IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1445 & 1446/Hyd/2015
Assessment Years: 2014-15 & 2015-16

Idea Cellular Ltd., Hyderabad.	Vs.	Asst. Commissioner of Income-tax, TDS Circle,
PAN – AACB 2100P		Ward - 1(1), Hyderabad.
(Appellant)		(Respondent)

Assessee by : Shri Ronak G. Doshi
Revenue by : Shri P. Chandrasekhar

Date of hearing : 19-06-2018
Date of pronouncement : 20-07-2018

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

Both these appeals filed by the assessee are directed against the orders of the learned Commissioner of Income-tax(A) - 8, Hyderabad, both, dated 30/10/2015 for AY 2014-15 and 2015-16. As the issue is identical in both the appeals, they were clubbed and heard together and, therefore, a common order is passed for the sake of convenience.

2. Briefly the facts of the case, as taken from AY 2014-15 are that the assessee company is engaged in the business of providing cellular mobile telephone services to its customers in Andhra Pradesh & Telengana through a network of distributors. In order to verify compliance to the provisions relating to tax deduction at source, a survey u/s 133A was conducted in the case on 16/02/2015. Subsequently, proceedings u/s 201(1) and 201(1A) of the Act, were initiated by issuing a notice on 23/02/2015. In response, the

assessee furnished the information called for. On verification of the information provided, AO noticed that the assessee was not deducting tax at source in the case of commission payments of Rs. 77,27,80,277/- made to its distributors on prepaid connections, during FY 2013-14. Since the assessee was not deducting tax at source on the commission payments to agents on prepaid sim cards and recharge coupons, sold through agents, a show cause notice was issued to the assessee on 23/02/2015 to show cause as to why demand u/s 201(1) and 201(1A) should not be raised for non deduction of TDS u/s 194H on the above mentioned expenditure.

2.1 In response, the assessee submitted that the agreement with the distributors is on principal to principal basis and that the distributors pay discounted price in advance and nothing is paid by the assessee to the distributors so as to attract the provisions of section 194H.

2.2 The AO following the earlier order in assssee's own case for AY 2009-10, held that there is a principal to agent relationship between the assessee company and the distributors, the margin earned by the distributors on sim cards and other services are in the nature of commission and, therefore, the assessee is liable to deduct tax at source u/s 194H of the Act and as the assessee had not complied with the provisions, treated it as an assessee in default as per the provisions of section 201(1) and is consequently liable to pay interest u/s 201(1A) of the Act. Accordingly, he computed the TDS payable u/s 201(1) @ 10% on the commission payment of Rs. 77,27,80,277/- u/s 194H at Rs. 7,72,78,028/- and interest u/s 201(1A) thereon from April, 2013 to March, 2015 @ 1% Rs. 1,42,12,714/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and the CIT(A) upheld the action of the AO.

4. Aggrieved by the order of the CIT(A), the assessee is in appeal before us raising five grounds of appeal, which relate to TDS on discount/ commission of Rs. 7,72,78,028/- u/s 201(1) and interest u/s 201(1A) of Rs. 1,42,12,714/-.

5. Before us, the ld. AR of the assessee filed written submissions, which are as under:

> *"AS REGARDS GROUND NO. I:*
> *TREATING ASSESSEE AS 'ASSESSEE IN DEFAULT' FOR NON-DEDUCTION OF TAX DEDUCTED AT SOURCE "(TDS)" UNDER SECTION "(U/S.)" 201 READ WITH SECTION "(R.W.S.)" 194H OF THE ACT WITHOUT ASCERTAINING AND PROVING THE FACT AS TO WHETHER RECIPIENT OF INCOME HAS PAID TAXES ON ALLEGED INCOME RECEIVED/ RECEIVABLE FROM ASSESSEE AS REQUIRED U/S. 191 OF THE ACT:*
>
> *SUBMISSIONS:*
>
> *1. The TDS Officer erred in treating the Assessee as an 'assessee-in-default' u/s. 201 r.w.s. 19H of the Act without ascertaining and proving that the recipient had not paid tax on the alleged income received/receivable from the Assessee as required u/s. 191 of the Act.*
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> *2. On the plain reading of section 201 rws 191 of the Act, unless and until the Income-tax Department has found that, the recipient of the income i.e., the pre-paid distributors ("the Distributors") have not discharged the tax liability, the Assessee cannot be treated as an 'assessee-in-default' u/s. 201 rws 194H of the Act.*
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> *In this regard, the Assessee would like to place reliance on:*
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> *• Jagran Prakashan Ltd. vs. DCIT (345 ITR 288)(Allahabad HC)*
> *• ICICI Bank Ltd. v. DCIT(TDS) (156 TTJ 569) (Lucknow Trib.)*
> *• Ramakrishna Vedanta Math vs. Income-tax Officer (24 Taxmann.com 29)(Kol.)*
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> *AS REGARDS GROUND II & III: TREATING THE ASSESSEE AS AN "ASSESSEE IN DEFAULT" U/S. 201 OF THE ACT FOR NON-DEDUCTION OF TAX U/S. 194H OF THE ACT ON DISCOUNT ALLOWED TO THE PRE-PAID DISTRIBUTORS ("THE DISTRIBUTORS") IN RESPECT OF SUPPLY OF SIM CARD/RECHARGE VOUCHERS (SIM/RV):*

