agreement of agency. He submitted that given the change of the contractual arrangements in the present case, the relationship between the parties has to be viewed qua the intention of the parties and it was not open to the Department to give a different connotation to such arrangements so as to arrive at erroneous conclusions. He also relied on the decisions of the Hon'ble Supreme Court in the case of Bank of India vs. K. Mohandas (289) 5 SCC 313, and invited the attention of the Bench to the following observations made by the Hon'ble Supreme Court:

"True construction of a contract must depend upon import of words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of contract affect the true effect of clear and unambiguous words used in contract. Intention of the parties must be ascertained from the language they have used, considered in the light of surrounding circumstances and the object of the contract. Nature and purpose of contract is an important guide in ascertaining intention of the parties. Contract must be read as a whole in order to ascertain true meaning of its several clauses and the words of each clause should be interpreted so as to bring them in harmony with other provisions, if that interpretation does no violence to the meaning of which they are naturally susceptible."

18. Ld. Counsel also placed reliance on the other decisions of the Supreme Court in this context being in the case of Nabha Power Limited vs. Punjab State Corporation Limited and Another (2018) 11 SCC 508, Satya Jain (Dead) Through L.Rs. and Ors. vs. Anis Ahmed Rushdie (Dead) (2013) 8 SCC 131 and Union of India vs. D. N. Revri & Co. and Ors., (1976) 4 SCC 147. Thus, he submitted, that there is a clear mandate of the Hon'ble Supreme Court of India that business efficacy and the intentions of the parties should not be meddled with when the written contracts are blatantly clear, so as to deliberately apply certain provisions of law, which are otherwise not applicable - more so to create legal consequences, when none exist.

19. The Ld. Counsel also submitted that the aforesaid principle is also applicable in the present case and supports the contention

of the Assessee that the relationship between the Assessee and its pre-paid distributors is on principal to principal basis and not that of a principal-agency relationship. In the present case as well, fixation of MRP by the Appellant is not conclusive of the arrangement between the parties and does not result into creation of a principal – agent relationship between the Appellant and the pre-paid distributors. It was further submitted that where the aforesaid condition is considered conclusive of the arrangement between the parties, all arrangements between the manufacturer and the distributors in the FMCG industry would become a principal – agent relationship since in such cases, MRP is always determined by the manufacturers.

20. He further submitted that in the present case, since relationship between the Appellant and distributors of its pre-paid talk time is on a 'principal to principal' basis, the margin earned by the distributors constitutes trade discount and not 'commission or brokerage' to attract tax deduction at source under section 194H of the Act. The aforesaid contention is supported by the distribution model of the Appellant. Our attention was drawn to the following terms of the Distributor Agreement placed before us:

- The pre-paid distributors are free to distribute the talk time to the retailers/ eligible subscribers at any price subject to the MRP, once they have acquired the same from the Appellant on payment of upfront consideration;

- The distributors in such cases become liable to the Appellant as debtors for the price to be paid for the talk time and not as agents;

- The ownership in the talk time passes to the distributors the moment they take delivery of the recharge coupons or an e-top-up (representing entitlement/ right to talk time) is credited to their account;

- Having taken delivery of the talk time, the distributors are free to use the same for their own consumption and not necessarily trade in the same by providing it at a margin to retailers/ subscribers;

- The distributors enter into an independent arrangement with retailers/ subscribers for distribution of pre-paid SIM cards/ talk time. The retailers distribute the pre-paid SIM cards and talk time to the subscribers at any price upto the MRP prescribed by the Appellant.

- In a pre-paid business model, significant risks and rewards are transferred to the pre-paid distributors on provision of SIM cards and talk time and the arrangement with the pre-paid distributors is on a 'principal to principal' basis. The SIM cards and talk time is provided to the distributors on payment of the consideration upfront. The fact that the Appellant may fix MRP for the talk time and may impose certain other restrictions on the distributor does not make the relationship a 'principal – agent' relationship. These could be construed as provisions inserted by the Appellant to save from any third party claims which may arise. Such a stipulation is there in most distributorship agreements whether the distributor is a white goods distributor or is engaged in the FMCG sector.

- Any loss suffered by the distributors on account of

unauthorized use of talk time (pursuant to say pilferage) or non-payment by the retailers/ subscribers is not made good by the Appellant. The above relationship is significantly different from a typical 'principal - 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.

21. In contrast, the responsibility/obligations of the Customer Management Unit [CMU] owner in the old Agreement dated 18.06.2004 between Aircel Digilink India Ltd. [ADIL] and Chokhani Distributors were as under –

Clause/ obligation/ responsibility Remark

It shall be the prime responsibility of CMU Owner to get, check, verify the complete information of the subscribers/prospective and obtain all documents such as Customer Application Form. Customer Agreement Form, PAN No., Residential/Office proof. Photo Identity Cards etc or any other document/proof required by Aircel ADIL whether in its discretion or as per the requirement by the authorities. This obligation is as per the TRAI regulations and these conditions are amended every now and then. This an industry practice and all the distributors/ Agents operating across the country for all the telecom operators carry out this exercise. It may be noted that this exercise is only carried out while selling new SIM card and not while recharging the talk time. The recharge coupons are sold to customers who already have a SIM card and need an e-top up or recharge coupon.

