IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 3785/Mum/2016 for (Assessment Year 2012-13)

M/s. Vodafone Idea Ltd. (Formerly known as Idea Cellular Ltd.), Skyline Icon, 1st Floor, 86/92 Andheri Kurla Road, Marol Naka, Andheri (E), Mumbai-400059. **PAN: AAACB2100P**	Vs.	ITO (TDS)-1(2)(4), 803, K.G. Mittal Ayurvedic Hospital Building, Charni Road (W), Mumbai-400002.
Appellant		Respondent

Appellant by : Shri Ronak Doshi with Shri C.D. Joshi (AR)

Respondent by : Shri S. Padmaja CIT-DR with Shri V.K. Agarwal (Sr DR)

Date of Hearing : 30.08.2019

Date of Pronouncement : 13.11.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of ld. Commissioner of Income-Tax (Appeals)-59 [for short the ld. CIT(A)], Mumbai dated 22.03.2016 for Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

> GROUND NO. I:
>
> 1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the TDS Officer of treating the Appellant as an "assessee in default" u/s.201 r. w.s 194H of the Act on the discount allowed by the Appellant to the Prepaid Distributors.

2. He failed to appreciate and ought to have held that the relationship between the Appellant and the Prepaid Distributor is of Principal to Principal ("P2P") and not Principal to Agent ("P2A").

3. The Appellant, therefore, prays that it be held that section 194H of the Act is not applicable and consequentially, the Appellant cannot be treated as an "assessee in default" u/s.201 r.w.s 194H of the Act.

4. Without prejudice to the above, the Appellant prays that it be held that since the Appellant is not "a person responsible for paying" commission to the Prepaid Distributor, the Appellant cannot be treated as an "assessee in default" u/s. 201 r.w.s. 194H of the Act.

5. Without prejudice to the above, in the absence of any "payment" or "credit" by the Appellant in favour of the Prepaid Distributor on account of the alleged commission, it be held that the Appellant cannot be treated as an "assessee in default" u/s. 201 r.w.s 194H of the Act.

6. Without prejudice to the above, the Appellant prays that if the mechanism to deduct tax at source u/s. 194H fails, the Appellant cannot be treated as an "assessee in default" u/s 201 r.w.s 194H of the Act.

7. 'Without prejudice to the above, in the absence of any decision of the jurisdictional Tribunal and Hon'ble High Court, the Appellant prays that where two views are possible on a particular issue and that High Courts of different jurisdictions have rendered divergent views, then the view which is favorable to the Appellant should be adopted and accordingly the issue be decided in favour of the Appellant.

WITHOUT PREJUDICE TO ABOVE GROUNDS:

GROUND NO. II:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order passed by the ITO(TDS) - 1(2)(4) ("TDS Officer") u/s 201/201(1A) of the Act, treating the Appellant as an "assessee in default" for non-deduction of tax at source on the discount allowed to the Prepaid Distributor without first ascertaining whether the recipient Prepaid Distributor had discharged tax on the income, if any, earned by them while dealing with the Appellant.

2. The Appellant prays that in view of section 191 of the Act and failure of the TDS Officer to ascertain whether the recipient Prepaid Distributor have paid tax on the

income, if any, from the Appellant, the order passed by the TDS Officer be quashed/set aside.

WITHOUT PREJUDICE TO ABOVE GROUNDS:

GROUND NO. III: LEVY OF INTEREST UNDER SECTION 201(1A) OF THE ACT.

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the TDS Officer in holding the Appellant as "assessee in default" under section 201(1) of the Act and thereby levying the interest under section 201(1A) of the Act.
2. The Appellant prays that the interest levied under section 201(1A) of the Act be deleted or be appropriately reduced.

2. The facts of the case in brief are that assessee is a company engaged in providing Cellular telephone services for prepaid and post paid to its customers. A survey under section 133A of Income –tax Act (Act) was conducted at the premises of the assessee on 09-09-2011 at Santaruz (E), Mumbai. During the course of survey, it was found that assessee; in the course of its business the assessee had appointed distributors for prepaid cellular connection and recharge coupon. The market price of said prepaid card of cellular connection and recharge facilities was provided by the assessee company as printed on such cards / coupons. But, at the time of selling its prepaid cellular connections and recharge coupons to the distributor in the form of discount / commission on the market price, the prepaid card as well as recharge coupon in the form of predefined information enabling the ultimate user to have access to the service provided by the assessee company. On the basis of the market price and the commission allowed by the assessee to its

distributor, the AO took his view that the distributions on bulk sale of such prepaid cards and recharge coupons were 'commission' paid to them which required deduction at source u/s 194H. Since the assessee failed to deduct tax at source, the assessee was treated as an assessee in default and accordingly a demand was raised u/s 201(1) r.w.s. 201(1A). The AO further noted that the assessee has given discount to prepaid distributor of Rs.1284,57,00,000/- and tax ought to be deducted under section 194H @10% and interest u/s 201(1A) @1% on the same.

