



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 14th day of August, 2014

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MRS. JUSTICE RATHNAKALA

ITA Nos.637-644 of 2013

c/w

ITA Nos.256-263 of 2012; ITA No.158 of 2013

ITA No.159 OF 2013; ITA No.160 OF 2013

ITA No.161 OF 2013; ITA No.162 OF 2013;

ITA No.163 OF 2013

ITA Nos.637-644 of 2013

BETWEEN:

M/S BHARTI AIRTEL LIMITED
55, DIVYASHREE CHAMBERS
BANNERGHATTA ROAD
BANGALORE-560029
(REPRESENTED BY ITS
HEAD LEGAL & REGULATORY
OF KARNATAKA CIRCLE,
SRI K G SURESH KUMAR
AGED ABOUT 48 YEARS
S/O GOPINATHAN NAIR

...APPELLANT

(BY SRI CHYTHANYA K K, ADVOCATE)

AND:

THE DEPUTY COMMISSIONER
INCOME TAX
CIRCLE 18 (1)
4TH FLOR, HMT BHAVAN
59, BELLARY ROAD
BANGALORE-56032

...RESPONDENT

(By Sri K V ARAVIND, ADVOCATE)

ITA is filed under Section 260-A of I.T. Act, 1961, arising out of order dated 23/08/2013 passed in ITA No.230 to 233/Bang/2011 and ITA.738 to 741/Bang/2013, for the Assessment Year 2005-06 to 2008-09, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order of the ITAT, Bangalore, B Bench in ITA Nos.230 to 233/Bang/2011 and ITA.738 to 741/Bang/2013 dated 23/08/2013.

ITA Nos.256-263 of 2012

BETWEEN:

M/S VODAFONE ESSAR SOUTH LTD
(NOW KNOWN AS
VODAFONE SOUTH LTD)
MARUTHI INFOTECH CENTRE
NO.11/1& 12/1 KORAMANGALA
INTERMEDIATE RING ROAD
AMAR JYOTHI LAYOUT
BENGALURU-560071
REPRESENTED BY ITS
SENIOR MANAGER-LEGAL
SRI C VIVEKANANDAN
AGED ABOUT 38 YEARS
S/O SRI M CHANDRAN

...APPELLANT

(By Sri VENKATARAMAN, SR. COUNSEL A/W SRI
M.V.SHESHACHAL, SRI PARTHASARATHI & SRI
MALLAHARAO, ADVOCATES)

AND:

THE DEPUTY COMMISSIONER
OF INCOME-TAX (TDS)
CIRCLE-18 (1)
4TH FLOOR, HMT BHAVAN
59 BELLARY ROAD
BANGALORE-560032

...RESPONDENT

(By Sri K V ARAVIND, ADVOCATE)

ITA is filed under Section 260-A of I.T. Act, 1961,
arising out of Order dated 27/03/2012 passed in ITA
Nos.241 to 248/Bang/2011, for the Assessment Years 2005-
06 to 2008-2009, praying to: (i) formulate the substantial
questions of law stated therein, (ii) allow the appeal and set-
aside the order of the ITAT dated 27/03/2012 bearing ITA
Nos.241 to 248/Bang/2011.

ITA No.158 of 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY REGISTERED
UNDER THE PROVISIONS
OF COMPANIES ACT, 1956,
HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOSUR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN BY ITS

AUTHORISED SIGNATORY
SAFEER AHMAD
PAN:AAACT2438A

...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND:

1. THE COMMISSIONER OF
INCOME TAX (TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),
4TH FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA is filed under Section 260-A of I.T. Act, 1961, arising out of Order dated 27/11/2012 passed in ITA No.1285/Bang/2012, for the Assessment Year 2006-07, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order dated 27/11/2012 in ITA No.1285/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1) of the Income Tax Act, 1961, in the interest of justice and equity.

ITA No.159 OF 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY REGISTERED
UNDER THE PROVISIONS
OF COMPANIES ACT, 1956,
HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOSUR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN BY ITS
AUTHORISED SIGNATORY
SAFEER AHMAD
PAN:AAACT2438A

...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND:

1. THE COMMISSIONER OF
INCOME TAX(TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),
4TH FLOOR, HMT BHAVAN,
GANGANAGAR,
59 BELLARY ROAD,
BANGALORE-560032

...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA is filed under Section 260-A of I.T. Act, 1961, arising out of Order dated 27/11/2012 passed in ITA No.1286/Bang/2012, for the Assessment Year 2006-07, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order dated 27/11/2012 in ITA No.1286/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1A) of the Income Tax Act 1961, in the interest of justice and equity.

ITA No.160 OF 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY REGISTERED
UNDER THE PROVISIONS
OF COMPANIES ACT, 1956,
HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOSUR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN BY ITS
AUTHORISED SIGNATORY SAFEER AHMAD
PAN:AAACT2438A ...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND:

1. THE COMMISSIONER
OF INCOME TAX(TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),
4TH FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032 ...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA is filed under Section 260-A of I.T. Act, 1961, arising out of Order dated 27/11/2012 passed in ITA No.1287/Bang/2012, for the Assessment Year 2007-08, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order dated 27/11/2012 in ITA No.1287/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1A) of the Income Tax Act 1961, in the interest of justice and equity.

ITA No.161 OF 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY REGISTERED
UNDER THE PROVISIONS
OF COMPANIES ACT, 1956,

HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOSUR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN BY ITS
AUTHORISED SIGNATORY
SAFEER AHMAD
PAN:AAACT2438A

...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND:

1. THE COMMISSIONER OF
INCOME TAX (TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032
2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),
4TH FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA filed Under Sec.260-A of I.T. Act, 1961, arising out
of Order dated 27/11/2012 passed in ITA
No.1288/Bang/2012, for the Assessment Year 2007-08,
praying to: (i) formulate the substantial questions of law
stated therein, (ii) allow the appeal and set aside the order

dated 27/11/2012 in ITA No.1288/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1A) of the Income Tax Act 1961, in the interest of justice and equity.