The CMU Owner shall forward the complete set of documents to

ADIL at its specified office. In case, at any point of time, if any document is not forwarded to ADIL, for any reason whatsoever, it shall be assumed that this document(s) is with CMU Owner and it shall be the responsibility of CUM Owner to keep these documents in safe custody and forward the same to ADIL whenever it is asked for. No such clause is present in the New Agreement. This gives a flavour of agency relationship.

The CMU Owner shall carry out all its obligation hereunder at its own cost and expenses including but not limited to usage of his/its own space and personnel etc and no reimbursement, whatsoever shall be made by ADIL to the CMU Owner on any account, whatsoever. This is a basic condition wherein the CMU owner is required to maintain its own place of business. This condition prevails in the new Agreement as well. The maintenance is at its own risk.

The CMU Owner shall be fully responsible for the employment and payment of wages, etc. to its employees, etc. and shall fully comply with all laws, rules, regulations, notifications, directions orders, etc. of the Government whether Central, State, local or Municipal relating to such employment, payment of wages etc. and all other matters connected. This is a basic condition wherein the CMU owner is required to maintain its own place of business. This condition prevails in the new Agreement as well. The maintenance is at its own risk.

Ensure all payments collected for and on behalf of ADIL and due to ADIL under this Agreement are tendered in a timely manner i.e. within 24 hours or in such other manner as ADIL may agree. The CMU Owner shall collect cash from the prospective Subscribers /

Subscriber only on prior written permission from ADIL and as per the policy of ADIL and its instructions communicated from time to time Otherwise CMU Owner shall restrain from collecting cash.

No such clause is present in the New Agreement. This gives a flavour of agency relationship.

Comply with all of ADIL's requirements in respect of invoicing and accounts. No such clause is present in the New Agreement. This gives a flavour of agency relationship.

Maintain ADIL's brand image and comply with all directions and guidelines issued in respect of the brand and not do anything to tarnish spoil or reduce the value of the same. This is a basic condition which is present in New Agreement as well.

Provide reports on customers expenses, service, purchases, inventory, compliance, bill collection and any other relevant details in the format and as required by ADIL. No such clause is present in the New Agreement. This gives a flavour of agency relationship. Though under the New Agreement the Distributor is required to provide reports every quarterly but that is requires only for purpose of betterment of his business.

Make payment to ADIL for any amount due under this Agreement by way of Account Payee Cheque or Banker's Draft or in such other manner as ADIL may agree. Basic condition

Pay all license fees, taxes, duties, service tax and any other charges, assessments or penalties whether statutory or otherwise levied by any authority in connection with the operation of the CMU and providing the Services. Basic condition – for the purpose of carrying out the business of the CMU. This condition is present

in the New Agreement

While this Agreement is in force not enter into agreement with any other party where such party could be considered to be a competitor to the Business. This condition is present in both the Agreements for carrying out business effectively.

Ensure that all its staff deal with the customers in a friendly and courteous manner and comply with all guidelines issued by the CMU Owner or ADIL This condition is present in both the Agreements. It's a common effort by both the parties for carrying out businesses effectively. This condition will benefit both the parties.

Comply with all other reasonable requests from ADIL from time to time as considered necessary to further the spirit and objects of this Agreement. General condition present in both the Agreements.

In the event of any loss/ misplacement etc of any / all Cheques/ drafts, the CMU Owner shall intimate the details thereof to ADIL within three hours of his discovering of the lost/ misplaced the Cheques/ drafts. The CMU Owner shall be responsible to ensure collection of amounts covered by such loss/ misplaced Cheques/drafts within a period of 7 days commencing from the time of such loss/misplacement failing which the CMU Owner shall be responsible to ADIL for loss of interest as also consequential losses for non-collection of the amounts covered by such/part of such Cheques/ drafts. This condition is not present in the New Agreement and clearly demonstrates agency relationship. This activity is not carried out by a Distributor under

the New Agreement as he carries out business and bears the risk.

CMU Owner hereby agrees that upon termination of this Agreement for any reason the CMU Owner will return all equipment and furniture supplied by ADIL forthwith upon request and remove all ADIL signage and all other items indicating that the Premises were operated as ADIL's CMU.

CMU Owner hereby agrees to grant an irrevocable license to ADIL and its designated employees to enter the premises and remove all ADIL signages if the CMU Owner has not done so itself to the satisfaction of ADIL within 7 days of termination of the Agreement.

This is a condition which indicated that on termination the CMU owner will give irrevocable license to ADIL to enter the premises of the CMU owner to remove the signages etc.