3. On appeal before CIT(A), the action of AO was confirmed. However, the Ld. CIT(A) directed the AO to restrict the order for Mumbai Circle, for treating the assessee in default in respect of tax required to be deducted at source on the payment of discount / commission. Further aggrieved by the order of ld. CIT(A), the assessee has filed present appeal before us.

4. We have heard the submission of Ld.AR of the assessee and Ld. DR for the revenue and perused the material available on record. The ld.AR of the assessee submits that the assessee is a Cellular service provider. The assessee, in the course of its business provides SIM cards and recharge voucher (RV) to distributors, who in turn sell them to sub dealers/ retailers, there is no principal – agent relationship between the assessee and the distributors on a discounted price. Such SIM card and RVs are then sold by the distributors to the retailers at any price, which the distributor deems fit at his / its discretion. The distributors are liable to pay the assessee discounted price in advance

irrespective of the fact that they are sold or unsold. The distributor is then free to sell to any retailers which are appointed by distributors at their own discretion and no control is exercised by the assessee. The terms and conditions between the distributor and retailer are decided between them. The distribution network is not different from the normal trade practice where the manufacturers appoint distributor or wholesaler and gives them an attractive discount on maximum retail price. The wholesaler would then sell goods to the retailer and the retailer to the consumers accordingly just like discount given by manufacturer in the course of their business and ultimately the same cannot be considered as commission. Similarly in assessee's case, the discount given to distributor which is on the same footing cannot be considered as commission. The agreement entered into by assessee with distributor, does not make the distributor its employee, agent, associate of the assessee for any purpose. The Ld.AR of the assessee submits that on similar set of facts, various Tribunals and High Courts held that where assessee, in the business of providing mobile telephone services, sold prepaid vouchers to its distributors at the rate lower than the face value, the difference cannot be regarded as commission requiring deduction of tax at source u/s 194H.

5. The ld.AR for the assessee submits that Hon'ble Karnataka High Court and Rajasthan High Court in Bharti Airtel vs DCIT 373 ITR 33 (Kar) and in assessee's own case by Rajasthan High Court reported at 402 ITR 539 (Raj) held that section 194H is not applicable on sale of prepaid SIM cards to

distributors. The ld. AR further submits that Mumbai Tribunal also decided similar issue in the following cases:-

- Tata Tele Services vs ACIT ITA No.2043/M/2014,
- ACIT Vs Reliance Communications Infrastructure Ltd in ITA 4677/Mum/2012 & 6726/Mum/2012,
- JCIT vs Bharat Business Channels Ltd (170 ITD 628),
- JCIT Vs Tata Teleservices (Mah.)Ltd ITA No.3857/Mum/2016 order. Dtd June 8, 2018,
- Tata Sky Ltd ITA No.6923-6926/Mum/2012 Order dt October 12, 2018

6. Further, the ld.AR for the assessee further submits that in assessee's own case, Pune Tribunal, Jaipur Tribunal, Bangalore Tribunal, Delhi Tribunal and Chennai Tribunal, decided identical issue in favour of the assessee in following cases:-

- ITA 807 & 808/Pun/2016 Dated May 07, 2018,
- ITAs 1041 of 2013 order dated Jan 04,2017,
- ITA 798/JP/2015 order. Dated May 13,2016,
- ITAs No.356 to 359/JP/2012 dated May 22,2015,
- ITA No.758-761/Bang/2014 dated May 1, 2018,
- ITA Nos. 941 & 2382/Del/2015 dated May 1, 2018,
- ITA No.1586/Che/2015 dated July 15, 2018

7. The ld.AR further submits that in case of other similar service provider, Ahmedabad Tribunal , Chennai Tribunal, Delhi Tribunal, and Jaipur Tribunal decided the issue in favour of the assessee in the following cases:-

- DCIT vs Vodafone West Limited in ITA No.1317/Ahd/2016 ord dt April 04, 2018,
- Vodafone Cellular Ltd vs DCIT (TDS),ITA No.2804&1644/Mads/2014 order dt September 21, 2017,
- Vodafone Cellular Ltd vs DCIT in ITA No.817/PN/ 2013 order dt January 04, 2017,
- Bharati Hexacom Ltd vs ACIT- 68 taxmann.com 357 (Del),
- Tata Teleservices Ltd vs ACIT in ITA No.309/JP/2019, 502, 503, 504 &505/JP/2011 Order dt March 13, 2015,
- Vodafone Essar Gujarat Ltd vs ACIT- 60 taxmann.com 214,
- Bharti Hexacom Ltd vs ITO (TDS) in ITA No.656/JP/2010 order dt June 12, 2015,
- ACIT vs Bharti Hexacom Ltd in ITAs No.830 to 833/JP/15, order dt April 18,2016

