आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1499-1502/Kol/2015
Assessment Years :2010-11 & 2011-12

Vodafone East Ltd. (Now amalgamated with **Vodafond Mobile Services Ltd**.), 11, Dr. U.N. Brahmachari Street, Kolkata-17 [**PAN No.CALUO 1146 F** & **CALHO 2158 C**]	**V/s.**	DCIT, (TDS), Circle-59 (TDS), Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.136-137/Kol/2016
Assessment Year: 2012-13

Vodafone Mobile Services Ltd.(formerly known as Vodafone South Ltd, which now stands merged with **Vodafone Mobile Services Ltd**.), 11, Dr. U.N. Brahmachari Street, Kolkata-17 [**PAN No.CALHO 2158 C** & **CALUO 1146 F**]	**V/s.**	ACIT, (TDS), Circle-59 (TDS), Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.1537-1540/Kol/2015
Assessment Years: 2010-11 & 2011-12

ACIT, Cricle-3(TDS) 10-B,, Middleton Row, 7th Floor, Kolkata-71	**V/s.**	Vodafone East Ltd. 11, Dr. U.N. Brahmachari Street, Kolkata-17 [**PAN No. AAAC 3796 J TAN No.CALUO 1146 F**]

अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.232-233/Kol/2016
Assessment Year: 2012-13

ACIT, Cricle-3(TDS) 10-B,, Middleton Row, 7th Floor, Kolkata-71	**V/s.**	Vodafone Mobile Services Ltd. (formerly known as Vodafone East Ltd.)11, Dr. U.N. Brahmachari Street, Kolkata-17 [**TAN No.CALUO 1146 F**]
ACIT, Circle-3(TDS), 10-B, Middleton Row, 7th Floor, Kolkata-71	**V/s.**	Vodafone Mobile Servies Ltd. (formerly known as Vodafone South Ltd.), 11, Dr. U.N. Brahmachari Street, Kolkata-17 [**TAN No. CALHO 2158 C**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Deepak Chopra, Advocate & Shri Manasvini Bajpai, Advocate
राजस्व की ओर से/By Respondent	Md. Usman, CIT-DR
सुनवाई की तारीख/Date of Hearing	04-10-2017
घोषणा की तारीख/Date of Pronouncement	26-10-2017

आदेश /O R D E R

PER BENCH:-

Out of 12 appeals – six each by the assessee as well as Revenue are directed against the different orders of Commissioner of Income Tax (Appeals)-24, Kolkata dated 23.09.2015 & 26.11.2015. Assessments were framed by ACIT/DCIT(TDS), Circle-3/Circle-59 Kolkata u/s 201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 28.01.2013, 28.03.2013 & 30.03..2014 for assessment years 2010-11 to 2012-13 respectively.

Shri Depak Chopra and Shri Mansvini Bajpaai, Ld. Advocate appeared on behalf of assessee and Md. Usman Ld. Departmental Representative appeared on behalf of Revenue.

2. At the outset it was observed the issues in all the appeals are common except the amount involved. Therefore, we heard them together and deem it appropriate to dispose of them by way of this common order for the sake of convenience by taking the **ITA 1501/Kol/2015** (A.Y. 2010-11) as lead case.

First we take up ITA No.1501/Kol/2015 relating to A.Y. 2010-11.

3. The assessee has taken the following grounds in the appeal filed by assessee:-

"*The Appellant respectfully submits that:*

> *On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 24, Kolkata ['learned CIT(A)'] has erred in passing the order under section 250 of the Income Tax Act, 1961 ('Act'), partially confirming the allegations of the Deputy Commissioner of Income Tax, Circle-59 (TDS) Kolkata (Teamed TDS officer') in relation to requirement of TDS on discount extended to pre-paid distributors by the Appellant.*
>
> *Each of the ground is referred to separately, which may kindly be considered independent of each other.*
>
> *1. Ground No. 1 - The order passed by the learned Income Tax Officer ('TDS officer') is bad in law*
>
> *1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not adjudicating the ground of appeal that the Appellant cannot be held as an '**assessee in default**' in view of the provisions of section 201(1) read with section 191 of the Act and the judgment of Jagran Prakashan Limited Vs DCIT (TDS) (21 Taxmann.com 489) (All HC), as there is no finding by the learned TDS officer with respect to the failure of the pre-paid distributors to pay tax directly, which is a jurisdictional pre-requisite.*
>
> *2. Ground No. 2 - Without prejudice to Ground 1, the Appellant is not liable to deduct tax on discount extended to its pre-paid distributors on transfer of right to pre-paid service*
>
> *2.1. 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 Appellant is to be treated as an "**assessee in default**' for non-deduction of tax at source under section 194H of the Act on discount*

extended by the Appellant to its pre-paid distributors on transfer of right to pre-paid service during the subject financial year.

2.2. 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 its pre- paid distributors is not that of' Principal to Principal' and the discount extended by the Appellant to them is in the nature of commission liable for deduction of tax at source under section 194H of the Act.

2.3. 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 in applying the provisions of Section 194H of the Act to the case of the Appellant, without taking cognizance of the fact that the Appellant is not responsible to make any payment/credit to the prepaid distributors towards the discount extended to them and responsibility/obligation to make payment/credit is a condition precedent for application of section 194H of the Act which is absent in the present case.

2.4. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that discount allowed by the Appellant is not income in the hands of its pre-paid distributors and that income, if any, arises only when the right to pre-paid service is further distributed/transferred. by the distributors.

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

2.6. (a) On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the facts of the case and the submissions made by the Appellant distinguishing its facts with those considered by the Calcutta High Court in the case of Bharti Cellular Ltd Vs ACIT and the Kerala High Court in the case of Vodafone Cellular Limited.

(b) On the facts and circumstances of the case and in law, the learned CIT(A) has failed to consider the recent judicial precedents in the case of Vodafone South Limited reported as Bharti Airtel Limited vs. DCIT (373 ITR 33 (Karnataka High Court) thereafter followed in the cases of Tata Teleservices [2013 (29 taxmann.corn 261) (Bangalore IT AT), Bharti Hexacom Ltd [2013] (33 taxmann.co n 210) (Delhi IT A T) and Idea Cellular Limited (ITA Nos. 356, 357, 358, 359/JP/2012, 326, 327,328 & 329/JP/2012) (Jaipur ITAT), where on similar facts the issue of non-applicability of withholding tax provisions under section 194H of the Act on discount extended to pre-paid distributors has been decided in favour of the Appellant.

Hereinafter all the grounds are without prejudice to Grounds 1 and 2.

3. Ground No. 3 - No interest under section 201(lA) 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 upholding interest under section 201(1)(1A) of the Act for Quarters I, 2 and 3 of the subject year even though the tax demand under section 201(I) of the Act for these quarters has been deleted by him on the basis that the same is time barred and hence the Appellant is not an assessee in default in respect of these quarters.

3.2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding levy of interest under section 201(1A) of the Act.

4. Ground No. 4 - Levy of penalty under section 221 of the Act

4.1. On the facts and circumstances of the case and in law, the learned C1T(A) has erred in rejecting the ground of appeal of the Appellant with respect to initiation of penalty proceedings under section 221 of the Act against the Appellant.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the acts and circumstances of the case."

4. First inter-connected issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by holding the discount as commission and therefore it is subject to the provision of Sec. 194H of the Act.

5. Briefly, the facts are that the assessee in the present case is a Limited Company and engaged in business of providing Cellular Mobile Telephony Services to its customers. The services are rendered by the assessee through the medium of pre-paid & post mobile connections. In the case on hand there is no dispute with regard to the services rendered under the post paid scheme by the assessee.

Under the prepaid scheme the assessee sales the SIM / starter pack and prepaid talk time to the subscriber of pre paid connections. The subscribers can acquire the SIM / starter pack and pre paid talk time by way of recharge coupons, electronic top up, Internet or any other mode. Thus, the assessee for the purpose of providing the SIM / starter pack and pre paid talk time to its

subscribers has created a distribution network by appointing the distributors exclusively for its pre-paid connections. In the case on hand the disputes relates to discount provided by the assessee on the sale of pre-paid talk time. The assessee was selling the recharge coupon / vouchers and starter pack to the customers through the net of distributors. During the course of assessment proceedings, AO observed that assessee was providing discount to its distributors from the Maximum Retail Price (MRP for short) on the sale of prepaid talk time through them which was in nature of commission. Therefore, assessee was liable for deduction of Tax Deducted at Source (TDS) u/s. 194H of the Act on the discount offered to its distributors.

The AO further observed that assessee was deducting TDS on the commission paid to its distributors under the scheme of post-paid connections. But the assessee failed to deduct TDS on the discount offered to its distributors on the sale of recharge coupon for pre-paid connections.

5.1 In this regard the assessee took the stand that the act of selling the recharge coupon to the subscribers is a transaction of sale. Such transaction between the assessee and the distributors was on principal to principal basis. The distributor was authorized to sale the recharge coupon to its retailers at any price not exceeding the MRP. Similarly, the retailers were authorized to sale the recharge coupons at any price but not exceeding the MRP as evident from clause 7 of the agreement between the assessee and distributors. Therefore, the transaction of sale of the recharge coupons through the distribution network was outside purview of TDS provision. It is because the act of selling the coupons through the distributors is merely a contract of sale. However, AO further observed certain facts as enumerated below :

1. The definition of commission provided u/s 194H of the Act is inclusive which may be received directly or indirectly. Thus in the present case the distributors on the purchase of prepaid talk time immediately gets the discount from the MRP amount which is nothing but commission. The distributor on further sale of the recharge coupons realizes the amount of commission.

2. The essence of transaction for the sale of talk time is same under both the models i.e. prepaid & post paid connections. The assessee is deducting the TDS under section 194H on the payment made to the distributors of post paid connections but the same is not being done in the case of prepaid distributors.
3. The relationship between the assessee and distributors of prepaid connections is not on principal to principal basis essentially but there exists an agency agreement between them as evident from the several clauses of agreement which reads as under:
   - *VESL is currently engaged in the business of providing cellular mobile telephone services of its customers throughout Bengal Service Area and wishes to establish Distributors to distribute its service tickets.*
   - *VESL hereby appoint the distributor, and the distributor hereby agrees to operate as distributor in accordance with the terms and conditions contained herein…[clause 2 of the agreement]*
   - *The distributor shall be responsible for the sale of the service tickets exclusively for VESL as set out hereunder. The distributor hereby agrees, confirms and undertakes;*
     (iii) to carry out its responsibilities with regard to e Topup as detailed in the Annexure-II;
     (iv) to strictly adhere to and comply with the Brand-image Guidelines set out in the Annexure-III; … [clause 7 of the agreement]
   - *The parties agree that upon termination of this Agreement for any reason the Distributor **<u>will return all equipment</u>** and furniture **<u>supplied by VESL</u>** forthwith upon request and remove all VESL signage and all other items indicating that the Premises were operated as an VESL Distributor. The Distributor hereby agrees to grant an irrecoverable license to VESL and its designated employees to enter the premises and remove all VESL signage if the Distributor has not done so itself to the satisfaction of VESL within 7 days of termination of the Agreement. [clause 10.1 of the agreement].*
     The Distributor shall not be entitled to any compensation or indemnity (whether for loss of distribution rights, goodwill or otherwise) as a result of the termination of this Agreement in accordance with its terms. [clause 10.2 of the agreement]
   - *VESL shall not be responsible for any post delivery defect in the Service Tickets. However, **<u>VESL may</u>** at its sole discretion and after making verification as it may deem fit, **<u>replace any unused</u>***

non-working refill slips *(physical or electronic Stock). [clause e to annexure I]*

- ***Promptly inform*** *the company of any facts or opinions of which the Distributor becomes aware likely to be relevant in relation to the commercial exploitation of the Service Tickets and which are* ***advantageous or disadvantageous to the interests of VESL****. [clause I)f) to annexure III]*
- ***Not during the continuance of this Agreement [and for the period of 1 year after its termination]*** *(whether alone or jointly and whether directly or indirectly) be concerned or interested* ***in marketing, distribution or sale of any products which are similar to*** *or competitive with any of the Service Ticket or which perform the same or similar functions; [clause 1 (i) to annexure III]*
- ***Use VESL's trademarks*** *and trade names relating the Service Tickets only in the registered or agreed style in connection with the marketing and sale of the Service Tickets and* ***shall not use such trademarks or trade names in connection with any other products*** *or services or as part of the corporate or any trade name of the Distributor. [clause 1(n) annexure III]*
- ***not alter, obscure, remove, interfere*** *with or add to any of the trademarks, trade names, markings or notices affixed to or contained in the Service Tickets or the Service Tickets Documentation at the time when they are delivered to the Distributor. [clause 1 (o) to annexure III]*
- ***keep sufficient stocks*** *of the Service Tickets to satisfy customer demand. [clause 1 (q) to annexure III]*
- ***provide VESL with quarterly stock reports showing the Distributor's Stock*** *of each of the Service Tickets at the beginning and end of each quarter and the movement of Stocks during the quarter. [clause 1(w) to annexure III]*
- ***permit VESL and its authorized agents*** *at all reasonable times to enter any of the Distributor's premises* ***for the purpose of ascertaining that the Distributor is complying with its obligations*** *under this Agreement [clause 1(y) to annexure III]*
- *Completion of all documentation and formalities in respect of sales of the Service Tickets, including.*

  (iii) ***proper verification of the identity of the customers*** *in respect of the sale of Prepaid cards and* ***proper documentation*** *thereof a per guidelines of concerned authorities; and*

  (iv) ***ensuring complete and proper documentary compliance*** *by the customer including properly completed Customer agreement Form/s, Enrollment Form/s [clause II(a) to annexure III]*
- *Bill collection and acceptance of payments on behalf of VESL for bills for charges in respect of cellular services and the Service Tickets on the following basis:*

Any payments by cheque will be payable to VESL and held for daily collection by VESL. [Clause II(d) to annexure III]

- *Demonstration and sales of value-added service of VESL. [Clause II(f) to annexure III]*
- ***Maintain such records** and provide VESL with such reports as may be required for evaluation of performance from time to time. [Clause III(b) to annexure III]]*

4. The transaction between the assessee and distributor in relation to SIM/ starter pack and recharge coupon is not sale & purchase transaction but actually it represents services provided by the distributors. Such services can neither be sold nor purchased but these can only be rendered.
5. The assessee is always remains the owner of the SIM which is device used to access the mobile network.

Thus, the AO in view of above held that discount offered by the assessee is nothing but the commission in terms of provision of Sec. 194H of the Act. Accordingly, the AO treated the assessee as defaulter for not deducting TDS for an amount of Rs.5,79,82,781.00 being 10% of Rs.57,98,27,810.00 u/s 194H of the Act.

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that the relationship between assessee and its distributors are based on principle-to-principle basis and but there was no payment made by assessee to its distributors in the name of "commission" rather, the distributors were making payment to assessee for the purchase of prepaid talk time coupons. As such, there was no element in the impugned transaction attracting the provision of sec. 194H of the Act. The impugned transaction between assessee and its distributors were in the nature of sale of goods. The distributors were not agent of assessee. However, Ld. CIT(A) disregarded the claim of assessee after having reliance on the judgment Hon'ble jurisdictional High Court in the case of *Bharati Cellular Limited Vs ACIT* reported in 354 ITR 507 (Cal) by observing as under:-

"6.2 In my view the decision of Hon'ble High Court of Calcutta in the case of Bharati Cellular Ltd. is applicable in the appellant case. In effect

the distributors or the franchises have been made liable as agent and there is indirect payment by the assessee to the franchisees of the commission for the service rendered whatever the terms of the agreement, the appellant is a principal exercising overall control on the business, various schemes and product and services, reducing the distributors or franchisees to agent. I, therefore, agree with the AO's view that the discounts are commission u/s. 194H and this liable to the provision of TDS. This ground is, therefore, not allowed."

7. Aggrieved by this, the assessee has come up in appeal before us.

8. Before us Ld. AR for the assessee filed a paper book running from pages 1 to 517 and submitted that the facts of the case i.e. Bharati Cellular Limited *(Supra)*, which relied by the Id. CIT(A) is are altogether different. Therefore the principles laid down by the Hon'ble jurisdictional High Court in the case of *Bharati Cellular Limited (Supra)* cannot be applied to the instant case. The relevant extract of the judgment is reproduced below:-

"*In this case, reading one of the standard agreements it does not appear that the same intends to create relationship in the nature of principal to principal. From cls. 16, 16.1, 16.2 and 16.3 of agreement, it emerges though nomenclature has been used franchisee the agreement is essentially that of the principal and agent albeit the stipulation in cl. 16.2. In real sense the franchisee acts on behalf of the assessee for selling start up pack, prepaid recharge coupons to the customers of assessee and it will be clear from cls. 4.1, 4.3, 4.4 & 8.1 of the agreement.*

(Paras 12 & 21)

It appears from the records in this case that the transaction in case of prepaid SIM cards, and rechargeable coupons, sufficient stocks are to be kept by franchisee, and then the same are to be sold to the retailers at a rate stipulated by the assessee, say at Rs. 324 and the retailer is allowed to sell it to the ultimate customer at the maximum price again fixed by the assessee, say at Rs. 330. The assessee is to realize lesser rate say at Rs. 317 per SIM card from franchisee. Thus discount of Rs. 7 is given. Therefore after selling all the SIM cards and prepaid coupons to the retailers the franchisee is to make payment of sale proceeds to the assessee after deducting a discount of Rs. 7 per SIM card. Thus this receipt of discount @ Rs. 7 is in real sense commission paid to the franchisees. Hence all the trappings of liability as agent, of the franchisee towards assessee subsists. There has been indirect payment by the assessee to the franchisee of the commission and the same is attractable under s. 194H.—CIT vs. Idea Cellular Ltd. (2010) 230 CTR (Del) 43 : (2010) 35 DTR (Del) 219 : (2010) 325 ITR 148 (Del) and Vodafone Essar Cellular Ltd. vs. Asstt. CIT (2010) 235 CTR (Ker) 393 : (2010) 45 DTR (Ker) 217 : (2010) 194 Taxman 518 (Ker) ***concurred with;*** *Ahmedabad Stamp*

Vendor Association vs. Union of India (2002) 176 CTR (Guj) 193 : (2002) 257 ITR 202 (Guj) ***distinguished.”***

(Paras 25 & 26)

The ld. AR further fairly agreed that the Hon’ble jurisdictional High Court in the case of *Hutchison Telecom East Limited Vs. CIT* reported in 375 ITR 0566 (Cal) has decided the issue against the assessee by observing as under:-

> “*The terms and conditions noticed above leave no manner of doubt that the relationship between Poddar Communications and the assessee appearing from the agreement relied upon by Mr. Khaitan is that of an agent and principal. Poddar Communications appears to have been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers.”*

The ld. AR further submitted that the above judgments were rendered by the Hon’ble jurisdictional High Court pertaining to the AYs 2003-04 & 2004-05 when the company was not owned by the present assessee i.e. Vodafone. In fact during the AYs 2004-05 the company was owned by Hutchison Telecom East Limited. The agreement referred by the Hon’ble Court i.e. Poddar Communication was the old business model which was carried on by erstwhile assessee i.e. Hutchison Telecom East Limited. However, the present assessee subsequent to the acquisition of the business from Hutchison Telecom East Limited has changed the business model.

The relevant clause of the agreement referred by the by the Hon’ble Court i.e. Poddar Communication are reproduced below:-

> *“5) SERVICE PROVIDER’S DUTITIES*
>
> *In order to provide the Services in the manner specified by HTEL, the Service Provider agrees to:*
>
> *(a) commit minimum manpower as under and comply with all statutory requirements with regards to wags and service conditions or any other regulations concerning such employees;*
>
> (b) *ensure that all payments to THE due under this Agreement are tendered in a timely manner;*
>
> (c) *comply with in reasonable time frames as determined by HTEL for completion of any of its obligations hereunder;*
>
> (d) *immediately advise HTEL as soon as it comes to know that any person is infringing or violating or is attempting or planning to infringe or violate any intellectual property rights owned or used by*

HTEL and its services and, if requested, forward promptly, a written report setting forth all the relevant information in its knowledge.

(e) Comply with all of HTEL's requirements in respect of invoicing and accounts;

(f) Unless otherwise agreed in writing, be solely responsible for all costs and expenses for all operating expenses incurred in connection therewith;

(g) Maintain HTEL'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;

(h) Provide reports on customers, expenses, purchases, inventory, compliance and any other relevant details in the format and as required by HTEL;

(i) Make payment to HTEL for any amounts due under this Agreement by way of Account Payee cheque or Banker's Draft or in such other manner as HTEL may agree;

(j) 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 providing the Services;

(k) Pay the Service tax to HTEL as may be assessed and levied from time to time.

(l) 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;

(m) Ensure that all its staff deal with the customers in a friendly and courteous manner and comply with all guidelines issued by the Service provider or HTEL; and

(n) Comply with all other instructions and directions to be issued by HTEL from time to time as considered necessary to further the sprit and objects of this Agreement.

(o) Comply with requirement of the law, in forces at the relevant time including but not limited to consumer protection legislation such as the Monopolies And Restrictive Trade Practices Act, 1969; the Consumer Protection Act, 1986 and other relevant laws;

(p) Covenants that the personnel employed by it in its business shall not be treated as the employee of HTEL; an it alone shall be fully responsible for compliance with provisions of law, and for all compensation, commission and benefits arising out of their employment / agreement and will assume full responsibility for their acts.

(q) In case any subscriber is introduced by Service Provider with an intent to commit a fraud or cause any loss to HTEL then Service Provider shall be solely responsible to make good the loss/damages, caused by such Subscriber to HTEL and in such case the agreement shall be terminated forthwith.

(r) HTEL is solely entitled with the service process shall be issued by HTEL; and the Service Provider shall be bound by the same as in force from time to time. HTEL makes no warranty either express or implied concerning HHTEL;s services for a particular use or purpose.

(s) The service provider shall not transfer, assign, sub-licence, encumber or in any other way deal with any of its rights or obligations under this agreement without the prior written consent of HTEL such rights and obligations being personal to the Service Provider.

*6) **HTEL's DUTIES***

HTEL agrees to;

(a) Provide its expertise and to guide and assist the Service Provider in the various activities pertaining to the setting up and operation of the services and to provide continuing assistance in providing the Services using the latest techniques and skills available to HTEL;

(b) Provide assistance (on request form the service provider) to its staff on service knowledge and updates;

(c) Provide and maintain an up-to-date list of services and/or suppliers form which the Service provider may purchase stock services or accessories;

(d) Ensure that all payments due to the service provider in accordance with this Agreement are paid within the agreed period.

*7) **PAYMENT***

In consideration of the service provider fulfilling its obligations herein HTEL will pay the service Provider the following:

Commission at the rates as per HTEL's policy from time to time and subject to applicable taxes and laws as may be in force at the relevant time and on payment terms as may be communicated to the Service Provider by HTEL form time to time.

The above agreement clearly shows that there was an agency agreement between the erstwhile assessee and its distributor. Therefore there was no ambiguity to the applicability of the provisions of TDS under section 194H of the Act.

8.2 However the present assessee has modified the agreement with its distributors and its relevant clauses of the agreement with M/s Rajsikha Communication, one of the distributors, for prepaid business model w.e.f. 21st April 2009 on sample basis are reproduced below:-

*"2. **APPOINTMENT***

VESL hereby appoints the Distributor, and the Distributor hereby agrees to operate as distributor in accordance with the terms and conditions contained herein. The parties acknowledge that such appointment is non-exclusive and that VESL may, in its sole discretion, establish other Distributor/associates an appoint such other persons in this behalf.

3.SALE AND PURCHASE OF THE SERVICE TICKETS

3.1 The sale and purchase of the Service Tickets a between VESL and the Distributor shall be governed by VESL's standard terms and conditions of sale as set out in the Annexure-I (including any modification thereof by VESL from time to time).

3.2 The Distributor agrees to deposit with VESL as security deposit a sum as mentioned in Part II of the Schedule I and keep deposited with VESL at all times during the subsistence of this Agreement, such sum of money as may be decided by VESL from time to time. The amount of deposit will be refunded on termination of this Agreement after deducting there from all amounts outstanding, if any, against the Distributor.

4. OBLIGATIONS OF THEE DISTRIBUTOR

The Distributor shall be responsible for the sale of the Service Tickets exclusively for VESL as set out hereunder. The Distributor hereby agrees, confirms and undertakes;

*(i) to carry out its responsibilities with regard to e Topup as detailed in the **Annexure-II**;*

*(ii) to strictly adhere to and comply with the Brand-image Guidelines set out in the **Annexure-III**; and*

(iii) to furnish an undertaking to VESL in such format and manner as VESL may prescribe form time to time with regard to due compliance with the rules, regulations and directions of Department of Telecommunications (DoT) and/or any other authority (Central/State/Local) in respect of verification of identit9y of customers (end users of the Prepaid cards).

5.VESL'S OBLIGATONS

VESL shall;

(a) provide the Distributor with such marketing and technical assistance as VESL may in its discretion consider necessary to assist the Distributor for the promotion of the Service Tickets;

(b) Endeavour to answer as soon as possible all technical queries raised by the Distributor or its customers concerning the use or application of the Service Tickets;

(c) Provide the Distributor with adequate quantities of instruction manuals, technical and promotional literature and other information relating to the Service Tickets;

(d) Provide the Distributor with all information and assistance necessary to enable the Distributor to perform its obligations hereunder in respect of any modified or enhanced versions of the Service Tickets.

(e) Provide it expertise and to guide and assist the Distributor in the various activities pertaining to the Service Tickets using the latest techniques and skills available to VESL;

(f) Provide assistance (on request from the Distributor) to its staff on service knowledge and updates.

(g) Provide and maintain an up-to-date list of the Service Tickets and/or suppliers from which the Distributor may purchase Stock and/or accessories;

6.TRAINING

6.1 VESL shall provide training in the use, installation and rendering of after-sale-services in respect of the Service Tickets to the Distributor and its personnel, wherever required.

6.2 Any additional training required by the Distributor shall be provided by VESL in accordance with is standard scale of charges in force from time to time.

6.3 The Distributor shall offer training in the use of the Service Tickets to all its customers on commercially reasonable terms.

7. CONSIDERATION

*7.1 In consideration of the Distributor fulfilling its obligations contemplated under this Agreement, VESL shall sell to the Distributor, the Service Tickets at rate ("**Distributor Price**") as may be communicated to the Distributor by VESL from time to time.*

Distributor Price here means the price of the Service Tickets offered by VSL to the Distributor, from, time to time.

*7.2 VESL shall, from time to time, declare the 'Maximum Retail Price' of the Service Tickets. The phrase "**Maximum Retail Price**" or the abbreviation "**MRP**" in the Agreement shall mean the Distributor shall be at liberty to sell the Service Tickets at the said Maximum Retail Price or at such a price below the said Maximum Retail Price.*

8. TERM

8.1 This Agreement shall be for a term of One year effective form 21.04.2001 and expiring on 20.04.2010 unless terminated by VESL as per clause 8.2

8.2 Notwithstanding the provisions of Clause 8.1 VESL may, at any time, terminate this Agreement by giving 30 days written notice to the Distributor without assigning any reason whatsoever."

ANNEXURE-I

SECURITY DEPOSIT

VESL shall sell the Service Tickets to the Distributor subject to the following terms and conditions:

(a) Purchase Order:

All sales shall be as per valid purchase order made by the Distributor;

(b) Payment:

(i) The Distributor shall make all payments in respect of purchase order in advance by way of an account payee crossed Bank Draft/Cheque favouring "Vodafone Essar South Limited" or in cash.

(ii) Delivery of the Service Tickets shall be only after receipt/realization of full payment in respect of each purchase order, VESL shall not be liable for transportation or any other arrangement for selling the Service Tickets.

(iii) All charges in respect of transportation from the place of delivery to its destination including any handling charges or other levies shall be borne by the Distributor.

(c) Place of Delivery:

(i) In case of physical Stock - at the place designated by VESL in this behalf.

(ii) In case of e Topup - electronic transfer of refill/recharge value by VESL to the Distributor.

(d) Time of Delivery:

All deliveries will be made only during working days (Monday to Friday except public holidays) during the working hours (i.e 10.00 a.m. to 5.00 p.m.) subject to availability of the stock.

(e) Return & Replacement:

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

No request of refund of any money shall be entertained by VESL in any circumstance.

(f) Warranty/ Guarantee:

VESL does not give any warranty or guarantee (express or implied) in respect of any of the Service Tickets unless otherwise expressly mentioned on the Service Tickets.

ANNEXURE-II

Responsibilities of the Distributor in respect of e-stock:

The Distributor hereby agrees and confirms as follows:

(i) The e-Stock shall be purchased by the Distributor form VDSL as per the standard terms and conditions of sale of VESL as set out in the ***Annexure-I****.*

(ii) VESL shall, on receipt of a valid purse order accompanied with the payment in full for such order, transfer the e-Stock to the Distributor's account, of such denomination's and such quantity as specified by the Distributor in the purchase order.

(iii)The Distributor shall confirm the receipt of the e-Stock and verify the specifications of denominations and quantity of e-Stock. In case of any variation in the e-Stock and in the specifications of the purchase order,

> *the Distributor shall forthwith inform VESL in writing by facsimile about such variations.*
> *(iv) Once VESL receives confirmation from the Distributor acknowledging receipt of thee-Stock to its account as per the purchase order of the Distributor, VESL shall not be liable, in any manner, for any loss, damage or destruction of the e-Stock caused in any manner whatsoever.*
> *(v) The Distributor shall appoint at its own in consultation with VESL, retailers for the e-Stock to such merchants who shall obtain a valid access card from the Distributor after authentication from VDSL. However, VESL shall not be liable for any act or omission of merchant or the Distributor.*

8.3 Thus the ld. AR submitted that as per the agreement once the sale of recharge coupon has taken place then all the risk and rewards attached with the products get transferred to its distributors. The assessee was nowhere liable for any loss, damage or destruction of the stock in any manner. In this connection, Ld AR drew our attention on agreement entered with distributors which is placed on pages 22 to 32 of the paper book and the relevant clause have already been discussed in preceding paragraphs. Ld. AR further also drew our attention on clause No.17.2 of the agreement which shows that the relationship between the assessee and its distributors are on principle-to-principle basis which reads as under:-

> *"17. **NO CREATION OF THIRD PARTY OBLIGATIONS***
> *17.1 Notwithstanding anything contrary contained herein, the Distributor shall not, without VESL's prior specific approval/consent in writing, assume or create any obligations on VESL's behalf or incur any liability on behalf of VESL or in any way pledge or purport to pledge VESL's credit or accept any contract binding upon VESL.*
> *17.2 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 VDSL."*

In view of above the ld. AR submitted that the case law i.e. Bharati Cellular Limited *(Supra)* relied by the ld. CIT(A) are based on distinguishable facts and therefore the same cannot be applied in the instant facts of the case. The

judgment was based on the old business model of the assessee for its prepaid recharge coupons. The earlier agreement is on the basis of which the erstwhile assessee i.e. Hutchison Telecom East Limited carried on the business and which was considered by the Hon'ble High Court is placed on pages 1 to 13 of the paper book. The relevant clauses of the agreement have already been discussed in the preceding paragraphs and the same are not reproduced herewith for the sake of brevity.

8.4 Further, Ld. AR submitted that the Hon'ble Karnataka High Court in the case of Bharati Airtel Limited Vs. CIT & ANR reported in 372 ITR 0033 for the AYs 2005-06 to 2008-09 where the Vodafone Essar South Limited was also a party to the judgment has decided the issue in favour of assessee after considering the new agreement as discussed above by observing as under:-

> *"Assessee 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 was 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 was 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 assesses. Then out of that income, the Assessee had 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 was 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 was 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 was allowed as discount by the Assessee to the distributor. There was no relationship between the Assessee and the sub-distributor as well as the retailer.*
>
> *(Para 62)*
>
> *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 was concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, High Court was satisfied that it was a sale of right to service. The relationship between the Assessee and the distributor was that of principal to principal and, therefore, when the Assessee sells the SIM cards to the distributor, he was not paying any commission; by such sale no income accrues in the hands of the distributor and he was 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 was no primary responsibility, the Assessee had no obligation to deduct TDS. Once it was 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 was that of principal to principal."*

The ld. AR also drew attention by submitting that the Hon'ble Rajasthan High Court in the case of various assessee's 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. The Hon'ble Court also considered the judgment in the case of Hutchison Telecom East Limited *(Supra).* The relevant extract is reproduced below:-

> *"42. He has also relied upon the decision of Calcutta High Court in the case of Hutchison Telecom East Ltd. Vs. Commissioner of Income-Tax-(2015) 375 ITR 566 (Cal)*
>
> > '2. In consideration of the service to be rendered by him, he shall get a commission at the rates as per the policy to be adopted by the assessee from time to time.
> > 13. The terms and conditions noticed above leave no manner of doubt that the relationship between Poddar Communications and the assessee appearing from the agreement relied upon by Mr. Khaitan is that of an agent and principal. Poddar Communications appears to have been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers.
> > 14. The judgments cited by Mr. Khaitan do not really provide any assistance to him in deciding the matter in one way or the other. In the case of Daruvala Bros.(P) Ltd. (supra), th question for consideration was whether the compensation received by the assessee was a revenue receipt or a capital receipt. The contention was that the compensation had been received by the assessee because the agency was surrendered for some of the territories. In lieu of such surrender, the compensation was paid by the principal. It is in that context, the question was considered and it was held that the sum paid to the assessee did not partake the character of compensation at all. We do not find any applicability of this judgment to the issue before us.'
>
> *43. We have heard learned counsel for the parties.*
> *44. Now, the first question which has come up for our consideration is, 'whether in the facts and circumstances of the case the learned Tribunal*

was right and justified in holding that assessee was liable to withhold tax at source under S. 194H of the Income Tax Act, 1961 amounting to Rs.19,74,842/- (including interest) in respect of sales to its distributors, which are on principal to principal basis and wherein property in the goods is transferred to the distributor'

45. Taking into account the provisions of Section 182 of the Contract Act and the arrangement which has been entered into between the company and the distributor and taking into account the provisions of Section 194H, the Tribunal while considering the evidence on record, in our considered opinion, has misdirected them in considering the case from an angle other than the angle which was required to be considered by the Tribunal under the Income Tax Act. The Tribunal has travelled beyond the provisions of Section 194H where the condition precedent is that the payment is to be made by the assessee and thereafter he is to make payment. In spite of our specific query to the counsel for the department, it was not pointed out that any amount was paid by the assessee company. It was only the arrangement by which the amount which was to be received was reduced and no amount was paid as commission.

46. In that view of the matter, if we look at the provisions of Section 194H and even if explanation is taken into consideration, there is no occasion of invoking provisions of Section 194H, since the amount is not paid by the assessee.

47. Taking into account the conclusion which has been arrived at by the Tribunal is misdirected in view of the arrangement which has been arrived at between the company and the Distributor. Assuming without admitting, if the contention which has been raised before the Tribunal is accepted, the same can be at the most expenses which are not allowable under the Income Tax Act, if at all claimed without proper basis but to conclude that they are covered under Section 194H and the income tax or the TDS is required to be deducted is not correct and accordingly disallowance on that basis is not correct in our considered opinion, from which amount of tax is to be deducted is a doubtful proposition inasmuch a the Management Information Scheme which has been sought to be relied upon for alleging that expenditure has been claimed could not have been relied upon by the Tribunal or the authorities under the Income Tax Act.

> *(i) The findings which are given by the Tribunal regarding Distributor being Agent in view of the discussion made here-in-above, the arrangement which has been made between the Company and the Distributor is on Principal to Principal basis and the responsibility is n the basis of agreement entered into between the parties.*
>
> *(ii) Regarding MRP, the findings which are arrived at is a price which has been fixed by the assessee company and other*

expenses, namely; commission given to the retailer and everything is too be managed by the Distributor.

In that view of the matter, the restrictions which are put forward will not decide the relation-ship of Principal and Agent.

(iii) The Distributor has all rights to reduce his margin. He can increase the margin of retailer and will reduce the margin from 10% to anything between 1% to 10%. There is no restriction by the assessee to give commission amount to the retailer.

(iv) Regarding area of operation, it is the business policy of the assessee to give Distributor-sip for a particular area. Only on that basis, it will be erroneous to hold that it is on Principal to Principal basis. For deciding the relation-ship on Principal to Principal basis, the criteria will not be of area of operation but agreement entered into between the parties.

(v) Regarding the change in price it is always between the assessee or the company and the Distributor to decide who will absorb the loss.

In that view of the matte, the findings arrived at by the Tribunal is erroneous.

(vi) Regarding the return of goods after expiry date, it is always the understanding between the manufacturer and company that the product is not for preparation or consumed before expiry date, the consumed items cannot be allowed otherwise manufacturer will invite criminal liability. To avoid any criminal liability or any criminal act is done for taking back the goods, will not deter the relation-ship to Principal to Principal basis.

(vii) Regarding supervision, s always for the manufacturer and the company to look into the matter that his Distributor or Sub-Distributor or Retailer will not induct in mal practice.

(viii) Regarding goods sold to the Distributor, it is always a matter of contract how further goods will be distributed. Restriction on sub-distributor will not change the transaction from principal to Principal.

(ix) Regarding expenses which are described by the Tribunal and one of the reason is that it is always for the se to allow any special allowance or expenses to promote the sale. In a

competitive world to promote the sale, if the Distributor is not given any encouragement, the business will not grow.

In that view of the mate, in view of the observations of the Supreme Court, the Income Tax Officer cannot enter into the shoes of the assessee. (S.A. Builder Vs. Commissioner of Income Tax- (2007) 288 ITR 1 (SC)

(x) Regarding providing a vehicle it was very clear that by providing vehicle and getting list of expenses will not decide the relation-ship of Principal and Agent.

48. In our considered opinion, Section 194H pre-supposes the payment to be made to the third party namely, Distributor or the Agency and if on a close scrutiny of Section 182, Distributor is not an agent, therefore in our considered opinion, the provisions of Section 194H have wrongly been invoked, and therefore, the first issue is answered in favour of assessee and against the Department."

In view of above the Id. AR prayed that the provisions of section 194H are not applicable to the present case and therefore there is no default committed by the assessee for non deduction of TDS. The Id. AR prayed to decide the matter on merit.

On the other hand, Ld. DR vehemently relied on the order of authorities below and left the issue to the discretion of the Bench.

9. 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 Id. 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.

11. In the result, assessee appeal is allowed partly.

Coming to remaining appeal of assessee in ITA No. 1499-1500, 1502/Kol/2015 (for A.Ys. 10-11 & 11-12) and ITA No. 136-137/Kol/2016 (for A.Y 12-13) **and Revenue's appeals in** ITA No.1537-1540/Kol/2015 (for A.Ys 10-11 & 11-12) and ITA No. 232-233/Kol/2016 (for A.Y 12-13).

12. In the remaining appeals, since the facts are exactly identical, both the parties agreed whatever view taken in the above appeal (**ITA No.1501/Kol/2015**) for the assessee may be taken in these appeals also, we hold accordingly.

13. As we have already held that the provisions of TDS u/s 194H of the Act are not attracted on the sale of recharge coupons for the pre-paid 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 and Revenue in their respective appeals become academic in nature and therefore do not require separate adjudication. Hence, all the other grounds of appeals become infructuous and accordingly are being dismissed as infructuous.

14. **In combine result, assessee's appeals are partly allowed and that of Revenue stand dismissed.**

Order pronounced in the open court 26/10/2017

Sd/-	Sd/-
(Aby. T. Varkey)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp

दिनांकः- 26/10/2017 **कोलकाता ।**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Vodafone East Ltd./Vodafone Mobile Services Ltd. 11, Dr. U.N. Bramachari St. Kolkata-17
2. राजस्व/Revenue-ACIT(TDS), Circle-3/DCIT(TDS), Circle-59, 10,-B, Middleton Row, 7th Floor, Kolkagta-71
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।