A similar condition is also present in the New Agreement but there are specific conditions for termination and as an effect of termination both the parties agree that the distributor shall return all equipment/ furniture and remove signages. It is clarified that the equipment and furniture which may be provided by the Appellant would be as a promotional activity with customization of the Appellant's and as such would become useless for the distributor after the termination.

22. Apart from the above, there are certain obligations of the CMU owner in relation to the Subscribers as prescribed under the Agreement at page 112 of the Paper book Vol – II. These conditions are not present in the New Agreement. The Distributor is not dealing with the subscribers directly, the retailers is selling the SIM card and recharge coupon etc. to the subscribers/customers. There are other Services also to be provided by the CMU owner under the Old Agreement as prescribed in Schedule – 1 of the Agreement at page 117 of the Paper book Vol. – II which were highlighted as under –

Provide assistance to customers on handset servicing and replacement of handsets under warranty. This condition is not present in the New Agreement and thus there is no such obligation on the distributor.

Assist customers in insurance claim settlements. No such condition/obligation is present in the new agreement.

Acceptance of customer's requests to provide itemized or duplicate bill request and provide clarifications on bill enquiries. This is condition pertains to a Post – paid model.

Bill collection and acceptance of payments on behalf of ADIL for telephone bills and SIM cards on the following basis:

a. Any payment by cheque or credit card will be payable to ADIL and held for daily collection by ADIL;

b. The CMU Owner shall prepare a daily summary statement of all payments received the previous day and forward this to ADIL by 2 pm each day.

c. In respect of all payments received by the CMU Owner for SIM Cards, the CMU Owner will ensure that ADIL receives its cheque and the application form within 28 hours of each purchase.

These conditions are no present in the new Agreement. The distributor under the new Agreement does not perform such functions on behalf of the assessee.

Facilitate SIM/ SPEED/ CASH card activation and replacement. This function has to be performed by the distributor only as he becomes the owner of the service ticket and is obliged to perform this function.

Activities under the head planning, processing and market development These functions are not performed by a Distributor under the new Agreement

23. Ld. Counsel submitted that, however, imposition of such conditions will not convert a contract of sale into a contract of agency. He further brought to our attention the decision of the Kolkata Benches in the case of M/s Vodafone East Limited (since amalgamated with Vodafone Mobile Services Limited) in ITA Nos.1499-1502/Kol/2015 for AY 2010-11 and 2011-12, where an identical issue had come up and similar pleas were taken qua the change of the commercial arrangements. He further drew our attention to para 8.2 of the Order of the Kolkata Bench of the Tribunal, the change of the commercial arrangement were duly noted. He pointed out that the ITAT distinguished the jurisdictional High Court judgment (Kolkata High Court) in case of

Hutchison Telecom East v/s CIT (375 ITR 566). The ITAT noting the change of the commercial arrangements, in para 8.4 of its Order followed the decision of the Hon'ble Karnataka and Rajasthan High Courts which High Courts (supra) had decided the issue in favour of the assessee taking note of the commercial terms as applicable in the new agreements. He further submitted that both before the Hon'ble Karnataka as well as Rajasthan High Courts, the Assessee was a party. He further submitted that the ITAT Kolkata Bench in paras 9 and 10 of its Order noted the change of facts, decided the issue in favour of the assessee.

24. On the issue of payment of roaming charges, the Ld. Counsel for the assessee relied on the decision rendered by the Kolkata Tribunal in the case of Vodafone East Limited Vs. ACIT (2015) [(43 ITR (Trib) 0551 (Kolk)] which in the Assessee's own case itself had examined the applicability of Section 194J qua the payment of roaming charges to other telecom operators after taking into consideration the statements recorded as per the decision of the Hon'ble Supreme Court in the case of Bharti [330 ITR 239 (SC)]. Having considered the decisions of Hon'ble Delhi High Court in the case of CIT v/s Bharti Cellular Limited (390 ITR 139), the decision of the Hon'ble Supreme Court in the case of CIT v/s Bharti Cellular Limited (330 ITR 239) and the statements of the expert witnesses recorded post the directions of the Hon'ble Supreme Court, the Kolkatta Bench of the Tribunal has decided the issue in favour of the assessee and held that the payment of roaming charges did not attract deduction of tax under Section 194J of the Act. This issue has also been decided in favour of the Assessee by the Delhi Bench of the Tribunal in DCIT Vs. Vodafone Essar Digilink Ltd. (2018) (52 CCH 181) (Del.). The Ld. Counsel for the

assessee also relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Kotak Securities Limited (2016) (383 ITR 1), the case of Vodafone Digilink Limited Vs. CIT (TDS) Chandigarh (167 ITD 679), the judgment of the Bombay Bench in the case of Reliance Communication Limited Vs. ACIT (TDS) [(2016) 69 taxmann.com 307 (Mum-Trib)]. The Ld. Counsel submitted that both the issues now stand decided in favour of the Assessee where it was held that there was no obligation on the assessee to withhold tax under the provisions of Section 194H on the discount allowed to distributors on prepaid SIM cards and there was no obligation to withhold any tax on the payment of roaming charges to other telecom operators under Section 194J of the Act, since such payments did not partake the character of fees for technical services.