8. The ld.AR in all fairness submitted that the Delhi High Court in CIT vs Idea Cellular Ltd 325 ITR 148 (Del), Kerala High Court in Vodafone Essar Cellular Ltd vs ACIT 232 ITR 255(Ker) and Calcutta High Court in Bharti Cellular Ltd vs ACIT decided the issue against the assessee. The Ld.AR submits that there is no decision of jurisdictional High Court on the similar issue. It was further submitted that Karnataka and Rajasthan High Courts, after considering the decision, which are against the assessee held the issue in favour of the assessee in Bharti Airtel 372 ITR 33 (Kar), Idea Cellular 402 ITR 439 (Raj).

9. The Ld.AR finally submits that since no decision of jurisdictional High Court is available on the issue so far, the decision favourable to assessee must be considered as per the decision of Hon'ble Supreme Court in CIT vs Vegetable Products 88 ITR 192(SC).

10. On the other, the Ld. DR for the revenue supported the order of lower authorities. The Ld. DR further submits that the lower authorities were right in their respective field. The ld. DR further submits that various tribunals had not examined the terms and the conditions of the distributor agreement entered between the assessee and the distributors. A bare perusal of distributor's agreement made it clear that there is clear relationship of principal and agent. The assessee has not explained the activity of dale of SIM cards. The ld. DR for the revenue relied on the decision of Hyderabad Tribunal in Idea Cellular Vs ACIT (2014) 51taxmann.com 50 Hyd Trib). The Pune Tribunal has not examined the facts in Qatar Airways [332 ITR 253 (Bom.)]. The ld. DR prayed for confirming the order of the ld. CIT(A).

11. We have considered the rival submissions of the ld. representatives of the parties and perused the material placed before us. We have also deliberated on various case law relied by ld. AR / DR for the parties. The assessing officer after considering the report of survey conducted at the premises of assessee on 09.09.2011 took his view that the margin allowed on the prepaid coupons was "commission" paid to the distributors, which should be subject to deduction of tax at source under section 194H. Since, the assessee failed to deduct the tax at sources, the assessee was treated as an assessee in default. From the record filed before us we find that the assessee filed Writ Petition challenging the jurisdiction of TDS Jurisdiction vide WP No. 2183 of 2014. The writ petition was decided vide order dated 29.09.2014, with the direction to raise all the issue before appellate authority. Accordingly the assessee filed appeal before ld CIT(A). The ld CIT(A) affirmed the action of assessing officer. However, on the issue of Jurisdiction the ld CIT(A) directed that assessing officer TDS could exercised his jurisdiction in respect of Mumbai Circle only.

12. We find that the Ahmedabad Tribunal in the case of Vodafone Essar Gujarat Ltd vs ACIT, TDS Circle, Ahmedabad [2015] 60 taxmann.com 214 (Ahmedabad-Trib) has considered an almost identical issue and decided the issue in favour of the assessee. The Hon'ble Bench after considering judgments of various Courts including the decision of Hon'ble Karnataka High Court in Bharti Airtel Ltd v. Dy.CIT (2015) 372 ITR 33 / 228 (Kar), has observed as follows:-

“6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We find that what is sold by the assessee is air time, whether through the physical vouchers or through the electronic transfer of refill/recharge value, to its distributors. It is this transaction which is subject-matter of different perceptions, so far as tax withholding obligations of the seller are concerned, of the parties before us. As a matter of fact, the assessment order itself states that the assessee has sold the "prepaid vouchers, of various face value, to its distributors at a rate lower than its face value", and that "the difference (between the face value and the price at which is sold) is nothing but commission on which no tax has been deducted". The short issue that we are required to adjudicate in this appeal is whether the provisions of section I94H will come into play in respect of the difference between the price at which the air time is thus sold to the distributors and its recommended retail price to the end consumers.

8. This issue is no longer *res integra.* As the same business model, with no or peripheral variations, has been followed by almost all the operators in the mobile telecommunication industry, this issue has been subject-matter before various forums, and more importantly, before various Hon'ble High Courts. Learned Representatives fairly agree that the above issue in appeal is subject-matter of difference of opinion by various Hon'ble non-jurisdictional High Courts and that we do not have the benefit of guidance by Hon'ble jurisdictional High Court.