FACTS IN BRIEF:

• The Assessee is a telecom service provider engaged in providing services in Andhra Pradesh. In the course of its business, it appoints various Distributors.

• The Assessee is admittedly paying service tax on the telecommunications services provided to the ultimate subscriber.

• The Assessee supplies Prepaid Cards i.e. Subscriber Identification Module and Recharge Vouchers ("SIM / RV") to its Distributors at a discounted price. The Distributors are free to resupply them to the Retailers at any price subject to the Maximum Retail Price ("MRP").

• It is the Distributor who pays the discounted price to the Assessee and there is no payment of any kind made by the Assessee to the Distributor for the above transaction.

• The Distributors are required to pay the Assessee, the discounted price of the products purchased by them in advance irrespective of the fact that whether such products purchased are in tum sold or are remained unsold.

• For the A.Ys 2004-05 to 2009-10, the Hon'ble Jurisdictional Hyderabad Tribunal, vide it's order dated May 23, 2014 [(66 SOT 184 (THyd URO)], has, following the order of the Hon'ble Delhi High Court in Assessee's own case (325 ITR 148) and Hon'ble Jurisidctional Andhra Pradesh High Court's order in the case of Vodafone Essar South Ltd. (ITA 291/2013), held the discount allowed to prepaid distributors to be in the nature of commission within the meaning of section 194H and accordingly assessee to be as assessee-in-default for non-deduction of tax at source U/S 201(1) r.w.s 194H of the Act. Against the said order of the Hon'ble Hyderabad Tribunal, the Assessee preferred an Appeal before the Hon'ble Andhra Pradesh High Court. The Hon'ble High Court has admitted the appeal against the said order of the Hon'ble Hyderabad Tribunal. For the sake of reference evidencing the admission of appeal by the Hon'ble Andhra Pradesh High Court, appeal status available from the website of the High Court is attached at Annexure-A.

Assessee's submissions:

At the outset, the Assessee most humbly admits that the issue has been decided against the Assessee by the Hon'ble Jurisdictional Andhra Pradesh High Court. Nevertheless, the

Assessee most humbly submits that even after the 'against' decisions of Delhi, Kerala and Calcutta High Courts on the said issue, the Hon'ble Kamataka High Court, after dealing with all the aforesaid decisions, has decided the issue in favour of the bunch of assessees in telecom sector. Recently, even the Hon'ble Rajasthan High Court has also decided the issue in favour of the Assessee in respect of it's Rajasthan Circle.

In view of the foregoing developments, the Assessee most humbly summarises it's contentions as under:

The Assessee's contention that no tax is deductible under section 194H of the Act on discount allowed to pre-paid distributors is based on two separate and distinct propositions:

I. The Assessee and the Distributors are acting on Principal to Principal ("P2P") basis and not as Principal to Agent ("P2A") and;

II. Without Prejudice to the above & assuming without admitting that relationship is P2A, in the instant case, as the payment is made by the Distributor and there is nothing ever payable by the Assessee to the Distributor or anyone else in respect of the SIM / RV, the mechanism for deducting tax u/s. 194H of the Act fails and thus the Assessee cannot be treated as 'assessee-in-default' u/s. 201 of the Act.

Proposition 1: The Assessee and the Distributors are acting on Principal to Principal ("P2P") basis and not as Principal to Agent ("P2A")

For attracting provisions of section of 194H of the Act it is essential that Assessee must appoint a person who would act on his behalf in the course of rendering services to third parties and only then it can be said that there exist P2A relationship. In the present case the arrangement between the Assessee and Distributors is not in the nature of P2A but P2P. In this context, attention is invited to the following:

(i) The Distributor is not acting as an agent of the Assessee but as an independent contracting party. (Refer Clause 2 of the Agreement at page no. 7 of the Factual Paper Book ("FPB")), which specifically states that the Agreement between the Assessee and the Distributor is on a P2P basis i.e., the Distributor, is not an agent of the Assessee.

(ii) The agent has to pay over to the principal all sums received by him from third parties (after making the specified retention) to the principal. (Section 218 of the Indian Contract Act). The

distributor does not have to pay over to the Assessee any amount realised by him from the retailer he having already paid purchase price upfront. (Refer Clause 4 of the Agreement at page no.8 of the FPB). Whatever, he may collect from the retailer, is collected at his own property and not on account of the Assessee Principal. The Assessee is not concerned with the profit / loss which the Distributor makes, the financial transaction with the Assessee being concluded when the Distributor pays the price to the Assessee.
(iii) In a principal agency relationship, an agent never takes credit risk or other risks and all risks are born by the Principal whereas in the Assessee's case the Distributor bears the credit risk in cases where credit is extended by the Distributor to Authorised Retailers or end user. (Refer Clause 6(q) of the Agreement at page no. 13 of the FPB)

(iv)In a principal agency relationship, the principal is liable to compensate the agent for any loss or damage suffered in discharging his functions as an agent (See Section 222, 223, and 225 of the Indian Contract Act). However, in Assessee's case, if there is any loss due to theft, natural calamity, etc., per se Assessee is not liable to recoup the same. Only in some cases, on Prepaid Distributor making payment of processing fees, the Assessee may revalidate the products. (Refer Clause 6.2 of the Agreement at page no. 14 of the FPB)

(v) In a principal agency relationship, the Principal is liable to take back the stock of products not used or sold by expiry date. However, in the present case it is agreed that inactive SIM I RV beyond expiry shall not be returned to the Assessee but shall be treated as used by the distributors at the end of the expiry period unless the same is brought to the notice of the Assessee by the distributor within the expiry period. (Refer Clause 6.3.3 of the Agreement at page no. 15 of the FPB)

(vi)On termination under the Principal and Agency relationship, the Principal is liable to take back the unsold stock without paying anything to the Agent since the stock was always belonging to Principal. In the Assessee's case, on the Distributor returning the SIM / RV, the Assessee is not responsible for any unused or unsold stock lying with the distributor post termination. (Refer Clause 10(i) of the Agreement at page no.24 of the FPB)

Thus, the above clauses read with agreement would prove that the relationship is of P2P and risk and rewards are also being transferred to Distributor. The risk of stock remaining unsold, expired etc. is with Distributor. Also, it would demonstrate that the difference between price paid to Assessee and selling price

to Retailer is on his own account and not on account of Assessee and hence the Assessee is not a 'person responsible for paying any income'. In fact, a mere purchase from Assessee does not generate income at the stage of purchase, at which stage the financial transaction with Assessee has already ended.

Proposition 2: Without Prejudice to the above & assuming without admitting that relationship is P2A, in the instant case, as the payment is made by the Distributor and there is nothing ever payable by the Assessee to the Distributor or anyone else in respect of the SIM / RV, the mechanism for deducting tax u/s. 194H of the Act fails and thus the Assessee cannot be treated as 'assessee-in-default' u/s. 201 of the Act.

In the present case, the Assessee is not liable in law or factually to make any payment to the Distributors. Indeed, the distributorship agreement makes it clear t t the Assessee has to provide to the Distributor SIM / RV for which the Distributors have to pay the distributor's price to the Assessee in advance, i.e., before the Assessee hands over the SIM / RV to the Distributor. The handing over of SIM / RV, a physical item representing the talk time by the Assessee is in return for the payment made by the Distributors (Refer Clause 4 of Agreement at page no.8 of the FPB). In view of the above, the condition for activating section 194H of the Act is not fulfilled. Responsibility for payment must be found in the contract with the Distributors. Under the agreement, the Assessee is not paying any amount to the Distributors.

Without prejudice to the above and even assuming whilst disputing that the Assessee is responsible for making any payment to the Distributors, the Department has to show that the Distributors have received a payment by way of commission or brokerage (which would include any payment received or receivable by the Distributors) whilst acting on behalf of the Assessee.

The liability of deducting tax at source u/s. 194H of the Act can be imposed only if the following conditions are cumulatively complied with:

• The payer should be a "person responsible for paying" such income to the payee;

• 'income should be in the nature of 'commission' or 'brokerage', and payment should be received by a person acting on behalf of other, in the course of rendering services to third parties;

• such income should be 'paid' or 'credited' by the payer in favour of the payee; the time of 'credit' or 'payment' should also be known, and the amount on which tax is deductible should be determinable.

As stated above, the Hon'ble Karnataka High Court in the case of Bharti Airtel Limited vs. DCIT (2014) (372 ITR 33) (Refer page no. 39 to 60 of LPB) has given a finding that the discount allowed to prepaid distributors is not liable for tax deduction at source U/S 194H of the Act. Also, this decision lays down the key ingredients for applicability of 194H of the Act, namely:

• Who is the person responsible for income
• In absence of payment or credit, when TDS to be deducted
• And lastly on what amount TDS is to be deducted

Albeit at the cost of repetition, the Assessee most humbly submits that as far as jurisdictional precedence is concerned, the Hon'ble Jurisdictional High Court in the case of MIs Vodafone Essar South Ltd. (supra) vide order dated July 17,2013 has upheld the order of the Hon'ble Hyderabad Tribunal and held that the provision of section 194H is applicable in respect amounts paid to the agents in connection with sale of SIM Cards and other services. However, in the second last para of the above High Court order, it has followed the decision of the Hon'ble Delhi High Court in the case of CIT v Idea Cellular Ltd. (325 ITR 145), Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd v ACIT (332 ITR 255) and Hon'ble Calcutta High Court in the case of Bharti Cellular v ACIT (244 CTR 185) and held that the AR had not distinguished the above case laws in so far as similarity of facts and method of accounting were concerned. Further, the Hon'ble Jurisdictional Tribunal in assessee's own case (supra) for A Y 2004-05 to 2009-10 has following the order of the Hon'ble Delhi High Court in Assessee's own case (supra) held the discount allowed to prepaid distributors to be in the nature of commission within the meaning of section 194H and accordingly assessee to be as assessee-in-default for non deduction of tax at source U/S 201(1) r.w.s 194H of the Act.

The Hon'ble Andhra Pradesh High Court has dismissed appeal in case of Vodafone Essar South Ltd (ITA No. 291 of 2013) vide order dated July 17,2013 by:

• Following the decision of Hon'ble Delhi, Kerela and Calcutta High Courts.

• Recording that before the ITAT, the AR did not bring any arguments to distinguish those cases in so far as similarity of facts and method of accounting are concerned.

In this regard the Assessee, most humbly submits as under:

• Hon'ble Delhi High Court in Assessee's Delhi Circle case was relating to AY 200304 and 2004-05 when Assessee accounted on gross sale price.

• Hon'ble Delhi High Court decided against the assesse mainly on the basis that services cannot be bought and sold and hence any intermediary is always an agent and not a distributor.

• Hon'ble Kerela and Calcutta High Courts majorly follows Delhi High Court and indirectly Jurisdictional High Court also follows those 3 High Courts.

• Assessee submits that certain clauses in present agreement are different from Delhi Circle.

• Assessee submits that the Hon'ble Kamataka High Court which was rendered post above High Court decisions, specifically refers to Delhi, Kerela and Calcutta High Courts and states that 'services can be bought and sold'.

• Lastly, it also considers the accounting treatment at para 11 .

• Post Kamataka High Court decision, Hon'ble Rajasthan High Court takes a view in favour of Assessee.

• Thus, Assessee submits that right to services can be bought and sold and hence relationship can be ofP2P.

• Secondly, considering net accounting in captioned years as demonstrated by the Assessee at Page no 39 of Factual Paper Book, even as per Para 11 of order of Hon'ble Karnataka High Court, it be held that the Assessee is not liable to deduct TDS.

• In the Assessee's own case for earlier year unlike in the case of Vodafone South Ltd, appeal is admitted by Hon'ble Jurisdictional High Court.)

• In any event, neither IT AT nor Hon'ble Andhra Pradesh High Court has considered the absurdity to hold Assessee as "assesse-in-default" u/s 201 r.w.s 194H on facts of present case by importing section 206C in 194H. If view of department is accepted then it means that when collecting price from distributor of say Rs 80/-, Assessee ought to have collected Rs

80/- + Rs 2(i.e. 10% on difference between MRP of Rs 100/- and Distributor price of Rs 80/-) thereby importing section 206C(a TCS mechanism is TDS provision.)

Therefore Assessee humbly submits that with utmost respect to Hon'ble Andhra Pradesh High Court, in view of above facts on accounting and above submissions, a different view may be taken.

In so far as recent decision of Hon'ble Hyderabad ITAT in Vodafone Mobile services Vs. DCIT (86 taxmann 115) is concerned,

It appears that main thrust of argument in that case was that Hon'ble Karnataka High Court being subsequent decision be considered.

Since Hon'ble Andhra Pradesh High Court granted stay, a different view may be undertaken.

Assessee humbly submits that:

• In present case Assessee has clearly demonstrated that it's accounting treatment is different from Vodafone Essar South Ltd and falls within para 11 of order of Karnataka High Court.

• Certain clauses as compared to Hon'ble Delhi High Court are different in current year.

• Restrictions per se cannot make Principal as agent.

• Neither IT AT in Vodafone Essar South Ltd nor High Court has considered the argument on section 206C as submitted above.

<u>WITHOUT PREJUDICE TO THE ABOVE:</u>

AS REGARDS GROUND IV: TAX ON SAME INCOME CANNOT BE RECOVERED TWICE:

1. The Assessee humbly submits that, as the recipients of income would have already accounted and discharged appropriate tax liability on their income, and the action of treating the Assessee as 'assessee-in-default' u/s. 201(1) of the Act and recovering the amount of taxes would tantamount to recovering of tax twice in relation to the same Income.

2. For this proposition, reliance is placed on following decisions:

a. Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT (293 ITR 226)(SC);
b. Bharti Cellular Limited vs. ACIT (200 Taxman 254) (Cal)
c. Vodafone Essar Limited vs. Dy. CIT (45 SOT 82) (T Mum)

3. In this regards, the Assessee submits that where the basic information of taxes paid by the recipient is provided by the Assessee, then the onus, to examine the facts and confirm whether the tax has been paid by the recipients or not, falls on the ITO. In this regards, the Assessee has submitted the declarations received from the Distributors (i.e. recipient of the income) which contains that the amount received from the Assessee has been offered for tax in their Return of Income, details of the jurisdiction under which they are assessed, address for communication and their PAN.

In view of the above, the Assessee request Your Honour to direct the Learned TDS Officer to consider the declarations submitted by the Assessee and recalculate the demand u/s. 201(1) of the Act and consequentially the interest u/s. 201(IA) of the Act.

WITHOUT PREJUDICE TO ABOVE

AS REGARDS GROUND V: LEVY OF INTEREST U/S. 20l(IA) OF THE ACT:

1) If it is held that the Assessee is liable to deduct TDS u/s. 194H of the Act, the Assessee humbly submit that where the recipient (i.e. the Distributors) of the income (i.e. discount) had paid income-tax on their income by way of advance tax or / and self assessment tax, then there was no question of levying any interest on the Assessee as the amount which was payable to the Income-tax Department have been duly paid by the Distributors. Reliance is placed on CIT Vs. Rishikesh Apartments Co-operative Housing (253 ITR 310) (Guj),

2) Further, the Assessee submits that, in the case of recipients of taxes who have claimed refund of taxes paid by them or who have filed loss return of income, there is no justification for charging of interest u/s. 201(1A) of the Act as the interest is to compensate the revenue for the loss. In the above case, the question of late deposit of advance tax / self-assessment tax to the Income-tax Department does not arise and therefore, there is no question of levying of interest on non-payment of TDS. In this contention, the Assessee relies on the following decisions which are as under:

• CIT vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (287 ITR 354) (Raj);
• ITO vs. Emerald Construction Co. (P.) Ltd. (29 SOT 495) (Jodh.)
• CIT v. Dewan Chand (178 Taxman 173) (Del) (HC);
• Ramakrishna Vedanta Math V s. Income-tax Officer (24 Taxmann.com 29)(Kolkata Tribunal)
• Madhya Pradesh Madhya Kshetra Vidyut Vitaran Co. Ltd. Vs. ACIT (ITA. No. 54 to 56/ Ind/2012)

Therefore, the Assessee submits that no interest should be chargeable on the Assessee as the Assessee is not an "assessee in default" under the Act."

6. Before us, the ld. DR relied on the order of the coordinate bench of this Tribunal in assessee's own case for AYs 2004-05 to 2009-10 in ITA Nos. 1083 to 1088/Hyd/2011, order dated 23/05/2014.

7. Considered the rival submissions and perused the material facts on record. We find that similar issues came up for consideration before the Tribunal in assessee's own case (supra) wherein the coordinate bench has dismissed the appeal of the assessee. Recently, the coordinate bench has passed judgment in the case of M/s Vodafone Mobile Services Ltd. in ITA Nos. 1189/Hyd/104 and 1401 to 1405/Hyd/2015 and others, order dated 29/09/2017. The facts in the above case are similar to the facts of the assessee's case and the findings of the coordinate bench are reproduced below:

84. We have carefully considered the rival submissions and perused record. It is not in dispute that Hon'ble Andhra Pradesh High Court in the case of M/s. Vodafone Essar South Ltd (ITTA No.291 of 2013) followed decisions of Hon'ble Delhi High Court (325 ITR 147), Hon'ble Kerala High Court (332 ITR 255) and Hon'ble Calcutta High Court (244 CTR 185) by observing that facts of the case in all those reported judgments are identical to the case of assessee and the assessee could not distinguish the above cases in so far as the similarity of the facts and method of accounting are concerned. In otherwords it can be considered as a decision rendered on merits. The issue as to whether payment to be made by the assessee is mandatory in order to invoke provisions of section 194H, or whether sale price at the end of distributor is ascertainable,

was already taken into consideration in detailed judgments rendered by Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court. It cannot be said that the decision of Andhra Pradesh High Court is not on merits. When the facts are identical there is no need for another High Court to pass a detailed order. In fact Hon'ble High Court of Andhra Pradesh categorically observed that there is no illegality or infirmity in the order passed by ITAT, Hyderabad Bench, which in turn is based upon the decisions referred to above.

85. As against this, Hon'ble Karnataka High Court had taken a diametrically opposite view with regard to need for payment to be made by assessee to distributor and the fact that computation is not possible since distributor can sell at any price subject to the maximum limit of MRP. Since Hon'ble Jurisdictional High Court had already rendered a decision on these points, we cannot reconsider the matter on those issues. Suffice to say that on the aforementioned issues we are bound by the decision of Hon'ble Andhra Pradesh High Court.
86. In fact Ld Counsel mainly focused on one issue i.e., on the aspect of "sale of service". According to Ld Counsel for the assessee this aspect of the matter was not considered either by Hon'ble Andhra Pradesh High Court or other High Courts which, in turn were referred to by Andhra Pradesh High Court. We shall now, therefore, refer to the order passed by Hon'ble Delhi High Court since Hon'ble Andhra Pradesh High Court has followed the said decision. In the case of CIT vs. Idea Cellular Ltd (supra) it was observed that connections are provided to subscribers through distributors, called "pre-paid market associates", appointed by assessee and such PMAs are not allowed to remove, obscure or delete any marks placed on prepaid SIM cards / recharge coupons and distributors are not allowed to sell similar products offered by other companies, which are in the similar line of business. Assessee reserved it's right to terminate the agreement unilaterally. If there are natural calamities or circumstances beyond the control of either party by which SIM cards / recharge coupons are destroyed, assessee agreed to replace the SIM cards / recharge coupons. Other clauses were also taken into consideration and the Court observed that cellular company has full legal and equitable title in respect of SIM cards / recharge coupons delivered to subscribers and distributors have to store the SIM cards etc., in such a way to clearly indicate at all times that pre-paid SIM cards / recharge coupons are owned by assessee. Even retailers cannot be appointed without prior approval of assessee. In fact no sales tax was even paid on the ground that there is no transfer of property to the distributor. It was

always treated as service, for acting as a live link between subscriber and assessee. Therefore, the relationship between assessee and distributor can only be considered as a relationship of "principal to agent". The Court further observed that the pricing freedom – permitting distributor to sell at any price - would not come in the way of determining the relationship between assessee and distributor so long as agent is obliged to render services for and on behalf of assessee on certain parameters and in this regard Hon'ble Delhi High Court relied upon a decision of the Apex Court in the case of Bhopal Sugar Industries Ltd vs. STO (1977) [40 STC 42] (SC). The Court also took note of the fact that legal relationship is established between assessee and the ultimate consumer / subscriber since activation of SIM cards by assessee is in the name of subscriber / consumer and service is provided to the subscriber. Merely because advance payment is received from distributor, it does not amount to 'sale of goods' since unsold SIM cards can be taken back by assessee under certain circumstances. The Court further observed that this is antithesis of "sale". The Court also observed that a service can only be rendered and it cannot be sold particularly when assessee-company is operating under the right of licence agreement entered into with the Government of India; nobody else can be given the right to operate as cellular service provider. It was thus concluded that the ultimate service is provided by assessee-company and not by distributor. SIM card / other module is only in the nature of a key to the consumer to have access to the telephone network.

87. Before parting the Court also took note of the fact that concerned distributor can always file return of income and claim credit for the payments already made on their behalf by the assessee. On the other hand, such a provision serves public purpose inasmuch as any distributor who is liable to pay tax but rather evading tax, would come under the Income Tax net and assessee is in no way affected by this.

88. Andhra Pradesh High Court also referred to decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd (supra) wherein Court observed that terminology used by the assessee for receiving the amount payable by distributors is immaterial since the discount given to distributor is for the services to be rendered to assessee in which event it falls within the definition of 'commission' u/s 194H of the Act. The discount is nothing but a margin given by assessee to distributor at the time of delivery of SIM cards / recharge coupons. Distributor acts as an agent on behalf of assessee for

procuring and retaining customers. The Court observed that essence of contract between assessee and distributor is that of service and distributors are acting as agents of assessee-company. Here also the Court noticed that the relationship between assessee and distributor is not on 'principal to principal' basis because the distributor is only a middleman between service provider and ultimate consumer. The Court further observed that the ***essence of a contract of agency is the agent's authority to commit the principal.*** *According to the Court, distributor commits assessee to subscribers to whom assessee is accountable under the service contract which is the subscriber since connection is arranged by distributor on behalf of assessee. Therefore, it was concluded that the terminology used by assessee for payment by distributors is immaterial and in substance the discount given at the time of sale of SIM cards / recharge coupons is a payment received or receivable by distributors for the services to be rendered to assessee and it falls within the definition of 'commission' u/s 194H of the Act.*

89. The Court also mentioned about the scheme of deduction of tax at source and observed that the grievance, if any, against recovery of tax by assessee, should be on distributors and not on assessee / cellular operators.

90. On careful perusal of the aforecited two judgments, which in turn were followed by Hon'ble jurisdictional High Court, indicate that the essence of contract was treated as a contract between 'principal and agent' and distributor in his capacity as an agent may exercise his authority to commit the principal to render services to subscribers and this in itself cannot be termed as contract between 'principal to principal'. In otherwords the issue is as to whether there was a sale of service or not was impliedly considered by Hon'ble High Court of Kerala which in turn was followed by Hon'ble Andhra Pradesh High Court. Thus it may be difficult for us to take a different view, merely because Hon'ble Karnataka High Court had taken a different stand under identical circumstances.

91. At this juncture, we may state that in the case of CIT vs. Thana Electricity Supply Ltd (supra) Hon'ble Bombay High Court observed that the expression "two views" should be understood in the sense that the Court, which is called upon to consider the issue, should be of the opinion that the other view is reasonable. With due respect we are of the view that the only reasonable interpretation is that of the view taken by Hon'ble Andhra Pradesh High Court by following decisions of Hon'ble

Delhi High Court, Kerala High Court as well as Calcutta High Court. In otherwords, the issue as to whether the agent's right to commit assessee to render service to subscribers would change the nature of contract from 'principal to agent' to 'principal to principal', was impliedly considered by the aforementioned High Courts which, in our view is most appropriate, in the circumstances of the case. Therefore, we prefer to follow the decisions of Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court.

92. Ld Counsel for the assessee referred to an order passed by SMC Bench of ITAT Hyderabad in the case of Bharat Sanchar Nigam Ltd (2015) [42 ITR (Trib) 669]. On careful perusal of the said order it indicates that the decision is essentially rendered in the light of the Circular issued by CBDT. It is well settled that the language used by the Tribunal, while disposing of the matter, particularly when it is essentially based on a Circular issued by CBDT, cannot be equated to a language used in a Statute. At any rate in the aforementioned case none appeared for the assessee. Ld DR had agreed that it is covered by the Circular as well as the latest decision of Hon'ble Karnataka High Court and thus there was no need for the Single Member to go in depth as to the nitty-gritties of the contract and the essential difference between the decision rendered by Hon'ble Andhra Pradesh High Court on one hand and the view taken by the Hon'ble Karnataka High Court on the other hand.

93. However, while giving a finding in the case on hand we have also carefully gone through the distributorship agreements. We are unable to accept the contention of the assessee that the distributor has complete right and control over the matter of providing talk-time to ultimate subscribers; distributor can of course insist upon assessee while making a request to provide talk-time through e-module etc., but the final decision has to be taken by assessee, only upon verification of consumer details which in turn has to be provided by distributor. Assessee can terminate the contract at any time by giving thirty days time without assigning any reason and distributor has to return all equipment and furniture supplied by the VESL upon termination of such contract. Other conditions such as maintaining the confidentiality and limitation of assigning rights or obligations to third party by distributor would also indicate that distributor is merely acting as an agent i.e., as a connecting link between assessee and ultimate subscriber.

94. We therefore prefer to follow the decision of Hon'ble jurisdictional High Court by holding that though distributor commits assessee to subscribers and exercise his authority to ensure arranging connection to subscriber, it will not alter the situation since the overall context in which such power is given to distributor has to be looked into in the circumstances of the case and the role of distributor can only be said to be a middleman between service provider on one hand (assessee herein) and ultimate consumer on the other hand. In otherwords the distributor can only be termed as an agent of assessee in which event providing service to ultimate consumer through the medium of distributor cannot be said to be a sale of service by assessee to the distributor.

95. Now we shall refer to the observations of jurisdictional High Court (order dated 25.08.2015) in W.P. Nos. 2456 and batch of 2015. In the aforementioned case, the Court was concerned with granting of stay and the very fact that it has granted partial stay indicates that the decision rendered by Hon'ble Karnataka High Court was not followed. In otherwords the observations made therein are only in the context of considering balance of convenience while granting stay and such observations need not be considered as a decision doubting the correctness of the judgment delivered by earlier Bench of High Court. In fact, even in the aforecited judgment, it was admitted that the earlier Bench affirmed the order of the Tribunal by following judgments of Hon'ble Delhi High Court, Kerala High Court and Calcutta High Court and because a similar issue is pending before Hon'ble Supreme Court, apart from the fact that there is a favourable decision of Hon'ble Karnataka High Court, Hon'ble Andhra Pradesh High Court thought fit to grant conditional stay. Therefore, observations made by Andhra Pradesh High Court in W.P. Nos. 2456 and others cannot be termed as an order doubting the correctness of earlier judgment of the same High Court.

96. The ITAT Hyderabad Bench is bound to follow the order passed Hon'ble jurisdictional High Court on merits rather than interpreting / reconsidering the issue based upon certain observations made by a later Bench while granting partial stay. We already noticed that earlier decisions of Hon'ble Delhi High Court and Kerala High Court are on the premise that distributor is merely a link between assessee and ultimate consumer / subscriber and distributor can at best enforce obligation on the part of assessee to provide connection / talk-time to subscriber which itself would not change the characteristic of transaction from 'principal to agent' to 'principal to principal'. We therefore

hold that the order passed by Assessing Officer, as confirmed by Ld CIT (A), by holding that assessee is a defaulter u/s 201(1) and consequently liable to pay interest u/s 201(1A) of the Act, subject to certain conditions as prescribed by Hon'ble Supreme Court (Hindustan Coca Cola Beverage P. Ltd), is in accordance with law."

As the grounds and facts in the AYs under consideration are similar to the above cases (supra), following the decision therein, we dismiss ground Nos. 1 to 4 and ground No. 5 is remitted to the file of the AO for recomputation of interest u/s 201(1A) of the Act in the light of the above decision and is treated as allowed for statistical purposes.

8. In the result, both the appeals under consideration are partly allowed for statistical purposes.

Pronounced in the open court on 20th July, 2018.

Sd/-	Sd/-
(P. MADHAVI DEVI)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, Dated: 20th July, 2018

Kv

Copy to:-

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2) ACIT, TDS Circle – Ward 1(1), 4th Floor, B Block, IT Towers, AC Guards, Hyderabad.
3) CIT(A) – 8, Hyderabad
4 CIT (TDS), Hyderabad
5) The Departmental Representative, I.T.A.T., Hyderabad.
6) Guard File