Arguments of the Ld. Departmental Representative (CIT-DR)

25. Per contra, the Ld. CIR DR filed written submissions dated 28.3.2019, 16.7.2019 and 24.9.2019, which extensively relied on the orders of the lower authorities, the judgment of the Hon'ble Delhi High Court, judgments of other High Courts where the matter had been decided against the assessee. The Ld. DR submitted that as regards the grounds relating to applicability of Section 194H is concerned, the same stands covered in favour of the Revenue by the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Limited (supra). The Ld. DR emphasized that the present assessee has now merged with Idea Cellular Limited and hence the Hon'ble Delhi High Court decision is applicable. Thereafter, the Ld. DR submitted that the Hon'ble Delhi High

Court had extensively discussed the matter in its judgment and having considered the same, decided the issue against the assessee. The DR also submitted that the assessee had made a very weak attempt to distinguish its case from the Delhi High Court judgment in the case of Idea Cellular Limited and drew our attention to similar clauses being present in the pre 2007 and post 2007 agreements on the return and replacement and effect of termination. The Ld. DR also relied on various clauses of the agreement post 2007 to emphasize that there were several conditions imposed upon the distributors in terms of adhering to brand image guidelines, maintenance of records, reporting and evaluation of performance. The Ld. DR also submitted that the plea of the assessee on the change in the contractual arrangement was also considered by the Coordinate Bench of the Tribunal in the case of Tata Teleservices Limited v/s ITO (171 ITD 196) and referred to the copy of the decision filed in the paper book filed by the Revenue on 20.02.2019. She further pointed out that the Coordinate Bench in spite of change in contractual arrangements had followed the Hon'ble Delhi High Court judgment, being the jurisdictional High Court and had not followed the Karnataka High Court judgment, which was in favour of the Assessee/s.

26. The Ld. DR also relied on the decision of the Hon'ble Hyderabad Bench of the Tribunal in the case of Vodafone Mobile Services Limited v/s ACIT (168 ITD 219) where the ITAT had dismissed similar plea taken by the assessee. Copy of the decision of the Hyderabad Bench was also referred to being a part of the paper book filed by the Revenue.

27. On the second issue relating to the obligation of the assessee to withhold tax under Section 194J of the Act on the payment of

roaming charges by the assessee to other telecom operators, the learned DR referred to the background of the matter including the decision of the Hon'ble Delhi High Court and the Hon'ble Supreme Court in the case of Bharti Cellular Limited (supra). She then referred to the statement of the technical expert recorded in the case of Vodafone Essar Limited and drew our attention to the answers given by the technical expert Ms. Vasanthi Ramamurthy, Divisional Engineer of BSNL to submit that the transmission of calls was automatic but to keep the system running in a fault free environment, continuous monitoring is required and hence human intervention is constantly required in the provision of roaming services. In view of the above, the learned DR submitted that the test laid down by the Hon'ble Delhi High Court, i.e., that for the payments to fall within the scope of fee for technical services under Section 194J of the Act, there was human intervention involved in the provision of roaming services and as such the payment made by the assessee to other telecom operators fall within the purview of fee for technical services and the assessee was obliged to deduct tax at source while making payments under Section 194J of the Act.

28. The Ld. DR also relied on the letter dated 20.8.2019 of the Assistant Commissioner of Income Tax, Circle 78(1), Laxmi Nagar, New Delhi where in reply it has been informed to the DR that the current jurisdiction of Vodafone Idea Ltd. is New Delhi where the TAN of idea Cellular is being used to file TDS returns. Hence, she submitted that the TAN jurisdiction being Delhi the judgment of the Hon'ble Delhi High Court would be applicable.

Rejoinder by the Counsel of the Assessee

29. In his rejoinder, the Ld. Counsel for the assessee referred to the detailed written submission filed on 29.07.2019 and brought to our attention that the contention of the Revenue that the judgment of the Hon'ble Delhi High Court was applicable on the facts of the case, being jurisdictional High Court was patently incorrect. He submitted that the impugned Order under Section

201 of the Act was passed by the AO in Karnal and the jurisdictional High Court in the present case was the Hon'ble Punjab & Haryana High Court. For this proposition he relied on the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Motorola India Limited (326 ITR 156) where the Hon'ble Punjab & Haryana High Court had clearly held that the situs of the AO at the time when the assessment was framed would be the determinative factor for the High Court jurisdiction to entertain an appeal. He also relied on the decision of the Delhi High Court in the case of DDA Vs. ITO (230 ITR 9) [further confirmed by the Supreme Court in the case of ITO vs. DDA (252 ITR 772)] that 201 orders were akin to an assessment. Further, the Counsel for the assessee again invited our attention to the decision passed by the Co-ordinate Bench in the case of Idea Cellular Limited itself for AY 2010-11 and 2011-12 where the Section 201 proceedings were initiated by the Income Tax Officer (TDS), Rohtak. The Counsel for the assessee drew our attention to para 6 of the Order where the Coordinate Bench had recorded that the Section 201 Order was passed by the Income Tax Officer (TDS), Rohtak and hence there being no decision from the jurisdictional High Court i.e. Punjab & Haryana High Court, the decision of the Income Tax Officer (TDS), Karnal which had decided the issue in favour of the assessee

should be followed. He further referred to para 7 of the said decision where the Coordinate Bench had recorded, after taking due note of the decision of Hon'ble Delhi High Court in the same Assessee's case. He further pointed out that the Coordinate Bench had held that for the Section 201 Order was passed by the Income Tax Officer (TDS), Rohtak, the jurisdictional High Court would not be the Delhi High Court and would be the Punjab & Haryana High Court. Thus, he submitted that in the case of Idea Cellular Limited itself where the Hon'ble Delhi High Court had decided the issue in favour of the assessee, the Coordinate Bench had taken a view in favour of the assessee following the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited (supra) and while following the Hon'ble Karnataka High Court decision, had decide the issue in favour of the assessee. He also referred to the order in the case of Idea Cellular Limited, Haryana Circle in ITA No.2299/Del/2015 for AY 2011-12 which had endorsed the view taken by the Coordinate Bench for AY 2010-11.

30. That apart, the counsel for the assessee, to rebut the contentions put forth by the Ld. DR, referred to the decision of the Coordinate Bench in the case of Tata Teleservices Limited (supra) and submitted that in para 15 of the said Order, the Coordinate Bench being bound by the jurisdictional High Court judgment i.e., Hon'ble Delhi High Court had decided against the assessee. He submitted that in the case of Tata Teleservices Limited, the Section 201 proceedings had been concluded by the Income Tax Officer, Ward-51, New Delhi and hence clearly the Co-ordinate Bench was bound by the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Limited. Same is the issue with the Hyderabad bench decision in the Assessee's own case. However, he also

brought to our attention that the Hon'ble High Court of Andhra Pradesh and Telangana had admitted the appeal of the Assessee vide order dated 6.12.2017 and granted stay or recovery proceedings (order is placed on page 395 of Paper book volume 2).

31. He further referred to the Hyderabad Bench decision in the case of Vodafone Mobile Services Limited (supra) where in para 84 and 85, the Hon'ble Tribunal had held that since the jurisdictional High Court had decided the issue against the assessee, they were bound by the decision of the Hon'ble High Court. The learned counsel for the assessee again drew our attention to the Coordinate Bench of Kolkata Tribunal's decision in the case of Vodafone East Limited where in-spite of the jurisdictional High Court (Kolkata High Court) decision having been rendered in the case of Bharti Cellular Limited (354 ITR 507), the Co-ordinate Bench had taken a note of the change of facts in the assessment year before it where the commercial transactions had changed and hence distinguished the Hon'ble Kolkata High Court's decision after elaborately referring to the various clauses of the contractual arrangements between the parties. Hence, he submitted that on this issue, it would be apt to follow the decision of Hon'ble Karnataka High Court as well as the Rajasthan High Court which decided the issue in favour of the assessee. The counsel for the assessee also submitted that without prejudice, the Hon'ble Delhi High Court itself had admitted the questions of law in the case of Tata Teleservices Limited by way of its Order dated 07.05.2018. He also submitted that as regards the Hon'ble Hyderabad Bench decision referred to by the learned DR following the Hon'ble Andhra Pradesh High Court judgment the Hon'ble High Court had

also admitted the questions of law and granted stay of recovery proceedings vide its Order dated 06.12.2017. All these Orders have been placed by the learned counsel in the paper book filed before us. To conclude it was submitted that decisions of the Hon'ble Karnataka and Rajasthan High Courts be followed and issue be decided in favour of the Assessee, in the absence of any decision by the jurisdictional High Court.

32. On the issue raised by the DR that the current TAN jurisdiction of Vodafone Idea Ltd. is New Delhi, the Ld. Counsel submitted that it is a settled position of law that the jurisdiction of the AO had to be seen at the time of passing the order under section 201 of the Act, which admittedly was Karnal and under the jurisdiction of the Punjab and Haryana High Court. He submitted that this issue also stands settled by the Hon'ble Punjab and Haryana High Court in the case of Motorola (supra). Thus, by relying on the current TAN jurisdiction of Vodafone Idea Ltd. does not further the case of the revenue. He otherwise also relied on the decision of the co-ordinate bench of the Tribunal where in the case of Idea Cellular Ltd. itself, relating to Haryana and UP, the co-ordinate bench had decided the issue in favour of the assessee in the absence of any jurisdictional High Court decision.

33. The issue of jurisdiction has also been dealt with by the Gujarat bench of Tribunal in Assessee's own case i.e. Vodafone Essar Gujarat vs ACIT for AY 2008-09 bearing ITA 386/AHD/2011 dated 07.07.2015.

34. As regards the attempt of the Ld. DR to draw a similarity between the pre and post 2007 agreements, the Ld. Counsel pointed out that the DR had relied on the "Return and

Replacement" clause and the clause relating to the "effect on termination" in the sample agreement filed by the Appellant in its paper book on 15.2.2019 (not 15.2.2008 as wrongly mentioned in the DR's submissions). The Counsel pointed out that clause 10 of such agreement deals with effect of termination. The clause provides that in the event of termination of the distributor agreement the parties agreed that all equipment and furniture supplied by the Assessee would be returned and does not refer to the return of service tickets. Hence, the similarity being drawn by the DR was factually incorrect. In fact, he pointed out, that clause (e) of Annexure -1 (at page 13 – referred to by the DR) specifically provides that the Assessee shall not be responsible for any post-delivery defect in services tickets. The clause also states that the Assessee may at its sole discretion and after making verifications as it may deem fit, replace any unused non-working refill slips. Hence, he submitted that unlike the facts of the Idea Cellular decision (of the Delhi high Court) under the existing commercial arrangements, there was no provision for return or refund in respect of the service tickets. Hence, he submitted that the averments made by the Ld. DR in her submissions of 16.7.2019 were factually incorrect and consequentially the endeavour of the DR to show similarity between the pre and post 2007 agreements was incorrect.

35. On the second issue, the Ld. Counsel for the assessee relied on the decision rendered by the Kolkata Tribunal in the case of Vodafone East Limited v/s ACIT (2015 43 ITR 2 (Trib.) 0551 (Kolk) which in the Assessee's case itself had examined the applicability of Section 194J qua the payment of roaming charges to other

telecom operators. He submitted that the statements of the Technical experts had been duly considered by the Kolkata Bench of the Tribunal and having considered the same had concluded that there was no human intervention involved and as such the provisions of section 194J were not applicable on payments of roaming charges made by the Assessee to other telecom operators.

DECISION

36. We have carefully considered the arguments of the Ld. Counsel for the assessee as well as of the learned CIT-DR and have also gone through the written submissions filed by the parties and judgments placed in support of their arguments. We shall first deal with the issue whether the Assessee was liable to withhold tax on discounts offered on sale of pre-paid sim services.

37. At the outset, we find merit in the contention of the Ld. Counsel of the Assessee that in the absence of any adverse judgment by the Hon'ble Jurisdictional High Court, i.e., the Hon'ble High Court of Punjab & Haryana, there being divergence of judicial opinion on the subject matter, a view in favour of the Assessee has to be taken. It has already been brought to our attention that a Coordinate Bench of this Tribunal in the case of Idea Cellular itself in ITA No. 852/Delhi/2015 vide order dated 1. 05.2018, has decided the issue in favour of the Assessee noting that in the absence of any judgment of the Jurisdictional High Court, i.e., the Hon'ble High Court of Punjab & Haryana, a view in favour of the Assessee have to be taken. The relevant portion of the Coordinate Bench's Judgment is reproduced as under:

"We have heard both the parties and perused all the records. The

first issue on which assessee was held by the Revenue as 'assessee-in-default' is for discount/commission on sale of prepaid sim cards. The issue contested herein was decided against the assessee by the Hon'ble Delhi High Court in case of the assessee's own case in CIT vs. Idea Cellular Ltd. for A.Ys 2003-04 and 2004-

5. But, in case of Bharati Airtel Limited vs. DCIT (2014) (372 ITR 33), Hon'ble Karnataka High Court and in assessee's own case (87 taxmann.com 295) Hon'ble Rajasthan High Court decided this issue in favour of the assessee. As per Ld. AR, the order u/s 201 of the Act was passed by ITO TDS, Rohtak and thus, the Hon'ble Punjab and Haryana High Court which has necessary jurisdiction. After looking into the address of the assessee, the assessee's address is at Noida, Uttar Pradesh. Thus, in both these circumstances the jurisdictional High Court will not be the Hon'ble Delhi High Court. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of CIT vs. Vegetable Products Ltd. 88 ITR 192 wherein it is held that if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted. In absence of any decision of the Hon'ble Punjab and Haryana High Court as well as the Hon'ble Allahabad High Court on this issue and in view of conflicting decisions of other High Courts, following the ratio of the Hon'ble Apex Court, the view favourable to assessee is upheld. Hence assessee cannot be deemed to be an 'assessee-in-default' on discount/commission of sale of prepaid sim cards. Therefore, Ground No. 2 of the assessee's appeal is allowed."

38. While coming to the above conclusion Coordinate Bench has noted that the issue was decided in favour of the Assessee by Karnataka High Court and since the orders under Section 201 of

the Income Tax Act were passed by the ITO TDS Rohtak the Hon'ble Punjab & Haryana High Court had the necessary jurisdiction. In paras 7 & 8 of their order the Coordinate Bench while relying on the Judgment of the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Limited (88 ITR 192) decided the issue in favour of the Assessee. We find that the above decision was rendered in the case of Idea Cellular Limited itself for the Haryana Circle in-spite of the contrary decision of the Delhi High Court in the case of that Assessee. It is a settled position in law that where two contrary decisions of the High Courts are available, the view taken in favour of the Assessee is to be adopted and applied. Based on the above and on this short ground itself the appeal of the Assessee is capable of being allowed.

39. Even otherwise, on merits we find that the commercial arrangement between the Assessee and its distributors had undergone a change with effect from 01.01.2007 and under the new commercial arrangement the relationship between the Assessee and the distributor's is clearly based on principal to principal basis and hence, the earlier judgments would not apply. Having carefully considered the written submissions of the Ld. DR dated 28.3.2019, 16.7.2019 and 24.9.2019 and the rejoinder made by the Ld. Counsel of the Assessee, we find that the commercial arrangements between the Assessee and distributors had significantly changed w.e.f. 2007. The new arrangements between the Assessee and the distributors were in fact in the nature of principal to principal given that all risk in the services tickets, once having sold to the distributors, passed to the distributors. Under the new arrangement, Vodafone Essar Digilink Limited, Haryana circle, transferred its prepaid talk time to the distributors

at a discount and the distributors in turn distributed the same to the retailers, the retailers thereafter transfer the same to the ultimate subscribers. At each level of the distribution, the party distributing the prepaid talk time retains a margin for its risk and efforts, while Vodafone Essar Digilink Limited, Haryana circle assumed the responsibility for the provision of services to the subscribers. Accordingly, post January 2007, the assessee also accounted for revenues on the basis of consideration received from the distributors, i.e., the price on which the prepaid talk time was transferred to the distributor. From the terms of condition mentioned in the new agreement the gist of which has been dealt with in para 20 herein fore it is quite evident that the relationship is no longer agent - principal relationship. The comparison and the differences between earlier agreements have been highlighted above which clearly shows the changes and how it has transformed to principal to principal relationship.

40. We also find support from the decision of the Kolkata Bench of Tribunal in the Assessee's case where the Bench has taken into note that change of commercial arrangement and had decided issue in favour of the Assessee, while holding that the discount offered on some of the prepaid services did not partake the character of commission under Section 194H of the Act and hence there is no obligation to withhold tax on such discounts on pre-paid services. The relevant para's read as follows:

"We have heard rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. From the foregoing discussion, we find that the AO has treated the discount given by the assessee to its distributors on the sale of recharge

coupons/ starter pack as commission expenses. Therefore the AO was of the view that the assessee was liable to deduct the TDS under section 194H of the Act. On the contrary the assessee treated the aforesaid transaction as sale at a price net of discount in the books of accounts. The ld. CIT (A) also confirmed the order of AO after having reliance in the case of Bharati Cellular Limited (supra).

9.1 Now the issue before us arises for our adjudication so as to whether the discount given by the assessee is in the nature of commission in the given facts & circumstances. From the submission of the Ld. AR for the assessee, we find that the transaction of recharge coupons was treated as sale in the books of accounts which was shown net of discounts in the books of accounts. In this connection we find that the agreement made between the assessee and the distributor was for the sale of recharge coupons and not the agreement for the commission. The relevant portion of agreement has already been discussed in the preceding paragraph and the same is not reproduced here for the sake of brevity. On perusal of the agreement it can be inferred that the transaction between the assessee and the distributor was based on principal to principal basis and which is in the nature of purchase and sale transaction. There was no clause in the agreement suggesting that the assessee is liable for the payment of the commission to the distributors. The distributor was authorized to sale the prepaid recharge coupons at a price of its/ his choice but not exceeding MRP determined by the assessee. We also find that all the risks & rewards attached with the product were shifted to the distributor. Thus we hold that there was no agreement between the assessee and the distributor as of principal and agent.

9.2 We also find that the business model of the assessee for the prepaid mobile connections and post paid mobile connections are different. In case of post paid connections the assessee is paying commission to the distributors against certain services rendered by them and therefore the TDS was being deducted. Thus according to the AO the TDS provisions should have also been applied to the discount offered by the assessee to the distributor of the prepaid connections which in our considered view was based on wrong assumptions of facts. In this connection, we find that under the post-paid connection there are certain services rendered by the assessee such as collection of documents for proof of identity, delivery of SIM cards, collection of charges etc. Against these services the distributors are paid the amount of agreed commission by the assessee after deducting TDS u/s 194H of the Act. However, we find that in case of prepaid connection the recharge coupons are sold to the distributors on outright sale basis at a discounted price. The amount of discount is not recorded in the books of accounts. Therefore we hold the transaction between the assessee and prepaid distributor for recharge coupons is nature of sale & purchase. Thus amount of discount cannot be equated with the commission as envisaged under section 194H of the Act. Similarly we find that the ownership of the recharge coupons gets transferred to the distributor on the sale of recharge coupons. In this connection, we also rely in the case of Bharti Airtel Limited Vs. CIT & ANR. reported in 372 ITR 33 (Kar) (supra) where the Hon'ble Karnataka High Court has decided the issue in favour of assessee. Similarly Hon'ble Rajasthan High Court in the case of various parties where the assessee was also a party has decided the issue in favour of assessee on the identical facts & circumstances in ITA No. 1/2014