9. This issue is covered, in favour of the assessee, by Hon'ble Karnataka High Court's common judgment in the cases of Bharti Airtel Limited, Tata Teleservices Limited and Voadfone South Limited, reported as *Bharti'AirtelLid. v. DCIT[2015] 372* 1TR 33/228 Taxman 219 (Mag)/[2014J 52 laxmann.com 31 (Kar) wherein their Lordships have, *inter alia,* observed as follows:

> "62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these prepaid 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 prepaid 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 86 earned by the distributor, sub-distributor and the retailer would be dependent 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 insofar 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' responsibility, 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 paying into the department, ultimately if the dealer is not liable to tax it is always open to him to for refund of the tax and, therefore, it cannot be said that Section I94H is not attracted to the case hand. As stated earlier, on a proper construction of Section I94H and keeping in mind the object wi which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to lax 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 account 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. 207- 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."

10. As we take note of the views so expressed by Hon'ble Karnataka High Court, we may also note that this issue has been decided against the assessee by, amongst others, Hon'ble Kerala High Court, in the case of *Vodafone Essar Cellular Ltd \. Asstt- CIT* [2010] 332 ITR 255/194 Taxman 518. The same

approach has been adopted by some various other Hon'ble non-jurisdictional High Courts as well, such as in the cases of *Bharli Cellular Ltd. \ Asstt. CIT* [2013] 354 ITR 507/[2000] 200 Taxman 254/12 taxmann.com 30 (Cal) and *CITv. Idea Cellular Ltd.* [2010] 325 ITR 148/189 Taxman 118 (Delhi!. In the case of Vodafone Essar Cellular Ltd *(supra)* Their Lordships have, inter alia, observed as follows:—

> "4. The main question to be considered is whether Section 194H is applicable for the "discount" given by the assessee to the distributors in the course of selling Sim Cards and Recharge coupons under prepaid scheme against advance payment received from the distributors. We have to necessarily examine this contention with reference to the statutory provisions namely, Section 194H. .
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> What is clear from Explanation (i) of the definition clause is that commission or brokerage includes any payment received or receivable directly or indirectly by a person acting on behalf of another person for the services rendered. We have already taken note of our finding in BPL Cellular's case (supra) abovereferred that a customer can have access to mobile phone service only by inserting Sim Card in his handset (mobile phone) and on assessee activating it. Besides getting connection to the mobile network, the Sim Card has no value or use for the subscriber. In other words, Sim Card is what links the mobile subscriber to the assessee's network. Therefore, supply of Sim Card, whether it is treated as sale by the assessee or not. is only for the purpose of rendering continued services by the assessee to the subscriber of the mobile phone.
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> Besides the purpose of retaining a mobile phone connection with a service provider, the subscriber has no use or value for the Sim Card purchased by him from assessee's distributor. The position is same so far as Recharge coupons or e-Top ups are concerned which are only air time charges collected from the subscribers in advance. We have to necessarily hold that our findings based on the observations of the Supreme Court in *BS\L's* case *(supra)* in the context of sales tax in the case of *BPL Cellular- Lid. (supra)* squarely apply to the assessee which is nothing but the successor company which has taken over the

business of BPL Cellular Ltd. in Kerala. So much so, there is no sale of any goods involved as claimed by the assessee and the entire charges collected by the assessee at the time of delivery of Sim Cards or Recharge coupons is only for rendering services to ultimate subscribers and the distributor is only the middleman arranging customers or subscribers for the assessee. The terms of distribution agreement clearly indicate that it is for the distributor to enroll the subscribers with proper identification and documentation which responsibility is entrusted by the assessee on the distributors under the agreement. It is pertinent to note that besides the discount given at the time of supply of Sim Cards and Recharge coupons, the assessee is not paying any amount to the distributors for the services rendered by them like getting the subscribers identified, doing the documentation work and enrolling them as mobile subscribers to the service provider namely, the assessee. Even though the assessee has contended that the relationship between the assessee and the distributors is principal to principal basis, we are unable to accept this contention because the role of the distributors as explained above is that of a middleman between the service provider namely, the assessee, and the consumers. The essence of a contract of agency is the agent's authority to commit the principal. In this case the distributors actually canvass business for the assessee and only through distributors and retailers appointed by them assessee gets subscribers for the mobile service. Assessee renders services to the subscribers based on contracts entered into between distributors and subscribers. We have already noticed 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. The terminology used by the assessee for the payment to the distributors, in our view, is immaterial and in substance the discount given at the time of sale of Sim Cards or Recharge coupons by the assessee to the distributors is a payment received or receivable by the distributor for the services to be rendered to the assessee and so much so, it falls within the definition of

