IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND MS.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.340/Chd/2013
(Assessment Year : 2009-10)

M/s Bharti Airtel Limited, Plot No.21, I.T. Park, Sector 26, Chandigarh. PAN: AAACB2894G TAN: PTLB10577A	Vs.	The Income Tax Officer, TDS-II, Chandigarh.

ITA No.216/Chd/2013
(Assessment Year : 2007-08)

M/s Bharti Airtel Limited, Plot No.21, I.T. Park, Sector 26, Chandigarh. PAN: AAACB2894G TAN: PTLB10577A	Vs.	The A.C.I.T.(TDS), Chandigarh.

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ITA No.217/Chd/2013
(Assessment Year : 2010-11)

M/s Bharti Airtel Limited, Plot No.21, I.T. Park, Sector 26, Chandigarh. PAN: AAACB2894G TAN: PTLB10577A (Appellant)	Vs.	The A.C.I.T.(TDS), Chandigarh. (Respondent)

Appellant by : Shri Anil Bhalla
Respondent by : Shri Ram Mohan Singh, CIT DR
Date of hearing : 19.03.2018
Date of Pronouncement : 30.05.2018

ORDER

PER ANNAPURNA GUPTA, A.M.:

All the above appeals have been preferred by the same assessee against the separate orders of Ld. Commissioner of Income Tax(Appeals), Chandigarh [hereinafter referred to as 'CIT(Appeals)'] dated 1.1.2013, 26.12.2012 and 26.12.2012

relating to assessment years 2009-10, 2007-08 and 2010-11 respectively.

2. It was common ground between both the parties that the issue involved in all the captioned appeals was common and identical. Therefore, they were heard together and are being disposed off by way of this common order.

3. For the sake of convenience we shall be dealing with the appeal of the assessee in ITA No.340/Chd/2013 relating to assessment year 2009-10 as the lead case and the decision rendered therein will apply mutatis and mutandis to other appeals also.

ITA No.340/Chd/2013:

4. Briefly stated the assessee is a telecommunication service provider. TDS Inspection/survey u/s 133A of the Act was carried out at the business premises of the assessee on 20.1.2010, during the course of which it was noticed that the person responsible (PR) had not deducted tax at source from the payment made towards incentives on prepaid Sim cards sold to distributors and also on the roaming charges paid to other service providers. The AO held that the assessee was liable to deduct tax on both the payments since the incentives paid to distributors was in the nature of commission requiring TDS u/s 194H of the Act ,while the roaming charges paid to other telecommunication providers was in the nature of service charges paid requiring TDS u/s 194C of the Act. Accordingly the assessee was held to be an

assessee in default for not deducting tax at source and consequently demand was created on the assessee u/s 201(1)/(1A) of the Act as under:

Section	*Demand u/s 201(1)*	*Demand u/s 201(1A)*	*Total*
194C	*Rs.422489/-*	*Rs.101197/-*	*Rs.523686/-*
194H	*Rs.50465972/-*	*Rs.5468432/-*	*Rs.55934404/-*
Grand Total	*Rs.50888461/-*	*Rs.5569629/-*	*Rs.56458090/-*

5. The matter was carried in appeal before the Ld.CIT(A) who held that the assessee was liable to deduct tax on the incentives paid to distributors on sale of prepaid SIM cards, but at the same time accepted the assessees contention that in case taxes were paid by the payee distributors on the said incentives, the assessee could not be treated to be in default for not deducting tax at source. Accordingly he directed the AO to verify this fact and grant relief to the assessee to the extent it is able to demonstrate the same. Vis-a-vis TDS on roaming charges, the Ld.CIT(A) restored the issue to the AO to adjudicate the same in the light of the direction given by the apex court in the case of Bharti Cellular Ltd. 193 Taxman 97 to determine whether the said payment qualified as fees for technical services as per section 194J of the Act. Ld.CIT(A) also reiterated his decision on the issue of TDS on incentives given to distributors, that the assessee could not be treated to be in default for not deducting tax at source if the payees had paid taxes on the same and gave identical direction to the AO to verify the said fact and grant relief to the assessee accordingly.

6. Aggrieved by the same the assesse has come up in appeal before us.

7. Ground No.1 to 1.3 raised by the assessee are on the issue relating to TDS on incentives paid to distributors on sale of cards u/s 194 H of the Act, and read as under:

> *"1) The learned Income Tax Officer, TDS-II (AO) had erred both on facts and in law in applying the provisions of Section 194H of the Income Tax Act to the discount given to distributors on sale of pre-paid products, being, "right to use Airtime for a specified value". The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.*
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> *1.1) The learned AO had erred both on facts and in law in treating the business relationship between the company and the distributor as principal to agent as against the actual relationship of principal to principal. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer."*
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> *1.2) The learned AO had erred both on facts and in law in passing an order u/s 201(1) and holding the assessee company to be in default in respect of non-deduction of tax amounting to Rs.50,465,972/- u/s 194H on the difference between the distributor's price and sale price of the prepaid card alleging the difference to be in the nature of commission. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned AO*
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> *1.3 The learned AO had erred both on facts and in law demanding the tax amounting to Rs.50,465,972/-, in spite of the fact that the amount has been subject to tax in the hands of distributors. The learned Commissioner of Income Tax (Appeals) has further erred in not considering the information filed by the company to substantiate that the distributor has already paid tax on the disputed amount."."*

8. During the course of hearing before us the Ld. counsel for assessee, at the outset, stated that ground No.1.3 raised was not being pressed since the Ld.CIT(Appeals) had agreed

with the contention of the assessee that since the payees had paid taxes on the impugned income the assessee should not be treated as an assessee in default for not deducting tax at source. The Ld. counsel for assessee conceded that the Ld.CIT(Appeals) had restored the issue to the Assessing Officer to only verify the fact of payment of taxes by the payees on the said income. The Ld. counsel for assessee, therefore, stated that not being aggrieved by the said action of the CIT(Appeals) it was not pressing the ground No.1.3 raised before us. Accordingly, ground No.1.3 is treated as dismissed.

9. Thereafter, Ld.Counsel for the assesee pointed out that both the AO and the CIT(A) had rested their case holding the assessee liable to deduct tax on incentives paid to distributors on sale of cards, relying upon the decision of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs M/s Idea Cellular Ltd.(2010) 325 ITR 148(Del) and the decision of the Hon'ble Kerala High Court in the case of M/s Vodafone Essar Cellular Ltd. Vs Assistant Commissioner Of Income Tax,(2010) 235 ITR 393 (Ker), wherein it was held that the discount given by the assessee to the distributors on prepaid cards was commission within the meaning of Explanation-1 to section 194H of the Act.

10. The Ld. counsel for assessee stated that since then the Hon'ble Karnataka High Court has decided the issue in favour of the assessee in the case of M/s Bharti Airtel Ltd.,

vs. Commissioner of Income Tax & Anr.(2015) 372 ITR 33 (Kar). Copy of the said order was placed before us. Referring to the same, the Ld. counsel for assessee pointed out that the Hon'ble Karnataka High Court had considered the judgment of the Hon'ble Delhi High Court in the case of M/s Idea Cellular Ltd. (supra) and the decision of the Hon'ble Kerala High Court in the case of M/s Vodafone Essar Ltd. (supra) and had held that in both the said cases the Courts had proceeded on the basis that the services could not be sold but had to be rendered and therefore could not be on principal to principal basis and they did not go into the question whether the right to service could be sold. The Ld. counsel for assessee pointed out that the Hon'ble High Court thereafter proceeded to hold that the transaction between the two was the sale of right to service and there was no services involved in the said transaction and further the relationship between the assessee and the distributors was that of principal to principal and, therefore, incentives given to the distributors was not in the nature of commission for the purpose of tax deduction at source u/s 194H of the Act. The Ld. counsel for assessee further pointed out that even the Hon'ble Rajasthan High Court in the case of Bharti Hexacom Ltd. dt.11-07-17,reported in 87 taxmann.com 295(Raj). which was a subsidiary of the assessee, had decided the issue in favour of the assessee. Further the Ld. counsel for assessee pointed out that various Benches of the I.T.A.T. had decided the issue in favour of the assessee following the aforesaid decisions of

the Hon'ble Karnataka High Court and Hon'ble Rajasthan High Court:

1) M/s Bharti Hexacom Limited vs ITO (TDS)-II
ITA No.656/JP/2010 dt.12-06-15

2) M/s Tata Tele Services Limited
ITA No.309/JP/2012,502 to 505/JP/2011
Dated 13.3.2015

3) M/s Bharti Hexacom Limited vs DCIT (TDS)
ITA Nos.258 to 262/Gau/2013
Dated 29.6.2015

4) Vodafone Essar Gujarat Limited vs ACIT
ITA No.386/Ahd/11 dated 7.7.2015.

11. The Ld. counsel for assessee further pointed out that there was no Jurisdictional High Court decision on the issue and in such a situation the principle of construction of law demanded that the decision favouring the assessee/beneficial to the assessee should be followed. The Ld. counsel for assessee stated that the I.T.A.T. Ahmedabad Bench in the case of Vodafone Essar Gujarat Limited (supra) and I.T.A.T. Gauhati Bench in the case of M/s Bharti Hexacom Limited (supra) had decided the issue on this principle only. The Ld. counsel for assessee also drew our attention to the decision of the Hon'ble Apex Court in this regard in the case of CIT vs Vegetable Products Limited, 88 ITR 192 (SC) and CIT,(Central)-I vs Vatika Township Pvt. Ltd., 367 ITR 466. The Ld. counsel for assessee, therefore, stated that the order of the Ld.CIT(Appeals) treating the assessee as an assessee in default for non-deduction of tax at source on the incentives paid to distributors on sale of prepaid cards u/s 194H therefore needed to be set aside.

12. The Ld. DR, on the other hand though conceded that there were divergent views on the issue, relied upon the order of the Ld.CIT(Appeals).

13. We have heard the contentions of both the parties, perused the orders of the authorities below and have also gone through the decisions referred to before us. The issue for consideration before us is vis-à-vis the nature of transaction between the assessee telecommunication services provider and its distributors in so far as it relates to sale of prepaid SIM cards and whether the discount of price given to the distributors on such sale of prepaid SIM cards is in the nature of commission attracting the provisions of section 194H of the Act. As pointed out to us, the Hon'ble Karnataka High Court in the case of the assessee itself, while dealing with an identical issue in appeal against the demand raised u/s 201(1) and 201(1A) of the Act, decided the issue in favour of the assessee. The Hon'ble High Court held that there was no relationship of principal and agent between the assessee and its distributors and the transaction was that of sale of right to service on a principal to principal basis.; The Hon'ble High Court held that when the assessee sold SIM card to distributors he was neither paying any commission by such sale, nor any income accrued in the hands of the distributors which condition was precedent for attracting section 194H of the Act. The Hon'ble High Court, therefore, held that the assessee was not under any obligation to pay any tax as no income was generated in his hands and

deduction of income tax at source being a vicarious responsibility there was no obligation to deduct TDS in the absence of a primary responsibility to pay tax. The relevant findings of the Hon'ble High Court in this regard are as under:

> *"From the aforesaid clauses, it is clear that there is no relationship of principal and agency. On the contrary, it is expressly stated that the relationship is that of principal to principal. Secondly the Distributor/Channel Partner has to pay consideration for the Product supplied and it is treated as sale consideration. There is a Clause, which specifically states that after such sale of Products, the Distributor/Channel Partner cannot return the goods to the assessee for whatever reason. It is the Channel Partner and the Distributor who have to insure the products and the godowns at their cost. They are even prevented from making any representation to the retailers unless authorized by the assessee. What is given by the assessee to its Distributor/ Channel Partner is a trade discount. It is not commission.*
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> *52. In Qatar Airways case it was held that, when the airlines sell the air tickets it would have no information about the exact rate at which the tickets would ultimately be sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price. The question of deducting any tax at source would not arise.*
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> *53. In the Ahmedabad Stamp Vendors' Association case also, it was held that, when the licensed stamp vendors took delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities can be termed as the service in the course of buying or selling of goods. Discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said amount is in the nature of cash discount and, therefore, such a transaction is a sale. Therefore, the discount made available to the licensed stamp vendors does not fall within the expression "commission" or "brokerage" under Section 194H of the Act.*
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> *54. In the Mother Dairy's case referred to supra, it was held that, the concessionaire purchases the milk from the dairy which raises a bill on the concessionaire and the amount he has paid for. The dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that is to*

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

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

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

57. Similar is the view expressed by the Kerala High Court in the Vodafone Essar Cellular Limited's case, where it was held that, the distributor is only rendering services to the assessee

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

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

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

difference between the sale price to retailer and the price which the distributor pays to the assessee is his income from business. It cannot be categorized as commission. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship.

60. The following illustration makes the point clear:

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

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

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

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

63. It was contended by the revenue that, in the event of the assessee deducting the amount and paying into the department, ultimately if the dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.

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

> *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.*
> *"*

14. Further we find that even the Hon'ble Rajasthan High Court in the case of M/s Bharti Hexacom Limited (supra), stated to be a subsidiary of the assessee, held that the discount paid to distributors was not in the nature of commission as envisaged u/s 194H of the Act and thus there was no liability to deduct tax at source on the same. The I.T.A.T. Jaipur Bench following the decision of the Hon'ble Rajasthan High Court in the case of M/s Bharti Hexacom Limited (supra) deleted the demand raised on identical issue in the case of M/s Bharti Hexacom Limited (supra) in a subsequent assessment year. Further we note that the I.T.A.T. Gauhati Bench has also affirmed the aforesaid proposition of law in the matter of the assessee itself i.e. Bharti Airtel Limited in its order dated 22.2.2018 in ITA Nos.59 to 62/Guahati/2012 relating to assessment years 2006-07 to 2009-10. Therefore, we find that the issue has been decided in favour of the assessee by various High Courts and various Benches of the I.T.A.T. in the case of the assessee's group concerns only wherein the business model is more or less of identical nature. The said decisions are therefore applicable to the facts of the present case. Moreover, for deciding the issue before us , when no decision of the Hon'ble Jurisdictional High Court is available on the issue and where there are decisions of non-Jurisdictional High Court expressing the contrary view, the

settled legal principle is that the view favourable to the assessee has to be adopted, as held by the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd., 88 ITR 192 (SC) and CIT Vs. Vatika Township Pvt. Ltd., 367 ITR 466 (SC).

15. In view of the aforesaid, upon considering the totality of the facts and circumstances of the case and applying the principles laid down in the judicial precedent cited before us we hold that the sale of prepaid sim cards by the assessee to the distributors are on principal to principal basis and hence out side the ambit of section 194H of the Act. Therefore, the assessee was not required to deduct tax on the same and, therefore, could not be held to be an assessee in default for not deducting tax at source. The demand raised on the assessee u/s 201(1) and 201(1A) of the Act is, therefore, directed to be deleted.

16. Ground of appeal Nos.1 to 1.2 are therefore, allowed while Ground No.1.3 is dismissed.

17. Ground Nos.2 to 2.1 relate to the issue of TDS on roaming charges and read as under:

> *2) The learned AO had erred both on facts and in law in applying the provisions of Section 194C of the Income Tax Act, 1961 to the transaction of national and international roaming charges paid to other telecom operators on account of roaming charges incurred by the appellant's subscriber on their network and creating a demand of Rs.4,22,489/- holding the assessee company to be in default. The learned Commissioner of Income Tax (Appeals) has erred in not deleting the demand raised u/s 194C / 201(1) and has erred in restoring*

the matter back to the file of the AO to determine the applicability of Section 194J of the Act.

2.1) The learned AO had erred both on facts and in law in not taking cognizance of the certificate issued by the Income Tax department u/s 195(2) of the Income Tax Act in respect of the charges paid to international telecom companies on account of the charges incurred by the subscriber of the assessee company while roaming in international territory, accepting that such payments were not subject to withholding tax u/s 195. The learned Commissioner of Income Tax (Appeals) has further erred in restoring the matter back to the file of AO.

18. During the course of hearing before us Ld.Counsel for the assessee pointed out that the AO had held the assessee liable to TDS on roaming charges paid to other telecommunication subscribers, which was paid on account of the subscribers of the assessee company using service of other telecommunication subscribers to make calls, following the decision of the Hon'ble Supreme Court in the case of M/s Bharat Sanchar Nigam Ltd. & Another Vs. Union of India & Others, 282 ITR 273, wherein the providing of mobile connection was held to be in the nature of service contract. Ld.Counsel for the assesee thereafter pointed out that the Ld.CIT(A), while adjudicating the issue, noted that the issue of tax deduction at source on the domestic roaming charges had been examined by the Hon'ble Supreme Court in the case of CIT vs M/s Bharati Cellular (2010) 193 Taxman 97, opining that it was necessary to find out if any human intervention was involved at any stage so as to determine whether the services rendered were in the nature of technical services warranting tax deduction at source u/s 194J of the Act. The Ld.CIT(Appeals) had noted that the Hon'ble Supreme

Court had given directions to the CBDT to the effect that the Department needs not proceed on the issue only by the contracts placed before the officers but should examine technical experts which would cooperate in disposing off the issue expeditiously and further enable the Appellate Forums to decide the legal issues based on the factual foundation. The Ld.CIT(Appeals) also noted that the Hon'ble Apex Court was of the view that the matter should receive fresh consideration in the hands of the Assessing Officer. Ld.Counsel for the assesee pointed out that considering the aforesaid decision of the apex court, the CIT(Appeals), had directed the Assessing Officer in the present case to take a fresh decision on the issue. Similarly, Ld.Counsel for the assessee pointed out that on the contention raised by the assessee that since the payees had paid taxes on the incomes received, the assessee could not be held as an assessee/payer in default for non deducting tax at source, the Ld.CIT(Appeals) directed the Assessing Officer to give a fresh opportunity to the assessee to submit requisite details and further directed that the demand be reduced to the extent the details were produced before the Assessing Officer.

19. Ld. counsel for assessee thereafter stated that it had no grievance against the aforesaid directions of the Ld.CIT(Appeals) since the Ld.CIT(Appeals) had only restored the issue to the Assessing Officer for considering the same afresh in the light of the directions of the Hon'ble Apex Court in the case of M/s Bharati Cellular (supra) on the

issue of TDS on roaming charges and also on the alternate contention raised by the assessee of no tax to be deducted at source where payees have paid taxes on the same, for verification of facts relating to the same. The Ld. counsel for assessee stated that it was, therefore, making no arguments on the grounds raised in 2 to 2.1 before us.

In view of the same, ground of appeal Nos.2 to 2.1 are treated as dismissed.

20. In effect the appeal of the assessee is partly allowed.

ITA No.216/Chd/2013:

21. The assessee has raised the following grounds:

1) *The learned ACIT (IDS), Chandigarh [AO] has erred both on facts and in law; in applying the provisions of Section 194] of the Income Tax Act, 1961 to the transaction of national roaming charges paid to other telecom operators on account of roaming charges incurred by the appellant's subscriber on their network. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in ignoring the factual evidence placed before him to show that there is no technical services rendered within the meaning of Section 194] of the Act as evident from the examination of the technical expert, and further erred in not adjudicating on the issue but restoring it back to the file of the Assessing Officer.*

2. *The AO has erred both on facts and in law in demanding the tax amounting to Rs. 12,54,601/-, in spite of the fact that the amount has been subject to tax in the hands of other telecom operators. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in imposing the requirement of furnishing certificate from the auditor of the deductees to certify the fact that the disputed amount has been taken into account by other telecom operators in computing their incomes and tax has already been paid on the same by other telecom operators.*

3. *The learned AO has erred both on facts and in law in charging interest of Rs.6,02,208/- u/s 201(1 A) of the Act. The learned Commissioner of Income Tax (Appeals) has*

further erred both on facts and in law in upholding the action of the learned AO."

22. It was common ground between both the parties that the sole issue in the present case pertains to tax deduction at source on roaming charges paid by the assessee to other telecommunication service providers. It was submitted by both the parties that the facts of the case and the issue in the present case were identical to that raised in ground Nos.2 to 2.1 in ITA No.340/Chd/2013 of the assessee's appeal. Ld.Counsel for the assessee contended that its contentions made in Ground No.2 to 2.1 of asseesses appeal in ITA No.340/Chd/2013, are reiterated herein also. Considering the above since admittedly the facts and issues involved in the grounds raised before us as above are identical to that in ground Nos.2 to 2.1 of the assessee's appeal in ITA No.340/Chd/2013, and also the pleadings of the Ld.Counsel for the assessee. our decision rendered therein at para 19 of our order above will apply to the above grounds also, following which the ground Nos.1 to 3 raised by the assessee are dismissed.

The appeal of the assessee is, therefore, dismissed.

ITA No.217/Chd/2013:

23. The assessee has raised the following grounds:

1) *The learned Asstt. Commissioner of Income Tax (TDS) (AO) has erred both on facts and in law in applying the provisions of Section 194H of the Income Tax Act to the discount given to distributors on sale of pre-paid products, being, "right to use Airtime for a specified value". The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.*

1.1) The learned AO has erred both on facts and in law in treating the business relationship between the company and the distributor as principal to agent as against the actual relationship of principal to principal. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

1.2) The learned AO has erred both on facts and in law in passing an order u/s 201(1) and holding the assessee company to be in default in respect of non-deduction of tax amounting to Rs.38,034,952/- u/s 194H on the difference between the distributor's price and sale price of the prepaid card alleging the difference to be in the nature of commission. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned AO.

1.3) The learned AO has erred both on facts and in law demanding the tax amounting to Rs.38,034,952/-, in spite of the fact that the amount has been subject to tax in the hands of distributors. The learned Commissioner of Income Tax (Appeals) has further erred in not considering the information filed by the company to substantiate that the distributor has already paid tax on the disputed amount.

2) The learned AO has erred both on facts and in law in charging interest of Rs.91,28,390/- u/s 201(1 A) of the Act. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned AO."

24. It was common ground between both the parties that the sole issue in the present case pertains to tax deduction at source on incentives paid to distributors on sale of prepaid SIM cards. It was submitted by both the parties that the facts of the case and the issue in the present case were identical to that raised in ground Nos.1 to 1.3 in ITA No.340/Chd/2013 of the assessee's appeal. Considering the above since admittedly the facts and issues involved in the grounds raised before us as above are identical to that in ground Nos.1 to 1.3 of the assessee's appeal in ITA No.340/Chd/2013, our decision rendered therein at para 15 & 16 of our order above will apply to the above grounds

also, following which the ground Nos.1, 1.1, 1.2 & 2 are allowed while ground No. 1.3 raised by the assessee is dismissed.

The appeal of the assessee is, therefore, partly allowed.

25. In the result, the appeals of the assessee in ITA No.340/Chd/2013 & ITA No.217/Chd/2013 are partly allowed and the appeal of the assessee in ITA No.216/Chd/2013 is dismissed.

Order pronounced in the Open Court.

Sd/-	Sd/-
(**SANJAY GARG)**	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated 30th May, 2018

Rati

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR

Assistant Registrar,
ITAT, Chandigarh