ITA No.162 OF 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY
REGISTERED UNDER THE
PROVISIONS OF COMPANIES ACT, 1956,
HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOUSR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN BY ITS
AUTHORISED SIGNATORY
SAFEER AHMAD
PAN:AAACT2438A

...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND:

1. THE COMMISSIONER OF INCOME TAX(TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032
2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),

4TH FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032 ...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA filed Under Sec.260-A of I.T. Act, 1961, arising out of Order dated 27/11/2012 passed in ITA No.1289/Bang/2012, for the Assessment Year 2008-09, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order dated 27/11/2012 in ITA No.1289/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1A) of the Income Tax Act 1961, in the interest of justice and equity.

ITA No.163 OF 2013

BETWEEN:

M/S TATA TELESERVICES LTD
A LIMITED COMPANY REGISTERED
UNDER THE PROVISIONS
OF COMPANIES ACT, 1956,
HAVING ITS OFFICE AT A BLOCK,
SOLICON TERRACES, 30/1,
HOSUR MAIN ROAD,
KORMANGALA,
BANGALORE-560095
REPRESENTED HERIEIN
BY ITS AUTHORISED SIGNATORY
SAFEER AHMAD
PAN:AAACT2438A

...APPELLANT

(By Sri S.S. NAGANAND, SR. COUNSEL FOR M/s. JUST
LAW, ADVOCATES)

AND

1. THE COMMISSIONER OF
INCOME TAX(TDS)
3RD FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032

2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 18(1),
4TH FLOOR, HMT BHAVAN,
GANGANAGAR, 59 BELLARY ROAD,
BANGALORE-560032 ...RESPONDENTS

(By Sri INDER KUMAR, SR. COUNSEL FOR SRI E I
SANMATHI, ADVOCATE)

ITA filed Under Sec.260-A of I.T. Act, 1961, arising out of Order dated 27/11/2012 passed in ITA No.1290/Bang/2012, for the Assessment Year 2008-09, praying to: (i) formulate the substantial questions of law stated therein, (ii) allow the appeal and set aside the order dated 27/11/2012 in ITA No.1290/Bang/2012 passed by the ITAT, Bangalore and also set aside the order dated 15/02/2011 and 24/11/2008 in respect of liability arising out of order passed U/Sec.201(1A) of the Income Tax Act 1961, in the interest of justice and equity.

These ITAs coming on for hearing this day,
N. KUMAR J delivered the following:

J U D G M E N T

As common questions of law are involved in all these appeals, they are taken up together for consideration and disposed of by this common order.

BRIEF FACTS

2. In **ITA No. 158/2013**, the assessee is M/s Tata Teleservices Limited. It is engaged in the business of providing telecommunication services across the country. They provide telecommunication services, sell service products such as Starter Kits and the Recharge Coupon Vouchers. Recharge Coupon Vouchers (RCVs) are the prepaid vouchers used for selling talk time to the pre-paid subscribers. Starter Kits are the new connections containing 'Removable User Identity Module' for providing the telecommunication connection. The assessee has entered into agreement with its Channel Partners. The second respondent conducted a survey under Section 133A of the Income Tax Act, 1961 (for short hereinafter referred to as

‘the Act’) on 29.2.2008. After hearing the explanation of the assessee, the second respondent opined that the Channel Partners are the Commission Agents of the assessee acting on fixed margins and fixed responsibilities, the difference between MRP and the selling price constitutes commission payment. Therefore, the assessee failed to deduct tax at source under Section 194H of the Act. Accordingly, an order came to be passed on 24.11.2008 under Section 201 (1) of the Act treating the assessee as assessee in default. Interest was also levied under Section 201 (1A) of the Act.

3. In **ITA Nos. 637-644/2013** the assessee is M/s Bharti Airtel Limited. The assessee is a Public Limited Company engaged in the business of telecom operations. A survey was conducted by the respondent in the business premises of the assessee to verify the compliance of TDS provisions by the assessee for the assessment years 2005-06 to 2008-09 on 27.2.2008. Here also after considering the terms and conditions stipulated in the agreement entered

into between the assessee and the distributors, the assessing authority was of the view that there is a principal and agent relationship between the two parties and, therefore, discount/commission made to such parties was liable for deduction of tax at source under Section 194H of the Act.

4. In **ITA Nos. 256-263/2012**, the assessee is M/s Vodafone Essar South Limited. It is in the business of cellular services. In the course of its business, the assessee appoints distributors to purchase starter packs (SIM cards), refill packs (refill/re-charge slips, refill/recharge cards, etop-up, etc.), etc., in bulk and then, sells them to sub-dealers or retailers. There was a survey conducted by the authorities to find out the compliance of TDS. After going through the agreement entered into between the assessee and its dealers, the assessing authority was of the view that the said agreement establishes a principal and agent relationship between the two parties and, therefore, any

discount/commission made to such parties was liable for deduction of tax at source under Section 194H of the Act.

5. The said orders were challenged by the assesseees by way of an appeal before the Commissioner of Income Tax (Appeals). The appeals came to be dismissed. Aggrieved by the said order, they preferred a second appeal to the Tribunal which also came to be dismissed. Aggrieved by the said order, the assesseees are before this Court.

6. We have heard the learned Counsel appearing for the parties.

RIVAL CONTENTIONS

7. **Sri S.S. Naganand**, the learned Senior Counsel appearing for M/s Tata Teleservices Limited contended that, the transaction between the assessee and the Channel Partners is on the basis of principal to principal basis. The terms of the agreement show that on sale of SIM cards, the

Channel Partner becomes the absolute owner of the SIM cards and the assessee has not retained any title over the property. In the invoices raised, it is categorically mentioned what is the MRP of such SIM cards, what is the trade discount to which the Channel Partner is entitled to. It is after giving deductions to the said discount, the amount due from the Channel Partner as purchase price of the SIM cards is mentioned. On payment of such amount, the SIM card is sold, sales tax is paid on that consideration. Therefore, in the case of prepaid services it is a case of out and out sale. No relationship of principal and agent exists. The assessee has not paid any amount to the Channel Partner and, therefore, Section 194H of the Act is not attracted. The reliance of the judgment of the Kerala High Court as well as the Delhi High Court has no application to the facts of this case.