> commission or brokerage under Explanation (i) of Section I94H of the Act. The test to be applied to find out whether Explanation (i) of Section I94H is applicable or not is to see whether assessee has made any payment and if so. whether it is for services rendered by the payee to the assessee. In this case there can be no dispute 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. The distributor undoubtedly charges over and above what is paid to the assessee and the only limitation is that the distributor cannot charge anything more than the MRP shown in the product namely, Sim Card or Recharge coupon. Distributor directly or indirectly gets customers for the assessee and Sim Cards are only used for giving connection to the customers procured by the distributor for the assessee. The assessee is accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor for the assessee. Therefore, the distributor acts on behalf of the assessee for procuring and retaining customers and. therefore, the discount given is nothing but commission within the meaning of Explanation (i) on which tax is deductible under Section I94H of the Act. The contention of the assessee that discount is not paid by the assessee to the distributor but is reduced from the price and so much so, deduction under Section 194H is not possible also does not apply because it was the duty of the assessee to deduct tax at source at the time of passing on the discount benefit to the distributors and the assessee could have given discount net of the tax amount or given full discount and recovered tax amount thereon from the distributors to remit the same in terms of Section I94H of the Act."

11. There is no, and there cannot be any, dispute about the fundamental legal position that in the hierarchical judicial system, that we have in our country, lower tiers of judicial hierarchy has to respectfully follow the views expressed by the higher tiers of judicial hierarchy. In the case of *Assistant Collector of Central Excise* v. *Dunlop India Ltd, (*1985) 154 ITR 172 (SC), Supreme Court has observed, quoting the House of Lords, as follows;

> 'We desire to add and as was said in *Cassell & Co. Ltd.* v. *Broome* (1972) AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of Courts" which exists in our country, "it is necessary for lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". "It is inevitable in a hierarchical system of Courts that there are decisions of the supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary. . . . But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted" (See observations of Lord Hailsham and Lord Diplock in *Broome* v. *Cassell).* The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system.'

12. The question whether the non-jurisdictional High Court binds the Tribunal benches or not came up for consideration before Hon'ble Bombay High Court in the case of *CJT\. Smt. Godwaridevi Saraf [1978]* 113 ITR 589. That was a case in which Their Lordships were *in seisin* of the question as to "whether, on the facts and circumstances of the case, and in view of decision in the case of*'A.M. Sali Maricar* v. *ITO* [1973] 90 ITR 116 (Mad) the penalty imposed on the assessee under s. 140A(3) was legal? The specific question before Their Lordships thus was whether the Tribunal, while sitting in Bombay, was justified in following the Madras High Court decision. It was in this context that Hon'ble Bombay High concluded as follows:

> "It should not be overlooked that IT Act is an all India statute, and if a Tribunal in Madras has proceed on the fooling that s. 140A(3) was non-existent, the order of penalty under that section cannot be imposed by any authority under the Act. Until a contrary decision is given by any other competent High Court, which is binding on the Tribunal in the State of Bombay (as it then was), it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land ...... an authority like Tribunal has to respect the iaw laid down by the High Court, though of a different State, so long as there is no contrary decision on that issue by any other High Court ......"

13. In the case of *CITv. Shah Electrical Corpn.* [1994] 207 ITR 350 (Gui). vide judgment dated 23rd June 1993, Their Lordships had an occasion to consider the aforesaid views. It was in this context that Their Lordships have observed as follows:

> "3. What is contended by the learned advocate for the Revenue is that the Tribunal decided the appeal on 26th Oct., 1976. By that time, the Andhra Pradesh High Court had upheld the validity of s. 140A(3). He drew our attention to the judgment of the Andhra Pradesh High Court in *Kashiratn v. ITO* (1977) 107 ITR 825 (API. From the report, it appears that the said judgment was delivered on 10th Dec., 1975. Therefore, the Tribunal was not right in proceeding on the basis that only the Madras High Court judgment was in the field and. therefore, it was open to it to proceed on the basis that s. 140A(3) was non-existent. He also submitted that for that reason, the Tribunal was not right in following the judgment of the Bombay High Court in *Godavaridevi's* case *(supra).*
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> 4. In our opinion, the legal position is correctly stated by the Punjab & Haryana High Court in *CfT vs. Ved Prakash* (1989) 77 CTR (P&H) 116 : (1989) 178 ITR 332 (P&H) when it observed that "unless and until the Supreme Court or the High Court of the State in question, under Art. 226 of the Constitution, declares a provision of the Act to be ultra vires, it must be taken to be constitutionally valid and treated as such".
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> 5. In our opinion, the Tribunal of another State would be justified in proceeding on the basis that the provision has ceased to exist because it has been declared as ultra vires by the High Court only when there is some material to show that the said decision has been accepted by the Department........"

