

आय अधकरण, “डी+यायपीठ, चेनई

PELLATE TRIBUNAL ‘D’ BENCH, CHENNAI

ी ए. मोहन अलंकामणी, लेखा सदय एवं ी धुवु आर.एल रेडी, यायक सदय के सम

**Before Shri A. Mohan Alankamony, Accountant Member &  
Shri Duvvuru RL Reddy, Judicial Member**

**I.T.A. Nos. 2804 & 1644/Mds/2014 & 376 & 377/Mds/2015  
Assessment Years: 2011-12, 2010-11, 2013-14 & 2014-15**

M/s. Vodafone Cellular Limited,  
[Formerly Vodafone Essar Cellular Ltd.]  
1045-1046, Avinashi Road,  
Coimbatore 641 018, Tamil Nadu.  
**[PAN: AAACB8614L]**

(अपीलाथ /Appellant)

Vs. The Deputy Commissioner of  
Income Tax,  
TDS Circle,  
Coimbatore.

(यथ/Respondent)

**I.T.A. Nos. 1414 & 1415/Mds/2014  
Assessment Years: 2011-12 & 2010-11**

M/s. Vodafone South Limited,  
[Formerly Vodafone Essar South Ltd.]  
Tower-I, 9<sup>th</sup> Floor, TVH Beliciaa Towers,  
Block-94, MRC Nagar, Chennai 600 028.  
**[PAN:AABCB5847L]**

(अपीलाथ /Appellant)

Vs. The Income Tax Officer . (TDS),  
Ward . I(6),  
Chennai.

(यथ/Respondent)

**I.T.A. Nos. 754 & 755/Mds/2017  
Assessment Years: 2012-13 & 2014-15**

M/s. Vodafone Mobile Services Limited,  
[Formerly known as Vodafone Cellular Ltd.  
which now stands amalgamated with  
Vodafone Mobile Services Ltd.],  
1045-1046, Avinashi Road,  
Coimbatore 641 018, Tamil Nadu.  
**[PAN: AAACB8614L]**

(अपीलाथ /Appellant)

Vs. The Deputy Commissioner of  
Income Tax,  
TDS Circle,  
Coimbatore.

(यथ/Respondent)

अपीलाथ क ओर से / Appellant by : Shri Salil Kapoor, Advocate  
यथ क ओर से/Respondent by : Mrs. T.H. Vijayalakshmi, CIT  
Ms. S. Vijayaprabha, JCIT  
सुनवाई क ताराख/ Date of hearing : 12.09.2017  
घोषणा क ताराख /Date of Pronouncement : 21.09.2017

**आदेश /O R D E R**

**1. JUDICIAL MEMBER:**

These eight appeals filed by three different assessees of same group are directed against order of the Id. Commissioner of Income Tax (Appeals) for various assessment years as stated above. Since different common issues are involved, all the appeals were heard together and being disposed of by this common order for the sake of brevity.

2. The first common ground raised in the appeals of all the assessees is that Ground No. 1 . The order passed by the learned TDS Officer is bad in law and void-ab-initio+ has not been pressed at the time of hearing of the appeals. Accordingly, the ground raised in the grounds appeal is dismissed as not pressed.

3. The second common ground raised in the appeals of all the assessees is that the Id. CIT(A) has erred in holding that the assessee is liable to deduct TDS on the amount of commission/discount allowed on the prepaid recharge coupons to the distributors under section 194H of the Income Tax Act, 1961 [Act+in short] and confirming the demand raised by the Assessing Officer.

3.1 The crux of the issue is that there was a survey under section 133A of the Act was conducted in the business premise of the assessee i.e., erstwhile Vodafone Essar Cellular Limited. Based on the information

led subsequently by the assessee in pursuant to summons issued under section 131 of the Act, the Assessing Officer has noticed that the assessee has not deducted TDS on the sale of prepaid recharge coupons as required under section 194H of the Act and the details are as under:

Name of the assessee	Financial year	Asstt. Year		Amount
Vodafone Cellular Limited	2010-11	2011-12	.	62,99,76,316/-
	2009-10	2010-11	.	57,74,75,884/-
	2012-13	2013-14	.	70,63,18,209/-
Vodafone South Limited	2013-14	2014-15	.	39,06,80,121/-
	2010-11	2011-12	.	2,68,29,295/-
Vodafone Mobile Services Limited	2009-10	2010-11	.	2,96,96,493/-
	2011-12	2012-13	.	67,72,18,080/-
	2013-14	2014-15	.	38,81,04,344/-

By holding that the discount offered by the assessee to their distributors as commission, the Assessing Officer held that the assessee was in default under section 201(1) r.w.s. 194H of the Act, since the assessee has not deducted TDS as per the provisions of section 194H of the Act on the prepaid recharge coupons. Accordingly, the Assessing Officer levied tax under section 201(1) of the Act as well as interest thereon under section 201(1A) of the Act and brought the same to tax.

3.2 The assessee carried the matter in appeal before the Id. CIT(A). After considering the submissions of the assessee and by following the decision of the Tribunal in assessee's own case in I.T.A. No. 1415 & 1416/Mds/2009

IT(A) dismissed the ground raised by the assessee.

3.3 On being aggrieved, the assessee is in appeal before the Tribunal. By reiterating the submissions as made before the lower authorities, the Id. Counsel for the assessee has submitted that the discount allowed to the distributors is on account of principal to principal basis and not that of principal to agent. It was also submitted that under this arrangement, the transaction in all substantial respects is akin to sale and purchase of goods as it happens in FMCG sector. The discount extended represents the difference between the MRP of the talk time and prepaid connections and the price at which these are transferred to the prepaid distributors. Since no payment is made by the assessee to its prepaid distributors, the discount extended to the prepaid distributors is in the nature of trade margin and such discount cannot be termed as commission so as to attract the provisions of section 194H of the Income Tax Act and therefore, the provisions of TDS are not applicable in assessee's cases. Various Benches of the Tribunal as well as the Hon'ble Karnataka High Court in the case of *Bharti Airtel Limited v. DCIT* have taken similar decision and the same squarely applies to the facts of the present case, which shall be followed. In the form of paper book, the assessee has filed following case law for consideration:

1. *Vodafone Cellular Limited Vs Dy. CIT (TDS-I) (ITA Nos. 817,818 1577,1578,1961 & 1962/PUN/2013)*(Pune Tribunal)

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- ed Vs ACIT, TDS (ITA Nos. 76-77/PAT/2012)
3. Tata Teleservices (Maharashtra) Limited Vs ACIT, TDS-3(1) (in ITA Nos. 2043 to 2045/Mum/2014) (Mumbai Tribunal)
  4. Bharti Airtel Limited Vs DCIT(TDS) (52 taxmann.com 31) (Karnataka HC)
  5. TATA Teleservices Limited Vs The ITa, TDS-1, Jaipur (ITA Nos. 309/JP/2012, 502, 503, 504, & 505/JP/2011)(ITAT Jaipur)
  6. M/s Bharti Hexacom Limited vs ITO(TDS)-II (IT A No. 656/JP/2010), (Jaipur ITAT)
  7. Vodafone Essar Gujarat Limited (in IT A No. 386/Ahd/11) (Ahmedabad ITAT)
  8. Idea Cellular Limited vs ITO (ITA 356 to 359(JP/2012) (Jaipur Bench)
  9. CIT Vs Ahmedabad Stamp Vendors Association 348 ITR 378 (SC)
  10. CIT Vs Ahmedabad Stamp Vendors Association 257 ITR 202
  11. Vodafone South Limited Vs Deputy Commissioner of Income Tax (618 to 621/Bang/2014, 601 and 602/Bang/2013 and 956 and 957/Bang/2014)
  12. CIT vs. Qatar Airways (20 taxmann.com 598) (Delhi HC)

Further, the Id. Counsel for the assessee has also filed copy of the recent judgement of Honble Rajasthan High Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. v. CIT in ITA No. 205 of 2005 and 44 others, which includes, Vodafone, Idea Cellular, Bharti Hexacom, Tata Teleservices, etc. dated 11.07.2017 considered the similar issue with regard to TDS under section 194H and other issues decided in favour of assessee both in assessee's appeal as well as Revenue's appeal and the same shall also be followed.

3.4 Per contra, The Id. DR relied on the decision in assessee's own case for the assessment years 2007-08 and 2008-09 in I.T.A. Nos. 1415 and 1416/Mds/2009 dated 01.04.2011, which was followed by the Id. CIT(A) while deciding the issue in appeals against the assessee.

es, perused the materials available on record and gone through the orders of authorities below. We have also carefully gone through the case filed by the assessee in the form of paper book and other judgements. The assessee, in the instant case, is engaged in the business of cellular mobile phone services and distribution of SIM cards including prepaid and postpaid services. The prepaid services are in the form of recharge coupons and SIM cards. Since the assessee has not deducted TDS from the discount offered by the assessee to their distributors, the Assessing Officer treated such discount offered by the assessee to their distributors as %commission+ and treated the assessee as an assessee in default under section 201(1) r.w.s. 194H of the Act. While doing so, the Assessing Officer rejected the contention of the assessee that the relationship between the assessee and the distributors was principal to principal and not that of principal to agent. Accordingly, 10% of the discounted amount was taxed and also levied interest thereon. By following the decision of the Tribunal in assessee's own case for the assessment years 2007-08 and 2008-09, CIT(A) confirmed the order passed by the Assessing Officer.

3.6 With regard to the discount offered by the assessee to their distributors is a commission or not, in assessee's own group case for the assessment year 2007-08 and 2008-09 in I.T.A. Nos. 1415 &

011, the Coordinate Benches of the Tribunal has held that the assessee was liable to deduct tax at source on the amount of commission/discount allowed to the distributors under section 194H for both the years under consideration and since it has failed to do so, therefore, the Assessing Officer had correctly created demand under sections 201(1) and 201(1A) of the Act and the Id. CIT(A) was not justified at all to delete such demands.

3.7 Similarly, by referring to the decision of Hon<sup>ble</sup> Delhi High Court in the case of CIT Vs. Idea Cellular Ltd. in 325 ITR 148 as well as various other decisions, in the case of Vodafone Essar Cellular Ltd. v. ACIT in 332 ITR 255, in the case of Vodafone Essar Cellular Ltd. v. ACIT in 332 ITR 255, the Hon<sup>ble</sup> Kerala High Court has held that the distributors acted on behalf of the assessee for procuring and retaining customers and, therefore, the discount given was commission within the meaning of Explanation (1) on which tax was deductible under section 194H of the Act.

3.8 Further, on similar facts and circumstances, in the case of Bharti Cellular Ltd. Vs. ACIT in 354 ITR 507, the Hon<sup>ble</sup> Calcutta High Court has also decided the issue against the assessee by upholding the action of the Assessing Officer in treating the assessee to be an assessee in default.

ple Karnataka High Court in the case of Bharti Airtel Ltd. Vs. DCIT in 372 TTR 33 has held that sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS under section 194H of the Act. While holding so, the Honble High Court has distinguished the decision of the Honble Kerala High Court in the case of Vodafone Essar Cellular Ltd. (supra), the decision of Honble Delhi High Court in the case of Idea Cellular Ltd.(supra) and the decision of Honble Kolkata High Court in the case of Bharti Cellular Ltd. (supra). The relevant observation of the Honble Karnataka High Court reads as under :

*“56. In the Idea Cellular Ltd. case (supra), 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 Ltd's case (Supra), 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.*

Service is nothing but service. SIM cards, have no value, unless service is applied to the customers. Service is provided 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 into 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, whoever 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

the commission paid at Rs.20/- is accounted. In the facts of the case, the essence of the contract of sale between 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

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as no obligation to deduct TDS. Once it is held in 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 Essar Cellular Ltd.*, (supra) 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

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

Ordered accordingly.

3.9 Moreover, while considering similar question of law on identical facts and circumstances in the case of Hindustan Coca Cola Beverages Pvt. Ltd. v. CIT in ITA No. 205 of 2005 and 44 others, which includes, Vodafone, Idea Cellular, Bharti Hexacom, Tata Teleservices, etc. dated 11.07.2017, the Hon'ble High Court of Judicature for Rajasthan Bench at Jaipur decided the issue in favour of assessee both in assessee's appeal as well as Revenue's appeal. The relevant observations of the Hon'ble High Court are as under:

*“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 itself 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*

on 194H, since the amount is not paid by the

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 as the Management Information System 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 hereinabove, the arrangement which has been made between the Company and the Distributor is on Principal to Principal basis and the responsibility is on 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 to 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-ship 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.

matter, the findings arrived at by the Tribunal is

(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 of Principal to Principal basis.

(vii) Regarding supervision, it is 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 assessee 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 matter, in view of the observations of the Supreme Court, the Income Tax Officer cannot enter into the shoes of the assessee. (S.A. Builders 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.

49. The second issue which has been raised for our consideration, as discussed hereinabove, the Management Information System was not a part of their books of accounts nor could have been relied upon by the Income Tax Authorities. The basis on which the proceedings were initiated, in our considered opinion, the Statutory Audit Report is final conclusion over the authorities under the Income Tax Act, therefore, the second issue is required to be answered in favour of the assessee.

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... whether 201A or 201(1A), in view of the courts, the argument canvassed by counsel for the appellant pre-supposes deduction out of the payment. In our conclusion in issue No.1, the amount was not required to be deducted since they have not made any payment. In that view of the matter any proceedings under Section 201 or 201(1A) are misconceived. In that view of the matter, this issue is also answered in favour of assessee.

51. Contention regarding provisions of Section 271 of the Act, in view of our answer in favour of assessee, this issue is also required to be answered in favour of assessee. Even otherwise as rightly held by the Supreme Court in *CIT Vs. Eli Lilly & Co. (India) P. Ltd.*(supra), the penalty could not have been levied in all the appeals filed by assessee Coca Cola.

**M/s Bharti Hexacom Ltd.**

52. Regarding the other appeals of Cellular Companies the questions are required to be answered as discussed hereinabove. The relationship is not of agent. It is principal to principal basis. The payment is received by the company and the amount of commission is never paid to the agent or the Distributor. Therefore, no TDS is required to be deducted. We also accept the contention raised by Mr. Jhanwar that even otherwise in view of divergent judicial views, one in favour of the assessee is required to be adopted as per settled law. Taking into consideration the above conclusion, the first issue is required to be answered in favour of assessee.

53. Regarding Section 194J of the Act, in view of the Kerala High Court decisions, the issue is answered in favour of assessee and third issue even as per the statutory definition, there is no service and Sections 201 and 194H would not apply in view of the agreement as referred hereinabove.

**Tata Teleservices**

54. In view of agreement the issue regarding 194H and 194J as held in other cases, both the issues are answered in favour of the assessee.

**Vodafone**

55. Issues regarding Sections 194H, 194J and 201 of the Act, they are answered in favour of assessee.

56. Additional questions are framed in the case of Department. There are 5 issues in favour of assessee (issue Nos. 1 and 2 are wrongly framed by the Court). However, in view of our above discussion, they are required to be answered in favour of the assessee.

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ferred by the assessee, issue No.4 is required to be answered in favour of the assessee that the CIT (A) has all jurisdiction to restore or set aside the judgment of AO since it is a statutory appeal, the appellate court has all powers to deal with the same. All other issues are answered in favour of the assessee.

### ***Idea Cellular***

58. As the agreement is produced, issues are answered in favour of assessee in the departmental appeals.

59. Even the contention which has been raised by the counsel for the assessee that the final tax is paid by the Distributor and not by the agent, the revenue is not at loss in any form.

60. ....

61. In view of the above discussion, all the appeals of assessees are allowed and those of Department are dismissed.”

3.10 In view of the above decisions of the Hon<sup>ble</sup> High of Judicature for Rajasthan Bench at Jaipur as well as Hon<sup>ble</sup> Karnataka High Court, we are of the considered opinion that the sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS under section 194H of the Act. However, we find that while deciding similar issue, the Hon<sup>ble</sup> Kerala High Court has taken a different view, as the relevant observations are reproduced hereinabove, and decided the issue against the assessee. In the absence of any jurisdictional High Court decision brought to the notice of the Bench, we are of the considered opinion that other High Courts' decisions are binding on the Tribunal to take a decision, but, since there exist two contradictory decisions other High Courts, we are of the opinion that the law laid down by the Hon<sup>ble</sup> Supreme Court in the case of CIT v. Vegetable Products Ltd. 88 ITR 192, which says

capable of more than one view, then the view which favours the tax payer should be preferred, we decide the issue in favour of the assessee by following the decisions of the Hon $\phi$ le High of Judicature for Rajasthan Bench at Jaipur as well as Hon $\phi$ le Karnataka High Court. However, in the orders of authorities below, there was no elaborate discussion with regard to the sale discount offered by the assessee and maintained in the books of accounts of the assessee. Accordingly, as has been held by the Hon $\phi$ le Karnataka High Court, we also remit the matter back to the file of the Assessing Officer only to find out as to how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in the books of the assessee or not. If the accounts are not reflected as set out by the Hon $\phi$ le Karnataka High Court in its order at para 60 of the order, as reproduced hereinabove, the provisions of section 194H of the Act is not attracted. Therefore, in line of the above observations of the Hon $\phi$ le Karnataka High Court, we restore the matter to the file of the Assessing Officer for necessary verification. Hence, for limited purpose to verify the books, as observed hereinabove, the ground raised by the assessee is allowed for statistical purposes.

4. The next common ground raised in the appeal of the assessee for the assessment years 2012-13 and 2013-14 is that the authorities below have erred in holding that manpower charges are subject to tax deduction at

the Act and thus holding that the assessee in default for deduction of tax at source from such payments under section 194C of the Act instead of section 194J of the Act.

4.1 Brief facts of the case are that during the course of survey, it was noticed that in the assessee's business premises, the services of the most of the personnel were provided by outsourcing agencies. The work relating to front office management, liaison work, data entry was being manned by the outsourced personnel. The assessee was deducting tax at source at the rate of 2% under section 194C of the Act on the payments made. The assessee, during the course of hearings, was questioned on this nature of business model and was asked to provide the details of manpower availed for these services and also its objection, if any, to invoke section 194J of the Act. The assessee's submission was that wherever the services of technical personnel were utilized as in the case maintenance of mobile towers, tax @ 10% under section 194J of the Act was deducted and in other cases tax under section 194C of the Act @ 2% was deducted. The argument advanced was that these services were not technical in nature and don't require technical knowledge. The assessee also filed a written submission arguing that since section 194C of the Act speaks of supply of labour for carrying out any work pursuant to a contract, the applicable rate of payment would be only 2%. However, the Assessing Officer observed that ~~work~~ work is

Sections 194C and 194J of the Act operate on different parameters. Definition of technical services in section 9 of the Act states as under:-

*"For the purposes of this clause, 'fees for technical services' means any consideration (including any turn» sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*

The above definition leaves no room for ambiguity as it clearly states that the provision for services of technical or other personnel for rendering any managerial, technical or consultancy services will be treated as technical services. The persons so supplied need not possess any technical qualifications. This is made clear by the phrase "other personnel." Since section 194J r.w.s Explanation 2 to (vii) of section 9 is a special provision in the Act defining technical services, it will override the general reference to supply of labour for carrying out any work contained in Section 194C of the Act. Further, on facts also it was seen in the assessee's case that personnel for performing front office, managerial and services including data entry etc have been taken on outsourcing basis. This would amount to supply of personnel for rendering technical services and would attract tax at deduction @ 10%. Failed to deduct the TDS, the assessee is in appeal and the Assessing Officer considered the assessee is in default and accordingly he invoked the provision of sections 201(1) and 201(1A) of the Act.

d an appeal before the Id. CIT(A). After considering the submissions of the assessee and by following the decision of the Tribunal in assessee's own case for the assessment years 2013-14 and 2014-15, the Id. CIT(A) confirmed the order of the Assessing Officer.

4.3 Aggrieved, the assessee is in appeal before the Tribunal.

4.4 At the time of hearing, the Id. DR has submitted that the issue is squarely covered against the assessee by the decision of the Tribunal for earlier assessment years, which was followed by the Id. CIT(A) and pleaded that the same shall be followed for the assessment years under consideration. On the other hand, the Id. Counsel for the assessee did not seriously advanced any argument against the earlier order of the Tribunal.

4.5 We have heard rival contentions and perused the materials available on record. On similar facts and circumstances in an identical issue in assessee's own case for the assessment years 2013-14 and 2014-15 in I.T.A. Nos. 564 & 565/Mds/2015 dated 16.09.2015, after considering the issue in detail, the Coordinate Benches of the Tribunal has observed and held as under:

*“8. We have carefully gone through the above services to be rendered by the service provider. The above services to be rendered by the employees to the service provider who shall be sufficiently trained and shall have adequate knowledge of service to be provided to the highest standard. Further, the*

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material to service provider to be used for the assessee. The service provider shall use such material solely for the purpose of rendering services hereunder in accordance with instructions of assessee and for no other purpose. Upon expiry or termination of this agreement, the service provider shall promptly return or deal with all such material in accordance with the instructions from the assessee. The service provider shall maintain and use the confidential information only for the purpose of this agreement and only as permitted herein. The service provider only make copies as specifically authorised by the prior written consent of the other party and with the same confidential or proprietary notices as may be printed or displaced on the original, to restrict access and disclosures of confidential information to such of their employees, agents and third parties on a "need to know" basis and upon the execution of a written undertaking from such employees, agents, and third parties to maintain confidentiality of the confidential information disclosed to them in accordance with this clause 8 and to treat the confidential information as confidential for a period of five years from the date of receipt. In the event of earlier termination of this agreement, the parties hereby agree to maintain the confidentiality of the confidential information for a further period of three years from the date of such termination. The service provider agrees that any of assessee's technical or business information that service provider's employees or agents acquire while on assessee's premises or through access to assessee's computer system or databases while on or off assessee's premises, shall be deemed confidential information. All information provided by the assessee to service provider shall at all times, remain the sole and exclusive property of assessee. Upon termination /expiry of this agreement, confidential information shall be returned to assessee or destroyed in accordance with the instructions of assessee and evidence of such destruction provided to assessee to its reasonable satisfaction the assessee may at its sole option, witness the destruction. The transactions – financial or otherwise and / or correspondence entered into by and between assessee and the service provider and submit such reports to assessee periodically as specified by the assessee. In the assessment year under consideration, the assessee availed/ made payments as under:-

Sl. No.	Name	F.Y 2012-13 (Amount)	F.Y. 2013-14 (Amount)	Nature of manpower services
1	Cameo Corporate Services Ltd.	9,79,005	2,99,903	Support services such as field activations, vender, payments queries, entering receipts into SAP, field verification etc
2	Forte Private Solutions Ltd.	4,27,08,092	3,57,70,557	
3	Sukhvasa Management services	5,88,39,000	2,50,66,617	
4	Caliber Point Business solutions	7,06,96,268	2,15,58,974	Customer support services such as tele-calling for bill payments, tele-calling for new activation.
5	G4S facility services India P. Ltd	67,36,620	26,61,421	House keeping services.

As can be seen, the payment can be made for three kinds of service. They are

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- as filed activations, vendor payment queries, SAP, field verification etc
2. Customer support services such as tele-calling for bill payments, tele-calling for new activations.
  3. House keeping services.

*On perusal of the same shows that the support services at "1" and "2 above would necessarily require technical expertise and managerial expertise because they would involve identification of the customers to whom such services have to be rendered. The activation of any new service/marketing and selling of the services would also essentially required in depth analysis and knowledge of the services provided and activities of the company. It is an admitted fact that the services provided by the assessee are highly technical in nature of services cannot be carried out by a person without requisite knowledge. Therefore the payments made for 1 & 2 will be covered for tax deduction u/s.194J. The third activity i.e. the house keeping services shall not constitute technical services as these would involve only normal housekeeping services, like security/sanitation which is provided for any organization. Therefore, it was held by the Commissioner of Income Tax (Appeals) that the payments made towards housekeeping services shall be subject to tax u/s.194C and he also held that the assessee should deduct tax u/s.194J for technical services for the services provided "1) Support services such as filed activations, vendor payment queries, entering receipts into SAP, field verification etc. and 2) Customer support services such 'as tele- calling for bill payments, tele- calling for new activation".*

*"9. In our opinion, the findings of the Commissioner of Income Tax (Appeals) is to be confirmed as the activities undertaken by the service provider for the assessee company discussed as per the agreement, it is not possible to undertake such activities without technical expertise, skilled manpower and by using up to date technology of the service provider. Contrary to this, the ld. Authorised Representative for assessee relied on the various judicial precedents. However, a careful reading of these judgments shows that the facts involved in the said cases were entirely different from the facts involved in this case. Therefore, it cannot be applied in the present case to decide the issue. In the case of CIT vs. Bharti Cellular Ltd (319 ITR 139) (Del), the Delhi High Court had an occasion to interpret and explain the expression 'fee for technical services' as appearing in S.194J. In this context, it was noted by the Delhi High Court that the said expression appearing in S.194J has the same meaning as given in Explanation (2) to S.9(1)(vii), which means any consideration for rendering of any 'managerial, technical or consultancy services'. Taking note that the word 'technical' is preceded by the word 'managerial' and succeeded by the word 'consultancy, Delhi High Court held that the rule of noscitur a sociis is clearly applicable and this would mean that the word 'technical' would take colour from the words 'managerial' and 'consultancy' in between which it is sandwiched.*

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Delhi High Court observed that it is obvious that the human element attached to it and similarly, the services 'consultancy' also necessarily intends human intervention. It was held by the Delhi High Court that the expression 'technical services' thus necessarily involves 'human element' or what is now a days fashionably called 'human interface'. In the case of *Bharti Cellular Ltd (supra)* before the Delhi High Court, the facility provided by MTNL and other companies to the assessee for interconnection/port access was one which was provided technically by the machines and since it did not involve any human interface, the Delhi High Court held that the same could not be regarded as 'technical services' as contemplated under S.194J of the Act.

10. It is worthwhile to note that the decision of the Delhi High Court in the case of *Bharti Cellular Ltd (supra)* was challenged by the Revenue before the Supreme Court, and although the Supreme Court in the judgment reported in 330 ITR 239, substantially agreed in principle with the meaning assigned by the Delhi High Court to the expression 'fee for technical services', as appearing in S.194J, they found that the question of human intervention was never raised even upto the level of the Tribunal. The Supreme Court also felt that some expert evidence was required to be brought on record to show how a human intervention takes place during the course of rendering of the services. The matter, therefore, was restored by the Supreme Apex Court to the file of the Assessing Officer with a direction to decide the same afresh, after examining a technical expert.

11. However in the present case, there is no dispute that there is 'human interface' in rendering service provider to the assessee. Being so, the said decision is squarely applicable to the assessee case and there is no need to sent the file back to the Assessing Officer to decide the issue a afresh. Accordingly, the ground of the appeal of the assessee is dismissed."

4.6 Respectfully following the above decision of the Coordinate Benches of the Tribunal, for the assessment years under consideration also, which was followed by the Id. CIT(A) to decide the issue, we find no reason to interfere with the order passed by the Id. CIT(A) on this issue and the same stands confirmed. Thus, the ground raised by the assessee is dismissed in both the assessment years.

in the appeal of the assessee for the assessment year 2011-12 is with regard to liability of TDS under section 194J of the Act on roaming charges paid to other telecom operators.

5.1 During the year under consideration, the assessee paid roaming charges to other telecom operators towards roaming services provided by such operators to the subscribers of the assessee. With regard to roaming means, an arrangement whereby a subscriber of a cellular phone uses cellular services outside the home network. Thus, the subscriber who is not roaming gets services from his home operator while the subscriber who is roaming will get services from both, the host of operator and the home operator. The host operator, of course, charges the home operator for providing telecom services to the subscriber of the later and vice versa. Based on the usage, the host operator would invoice the home operator, which the home operator would recover from his own subscriber. When the assessee was asked as to why TDS was not deducted on the expenditure incurred towards roam charges paid by the assessee as per the provisions of section 194J of the Act, it was the submission of the assessee that roaming charges are paid for automated services which require no human intervention or skill and hence provisions of 194J of the Act are not applicable as per the decision of the Honble Madras High Court in the case of Skycell Communications v. CIT 119 Taxman 496. After considering the

and by making elaborate discussion with regard to the issue, since the assessee has not deducted TDS under section 194J of the Act, the Assessing Officer levied tax under section 201(1) as well as interest under section 201(1A) of the Act. On appeal, the Id. CIT(A) confirmed the order of the Assessing Officer.

5.2 On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has submitted that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for earlier assessment years 2009-10 and 2010-2011 and prayed that the same should be followed. On the other hand, the Id. DR strongly supported the orders of authorities below.

5.3 We have heard both sides, perused the materials available on record and gone through the orders of authorities below. We find that in an identical issue on similar facts and circumstances, in assessee's own case for assessment years 2009-10 and 2010-2011 in I.T.A. Nos. 2802 & 2803/Mds/2014 dated 31.07.2015, the Coordinate Benches of the Tribunal has observed and held as under:

*“2. The assessee has raised several grounds in both the appeals; however the Ld. A.R. has confined his arguments only with respect to one identical ground raised in both the appeals which is reproduced herein below for adjudication.*

*“On the facts and circumstance of the case and in law, the Ld. CIT (A) has erred in upholding the decision of*

officer that the appellant is to be treated 'as if by default' for non-deduction of tax at source under section 194J of the Act on roaming charges paid by the appellant to other telecom operators and thus, holding the appellant liable to pay tax U/s. 201(1) and interest U/s.201(1A) of the Act.”

3. The assessee is engaged in the business of providing cellular mobile services. During the course of its business the assessee had paid roaming charges to other telecom operators against which the assessee had not deducted tax at source in accordance with the provisions of Section-194J of the Act. After an elaborate discussion, the Ld. Assessing Officer came to a conclusion that the machinery and equipments deployed by the service provider company cannot work on its own and there has to be man-machine interface and human intervention at various levels and therefore, the service rendered by the service provider company amounts to rendering of “technical service” and accordingly the payment made by the assessee company to the service provider company would be exigible to the provisions of section 194J r.w.s 9(1)(viii) of the Act. The Ld. CIT (A) also upheld the view of the Ld. Assessing Officer.

4. At the outset, the Ld. A.R. submitted that this issue is covered by the recent decision of the Chennai Bench of the Tribunal in the case of M/s. Dishnet Wireless Ltd., in ITA Nos.320 to 329/Mds/14 vide order dated 20.07.2015 where it was held that the tax need not be deducted at source in respect of payment towards roaming charges to other service providers, since it would not amount to payment of fees for technical services as provides U/s.194J of the Act. Ld. D.R vehemently argued by referring to the order of the Ld. Assessing Officer from page No.10 to 14 wherein the statement of Smt. Vasanthi Ramamurthy Divisional Engineer, BSNL Coimbatore was extracted from which it could be inferred that continuous human interference is required for operating the facility provided by the service provider and hence the service rendered by the service provider would amount to technical service. Therefore, Ld. D.R stoutly contended that the roaming charges paid by the assessee company would amount to payment of fee for technical services by which the provisions of section 194J of the Act would be attracted and the assessee will be liable to deduct tax at source.

5. After hearing the both sides, we find the issue in both the appeals to be identical and squarely covered by the decision of the

tribunal cited by the Ld. A.R. supra. The  
er is extracted herein below for reference:-

“25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. We have gone through the judgment of Apex Court in *Bharti Cellular Limited (supra)*, The Apex Court after examining the provisions of Section 9(1)(vii) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light of the above judgment of the Apex Court, the Department obtained an expert opinion from the Sub-Divisional Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required, as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical service. It is common knowledge that when one of the subscribers in the assessee’s circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider’s place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to Question No.23:-

“Regarding roaming services as explained to question no.21. Regarding interconnectivity, initially human intervention is required for establishing the physical connectivity and also for doing the required configuration. Once it is working fine, no intervention is required. In case of any faults human intervention is required for taking necessary corrective actions.”

In view of the above, once configuration was made, no human intervention is required for connecting the roaming calls. The subscriber can make and receive calls, access and receive data and other service without any human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for

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ing call, no human intervention is required  
uration in system. This Tribunal is of the  
considered opinion that human intervention is necessary for  
routine maintenance of the system and machinery. However, no  
human intervention is required for connecting the roaming calls.  
Therefore, as held by the Apex Court in *Bharti Cellular Limited*  
(supra), the roaming connections are provided without any  
human intervention and therefore, no technical service is availed  
by the assessee. Therefore, TDS is not required to be made in  
respect of roaming charges paid to the other service providers.”

*Therefore, following the above mentioned recent decision of the co-ordinate Chennai Bench of the Tribunal, we hereby hold that in case of the assessee the roaming charges paid by the assessee will not fall under the category of ‘fees for technical services’ and therefore, the provisions of section 194J of the Act would not be attracted in the case of the assessee. Further, since Sections 201(1) & 201(1A) of the Act are consequential, they will also not be applicable to the case of the assessee.”*

5.4 The Id. DR could not controvert the above findings of the Tribunal, or filed any higher Court’s decision having modified or reversed the above decision of the Tribunal or the case law relied thereon in the case of M/s.Dishnet Wireless Ltd., in ITA Nos.320 to 329/Mds/14 vide order dated 20.07.2015, to take a different view. Respectfully following the decision of the Coordinate Benches of the Tribunal in assessee’s own case for earlier assessment years, we set aside the order of the Id. CIT(A) on this issue and hold that the roaming charges paid by the assessee will not fall under the category of fees for technical services and therefore, the provisions of section 194J of the Act would not be attracted in the case of the assessee. Since sections 201(1) and 201(1A) of the Act are consequential, they will

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case of the assessee. Thus, the ground raised  
by the assessee is allowed.

6. In the result, all the appeal filed by the assessee are partly allowed for  
statistical purposes.

Order pronounced on the 21<sup>st</sup> September, 2017 at Chennai.

Sd/-  
(A.MOHAN ALANKAMONY)  
ACCOUNTANT MEMBER

Sd/-  
(DUVVURU RL REDDY)  
JUDICIAL MEMBER

Chennai, Dated, 21.09.2017

Vm/-

आदेश क० प्रतिलिपि अपेक्षित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/  
Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5.  
प्रभागीय प्रशासक/DR & 6. गार्डफाइल/GF.