8. **Sri Chythanya**, learned counsel appearing for Bharti Airtel Limited submitted that the terms of the

agreement between the parties had not created any relationship of principal and agent. On the contrary, it makes it clear that there is a relationship between principal and principal. What is sold by the assessee to the distributor is the right to receive the services. In the invoice raised, the MRP and the amount of discount are mentioned. M.R.P minus the discount is the sale price. In the accounts, there is no reference to this discount portion at all. Under the terms of the agreement, there is no liability on the part of the assessee to make any payment to the distributor. On the date of sale, no income has accrued to the distributor. It is only if and when the distributor sells the sim-cards/pre-paid/e-coupon/e-topups either to the sub-distributor or to the retailer, he may earn income, which is chargeable to tax. Therefore there is no liability cast on the assessee under Section 194H of the Income Tax Act to deduct tax at source on a future income to be earned by the distributor and therefore all the three authorities were in error in holding it otherwise.

9. **Sri N. Venkataraman**, learned Senior Counsel appearing for Vodafone submitted that in order to find out the application of Section 194H of Income Tax Act, whether the ingredients of the aforesaid Section exist or not is to be looked into and not the relationship as explained in the explanation. Admittedly, the telephone is a service. Sim-cards/pre-paid/e-coupon/e-topups though are not goods, they confer a right to receive services. A service provider, in order to market his products, has to necessarily depend on a supply agent. The right to receive service can be sold. The Distributor after purchase of the sim-cards/pre-paid/e-coupon/e-topups, is entitled to sell the same at a maximum price prescribed by the assessee. The difference between the purchase price and the sale price is his income. In the books of the assessee, there is no reference to the said discount at all. The three judgments on which reliance is placed by the lower authorities in denying the relief proceeds on the assumption that service cannot be sold. Article XXVIII General Agreement on Trade in Services, is a part of GAT. It

defines supply of service which includes the production, distribution, marketing, sale and delivery of a service. It recognizes selling and marketing of services and therefore, once service is sold to the distributor, then the relationship of principal and agent is not necessary. It would be a relationship of principal to principal and in that view of the matter, as the facts of the case do not fall within the scope of Section 194H, there is no liability on the part of the assessee to deduct tax from an income, which has not arisen.

10. Per contra, **Sri Indra kumar**, learned Senior counsel appearing for the Revenue sought to support the impugned orders. He pointed out from the judgment of the Kerala High Court where the judgment of the Tribunal has been extracted, which shows that when the sim-cards/pre-paid/e-coupon/e-topups is given to the distributor, the assessee-company was crediting the sales account with Rs.100/-. Assessee was debiting the cash amount with Rs.80/- though by paying cash to the distributor. The

assessee was paying a commission amount of Rs.20/-. This is the commission enjoyed by the distributor. In the said case, it was held that there existed a relationship of principal and agent. That is Rs.20/- represented the commission. Therefore, he submitted that in the instant case, the assessee being the same, the contention of the assessee that there is no relationship of principal and agent is factually incorrect and therefore, he submits that the authorities were justified in passing the impugned order. Consequently, he contended that the terms and contents of the agreement between the parties clearly demonstrate that neither these channel partners nor the distributors had any freedom in the matter of selling the products, which is supplied to them by the assessee. There was a complete control, which will clearly establish that it is not in a relationship of principal and principal but it is a relationship of principal and agent. When three fact finding authorities have recorded a question of fact, no case for interference is made out. He also submitted that as is clear from the invoice raised, though the

price of the sim-cards/pre-paid/e-coupon/e-topups is Rs.100/-, it is sold for Rs.80/-, Rs.20/- being the discount given to the distributor, which is in the nature of a commission paid by the assessee to the distributor and therefore Section 194H is attracted as rightly held by the three authorities and therefore, he submits that no case for interference is made out.

11. **Sri Venkataraman**, learned Senior counsel pointed out that the assessment year in the Kerala High Court's case was 2007-2008. However, having regard to the accounting practice followed by the assessee, they have mentioned the contents of the invoice and produced their books of accounts also. But nowhere, it is shown that Rs.20/- is paid by the assessee to the distributor. However, subsequently, after understanding the law for the subsequent years, there is no mention of the trade discount paid to the distributor in their accounts. It is treated as an out and out sale between principal and principal and what is

credited to the account of the distributor is only the sale price and therefore, the said judgment has no application to the present case.

SUBSTANTIAL QUESTIONS OF LAW

12. In the light of the aforesaid facts and rival contentions, the substantial questions of law, which arise for our consideration in all these three appeals are as under:

- (1) *Whether the word 'income' which is defined under Section 2(24) of the Income Tax Act, 1961 can be given a wider meaning by the Department so as to include within its scope also a 'trade discount' for bulk sales such as discount allowed by the assessee to its distributors (channel partners) on the bulk purchases made by them of Starter-kits (SUKs), Recharge Vouchers (RCVs) and prepaid cards ?*
- (2) *Whether Section 194H of the Income Tax Act is attracted to sale of RCVs, prepaid cards and starter kits and the trade discount allowed by appellant to its distributors*

*would amount to payment of "Commission"
requiring deduction of tax at source?*

TELECOMMUNICATION

13. The Apex Court in the case of ***Bharat Sanchar Nigam Limited and another Vs. Union of India and others*** reported in **282 ITR 273** was called upon to decide the question as to what is the nature of the transaction by which mobile phone connections are enjoyed. Whether it is a sale or is it a service or is it both? Answering the said question at para 82 of the said judgment, it was held that telephone service is nothing but a service. There is no sales element apart from the obvious one related to the hand set, if any. Dealing with the question whether a sim card was "goods" within the definition of the word in the Sales Tax Act it was held that what a simcard represents is ultimately a question of fact. In determining the issue, the Assessing Authorities will have to keep in mind the following principles:

“If the SIM card is not sold by the assessee to the subscribers, but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon.”

14. As there was no sufficient material on the basis of which they could reach a decision, the matter was remitted back to the respective High Court to record a finding of fact and then decide the case on merits. The dispute before the Supreme Court was whether sales tax is payable on the value of the SIM cards to the State Government or service tax is payable to the Central Government. After remand, before the Kerala High Court, the State Government gave up its claim for sales tax. Therefore, the only question, which arose for consideration before the Kerala High Court was whether the value of the

SIM cards form part of taxable service. After examining the functioning of the SIM card, the Kerala High Court held that the SIM card is a computer chip having its own SIM number on which the telephone number can be activated. The SIM card is a device through which the customer gets a connection from the mobile tower. Unless it is activated, the service provider cannot give service connection to the customer. Signals are transmitted and conveyed through towers and through SIM card communication signals reach the customer's mobile instrument. In other words, it is an integral part required to provide mobile service to the customer. The customer cannot get service without the SIM card and it is an essential part of the service. The SIM card has no intrinsic value or purpose other than use in a mobile phone for receiving mobile telephone service from the service provider. Therefore, they accepted the stand of the BSNL that it is not goods sold or intended to be sold to the customer but supplied as a part of service. Consequently,

they held the value of SIM card supplied by the BSNL forms part of taxable service on which service tax is payable.

15. The said order was challenged before the Apex Court by the assessee. The Apex Court in the case of ***Idea Mobile Communication Limited Vs. Commissioner of Central Excise and Customs, Cochin*** reported in **(2011)43 VST 1(SC)** held that the position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards the SIM cards will form part of the taxable value for levy of service tax, for the SIM cards are never sold as goods independent of the services provided. They are considered as part and parcel of the services provided and the dominant purpose of the transaction is to provide services and not to sell the materials, i.e., SIM card which on its own but without the service would hardly have any value at all. Thus, it was established from the records and facts of the case that the value of the SIM cards formed part of activation charges as no activation was possible

without a proper functioning of a SIM card and the value of the taxable service was calculated on the gross total amount received by the operator from the subscribers. Therefore, the judgment of the Kerala High Court was upheld.

16. It is in this background we have to understand the telecommunication services provided to the customers by the assessee. It is in two models.

(1) Prepaid: *Under the prepaid model, the subscriber is required to take a mobile telephone connection, through a distributor, from a telecom operator. Under this model, the subscriber pays for the talk time in advance (paid through a distributor) and its balance depletes as and when he uses it. When the prepaid amount is used fully, the subscriber is required to get his 'service/talk time' re-charged, for which he buys recharge voucher for a chosen amount/validity. He pays for the talk time purchased in advance. This is called prepaid model.*

(2) Postpaid: *In the postpaid model, the subscriber signs up an agreement with the telecom operator seeking a telephone connection. He uses the connection and is subsequently billed for the usage on monthly basis (per his billing cycle). The subscriber here makes the payment to telecom company post usage of telecom services, hence the model is called postpaid service.*

In the pre-paid model customer would first re-recharge his connection with the required amount and then, use it for voice or non-voice requirements. As and when the balance available is exhausted after using up, then customer has to re-charge again for a denomination for which Re-charge Vouchers are made available by the telecom operator. In Postpaid model, customer would be permitted to use the services and billed subsequently as per Billing Cycle. In this situation, customer need not re-charge.

STATUTORY PROVISIONS

17. In these cases we are concerned with only pre-paid products. In all these three sets of cases, an invoice is raised which apart from other particulars, contain the unit price, discount offered, net value of the unit after such discount and the sales tax paid on that net value and the maximum retail price of the unit for which the dealer could sell the said units. The dealer/distributor pays to the assessee the net value of the unit. The question for consideration is whether the assessee is liable to deduct tax at source on the discount amount shown in the said invoice.

18. The claim of the Revenue is under Section 194H of the Act, which falls in chapter XVII of the Act. Chapter XVII of the Act deals with collection and recovery of tax. Section 190(1) of the IT Act reads as under:-

“190. Deduction at source and advance payment (1) *Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on*

such income shall be payable by deduction or collection at source or by advance payment or by payment under sub-section (1A) of Section 192, as the case may be, in accordance with the provisions of this Chapter.”

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of Sub-section (1) of Section 4.”

19. Section 190 of the Act, provides for deduction at source and advance payment. Section 190(2) of the IT Act makes it very clear that the TDS provisions are subservient and subordinate to the charging provisions of Section 4 of the IT Act. Section 194H reads as under:-

“194H. Commission or brokerage – *Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D or brokerage, shall, at the time of credit of*

such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten per cent :

Provided *that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed five thousand rupees :*

Provided further *that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:*

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.

Explanation.—For the purposes of this section,—

(i) “commission or brokerage” includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

(ii) the expression “professional services” means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) *the expression “securities” shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) ;*

(iv) *where any income is credited to any account, whether called “Suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.”*

20. Section 4 of the Act provides for basis of charge.

Section 4(1) of the Act reads as under:

“4. Charge of Income Tax. (1) *Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act] in*

respect of the total income of the previous year of every person;

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-Section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provisions of this Act.”

JUDGMENTS

21. Section 194 H of the Act, has been the subject matter of interpretation by various High Courts across the Country. We have two streams of judgments delivered in favour of and against the revenue. The judgments in favour of the assessee are as under:

22. The High Court of Bombay in the case of **COMMISSIONER OF INCOME TAX vs QATAR AIRWAYS** [(2011) 332 ITR 253 dealing with Section 194H of the Act held as under : -

“3. Be that as it may, for section 194H to be attracted, the income being paid out by the assessee must be in the nature of commission or brokerage. Counsel for the Revenue contended that it was not the case of the Revenue that this difference between the principal price of the tickets and the minimum fixed commercial price amounted to payment of brokerage. We find however, that in order to deduct tax at source the income being paid out must necessarily be ascertainable in the hands of the assessee. In the facts of the present case, it is seen that the airlines would have no information about the exact rate at which the tickets were ultimately sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price and it would be impracticable and unreasonable to expect the assessee to get a feed back from their numerous agents in respect

of each ticket sold. Further, if the airlines have discretion to sell the tickets at the price lower than the published price then the permission granted to the agent to sell it at a lower price, according to us, can neither amount to commission nor brokerage at the hands of the agent. We hasten to add any amount which the agent may earn over and above the fixed minimum commercial price would naturally be income in the hands of the agent and will be taxable as such in his hands. In this view of the matter, according to us, there is no error in the impugned order and the question of law as framed does not arise.”

23. The High Court of Gujarat in the case of **AHMEDABAD STAMP VENDORS ASSOCIATION vs UNION OF INDIA [(2002) 124 TAXMAN 628(GUJ)]** held as under : -

“18. It is also not possible to accept the contention of Mr. Naik for the Revenue that the definition of "commission or brokerage" as contained in the Explanation to Section 194H is so wide that it would include any payment receivable, directly or indirectly, for services in

the course of buying or selling of "goods" and that, therefore, the discount availed of by the stamp vendors constitutes commission or brokerage within the meaning of Section 194H. If this contention were to be accepted, all transactions of sale from a manufacturer to a wholesaler or from a wholesaler to a semi-wholesaler or from a semi-wholesaler to a retailer would be covered by Section 194H. To fall within the aforesaid Explanation, the payment received or receivable, directly or indirectly, is by a person acting on behalf of another person (i) for services rendered (not being professional services), or (ii) for any services in the course of buying or selling of goods, or (iii) in relation to any transaction relating to any asset, valuable article or thing. The element of agency is to be there in case of all services or transactions contemplated by Explanation (i) to Section 194H. If a car dealer purchases cars from the manufacturer by paying price less discount, he would be the purchaser and not the agent of the company, but in the course of selling cars, he may enter into a contract of maintenance during the warranty period, with the customer (purchaser of the car)

on behalf of the company. However, such services rendered by the dealer in the course of selling cars does not make the activity of selling cars itself an act of agent of the manufacturer when the dealings between the company and the dealer in the matter of sale of cars are on "principal to principal" basis. This is just an illustration to clarify that a service in the course of buying or selling of goods has to be something more than the act of buying or selling of goods. When the licensed stamp vendors took delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities (buying from the Government and selling to the customers) can be termed as the service in the course of buying or selling of goods.

19. *In view of the above discussion, we uphold the contention urged on behalf of the petitioner's association that the discount made available to the licensed stamp vendors under the provisions of the Rules, does not fall within the expression "commission" or "brokerage" under Section 194H."*

24. This judgment was challenged by the revenue before the Apex Court. The Apex Court dismissed the appeal holding that they are satisfied that 0.50% to 4% discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said amount is in the nature of cash discount and, therefore, such a transaction is a sale and consequently Section 194H of the Act has no application. The said judgment is reported in [(2012) 348 ITR 378].

25. The High Court of Delhi in the case of **COMMISSIONER OF INCOME TAX vs MOTHER DAIRY INDIA LIMITED [(2013) 358 ITR 218 (DELHI)]** dealing with the question, whether difference between MRP and price which concessionaire paid to assessee was his income from business and it could not be categorized as commission within the meaning of Section 194H held as under:-

“12. The principal question that falls for consideration is whether the agreements between the assessee and the concessionaires gave rise to a relationship of principal to principal

or relationship of principal to agent. On a fair reading of all the clauses of the agreement as have been referred to in the orders of the Tribunal as well as those of the income tax authorities, we are unable to say that the view taken by the Tribunal is erroneous. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the concessionaire 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 of the Dairy. The clauses of the agreements show that there is an actual sale, and not mere delivery of the milk and the other products to the concessionaire. The concessionaire purchases the milk from the Dairy. The Dairy raises a bill on the concessionaire and the amount is paid for. The Dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that is to the account of the concessionaire and the Dairy is

not responsible for the same. These clauses have all been noticed by the Tribunal. The fact that the booth and the equipment installed therein were owned by the Dairy is of no relevance in deciding the nature of relationship between the assessee and the concessionaire. Further, the fact that the Dairy can inspect the booths and check the records maintained by the concessionaire is also not decisive. As rightly pointed out by the tribunal the Dairy having given space, machinery and equipment to the concessionaire would naturally like to incorporate clauses in the agreement to ensure that its property is properly maintained by the concessionaire, particularly because milk and the other products are consumed in large quantities by the general public and any defect in the storage facilities which remains unattended can cause serious health hazards. These are only terms included in the agreement to ensure that the system operates safely and smoothly. From the mere existence of these clauses it cannot be said that the relationship between the assessee and the concessionaire is that of a principal and an agent. That question must be decided, as has been rightly decided by the Tribunal, on the basis

of the fact as to when and at what point of time the property in the goods passed to the concessionaire. In the cases before us, the concessionaire becomes the owner of the milk and the products on taking delivery of the same from the Dairy. He thus purchased the milk and the products from the Dairy and sold them at the MRP. The difference between the MRP and the price which he pays to the Dairy is his income from business. It cannot be categorized as commission. The loss and gain is of the concessionaire. The Dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship. The supervision and control required in case of agency is missing.

13. *It is irrelevant that the concessionaires were operating from the booths owned by the Dairy and were also using the equipment and furniture provided by the Dairy. That fact is not determinative of the relationship*

between the Dairy and the concessionaires with regard to the sale of the milk and other products. They were licencees of the premises and were permitted the use of the equipment and furniture for the purpose of selling the milk and other products. But so far as the milk and the other products are concerned, these items became their property the moment they took delivery of them. They were selling the milk and the other products in their own right as owners. These are two separate legal relationships. The income-tax authorities were not justified or correct in law in mixing up the two distinct relationships or telescoping one into the other to hold that because the concessionaires were selling the milk and other products from the booths owned by the Dairy and were using the equipment and furniture in the course of the sale of the milk and other products, they were carrying on the business only as agents of the Dairy.

26. The judgments in favour of the Revenue are as under:

The revenue relied on the judgment of the Delhi High Court in the case of **COMMISSIONER OF INCOME TAX vs SINGAPORE AIRLINES LIMITED AND OTHERS [(2009) 224 CTR (DEL) 168]** where it was held as under : -

“24. The submission of some of the learned counsel for the assessee-airline that the monies retained in the form of supplementary commission are really in the nature of discount rather than commission is not tenable. The fact that this is a payment which the travel agent receives from the passenger by virtue of the sale of the Traffic Documents/Air Tickets of which the assessee is the proprietor at a point till the transaction is made would clearly establish that it is a commission as against the discount. The word „discount“ is normally used to describe a deduction from the full amount or value of something, especially a price (see Black’s Law Dictionary VIIth Edition page 477) whereas a commission is defined in Explanation (1) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the

assessee-airline. In view of the fact that the payment retained by the travel agent is inextricably linked to the sale of the traffic document/air ticket, it cannot but lead to a conclusion that the payment retained which is the supplementary commission, is a commission within the meaning of Section 194H of the Act. This is especially so, as indicated above, at no point in time the travel agent obtains proprietary rights to the Traffic Documents/Air Tickets. There is no value or price paid by him on which the travel agent gets a deduction. The price or value is received by the assessee-airline through the medium of the travel agent from the passenger which is also one of the facets of the services offered by the travel agent. The price or value of the Traffic Document received by the travel agent for and on behalf of the assessee-airline is held in trust. Thus the money retained by the travel agent is commission (supplementary commission) within the meaning of Section 194H of the Act. Therefore, for the assessee-airline to contend, as discussed hereinabove, that in so far as the first leg of the transaction is concerned whereby they pay standard commission to the travel agent on

which assessee-airline deduct tax at source, the relationship between the assessee-airline and the travel agent is that of principal and agent, whereas the money or monies which the travel agent retains over and above the net fare is not commission since the relationship transforms - from one which commences as a principal and agent relationship and ends up into that of a principal to principal relationship; is completely untenable as there are no two transactions in point of fact. The transaction is a singular transaction which is executed between the travel agent while acting on behalf of the principal airline in selling the traffic documents/ air tickets to a third party which is the passenger and thereby creating a legal relationship between the principal that is, the assessee-airline and the third party, which is the passenger. For any enforcement of rights emanating there from the principal would have the right to sue the passenger and similarly the passenger would have the right to sue the principal, that is, the assessee-airline.”

27. In the aforesaid judgment, the relationship of principal and agent was not in dispute. The Airline paid standard commission to the travel agent on which assessee-Airline deducted tax at source. The dispute was only in respect of the money or monies which the travel agent retains over and above the net fare, the question was whether it was a commission. The Delhi High Court held that, under an agreement only one relationship exists and transaction is a singular transaction which is executed between the travel agent while acting on the principal-Airline in selling the traffic document/air ticket to third party who is a passenger and, therefore, the second leg of transaction cannot be different from the first leg of the transaction.

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 pre-paid 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) aboverereferred 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 assessee 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.

FIRST PRINCIPLES

31. The Apex Court in the case of ***A.V.Fernandez Vs. State of Kerala***, reported in **1957 SCR 837** observed thus:

“If there is a liability to tax, imposed under the terms of the taxing statute, then follow the provisions in regard to the assessment of such liability. If there is no liability to tax there cannot be any assessment either.”

32. The Apex Court in the case of ***Bhavani Cotton Mills Ltd., vs. State of Punjab and another*** reported in **AIR 1967 SC 1616** observed thus:

“If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid because, if particular sales or purchases are exempt from taxation altogether they can never be taken into account at any stage for the purpose of calculating or arriving at the taxable turnover and for levying tax.”

33. The Apex Court in the case of ***GE INDIA TECHNOLOGY CEN. (P) LIMITED vs COMMISSIONER OF INCOME TAX [(2010) 327 ITR 456]*** in para 9 has held as under:-

“9..... the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the ITO (TDS). It is a

provision requiring tax to be deducted at source to be paid to the revenue by the payer who makes payment to a non-resident. Therefore, Section 195 has to be read in conformity with the charging provisions, i.e., section 4, 5 and 9. While interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated Code. Section 195 appears in Chapter XVII which deals with collection and recovery.”

34. The Apex Court in the case of **COMMISSIONER OF INCOME TAX, NEW DELHI vs ELI LILLY AND COMPANY (INDIA) (P.) LIMITED [(2009) 312 ITR 225]** has held as under:-

“..... the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are “chargeable to tax” under the Income-Tax Act. section

192 imposes statutory obligation on the payer to deduct TAS when he pays any income chargeable under the head “salaries”. Similarly, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum “chargeable under the provisions of the Act”, which expression, as stated above, do not find place in other sections of Chapter XVII. The provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act.....”

35. The Apex Court in the case of **DEPUTY COMMISSIONER OF SALES TAX (LAW) BOARD OF REVENUE (TAXES), ERNAKULAM vs ADVANI OORLIKON (P) LTD., [AIR 1980 SC 609]** explaining the meaning of discount held as under : -

“5.cash discount cannot be confused with trade discount. The two concepts are wholly distinct and separate. Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a

discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense. The outward invoice sent by a wholesale dealer to a retailer shows the catalogue price and against that a deduction of the trade discount is shown. The net amount is the sale price, and it is that net amount which is entered in the books of the respective parties as the amount reliable”.

Further it was held that,

7. Nor is there any question here of two successive agreements between the parties, one providing for sale of the goods at the catalogue price and the other providing for an allowance by way of trade discount. Having regard to the nature of a trade discount there is only one sale price between the dealer and the retailer, and that is the price payable by the retailer calculated as the difference between the catalogue price and

the trade discount. There is only one contract between the parties, the contract being that the goods will be sold by the dealer to the retailer at the aforesaid sale price.

36. The Apex Court in the case of **BHOPAL SUGAR INDUSTRIES LIMITED vs SALES TAX OFFICER [(1977) 6 CTR (SC) 284]** answering the question whether contract between the assessee and Caltex India was one of agency or sale held as under : -

“5. This question, therefore, will have to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the documents and the surrounding circumstances and having regard to the course of dealings between the parties.

6. while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe

the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. Thus the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent.”

37. The Constitution Bench of the Apex Court in the case of **PADMA SUNDARA RAO (DEAD) AND OTHERS vs STATE OF T.N. AND OTHERS [(2002) 3 SCC 533]** dealing with the question how the Court should understand the decision of the Court as precedents held as under : -

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of

the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”

38. The Apex Court in **UNION OF INDIA vs CHAJJU RAM (DEAD) BY LRS AND OTHERS [(2003) 5 SCC 568]** on the same question held as under : -

“23. It is now well-settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is equally well-settled that a little difference in facts or additional facts may lead to a different conclusion.”

39. The provisions for deduction of TAS (tax at source) which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax form one single integral, inseparable Code. Therefore, the provisions relating to TDS apply only to those sums which are “chargeable to tax” under the Income-Tax Act. While

interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated Code. In order to deduct tax at source the amount being paid out must necessarily be ascertainable as income chargeable to tax in the hands of the payee. TDS is a vicarious liability and it presupposes existence of primary liability. Therefore, the TDS provisions have to be read in conformity with the charging provisions, i.e., section 4, 5 and 9.

40. Section 194H deals with deduction of TAS in respect of any income by way of commission or brokerage. The following three conditions are to be fulfilled for attracting the said provision. They are:

- (1) *The assessee should be responsible for paying an income by way of commission or brokerage to the distributor.*
- (2) *There should be a payment either by cash or by issue of a cheque or draft or any other mode or*

credit of such income to the distributor in the accounts of the assessee.

(3) Tax is to be deducted at the time of payment or credit thereof, whichever is earlier.

41. The word income has been defined under Section 2(24) of the Act. Income includes profits and gains. A commission is defined in Explanation (i) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the principal. The element of agency is to be there in case of all services or transactions contemplated by Explanation (i) to Section 194H. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. While interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. Thus the mere formal description of a person as an agent or buyer is not

conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the concessionaire 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. For section 194H to be attracted, the income being paid out by the assessee must be in the nature of commission or brokerage. The element of agency is to be there in case of all services or transactions contemplated by Explanation (i) to Section 194H. The word "discount" is normally used to describe a deduction from the full amount or value of something, especially a price whereas a commission is defined in Explanation (i) to Section 194H as any payment received or receivable, directly or indirectly by an agent for services rendered acting on behalf of the principal.

42. The word "discount" is normally used to describe a deduction from the full amount or value of something, especially a price. Cash discount cannot be confused with trade discount. The two concepts are wholly distinct and separate. Cash discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. It is a discount granted in consideration of expeditious payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. The allowance enables the retailer to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense.

43. The principal question that falls for consideration in all these appeals is whether the agreements between the assessee and the distributors gave rise to a relationship of principal to principal or relationship of principal to agent. However, the question arising in a case

has to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the document and the surrounding circumstances and having regard to the course of dealings between the parties and the statutory provisions and the interpretation placed by Courts in the judgments on the point.

AGREEMENTS

44. The distribution agreement between Bharti Mobile Limited and its Distributors, discloses that for the promotion of Marketing and Distribution of the products/services of the assessee and also other related services/products, the assessee has desired to avail services of Distributor for marketing and distribution of Cellular Phone Connections and other related products. The Distributor has to provide services mentioned in the agreement at paras 1, 2, 3 and 4. Further the agreement stipulates that the Distributors have to represent to the

customers that the Distributor's agreement with the customers/its dealers is on Principal-to-Principal basis and the assessee is in no way concerned or liable to the customer/dealers of the Distributor. Further it provides that Distributor shall not make any promise, representation or to give any warranty or guarantee with respect to services and products, who are not authorized by the assessee.

45. Clause 9 of the agreement makes it abundantly clear that the Distributor shall purchase material from the assessee and sell the same to the customer. This will include Handsets, SIM Cards/recharge cards and any other products. The sales tax liability on the products sold by the Distributor from its premises shall solely vest with the Distributor. That the insurance liability for the entire stock in trade in the premises at the address under reference will be of the Distributor and the liability for any loss or damage due to any fire, burglary, theft, etc., will be of the Distributor.

46. Clause 23 sets out the relationship. It provides that Distributor understands that it is an independently owned business entity and this agreement does not make the Distributor, its employees, associates or agents as employees, agents or legal representative of the assessee for any purpose whatsoever. The Distributor has no express or implied right or authority to assume or to undertake any obligation in respect of or on behalf of or in the name of the assessee or to bind the assessee in any manner. In case, the Distributor, its employees, associates or agents hold out as employees, agents or legal representatives of the Company, the Distributor shall forthwith upon demand make good any/all loss, cost, damage including consequential loss, suffered by the assessee on this account.

47. In the agreement between Tata Teleservices Limited, the Distributor is described as Channel Partner.

The “Channel Partner” shall mean the person whose name is appearing in the agreement appointed by TTSL for marketing and/or distributing the products and services of TTSL.

“ Consideration” is defined under the agreement. It shall mean the trade discounts, commissions and other monetary compensation that Channel Partner is entitled to receive for distributing the products and services, which will keep changing periodically due to various factors including changing nature of market and the same will be informed by TTSL to Channel Partner from time to time.

48. Clause 2.4 provides that the Channel Partner acknowledges that it is acting for the limited and exclusive purpose of the agreement which does not constitute Channel Partner as a servant or employee or partner of joint venture or affiliate or group company of TTSL. The Channel Partner shall have no authority to bind TTSL in any respect whatsoever and shall not hold itself out as owned by or

associated with TTSL, other than as an independent Channel Partner on a principal to principal basis, authorized and permitted to market the Products and Services under the agreement. None of the employees of Channel Partner shall be construed or deemed to be the employees of TTSL at any time the Channel Partner shall indemnify and keep indemnified TTSL, its directors and officers against any claim, demand, loss or whatsoever in this connection.

49. Clause 8.5 of the agreement stipulates that the Channel Partner be liable to pay all the taxes such as sales tax, service tax applicable and payable in respect of the subject matter of this agreement and any statutory increase in respect thereof. Clause 8.9 provides that Channel Partner shall procure the Products from TTSL or such person/s authorized by TTSL. Channel Partner shall ensure that there is no sale of spurious and unauthorized Products from Channel Partner outlet(s) and/or the retails outlets under the control of Channel Partner. Clause 10.1 provides that in

consideration of the Channel Partner duly performing the duties and obligations as contemplated in the agreement, the Channel Partner shall be entitled to the consideration as set forth in the Schedule being attached to the agreement. Clause 10.4 provides that Channel Partner shall be solely liable for any state and local taxes including sales tax, in relation to this agreement. TTSL shall have no liability or obligation for any state or local income tax liability of Channel Partner or any person assigned/appointed by Channel Partner. Clause 15.2 provides that TTSL shall have no obligation to take back any Products sold to Channel Partner. Clause 21.1 stipulates that Channel Partner shall alone be responsible for all loss and damage arising out of or relating to the operation of the channel arrangement or arising out of the acts of commissions or omissions of Channel Partner or any of its dealers, operators, agents, servants or personnel in connection with rendering of services by Channel Partner.

50. In the case of M/s Vodafone Essar South Ltd, Clause 17.2 of the agreement stipulates that the relationship of the parties is that of seller and buyer and it is hereby expressly agreed and clarified that this agreement between VESL and the Distributor is on principal to principal basis and neither party is, nor shall be deemed to be, an agent/partner of the other. Nothing in this agreement shall be construed to render the Distributor, a partner or agent of VESL. However, the appointment of such retailers outlets will be governed on principal to principal basis between such retailers/outlets and the Distributor.

51. From the aforesaid clauses, it is clear that there is no relationship of principal and agency. On the contrary, it is expressly stated that the relationship is that of principal to principal. Secondly the Distributor/Channel Partner has to pay consideration for the Product supplied and it is treated as sale consideration. There is a Clause, which specifically states that after such sale of Products, the

Distributor/Channel Partner cannot return the goods to the assessee for whatever reason. It is the Channel Partner and the Distributor who have to insure the products and the godowns at their cost. They are even prevented from making any representation to the retailers unless authorized by the assessee. What is given by the assessee to its Distributor/Channel Partner is a trade discount. It is not commission.

52. In ***Qatar Airways*** case it was held that, when the airlines sell the air tickets it would have no information about the exact rate at which the tickets would ultimately be sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price. The question of deducting any tax at source would not arise.

53. In the ***Ahmedabad Stamp Vendors' Association*** case also, it was held that, when the licensed stamp vendors took delivery of stamp papers on payment of

full price less discount and they sell such stamp papers to retail customers, neither of the two activities can be termed as the service in the course of buying or selling of goods. Discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said amount is in the nature of cash discount and, therefore, such a transaction is a sale. Therefore, the discount made available to the licensed stamp vendors does not fall within the expression “commission” or “brokerage” under Section 194H of the Act.

54. In the ***Mother Dairy's*** case referred to supra, it was held that, the concessionaire purchases the milk from the dairy which raises a bill on the concessionaire and the amount he has paid for. The dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that

is to the account of the concessionaire and the dairy is not responsible for the same. The concessionaire becomes the owner of the milk and the products on taking delivery of the same from the Dairy. He thus purchased the milk and the products from the Dairy and sold them at the MRP. The difference between the MRP and the price which he pays to the Dairy is his income from business. It cannot be categorized as commission. The loss and gain is of the concessionaire. The Dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship. The supervision and control required in case of agency is missing. Therefore, it was held that there is no relationship of principal and agent and the consideration paid to the concessionaire is not commission.

55. In the **Singapore Airlines** case, the relationship of principal and agent was not in dispute. At no point in time the travel agent obtains proprietary rights to the Traffic Documents/Air Tickets. There is no value or price paid by him on which the travel agent gets a deduction. The price or value is received by the assessee-airline through the medium of the travel agent from the passenger which is also one of the facets of the services offered by the travel agent. The price or value of the Traffic Document received by the travel agent for and on behalf of the assessee-airline is held in trust. Thus the money retained by the travel agent is commission. The airline paid standard commission to the travel agent on which assessee- airline deduct tax at source. The dispute was only in respect of the money or monies which the travel agent retains over and above the net fare. In that context, the Delhi High Court held that, under an agreement only one relationship exists and the transaction is a singular transaction which is executed between the travel agent while acting on behalf of the principal airline in selling

the traffic documents/air tickets to a third party who is a passenger and, therefore, the second leg of the transaction cannot be different from the first leg of the transaction.

56. In the ***Idea Cellular Limited's*** case, the Delhi High Court proceeded on the footing that the assessee is providing the mobile phone service. It is the ultimate owner of the service system. The service is meant for public at large. They had appointed distributors to make available the pre-paid products to the public and look after the documentation and other statutory requirements regarding the mobile phone connection and, therefore, the essence of service rendered by the distributor is not the sale of any product or goods and, therefore, it was held that all the distributors are always acting for and on behalf of the assessee company.

57. Similar is the view expressed by the Kerala High Court in the ***Vodafone Essar Cellular Limited's*** case,

where it was held that, the distributor is only rendering services to the assessee and the distributor commits the assessee to the subscribers to whom assessee is accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee. In that context it was held that, discount is nothing but a margin given by the assessee to the distributor at the time of delivery of SIM Cards or Recharge Coupons against advance payment made by the distributor.

58. In both the aforesaid cases, the Court proceeded on the basis that service cannot be sold. It has to be rendered. But, they did not go into the question whether right to service can be sold.

59. The telephone service is nothing but service. SIM cards, have no intrinsic sale value. It is supplied to the customers for providing mobile services to them. The SIM card is in the nature of a key to the consumer to have access

to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or title of the goods from the assessee-company to the distributor or from the distributor to the ultimate consumer. Therefore, the SIM card, on its own but without service would hardly have any value. A customer, who wants to have its service initially, has to purchase a sim-card. When he pays for the sim-card, he gets the mobile service activated. Service can only be rendered and cannot be sold. However, right to service can be sold. What is sold by the service provider to the distributor is the right to service. Once the distributor pays for the service, and the service provider, delivers the Sim Card or Recharge Coupons, the distributor acquires a right to demand service. Once such a right is acquired the distributor may use it by himself. He may also sell the right to sub-distributors who in turn may sell 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 assessee. 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 assesseees also.

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

ORDER

1. *Appeals are allowed.*
2. *The impugned orders passed by the authorities are hereby set aside.*
3. *The matter is remitted back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and*

whether the sale discount is reflected in their books. If the accounts are not reflected as set out above, in para 60, Section 194H of the Act is not attracted.

Ordered accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

ckl/sps/nvj-