(Emphasis supplied)

14. A little later, however, while dealing with a materially similar situation, in the case *of CIT v. Maganlal Mohanlal Panchal (HUF)* [1994] 210 ITR 580 (Guj). vide judgment dated 1st September, 1994, Their Lordships have held as follows:

> "........ At the time when the Tribunal decided the appeal, that was the only decision in the field and, therefore, in view of what the Bombay

High Court has held in *CIT* v. *Smt. Godavaridevi Saraf* (19781 113 ITR 589 mom) and *CIT* v. *Smt. Nirmalabai K. Darekar* (1990) 186 ITR 242 (BomX the Tribunal was bound to follow the said judgment of the Madras High Court. It, therefore, cannot be said that the Tribunal committed an error in following the said judgment of the Madras High Court. In view of the said decision of the Madras High Court, the only course which the Tribunal could have followed was to direct the ITO to consider the partial partition on the merits and pass an order under s. 171 first and then under s. 143(3) of the Act."

15. It is clear that, except on the issue of legality of the statutory provision itself, the decisions of even the non-jurisdictional High Courts are binding on the lower tiers of judicial hierarchy such as this Tribunal. As we hold so, we are alive to the school of thought that non-jurisdictional High Courts are not binding on the subordinate courts and Tribunals, as articulated by Hon'ble Punjab & Haryana High Court in the case of *CIT* v. *Ved Parkash* [1989J 178 ITR 332 44 Taxman 365 but then that was a case in the context of validity of a statutory provision, i.e. I40A(3), covered by the rider to the general proposition. This exception does not come into play in the present case as we are not, and we cannot be, dealing with the constitutional validity of a provision. Clearly, therefore, the views expressed by Hon'ble non-jurisdictional High Court, in the absence of a direct decision on that issue by the Hon'ble jurisdictional High Court, deserve utmost respect and deference.

16. The difficulty, however, arises in the case in which Hon'ble non-jurisdictional High Courts have xpressed conflicting views and the subordinate courts and Tribunals do not have the benefit of guidance rom Hon'ble jurisdictional High Court.

17. In our humble understanding of the legal position and of the propriety, it will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the Hon'ble High Courts- something diametrically opposed to the very basic principles of hierarchical judicial system. Of course, when the matter travels to Hon'ble jurisdictional High Court, Their Lordships, being unfettered by the

views of a non-jurisdictional High Court, can take such a call on merits. That exercise, as we understand, should not be carried out by us.

18. The choice of which of Hon'ble High Court to follow must, therefore, be made on some objective criterion. We have to, with our highest respect of all the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Supreme Court in the matter *of CIT v. Vegetable Products lid.* [1973] 88 1TR 192. Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted" Although this principle so laid down was in the context of penalty, and Their Lordships specifically stated so in so many words, it has been consistently followed for the interpretation about the statutory provisions as well. In another Supreme Court judgment, *Petron Engg. Construction (P.) Ltd* v. CffPr[1989] 175 ITR 523/[l988] 41 Tax man 294 the above principle of law has been reiterated by observing as follows:

> "........ Counsel submits that when two interpretations are possible to be made, the interpretation which is favourable to the assessee should be adopted. In support of that contention, learned counsel has placed reliance upon a few decisions of this Court in *CJTv. Madho PrasadJatia* (1976) 105 ITR 1 79 (SC): *C1T\. Vegetable Products Ltd.* (1973) 88 ITR 192 (SO and *C/T vs Kulu Valley Transport Co. P. Ltd* (1970) 77 ITR 518 (SC) :........ The above principle of law is well-established and there is no doubt about that.,....."

19. Having noted the legal position as above, it is appropriate, for the sake of completeness, to note the exception to this general rule as well. Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of taxpayer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in *Littman* v. *Barron* 1952(2) AIR 393 and followed by Apex Court in *Mangalore Chemicals & Fertilizers Ltd* v. *Dy. Commissioner of Commercial Taxes* [1992] Suppl. (I) SCC 21 and *Novopan India Lid.* v. *CCE& C* 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute

should be construed in favour of a taxpayer does not apply to a provision giving taxpayer relief in certain cases from a section clearly imposing liability". This exception has been also reiterated by Supreme Court in the case of *Oil & Natural Gas Commission* v. *C!T* [2015] 59 (axmann.com 5. However, in the present case, this exception has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter *of State of M.P.* v. *Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Lid.* AIR 1972 SC 614. That is what Hon'ble jurisdictional High Court has also held in the case of *Shah Electrical Corporation (supra).* None of these exceptions, however, admittedly apply to the situation that we are dealing with at present.

20. There can be no dispute on the proposition that irrespective of whether or not the judgments of Hon'ble non-jurisdictional High Courts are binding on us. these judgments deserve utmost respect which implies that, at the minimum, these judgments are to be considered reasonable interpretations of the related legal and factual situation. Viewed thus, when there is a reasonable interpretation of a legal and factual situation, which is favourable to the assessee, such an interpretation is to be adopted by us. In other words, Hon'ble non-jurisdictional High Court's judgment in favour of the assessee. in the light of this legal principle laid down by Supreme Court, is to be preferred over the Hon'ble non-jurisdictional High Court not favourable to the assessee. In our humble understanding, it is only on this basis, without sitting in value judgment on the views expressed by a higher tier of judicial hierarchy, that the conflicting views of Hon'ble non-jurisdictional High Courts can be resolved by us in a transparent, objective and predictable manner.

21. It is very tempting to believe, or pretend to believe, that, in the absence of direct decision on the issue, by the Hon'ble jurisdictional High Court, we have unfettered discretions in exercise of our judicial powers but then such an approach will not only be contrary to settled legal position, as set out above, but also, in a way, an exercise in impropriety.

22. We may also mention that a single member bench of this Tribunal, in the case of *JTO* v. Bharat *Sanchar Nigam Ltd.* (ITA No 170/Hyd/2010 and CO No10/Hyd/10; order, dated 5th June, 2015) has reached the same conclusion but the reasoning adopted, for following Hon'ble Karnataka High Court's judgment

in the case of *Bharti Airtel Ltd. (supra),* was stated to be that "Since no jurisdictional High Court decision is available as on date, the latest decision of Karnataka High Court, which has considered and distinguished earlier rulings of other High Courts, deserves to be followed". Our conclusion is the same but our decision to follow Hon'ble Karnataka High Court's judgment is simply this judgment is to be preferred over, in the light of settled legal principles set out above, other Hon'ble High Court judgments, because it is favourable to the assessee. With utmost respect and reverence to all the Hon'ble Courts, it is not for us to choose which decision is to be followed because of its merits because of what it has discussed or because of how it has distinguished other Hon'ble High Courts or because of its liming i.e. of its being latest. Even when a non-jurisdictional High Court distinguishes all other decisions of Hon'ble High Courts but holds a view unfavourable to the assessee, that decision cannot normally be preferred over a decision from another Hon'ble non-jurisdictional High Court decision, of equal stature, in favour of the assessee. That is, as we understand, correct approach to the matter and that is the reason why we come to the same conclusion as the SMC did but for altogether different reasons.

23. We have also noted that material facts of the case and the terms of agreements with the distributors are the same as were before Hon'ble Karnataka High Court in the above case. A comparative chart of these clauses is as follows:

Sr.No.	Disclosure in the Agreement as highlighted in the Hon’ble Karnataka High Court’s judgement – relevant extracts	Corresponding clause in the agreement of the assessee with its prepaid distributors
1	‘The agreement stipulates that the distributors have to represent to the customers that the distributor’s agreement with the customers / its dealers is on Principal to Principal basis and assessee is no way concerned or liable to the customers / dealers of the	Clause 17.2 specifically provides that the relationship created by the agreement is that of a buyer and seller and that the agreement is on a ‘principal to principal’ basis and neither party is, nor shall be deemed to be, an agent / partner of the other. It is also provided that nothing in the Agreement shall be construed to

	Distributor' Page 68.	render the distributor a partner or agent of the assessee.
2	"Distributor shall not make any promise, representation or to give any warranty or guarantee with respect to services and products, who are not authorised by the assessee'- Page 69.	Clause 1e of Annexure III to the agreement provides that the distributor shall not make any promises or representation or give any warranties or guarantees in respect of the service tickets except such as are consistent with those which accompany the Service Ticket or as expressly authorised by the assessee in writing.
3	That the insurance liability for the entire stock in trade in the premises at the address under reference will be of the Distributor and the liability for any loss or damage due to any fire, burglary, theft, etc., will be of the Distributor.'- Page 69.	As per clause (iv) of Annexure II to the agreement, the assessee is not liable for any loss, pilferage or damage to the recharge vouchers / service tickets post-delivery of the same to the distributors. The assessee does not compensate the distributors for any unsold stock.
4	'The Distributor has no express or implied right or authority to assume or undertake any obligation in respect of or on in the name of the assessee. 'Page 70.	Distributor does not have an authority to assume or create any obligations VWL's behalf or incur any liability on behalf of VWL or accept any contract binding upon VWL (clause 17.1 of the Agreement).
5	Çhannel Partner be liable to pay all the taxes such as sales tax, serv ice tax applicable and payable in respect of the subject-matter of this agreement and statutory	The distributor shall pay all licenses, fee, taxes, duties, sales-tax, service tax and any other charges, assessments penalties whether statutory or otherwise levied by any authority in connection with the operation of

	increase in respect thereof'- Page 72.	distributor's officer (Clause III(b) of Annexure III to agreement).
6.	'After sale of products distributor / channel partner cannot return goods to the assessee for whatever reason'- Page 74.	The assessee shall not be responsible for any post delivery defect in the service tickets. No request of refund of any money shall be entertained by the assessee in any circumstances (Clause e-Annexure I).
7	'Distributors are even prevented from making any representation to the retailers unless authorized by the assessee'.	The distributor shall not make any promises or representations or give any warranties or guarantees in respect of the products (i.e. SIM card and prepaid vouchers)(Clause 1 i.e. Annexure III).

24. In the light of the above discussions, and particularly as there is no dispute that the factual matrix of all the cases before the Hon'ble non jurisdictional High Courts were materially the same as in this case, in conformity with the esteemed views of Hon'ble Karnataka High Court in *Bharti Airtel's* case *(supra),* and hold as follows:

(a) On the facts of the case, and as is evident from a reading of the agreements before us, the assessee has sold, by way of prepaid vouchers, e-top ups and prepaid SIM cards, the 'right to service' on principal to principal basis to its distributors. As evident from the terms and conditions for sale, placed at page 136 of the paper book, not only that the sale was final and the assessee was not responsible for any post-deliver}' defects in the services, it was specifically agreed that "no request of refund of any money shall be entertained by VEGL (i.e. the assessee) under any circumstances".

(b) The fact that there are certain conditions and stipulations attached to the sale of this right of service by the assessee to his distributors does not affect the character of sale on principal to principal basis.

(c) Section 194 H comes into play only in a situation in which "any person, ... responsible for paying ...... to a resident, any income by way of commission" pays or credits such "income by way of commission" . However, since at the time of the assessee selling these rights for a consideration to the distributor, the

distributor does not earn any income, the provisions of Section I94H do not come into play on the transaction of sale of the right to service by the assessee to his distributors. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor

(d) So far as the transaction of sale of 'right to service[1] by the assessee to his distributor is concerned, while it has income potential at a future points of time (i.e. when this right to service is sold at a profit by the distributor), rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Therefore, at the time of the assessee selling these prepaid cards, he is not in possession of any income belonging to the distributor. Accordingly, 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.

(e) In a situation in which the assessee has credited the sale proceeds at the transaction value (in contrast with the transaction being shown at face value and the difference between face value and the transaction value credited to the distributor), the tax deduction liability under section I94H does not arise. While learned counsel for the assessee has stated at the bar that the sale proceeds are credited at the transaction value, this aspect of the matter is to be verified by the Assessing Officer, and in case the sales is accounted for at the face value, to that extent, the tax withholding liability is to be sustained,

25. Ground No. 1 is thus allowed in the terms indicated above."

13. In view of the aforesaid discussions, we find that the facts and circumstances in the present case are *pari materia* with the case decided by the Ahmedabad Tribunal. Therefore, respectfully we have no hesitation in following the decision of the Ahmedabad Bench of the Tribunal in Vodafone Essar Gujarat Ltd vs ACIT, TDS Circle, Ahmedabad (supra). We have also noted that the coordinate bench of Ahmedabad Tribunal has considered the distributor agreement executed between the assessee and its

distributors. We have further noted that there is no decision of jurisdictional High Court available on the issue, nor it is brought to our notice by ld. DR for the revenue, therefore, as per law laid down by Hon'ble Supreme Court in CIT Vs Vegetable Products 88 ITR 192(SC), that in view of conflicting decision of non-jurisdictional High Court, the view favourable to the assessee be upheld . Therefore, considering the decision of Ahmedabad Tribunal in Vodafone Essar Gujarat Ltd Vs ACIT, TDS (supra), various decision of Tribunal as referred in para 6 & 7 and the decisions of Hon'ble Rajasthan and Karnataka High Court as mentioned in para 5 above, the Grounds of the appeal is allowed.

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

Order pronounced in the open court on 13/11/2019.

Sd/-	Sd/-
RAJESH KUMAR	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 13.11.2019
SK

<u>Copy of the Order forwarded to</u> :

1. Assessee
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai