आयकर अपीलीय अधीकरण, न्यायपीठ – "A" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
(समक्ष श्री ए.टी. वर्की, न्यायिक सदस्य **एवं** डॉ ए.एल. सैनी, लेखा सदस्य)
[Before Shri A.T. Varkey, JM & Dr. A.L. Saini, AM]

I.T.A. Nos. 1579 to 1582/Kol/2019
Assessment Years: 2014-15 to 2016-17 & 2018-19

Vodafone Idea Limited (Formerly Idea Cellular Limited) 7th Floor, DN 52, Sector-5, Srijan Tech Park, Salt Lake, North 24-Parganas, Kolkata-700 091.	Vs.	ACIT(TDS) Circle-2, Kolkata.
(PAN: AAACB 2100 P)		
Appellant		Respondent

For the Appellant	Shri Deepak Chopra, Adv. & Smt. Manasvini Bajpai, Adv.
For the Respondent	Dr. P.K. Srihari, CIT(DR) & Shri Supriyo Pal, JCIT

Date of Hearing	21.10.2019
Date of Pronouncement	22.11.2019

ORDER

Per Shri A.T.Varkey, JM

These appeals are preferred by the assessee against the action of the Ld. CIT(A)-24, Kolkata dated 10.06.2019 confirming the action of AO u/s 201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter 'the Act') for Assessment Years (hereinafter 'AY') 2014-15 to 2016-17 & 2018-19.

2. Though the assessee has raised several grounds of appeals, the main ground of appeal is against not getting proper opportunity before the AO while he passed the order u/s 201(1)/201(1A) of the Act treating the assessee to be in default for non-deduction of TDS.

3. At the outset itself the Ld. Counsel for the assessee, Shri Deepak Chopra drew our attention to ground no. 1(b) which the assessee preferred before the CIT(A) wherein the grounds of appeal of the assessee are as under:

> *"b) The appellant was given very short opportunity to reply before concluding the assessment proceedings u/s 201(1)/201(1A) of the Act."*

4. The Ld. CIT(A) has dismissed this ground of appeal of the assessee vide para 5.1 of his order and was of the opinion that the AO has given sufficient opportunity to the assessee. Assailing the aforesaid action of the Ld. CIT(A), the Ld. Counsel draws our attention to the affidavit filed by the assessee to show that the assessee had not got proper opportunity before the AO. We note that a survey was carried out on the business premises of the assessee company on 05.09.2016. Thereafter notice u/s 201(1)/201(1A) of the Act was issued to the company on 28.09.2016 for the aforesaid assessment years. In terms of the questionnaire raised be the AO, the company was required to furnish the following details:

a) Copies of audited balance sheet, profit and loss account Form 3CD along with computation of income;
b) Details of bank accounts etc.;
c) Copy of TDS return filed giving details of TDS payments;
d) Party wise details of MRP, invoices amount and commission/discount allowed on recharge vouchers, starter packs for all telecom circles under the relevant TAN jurisdiction;

5. It was brought to our notice that on 17.01.2017, the assessee had submitted the reply and in para 6 of the reply, the assessee company highlighted the features of the contractual arrangement between the company and distributors. The various clauses of the agreement were referred to in the said submission in para 6 (copy of the reply dated 17.01.2017 is enclosed as Annexure 2). On a perusal of this Annexure 2 which is found placed from page 9 to 28, we note that the assessee had replied to the AO/ACIT(TDS), Circle-2, 10B, Middleton Row, 7th Floor, Kolkata-700 071 at page 11 below para 6 which is stated as under:

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

- *The Distributor is not acting as an agent of the Assessee but as an independent contracting party, (Refer Clause 4 of the Agreement at page no 4), which specifically states that the Agreement between the Assessee and the Distributor is on a principal to principal basis i.e. the Distributor, is not an agent of the Assessee. This being the specific provision agreed by both the parties, it is not open to the Income-tax Officer to make a determination contrary to what the parties have provided.*

- *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 SIMs/Recharge Vouchers 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 7 page 5 to 10)" [Emphasis given by us]*

6. It was brought to our notice that after this detailed reply by assessee company dated 17.01.2017, neither any further query was raised by the AO nor the AO asked the assessee to produce any agreement to support the aforesaid claim of the assessee. And it was pointed out to us that thereafter (assessee's reply to AO dated 17.01.2017) there was no further direction/action from the part of the AO till January, 2019 i.e. for 2 years there was no action on this issue.

7. Thereafter on 11.01.2019, the assessee received another notice from the successor AO u/s 201 of the Act, who repeated the allegation raised by his predecessor against the assessee and the AO then directed the assessee to submit the general ledger containing MRP of recharge vouchers/starter packs distributors price and discount given as well as audit report and tax audit report, which facts we note from a perusal of copy of notice dated 11.01.2019 which is enclosed along with the Annexure 'A' which is found placed at page 29. The assessee company pursuant to the direction of AO dated 24.01.2019 submitted the audit and tax audit reports (copy of letter dated 24.01.2019 of assessee submitting these documents is seen enclosed as Annexure 4) and it was brought to our attention that copy of the general ledger was submitted along with letter dated 31.01.2019 (Annexure 5). Thereafter the AO issued another letter dated 06.02.2019 wherein he directed the assessee company to submit

distributor wise details in respect of the discount given to distributors. The AO also required the assessee company to file Form 26A from distributors (Copy of the same is found enclosed as Annexure 6). Thereafter on 18.02.2019 the assessee sought additional time from AO to furnish the said details asked vide Annexure 6 which is found annexed as Annexure 7. On 25.02.2019, the AO granted additional time of three (03) days and required the assessee to submit the details vide 28.02.2019 (refer Annexure 8). On 28.02.2019 the assessee could not submit the details sought by the AO, however filed submission before the AO pointing out that Section 194H of the Act was not applicable to the transactions with the distributor. (refer Annexure 9). Thereafter the AO passed the order u/s 201 of the Act on 07.03.2019 whereby he held the assessee as a defaulter within the meaning of Section 201 of the Act in all the cases which are in appeal before us. On appeal, the Ld. CIT(A), taking note of the written submissions of the assessee, sought a remand report from the AO and while the AO submitted remand report, the assessee filed its written submission and also filed the distributorship agreement dated 29.09.2010 between the company and one distributor M/s. Kattayani (a sole proprietorship concern). Since as per clause 3 of the said agreement, the agreement was valid only till 31.03.2013, along with this agreement, extension letters of the contractual period dated 12.06.2014 (extending the agreement for a period of 3 years w.e.f. 01.04.2014) and a letter dated 19.09.2017 (extending the agreement for another period of 3 years w.e.f. 01.04.2017) were submitted. The aforesaid contractual extension letters are seen placed at page 40 to 41 of the PB. According to the Ld. Counsel, the Ld. CIT(A) while adjudicating the *lis* before him, referred and relied only on the clauses of this agreement dated 29.09.2010 and according to the Ld. Counsel for assessee since the Ld. CIT(A) neither directed the assessee to file any other agreement nor the assessee filed any agreement, which omission on the part of the earlier AR [who handled the case before the Ld. CIT(A)] was admitted by Ld. Counsel for assessee as a failure on the part of the earlier AR of the assessee and it happened also due to the fact of merger between M/s. Vodafone and M/s. Idea (effective from 31.08.2018) which resulted in some practical difficulties in retrieval of agreements (which facts are explained in the Affidavit) and the Ld.

Counsel pleaded that due to aforesaid reason, and the failure on the part of earlier Ld. AR as discussed above should not be a ground to deny justice to assessee and therefore the documents (infra) which is essential to adjudicate the *lis* before us need to be admitted. The following documents according to him were *sine qua non* to decide the issue.

a) Copy of the pre-paid marketing agreement dated 07.11.2002;
b) Distributorship agreement dated 25.04.2014;
c) Distributorship agreement dated 19.08.2015;
d) Distributorship agreement dated 11.08.2016;

8. Shri Deepak Chopra, the Ld. Counsel for assessee drew our attention to the notice that there were several changes between the distributorship agreements dated 29.09.2010 filed before the Ld. CIT(A) and the agreements after that date and which is applicable in the relevant assessment years under consideration and drew our attention to certain notable changes:

a) Clauses 7.6.2 and 7.6.3 of the 2010 agreement were merged into one clause – being clause 7.6.2 of the new agreements;
b) Clause 13 of the 2010 agreement (relating to severance with distributors and its consequences) underwent a significant change in the later agreements (as applicable for the year under consideration)

9. According to the Ld. Counsel for assessee, the change in clause 13 of the later agreements has a direct and significant bearing on the transfer of risk and the relationship between the parties in respect of the sale of pre-paid sim cards and the effect of termination or severance. The Ld. Counsel for assessee also drew our attention to the fact that post the merger of M/s. Vodafone and M/s. Idea (effective 31.08.2018) there were some practical difficulties in retrieval of the agreements. This was due to changes in the team and alignment of accounting and legal record across erstwhile entities which got merged together. Accordingly, during the hearings before Ld. CIT(A) in the month of May 2019 they (assessee) were unable to retrieve the necessary records (being the agreements applicable for the relevant financial years). The Ld. Counsel for assessee admitted that earlier AR [who handled the appeal before

Ld. CIT(A)] could not point out the changes made later on in the agreements which is critical for adjudication of the *lis* and the omission to do so was not with mala fide intention. Therefore, he wanted the aforesaid documents to be admitted and then only according to Ld. Counsel, the *lis* involved in this case can be adjudicated or else there will be miscarriage of justice. Therefore he pleaded that the documents referred to in para 7(a) to (d) are *sine qua non* to decide the *lis* before this Tribunal. And the Ld. Counsel, fairly conceded that these documents for the reasons aforestated (Supported by Affidavit) could not be placed before the lower authorities. However, a perusal of the same would reveal that critical changes were in fact made in the agreements mentioned in para 7(a) to (d) and it will also show that the assessee had in fact made it clear to AO as early as on 17.01.2017 the important changes made in the contract between Appellant assessee and its distributors i.e. Principal to principal and in the Assessment Years under consideration that the relation between them cannot be termed as that between Principal and its Agent (Para 4-6 supra). However, the AO did not call for the changed contracts and kept silent after perusal of the reply by assessee as on 17.01.2017 and so the assessee did not produce the contracts referred to in para 7(a) to (d) supra. And when the AO again asked questions after two years on 11.01.2019, he did not bother to call for the new contracts, so the assessee did not file it before AO, prompting AO to declare the assessee as a defaulter for the purpose of Section 201 of the Act actions of AO was without giving proper opportunity to the assessee at assessment stage and by relying on the case of *Tin Box Company Vs. CIT [Three Hon'ble Judges Bench] (2001) 249 ITR 216 (SC)*, he prayed that the matter be remanded for *de novo* adjudication of the AO.

10. Per contra, the Ld. CIT(DR) vehemently opposing the plea of the assessee to remand the issue back to AO, wondered as to how the assessee did not produce the documents referred to in para 7(a) to (d) supra before the AO/Ld. CIT(A). So according to him, this was clearly an afterthought on the part of assessee to wriggle out of the judicial decisions against the assessee in the earlier years and should not be allowed.

11. Having heard both the parties, we note that the AO had held that the Appellant/assessee had failed to deduct tax at source on the discounts offered by the Appellant to its distributor and since such discounts being in the nature of "commission" as envisaged under section 194H of the Act, and the failure to deduct tax at source rendered the Appellant as an *assessee-in-default* in terms of section 201 of the Act, which action of AO had been confirmed by the Ld. CIT(A). Hence, these appeals have been preferred by the Appellant assailing the impugned order of Ld. CIT(A) mainly on the ground that no proper opportunity was granted to it before the AO at the assessment stage. So it was prayed that the matters involved in the aforesaid appeal be remanded back to AO for *de novo* adjudication and with liberty to produce the relevant agreement cited at para 7(a) to (d) supra.

12. When the appeals came up for hearing before this Tribunal ['A' Bench on 09.09.2019] wherein, on behalf of the Appellant, it had been brought to our attention that an application dated 13.08.2019 had been filed in terms of Rule 29 of the ITAT Rules for bringing on record the "Distributor Agreements" which were operative and applicable for the relevant financial years in consideration of these appeals. According to the Ld. Counsel for assessee before the Ld. CIT(A) an agreement of the year 2010 had been submitted, the terms of which had been interpreted by the Ld. CIT(A) while deciding the matter against the Appellant. According to Ld. Counsel, the issue involved in these appeals are whether the transactions [between assessee/Appellant and its distributor] of pre-paid SIM cards and talk time was a transaction which can be termed as principal to principal contract (and an agreement of sale) and not that of a principal and agent. So according to Ld. Counsel for the assessee, the interpretation of the terms of the relevant agreements would be imperative as it is only these terms which would be determinative of the relationship between the parties. It was also brought to our notice that the contractual terms had changed significantly from the earlier arrangements of the year 2002, on the basis of which this Tribunal had decided the appeals of the preceding years against the Appellant. It was also submitted that Tribunal had followed the judgment of the jurisdictional Hon'ble High Court in the

case of *Bharti Cellular Ltd. Vs. ACIT* (2011) (354 ITR 507) (Cal.). It was also submitted that this Trubunal in the case of *Vodafone East Ltd. Vs. DCIT* (ITA 1499-1502/Kol/2015) (pertaining to AYs 2010-11 to 2011-12) had noted that w.e.f. January 2007 the contractual terms had changed and decided the matter in favour of the assessee (M/s. Vodafone East Ltd.).

13. According to the Ld. Counsel for assessee, consideration of the later agreements [mentioned in para 7(a) to (d) supra] has a direct and significant bearing on the transfer of risk and relationship between the parties (assessee/Appellant and its distributors) in respect of the pre-paid SIM cards. In the light of the aforesaid facts and in order to distinguish the facts from the earlier years, four agreements were filed along with the application dated 13.08.2019 before this Tribunal-

(a) Copy of the pre-paid marketing agreement dated 07.11.2014;
(b) Distributorship agreement dated 25.04.2014;
(c) Distributorship agreement dated 19.08.2015;
(d) Distributorship agreement dated 11.08.2016.

14. And it was brought to our notice that during the course of the hearing conducted on 09.09.2019, the Tribunal directed the Appellant to file an affidavit in support of the Rule 29 application, since the Ld. Departmental Representative had raised doubts about the authenticity of the agreements now proposed to be filed for the first time before us and to explain why the said agreements could not be filed before the lower authorities. Hence, in terms of the said directions of the Tribunal, an affidavit has been filed, which we deem it fit to reproduce [the sworn affidavit by the assessee company's General Manager Shri Arun Mohanlal Asawa dated 18th October, 2019] the same as under:

> *"I, Arun Mohanlal Asawa, son of Sh. Sh. Mohanlal G. Asawa, aged 48 years, resident of EE-188/5, Sector 2, Salt Lake, Kolkata-700 091, do hereby affirm and declare as under-*
>
> *1. That I am working in the capacity of General Manager with the Appellant Company and as such am conversant with the facts of this case, duly authorised and competent to swear this affidavit.*

2. *That a survey was carried out on the business premises of the Company under section 133(2A) of the Income Tax Act, 1961 (Act) on 5.9.2016. Thereafter, a notice under section 201(1)/201(1 A) of the Act were issued to the Company on 28.9.2016 for all the above mentioned years. A copy of the said notice and the questionnaire are enclosed as Annexure 1 for ready reference. In terms of the said questionnaire the Company was required to furnish the following details-*

   (a) copies of audited balance sheet, profit and loss account Form 3 CD along with computation of income;
   (b) Details of bank accounts etc.;
   (c) Copy of TDS return filed giving details of TDS payments;
   (d) Party wise details of MRP, invoices amount and commission/discount allowed on recharge vouchers, starter packs for all telecom circles under the relevant TAN jurisdiction.

3. *On 17.1.2017 the Company submitted a reply to the said notice and questionnaire. In para 6 of such reply the Company highlighted the features of the contractual arrangement between the Company and Distributors. The various clauses of the agreement were referred to in the said submissions (in para 6). A copy of the reply dated 17.1.2017 is annexed as Annexure 2. Thereafter, no further query was raised by the AO nor any agreement was required to be submitted. No proceedings were conducted between January 2017 till January 2019 as explained in the following para's.*

4. *On 11.1.2019 the Company received another notice (by the successor AO) under section 201 of the Act. It was alleged that the Company has failed to deduct tax at source in respect of the discount to various distributors. The said notice also referred to the preceding years proceedings under section 201 and the confirmation of the applicability of section 194H on such discounts by the first appellate authority. The said notice required the company to submit the general ledger containing MRP of recharge vouchers/starter packs distributors price and discount given as well as audit report and tax audit report. Copy of notice dated 11.1.2019 is enclosed as Annexure 3.*

5. *By way of its letter dated 24.1.2019 the Company submitted the audit and tax audit reports. Copy of letter dated 24.1.2019 is annexed as Annexure 4. The copy of the general ledger was submitted by way of letter dated 31.1.2019. Copy of letters dated 24.1.2019 and 31.1.2019 are enclosed as Annexures 4 and 5 respectively.*

6. *On 6.2.2019 another notice was issued to the Company to submit distributor wise details in respect of the discount given to distributors. The AO also required the Company to file Form 26A from distributors. Copy of notice dated 6.2.2019 is enclosed as Annexure 6. On 18.2.2019 the Company sought additional time to furnish the said details. Copy of letter dated 18.2.2019 is enclosed as Annexure 7.*

7. *On 25.2.2019 another notice was issued granting additional time and requiring submission of details by 28.2.2019. Copy of notice dated 25.2.2019 is enclosed as Annexure 8.*

8. *On 28.2.2019 the Company submitted the necessary details and also raised the limitation issue. A note on non-applicability of the provisions of section 194H*

was also filed along with the letter dated 28.2.2019. Copy of letter dated 28.2.2019, along with the note on merits, is enclosed as Annexure 9.

9. *The proceedings culminated in an order passed on 7.3.2019 under section 201 of the Act whereby the Company was held to be an assessee-in-default within the meaning of the said provisions. On the same date orders for other Assessment years were also passed by the AO. Copy of such order/s is/are forming part of the appeal set before this Hon'ble Tribunal.*

10. *Thereafter, aggrieved with the ordcr/s dated 7.3.2019 the Company preferred appeals before the CIT(A). Before the CIT(A) written submissions were filed on which a remand report was sought. The AO submitted a remand report to which the Company filed its submissions. Before the CIT(A) the Company filed a "distributorship agreement" dated 29.9.2010 between the Company and one M/s. Kattayani (a sole proprietorship concern). As per clause 3 of the said agreement, the same was valid only till 31.3.2013. Along with this agreement extension letters dated 12.6.2014 (extending the agreement for a period of three years w.e.f. 1.4.2014) and letter dated 19.9.2017 (extending the agreement for another period of three years w.e.f. 1.4.2017) were submitted. These extension letters appear on pages 40 and 41 of the paper book filed before the Hon'ble Tribunal. While adjudicating the lis before him, the CIT(A) referred and relied on the clauses of this agreement only. No other agreement was filed before the CIT(A) nor directed to be filed by the CIT(A).*

11. *On legal advise the Company filed an application under Rule 29 of the Income Tax Appellate Tribunal Rules, 1963 seeking leave to place on record the following agreements-*

    (a) Copy of the pre-paid marketing agreement dated 7.11.2002;
    (b) Distributorship agreement dated 25.4.2014;
    (c) Distributorship agreement dated 19.8.2015;
    (d) Distributorship agreement dated 11.8.2016.

12. *This was advised as a perusal of the Distributorship agreement dated 29.9.2010 filed before the CIT(A) revealed that there were several changes when compared with the later agreements (which are sought to be placed for consideration before the Hon'ble Tribunal now) applicable for the years under consideration. Although most of the terms and conditions as contained in the 2010 agreement remained the same as the later agreements with the following notable changes-*

    (a) Clauses 7.6.2 and 7.6.3 of the 2010 agreement were merged into one clause - being clause 7.6.2 of the new agreements.
    (b) Clause 13 of the 2010 agreement (relating to severance with distributors and its consequences) underwent a significant change in the later agreements (as applicable for the year under consideration).

13. *The change in clause 13 of the later agreements has a direct and significant bearing on the transfer of risk and the relationship between the parties in respect of the sale of pre-paid sim cards and the effect of termination or severance.*

14. *It is submitted that post the merger of Vodafone and Idea (effective 31.8.2018) there were some practical difficulties in retrieval of the agreements. This was due to changes in the team and alignment of accounting and legal record across*

erstwhile entities which got merged together. Accordingly, during the hearings before CIT(A) in the month of May 2019 we were unable to retrieve the necessary records (being the agreements applicable for the relevant financial years).

15. That before the CIT(A) this critical fact was omitted to be pointed out and considered since in the 2010 agreements no such amended clause 13 existed and the CIT(A) referred to the old clauses of the 2010 agreement only. This error was discovered on receipt of the order of the Ld. CIT(A).

16. All agreements executed between the Company and Distributors are on non-judicial stamp paper hence the same are authentic and genuine and entered into with third/unrelated parties.

That, I, Arun Mohanlal Asawa, the deponent named above, do hereby solemnly affirm that the contents of the above affidavit are true and correct and nothing has been concealed therefrom."

15. We note that AO pursuant to a survey on 05.09.2016 issued notice u/s 201(1)/201(1A) of the Act (Annexure 1) and the assessee had filed the detailed reply to same vide letter dated 17.01.2017 (Annexure 2). A perusal of Annexure 2 reveals that the assessee had contended that its relationship between the distributor is that of *Principal to principal*, which facts are revealed from various averments given in the reply dated 17.01.2017 (Page 9 to 28) to AO/ ACIT (TDS), Circle-2, Kolkata which is reproduced for getting clarity on the aspect (i.e. against the doubt expressed by the Ld. CIT DR that the new agreements are an afterthought), so we need to know what was the stand of Appellant/assessee as early as on 17.01.2017 itself:

"1. We are a cellular service provider in the circles of Kolkata. In the course of our business, we have entered into an agreement with various Distributors on Principal to Principal basis to cater the business of the Company.

2. In pursuance of an agreement, we supply SIM/RV to the Distributors at a discounted price which is Maximum. Retail Price ("MRP") less the discount. The Distributors places the order for SIM/RV with us vide the Purchase Order, and the discounted price of the SJM/RV is required to be paid in advance by the Distributors irrespective of the fact that whether such products purchased are in turn sold or are remained unsold.

3. The Distributors can, in turn, independently sell the SIM/RV to various sub-dealers or retailers or ultimate customers at any price maximum to the extent of MRP.

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

5. ……

6. *For attracting provisions of section of I94H of the Act it is essential that assesses Company, must appoint a person who would act on its behalf in the course of rendering services to third parties and only then it can be said that there exist Principal to Agent (P2A) relationship. In the present case the arrangement between the assessee and Prepaid Distributors is not in the nature of P2A but Principal to Principal (P2P). In this context, attention is: invited to the following:*

> *The Distributor is not acting as an agent of the Assessee but as art- independent contracting party. (Refer Clause 4 of the Agreement at page no. 4), which specifically states that the Agreement between the Assessee and the Distributor is on a principal to principal basis i.e. the Distributor, is hot an agent of the Assessee. This being the specific provision, agreed by both the parties, it is not open to the Income-tax Officer to make a determination contrary to what the parties have-provided.*

> *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. (Sec. 2.18 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 7.6_of the Agreement at page no._5). 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.*

> *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 7 page 5 to 10)*

> *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 Company may revalidate the products. (Refer Clause 7 page 5 to 10).*

> *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 SIMs / Recharge Vouchers 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 7 page 5 to 10)*

> *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 tire stock was always belonging to Principal. In the Assessee's case, on the Distributor returning the SIM/RV, the Assessed is not responsible for any unused or unsold stock*

lying with the distributor post termination. (Refer Clause 7 page 5 to 10)

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 also 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 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 Assessed has already ended.

7. *Further, it has been held under the English Law that where an Agent is permitted to sell the goods at such prices, and on such terms and conditions as he thinks fit, and when he is allowed to retain any profits over and above an agreed price, the payment of which he guarantees to the principal, the Agent could be regarded as the "Buyer" of goods and not an Agent in law. Re "Neville, ex p White (1871) 6 Ch App 397. Also Hon'ble. Supreme Court of India has applied the ratio of the foregoing judgment in the case of Gordon Woodroffe & Co. v. Sk. M. A. Majid & Co. AIR 1967 SC 181 (V. 54 C 36) The relevant extracts are reproduced below:*

"It is well-established that even an agent can become a purchaser when an agent pays the price to the principal on his own responsibility. In Ex parte White, In re Nevil, [(1871) 6 Ch. 397] T & Co. were in the habit of sending goods, for sale to N who was a partner in the firm of N & Co., but received these goods on his private account, The course of dealing between T & Co. and N was that the goods were accompanied by a price list N sold the goods on what terms he pleased, and each month sent to T & Co., an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month he paid the amount in cash without any regard to the prices at which he had sold the goods, or the length of credit he had given. On these facts it was held by the Court of Appeal in Chancery that though both the parties might look upon the business as an agency, N did not, in fact, sell the goods as agent of T & Co., but on his own account, upon the terms of his paying T & Co. for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys, which T & Co., had no right to follow.Reference may be made, in this connection to the following passage from Blackwood Wright., 'Principal and Agent', Second Edn. page 5:

"In commercial matters, where the real relationship is that of vendor and purchaser, persons are sometimes called agents when, as a matter of fad, their relations are not those of principal and agent at all, but those of vendor and purchaser. If the person called an 'agent' is entitled to alter the goods manipulate them to sell them at any price that he thinks fit after they have been so manipulated, and is still Only liable to pay for them at a price fixed beforehand, without any reference to the mice at which he sold them, it is impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation o f principal and agent exists - Ex parte White, In re Nevill (1871), 6 Ch. 397 - A purchaser had not to account to his vendor; his only duty is to pay him; and all the other rights and duties which exist between

principal and agent do not exist between vendor and purchaser - Ex parte Bright, In re Smith (1879), 10 Ch. Div. 566; Ex parte White, In re Nevill - (1871) 6Ch. 397-"

Applying the ratio laid down by the Hon'ble Supreme Court, in the present case also, the Distributors is paying a discounted price in advance on his own account arid he is not accountable to us' in respect of the price which the- retailer realizes and hence, he is acting as a Principal.

8. *It is a settled law that restrictions per se would not make all transactions that of Principal and Agent. In this regards, reliance is placed on following decisions:*

   - *Ahmedabad Stamp Vendors Associations vs. Union of India (257 ITR 202) (Guj), now affirmed by the Hon'ble Supreme Court is reported in 348 ITR 378;*
   - *Bhopal Sugar Industries vs. STO (1977 - 064 AIR 1275)*
   - *Foster's India P. Ltd. Vs. ITO (117 TTJ 346).*

Thus, we humbly submit that based on the ratio of the above decisions as also the agreement for the relevant assessment year, the relationship with Distributor is on principal to principal basis and hence, TDS u/s. 194H of the Act cannot be applied.

9. ……

10. ……

11. ……

12. ……

13. ……

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

7. *We humbly submit that, as the recipients of income, would have already accounted and discharged appropriate tax liability on their income, and the action of treating us as 'assesses in default' u/s 201(1) of tire Act and recovering the amount of taxes would tantamount to recovering of tax twice in relation to the same income.*

> *With effect from 1st July 2012, Section 201(1) of the Act has been amended and following para has been included:*

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax, in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-

(i) Has furnished his return of income under section 139 of the Act;
(ii) Has taken into account such sum for computing income in such return of income; and
(iii) Has paid the tax due on the income declared by him in such return of the income,

And the person furnishes a certificate to this effect from an accountant in such form as maybe prescribed.

> In view of above amendment, we request you to provide us the reasonable opportunity and time to submit the certificates of the learned Accountants as prescribed in the Act before passing any order and not treat us as being Assessee in Default under section 201 of the Act.

8. For this proposition, reliance is placed on the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT (2931TR 226) where it has been held that where deductee, recipient of income, has already paid taxes on amount received from deductor, the department once again cannot recover tax from the deductor on same income by treating deductor to be "assessee-in-default" for shortfall in. its amount of tax deducted at source.

9. In the case of Bharti Cellular Limited vs. ACIT (200 Taxman 254) (Cal), the Hon'ble Calcutta High Court directed to the Assessing Officer to examine whether ail the franchisees, whose Income-tax has not been deducted at source by the assessee, has paid taxes on their income or not and accordingly, to the extent, tax credit to be given to the Assessee.

10. ……

11. ……

12. ……

In view of the: above foregoing, we submit, that we shall not be liable to pay tax u/s 194H of the Act, hence, we are not an "assessee in default u/s 201(1) of the Act.

We hope our above submissions provide sufficient cause as to why no tax was deducted by us and that we cannot be treated as an "assessee in default" under section 201(1) of the Act. We further request Your Goodself to kindly grant us an opportunity of personal hearing, in the matter, in case Your Goodself decides otherwise."

16. We also note that the aforesaid reply of assessee to AO dated 17.01.2017 has been received by the ACIT (Shri Malay Bhadra) on 20.01.2017 [His signature with the official seal and hand written endorsement of having received the letter is found on the letter of assessee dated 17.01.2017 page (2) Annexure-2] and thereafter we note that no action was initiated by the AO till 11.01.2019. That is after approximately two years, the successor AO initiated action again on 11.01.2019 and passed the order on 07.03.2019 declaring assessee as a defaulter as per Section 201 of the Act and levied taxes on the assessee. Thus we note that though the impugned order of AO was passed

on 07.03.2019, and the assessee's case [as early as on 17.01.2017] was that its relationship between its distributor is that of *Principal to principal* and therefore it shall not be liable to deduct tax as contended by the AO and thus not a defaulter u/s 201(1) of the Act. And according to assessee it did not file the agreements [new agreements stated in page 7(a) to (d) supra] before the AO since it was not asked for production by the AO. However Ld. Counsel Shri Deepak Chopra fairly conceded that there was a failure even to produce the relevant agreements (changed) before the first appellate authority and the decision of Ld. CIT(A) was based on an agreement dated 29.09.2010 and (extension) letters, which had changed and very much relevant for the Assessment Years under consideration. Thus according to him, the agreements mentioned in para 7(a) to (d) supra, has a direct and significant bearing on the transfer of risk and relationship between the parties (assessee/Appellant and its distributors) in respect of the pre-paid SIM cards and was therefore since qua non to support its averments submitted before the AO as early as 17.01.2017 (supra). So we note that the assessee had made the averments to the effect [as early as on 17.01.2017] that its relationship with distributor in respect of pre-paid SIM cards is that of Principal to principal, however failed to produce the agreements which was essential to adjudicate before the AO/Ld. CIT(A) due to the failure on the part of Ld. AR of assessee and due to merger of M/s. Vodafone with M/s. Idea. So on a perusal of the letter dated 17.01.2017 submitted before the AO as discussed and the agreements supporting the ibid claim of assessee which assessee failed to produce earlier before the authorities below[and now assessee want to produce], ex-facie cannot be said to be an afterthought. We note that assessee consistently pleaded that it had Principal to principal relationship between it (assessee) and its distributor in respect of prepaid SIM cards. So we are of the prima-facie view that the documents mentioned above at page 7(a) to (d) need to be considered by the AO for adjudicating the issue. And since there is a failure on the part of the earlier AR to produce the aforesaid documents before the authorities below which is an essential document to decide the issue, we are of the view that justice should not be denied to assessee for the failure on the part of the Ld. AR of the assessee. And also the endeavor of the AO should be the "Quest for

Truth" which he should undertake while assessing an assessee and the AO to adjudicate the *lis* before him *de novo* and even he is at liberty to look into the authenticity/genuinity of the agreements which the Ld. CIT(DR) had expressed his reservations and doubts and in case the AO finds the agreements mentioned in para7 (a) to (d) supra are authentic and genuine, he shall admit the additional documents and decide the issues. So the impugned order of Ld CIT(A) is set aside and the matters are remanded back to AO and the AO is directed to decide *de novo* the issue/issues after hearing the assessee; and the assessee is at liberty to produce all the documents necessary to adjudicate the issue as discussed (supra) and thereafter the AO to decide the issue/issues in accordance to law. For doing so, we rely on the decision of the Hon'ble Supreme Court in the case of Tin Box [supra], since we are of the considered opinion that assessee did not get proper opportunity before the AO during the assessment stage on the facts discussed supra.

17. In the result, all the appeals of the assessee are allowed for statistical purposes.

Order is pronounced in the open court on 22 November, 2019.

Sd/-	Sd/-
(A.L. Saini)	(A.T. Varkey)
Accountant Member	Judicial Member

Dated: 22 November, 2019

Bidhan (P.S.)

Copy of the order forwarded to:

1 Appellant – Vodafone Idea Limited (Formerly Idea Cellular Limited), 7th Floor, DN 52, Sector-5, Srijan Tech Park, Salt Lake, North 24-Parganas, Kolkata-700 091.
2 Respondent – ACIT(TDS), Circle-2, Kolkata.
3 CIT(A)- 24, Kolkata. (sent through e-mail)
4 CIT
5 DR, Kolkata Benches, Kolkata. (sent through e-mail)

/True Copy,

By order,

Assistant Registrar