& ITA No. 4/2014 vide order 11/07/2017 (supra). The ld DR has not brought anything contrary to the arguments of ld AR. Therefore we have no alternate except to follow respectfully the ratio laid down by the Hon'ble Karnataka High Court and Rajasthan High Court in the case of Bharti Airtel Limited Vs. CIT (supra) and in the case of various assessee's where the assessee was also a party i.e. Vodafone Mobile Services Limited (supra). Hence, we have no hesitation in reversing the order of authorities below. Hence this ground of appeal of the assessee is allowed.

10. As we have already held that the provisions of TDS under section 194H of the Act are not attracted on the sale of recharge coupons for the prepaid talk time to the distributors and accordingly the assessee cannot be treated as assessee in default for non deduction of TDS u/s 201 of the Act. Thus, other grounds raised by the assessee become academic in nature and therefore do not require separate adjudication. Hence, these grounds become infructuous and accordingly being dismissed."

41. We find that the facts of the present case are identical to that considered by the Kolkata Bench of the Tribunal in the Assessee's own case. We do not find any merit in the Revenue's plea that the decision of Delhi High Court is applicable in the present case. The Hon'ble Punjab & Haryana High Court has already settled this issue of jurisdiction in the decision of CIT Vs. Motorola India Limited (326 ITR Page 156), where the Hon'ble High Court held that it is the situs of AO at the time when Assessment was framed which would be determinative of deciding the issue of the High Court's appellate jurisdiction. On the facts of the present case it is not in dispute that the impugned orders were passed by the Income Tax Officer (TDS) Karnal. The Ld. DR had also pleaded

that since the Assessee had merged with Idea Cellular, the decision of the Delhi High Court should be applied. However, we find no merit in this contention since the way the position stands today the resulting company is Vodafone Idea Ltd. having jurisdiction in Mumbai. On that count also, the issue is covered in favour of the Assessee by the decision of the Coordinate bench of the Mumbai Tribunal in the case of Tata Teleservices Ltd. Vs. ACIT (ITA 2043/Mum/2014 - decision dated 27.5.2016) and ACIT Vs. Reliance Communications Infrastructure Ltd. (ITA 4677/Mum/2012 – decision dated 23.3.2016).

42. Be that as it may, since the orders u/s 201 were passed by the ITO Karnal, it is clear that the Jurisdictional High Court being the Hon'ble Punjab & Haryana High Court would have the appellate jurisdiction over the matter. Thus, while respectfully following the decision of the Coordinate Bench in case of DCIT Vs. Idea Cellular Limited (decision dated 01/05/2018 in ITA No. 852/Delhi/2018) this issue is decided favour of the Assessee and grounds are accordingly allowed.

43. Accordingly, we hold that there was no requirement for the Assessee to withhold taxes on the amount of discounts offered by it on pre-paid services under section 194H of the IT Act and consequentially the Assessee could not be treated as an assessee-in-default in terms of section 201 of the IT Act.

44. The other issue, which is relevant for the Assessment Order 2010-11 and 2011-12 is whether the Assessee was in default in respect of the roaming charges and consequentially whether the Assessee was required to withhold tax under Section 194J of the Act. We find that this issue has already decided in favour of the

Assessee in the Assessee own case by the Kolkata Tribunal in the case of Vodafone East Limited vs. ACIT (2015) (43) ITR (Trib.) 551). We also find that this issue was also considered by the Coordinate Bench in the case of DCIT Vs. Idea Cellular (ITA 852/Delhi/2015) and the issue has been decided in favour of the tax payer to the extent that payments for roaming charges do not partake the character of fees for technical services and hence there is no obligation to withhold tax on such payment under Section 194J of the Act. No contrary decision has been brought to our attention by DR and respectfully following the Coordinate Bench decision as noted above, the issue is also decided in favour of the Assessee.

45. The last issue is in respect of levy of interest under the provisions of 201(1A) of the Act. Since we have already held that the Assessee was not an assessee-in-default in terms of Section 194H and Section 194J of the Act, this ground of appeal is academic and disposed of as such.

46. In conclusion, the appeals of the Assessee are allowed.

Order pronounced in the Open Court on 20th January, 2021.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 20th January, 2021

PKK: