

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I-2' BENCH
MUMBAI**

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.3425/Mum/2014
(Assessment Year :2009-10)**

M/s. Vodafone Idea Ltd.(As successor to Spice Communications Limited 10 th Floor, Birla Centurion Century Mills Compound Pandurang Budhkar Marg Worli, Mumbai – 400 030	Vs.	Dy.Commissioner of Income Tax, Circle-3(2) Room No.608, 6 th Floor Aayakar Bhavan M.K.Road, Mumbai-400020
PAN/GIR No.AAACB2100P		
(Appellant)	..	(Respondent)

Assessee by	Shri J.D. Mistry & Ms. Manshi Padhiar
Revenue by	Shri T.Shankar
Date of Hearing	01/12/2022
Date of Pronouncement	24/02/2023

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No. 3425/Mum/2014 for A.Y.2009-10 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-4, Mumbai in appeal No.CIT(A)-4/IT-84/DCIT-3(2)/2011-12 dated 12/03/2014 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 29/12/2011 by the Id. Dy. Commissioner of Income Tax-3(2), Mumbai (hereinafter referred to as Id. AO).

2. The ground No.II raised by the assessee is challenging the disallowance of discount amounting to Rs.31,68,50,210/- given to prepaid distributors u/s.40(a)(ia) of the Act for non-deduction of tax at source u/s.194H of the Act. The ground No.I raised by the assessee is with regard to non-adjudication of additional evidences filed before the Id. CIT(A) is interconnected with ground No.II. Hence, they are taken up together for disposal.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of providing cellular services in the telecom circles of Maharashtra, Gujarat, Andhra Pradesh, Madhya Pradesh, Kerala, Uttar Pradesh(W), Haryana, Delhi, Uttar Pradesh (E), Himachal Pradesh and Rajasthan. The assessee had filed its return of income on 26/09/2009 declaring total income of Rs.'Nil' after setting of brought forward unabsorbed depreciation of Rs.33,06,29,157/-. The assessee filed its revised return of income on 01/04/2010 declaring total income at Rs.Nil after set off of brought forward unabsorbed depreciation of Rs.229,74,10,373/- on 30/03/2011. The assessee filed second revised return of income declaring total income at Rs.Nil after setting off of brought forward unabsorbed depreciation of Rs.234,59,26,810/-. During the course of assessment proceedings, the assessee was asked to submit details of commission and discount given to dealers and tax deducted on the same. On perusal of the details furnished by the assessee, the Id. AO observed that assessee had deducted tax at source for the commission payments made but had not deducted tax for the discount allowed to the distributors. Accordingly, the assessee was asked to make its submissions as to why tax was not deducted on the discount allowed to the distributors. The Id. AO ignoring the submissions made by the assessee merely followed the decision of Hon'ble Delhi High Court in the case of

assessee company reported in 325 ITR 148 (Del) wherein it was held that the relationship between assessee and the Distributors was that of Principal to Agent and accordingly the discount given to the dealers / distributors would be in the nature of commission on which tax is deductible u/s 194H of the Act which has not been done by the assessee and consequently the same would be liable for disallowance u/s 40(a)(ia) of the Act.

3.1. The assessee made elaborate submissions before the Id. CIT(A) enclosing the distributors agreement entered into by the assessee with the distributors for a territory in Karnataka Circle and made detailed submissions with respect to each and every clause thereon in the agreement. These were considered as additional evidences of the Id. CIT(A) and a remand report were called for from the Id. AO. The Id. AO submitted his first remand report on 18/06/2013 objecting to the admission of additional evidences on the ground that assessee failed to furnish these evidences during the course of assessment proceedings despite providing sufficient opportunities; secondly, this issue is a recurring issue and disallowance has been made in the earlier assessment year also ; accordingly, in view of the decision of the Hon'ble Delhi High Court in assessee's own case in the case of Idea Cellular Ltd. reported in 325 ITR 148 (Del) and hence the discount given to the dealers / distributors by the assessee would result in violation of provisions of Section 194H of the Act and consequently disallowance u/s.40a(ia) of the Act has to be made. The assessee furnished its rejoinder to the remand report on 18/07/2013. Subsequently, the Id. AO submitted his second remand report dated 05/08/2013. In the rejoinder, the assessee had raised that the issue would in any case would be covered by the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola

Beverages Pvt. Ltd. reported in 293 ITR 226 (SC). The Id.AO in the second remand report submitted that the said Hon'ble Supreme Court decision was not cited by the assessee before the assessment proceedings and hence, the same should not be considered by the Id. CIT(A). The assessee filed its rejoinder to the second remand report on 10/09/2013. Further, the Id. AO submitted his final remand report on 17/10/2013. In all the remand reports, the Id. AO objected to the admission of additional evidences by the Id. CIT(A). Accordingly, the Id. CIT(A) rejected the additional evidences furnished by the assessee without admitting the same by stating that the assessee's case does not fall under any of the clauses mentioned in Rule 46A of the Income Tax Rules.

3.2. It is not in dispute that during the year under consideration, the assessee paid discount on prepaid products to 213 distributors in Punjab circle totalling to Rs.11,76,80,658/- and 491 distributors in Karnataka Circle amounting to Rs.19,91,69,552/-. The total discount paid was Rs.31,68,50,210/-. The assessee furnished the names of the distributors, address of the distributors, PAN of the distributors and the discount paid thereon in respect of parties where details are available with it. The assessee pleaded that the relationship between assessee company and the distributor is on principal to principal basis and therefore, the discount given to prepaid distributors would not be subjected to deduction of tax at source (TDS). It was also pointed out by the assessee, on without prejudice basis, that the assessee receives the entire sale price from the distributors in advance and that no payment is made to the distributors or credit given in favour of the distributor and accordingly, the entire provisions of Chapter XVIIIB of the Act warranting deduction of tax at

source fails. The assessee stated that for deducting tax in terms of Section 194H of the Act –

- (a) Income should be in the nature of commission or brokerage
- (b) Payment should be received by a person acting on behalf of other, in the course of rendering services to third parties.
- (c) Such income should be paid or credited by the payer in favour of payee.
- (d) The payer should be a person responsible for paying such income to payee.
- (e) The amount of commission should be actually ascertainable.
- (f) The time of credit or payment should also be known.

3.3. Accordingly, it was submitted that to effectuate TDS, an amount that would be paid should be clearly determinable, the time when tax should be deducted at source should have crystallised, and the payer should be responsible for earning of such income by the distributor. Since, all these parameters fail, the assessee company is not obligated to deduct tax at source on the discount given to distributors for prepaid cards.

3.4. We find that assessee in the course of its business appoints prepaid distributors (i.e. distributors). The assessee supplies prepaid sim cards and recharge vouchers to its distributors at a discounted price. The assessee supplies prepaid sim cards containing the talk time worth at a higher figure than the discounted price to the distributors. The distributors supply them to the retailers and retailers sell the same to the ultimate customer / user. The distributors make payment of the discounted price in advance to the assessee and there is no payment of any kind made by the assessee to its distributors. The distributors would

sell to the retailers after adding its margin and the retailers would sell to the customer after adding his margin. The ultimate price to the customer / user is subjected to the Maximum Retail Price (MRP) fixed by the assessee. It is pertinent to note that the distributor does not earn any income just by obtaining the prepaid sim cards and recharge vouchers from the assessee. The distributor earns income only if the said sim cards and recharge vouchers were sold further. Hence, there is no fixed amount of commission that could be determined from the agreement entered into by the assessee with the distributors. Once the amount of commission income that could be determined in the hands of the distributor is not permissible, there cannot be any obligation of deduction of tax at source that could be casted on the assessee.

3.5. From the perusal of the distributors agreement, we find that the distributor is allowed to distribute to its retailers at any price between the consideration paid to the assessee and the MRP fixed by the assessee. The distributor possesses complete freedom of pricing. Hence, the first tranche of the transaction is selling of prepaid sim cards and recharge vouchers containing the talk time for a higher value by the assessee to the distributors, on which the distributor does not earn any income at all. As stated supra, the distributors earn income only when the said sim cards and recharge vouchers were sold at a price higher than its purchase price (i.e. the price paid by the distributor to the assessee herein). Hence, it is highly impossible to determine the amount of income that would accrue to the distributor on which tax ought to have been deducted by the assessee u/s.194H of the Act. Hence, the entire TDS computation mechanism fails in this case. In this regard, we find that the Id. AR rightly placed reliance on the decision of *Hon'ble Karnataka High Court in*

the case of Bharti Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar) wherein it was held as under:-

62. In the appeals before us, the assessee sells prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor. In other words the income accrued or belonging to the distributor should be in the hands of the assessee. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a subdistributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary 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.

3.6. First of all, the assessee herein does not make any payment of commission or discount to the distributor in the instant case. What assessee does is - it sells prepaid sim cards and recharge vouchers at a

discounted price than the MRP to the distributors. This amounts to sale of right to service (i.e. talk time upto MRP). Assuming the MRP of the sim cards and recharge vouchers is Rs.100/-, the assessee sells the same to its distributors at a discounted price of Rs.70/-. Later the distributor in turn sells the same product to retailers at Rs.90/- and thereafter, the retailer sells the same product to the ultimate customer /user at Rs.100/-. In this case, the distributors margin would be Rs.20/- (i.e. Rs.90-Rs.70) and retailers margin would be Rs.10 (Rs.100-Rs.90). From the above example, it could be seen that there are different amounts of margins earned by the distributor and retailer at every point in time. As stated supra, the margins arise to the distributor or the retailer only when the product is ultimately sold by them to the respective parties, i.e. the distributor earns the margin when he sells the sim cards to the retailers and retailer earns margin when he sells to the ultimate customer / user. In this scenario, how the assessee could be expected to determine the margins that could be derived by the distributor or the retailer and deduct tax at source. Admittedly, the agreement is entered by the assessee only with the distributors. It is very likely that the distributor may not be able to sell the prepaid sim cards and recharge vouchers. In this scenario, there cannot be any income that would accrue to the distributors and hence there would be no question of deduction of tax at source by the assessee company. The assessee has got absolutely no control over the appointment of retailers. Hence, the entire computation mechanism of deduction of tax at source in terms of Section 194H of the Act grossly fails as the income component thereon is not determinable when the assessee sells the sim cards to the distributors. Accordingly, the arguments advanced by the Id. DR before us vehemently that the TDS is to be done by the assessee at the difference in price of MRP and its sale price is rejected. We hold that the argument of the Revenue only results in

impossibility of performance in the hands of the assessee. The famous legal maxim "*LEX NON COGUT AD IMPOSSIBLIA*", meaning thereby – '*law cannot compel a person to perform an act which he could not possibly perform*', would certainly come to the rescue of the assessee herein. As stated supra, the assessee only collects the discounted price of goods from its distributors and does not make any payment thereon. This aspect is squarely covered by the decision of *Hon'ble Jurisdictional High Court in the case of CIT(TDS) vs Super Religare Laboratories Ltd reported in 284 Taxman 657 (Bom)* wherein the head notes are reproduced hereunder:-

Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Commissions, brokerages etc. (Collection centres, discount allowed to) - Assessee-company was engaged in providing laboratory and testing services to customers through its own and through third party collection centres - It allowed certain discount to these collection centres - Assessing Officer held that such discount allowed by assessee to collection centres was in nature of commission and assessee was obligated under section 194H to deduct tax at source on same - It was noted that provision of section 194H to deduct tax was applicable only to a person who was responsible for paying, at time of credit to account of payee or at time of payment - Whether, since assessee did not perform any act of paying but was only receiving payments from these collection centres, there was no obligation on assessee-company to deduct tax at source under section 194H on discount so allowed - Held, yes [In favour of assessee]

3.7. Similarly in yet another decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Qatar Airways reported in 332 ITR 253 (Bom)*, the same decision was rendered. The facts of that case and decision rendered thereon are reproduced herein for the sake of convenience :-

1. The question of law as raised in this appeal is as under:

"Whether on the facts and in the circumstances of the case and in law, the difference in amount between commercial price and published price is special commission in the nature of commission or brokerage within the meaning of Explanation (i) to section 194H of the Income-tax Act 1961 ?"

2. It is not in dispute that the airlines have a discretion to reduce the published price to their tickets. In the present case, the airlines had an agreement with their agents to sell their tickets at a minimum fixed commercial price which was

lower than the published price but was of a variable nature and could be increased by the agent, at his discretion, to the extent up to the published price. It is not in dispute that under rules of IATA, the commission payable to the agent was 9 per cent. of the published price. It is an admitted position that the TDS has been deducted while payment of this commission of 9 per cent. It is the contention of the Revenue that the difference between the published price and the minimum fixed commercial price amounts to an additional special commission and therefore, TDS is deductible on this amount under section 194H of the Income-tax Act.

3. On a perusal of the order of the Income-tax Appellate Tribunal, we find that it proceeded on the basis of its earlier decision in the case of Korean Air v. Dy. CIT in which, in similar circumstances, it was held that TDS was not deductible. He finds that though an appeal was preferred against the aforesaid decision the same has been rejected by this court for non-removal of the office objections under rule 986. Be that as it may, for section 194H to be attracted, the income being paid out by the assessee must be in the nature of commission or brokerage. Counsel for the Revenue contended that it was not the case of the Revenue that this difference between the principal price of the tickets and the minimum fixed commercial price amounted to payment of brokerage. We find however, that in order to deduct tax at source the income being paid out must necessarily be ascertainable in the hands of the assessee. In the facts of the present case, it is seen that the airlines would have no information about the exact rate at which the tickets were ultimately sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price and it would be impracticable and unreasonable to expect the assessee to get a feed back from their numerous agents in respect of each ticket sold. Further, if the airlines have discretion to sell the tickets at the price lower than the published price then the permission granted to the agent to sell it at a lower price, according to us, can neither amount to commission nor brokerage at the hands of the agent. We hasten to add any amount which the agent may earn over and above the fixed minimum commercial price would naturally be income in the hands of the agent and will be taxable as such in his hands. In this view of the matter, according to us, there is no error in the impugned order and the question of law as framed does not arise. The appeal is therefore, dismissed in limini.

3.8. We find that the Id. CIT(A) observed that the issue in dispute is squarely covered by the decision taken by his predecessor in the assessee's own case for A.Y.2008-09 vide Appeal No.CIT(A)-4/IT-239/ITO-3(2)(4)/2011-12 dated 10/01/2014 and reproduced the order passed by his predecessor in its entirety and finally in para 5.3.1.2 of his order observed as under:-

“5.3.1.2 Having carefully and dispassionately considered the facts and circumstances of the present appeal and those of earlier A.Y. 2008-09, it is noticed that facts and circumstances are identical in both years and therefore ground of appeal no. I of the present appeal is squarely covered by my decision on ground of appeal no. I in the same case of M/s. Idea Cellular Ltd., A.Y. 2008-09, Appeal No. CIT(A)-4/IT-239/ITO.3(2)(4)/2011-12 dated 10.01.2014 vide paragraph no. 6 as extracted above. Therefore, ground of appeal no. I of the present appeal is not allowed. For the same reasons, as discussed above, without prejudice ground to the ground of appeal no. I is also not allowed”.

3.9. From the above final observation of the Id. CIT(A) it could be seen that the Id. CIT(A) had dismissed the plea of the assessee on the ground that similar disallowance was made in A.Y.2008-09 and since the facts and circumstances of A.Y.2009-10 are identical with A.Y.2008-09, the decision taken in A.Y.2008-09 shall be squarely applicable for the year under consideration also. It is pertinent to note that this appellate order i.e. appeal for A.Y.2008-09 had already been agitated by the assessee before this Tribunal and this Tribunal in ITA No.2285/Mum/2014 dated 12/10/2022 for A.Y.2008-09 had elaborately deleted the very same disallowance u/s 40(a)(ia) of the Act and decided the issue in favour of the assessee. It is not in dispute that the agreements entered into by the assessee with its distributors were subject matter of verification and examination by the Id. AO for A.Y.2008-09. This is evident from the detailed analysis made by this tribunal in A.Y. 2008-09 in the order referred supra. In view of the finding given by the Id. CIT(A) that facts and circumstances of A.Y.2008-09 are identical with A.Y.2009-10, it could be safely presumed that the agreements entered into during the year for fresh telecom circles are same as that was entered for other telecom circles in A.Y.2008-09. In other words, terms and conditions of the distributors agreement always remain the same for all telecom circles.

3.10. Before us, the Id. DR vehemently argued that the agreement entered by erstwhile assessee Spice Communications Ltd. with its distributors need not be the same with the agreements entered by Idea Cellular Ltd with its distributor. The assessee has not furnished the agreements before the Id. AO during the course of assessment proceedings. Hence, neither the Id. AO nor the Id. CIT(A) had gone into the clauses in the agreement. Accordingly, in terms of Section 255(6) of the Act, this Tribunal has to go through the entire clauses of the agreement by causing such enquiry either on its own or by asking a remand report in order to ensure whether relationship between the assessee and its distributors is principal to principal or principal to agent. The Id. DR placed reliance on the decision of the *Hon'ble Jurisdictional High Court in the case of Thyrocare Technologies Ltd. vs. ITO in ITA No.53 & 54 of 2016 together with Writ Petition No.730 & 847 of 2016 dated 11/09/2017* wherein he referred to para 19 & 20 of the said order which reads as under:-

“19. We do not see how it is possible for us to uphold the order of the Tribunal and when it purports to decide two appeals of the Revenue by this single paragraph conclusion. There is absolutely no discussion of the law and why the Co-ordinate Bench decision rendered at Delhi is either distinguishable on facts or inapplicable. There is no discussion, much less any finding and conclusion that the order of the first appellate authority is perverse or is contrary to law. There are no infirmities, much less serious errors of fact and law noted by the Tribunal in the order of the Commissioner, which the Tribunal is obliged to and which order is therefore interfered with by the Tribunal. Why the Tribunal feels it is its duty and obligation to interfere with the order of the first appellate authority, therefore, should be indicated with clarity. We have also not seen a reference to any communication or to any document which would indicate that the six queries raised by the Tribunal on the assessee have not been answered, much less satisfactorily. The Tribunal should have, independent of the statements, referred to such of the materials on record which would disclose that the assessee has entered into such arrangements so as to avoid the obligation to deduct the tax at source. If the arrangements are sham, bogus or dubious, then such a finding should have been rendered. Therefore, we are most unhappy with the manner in which the Tribunal has decided these appeals. We have no alternative but to set aside such order and when the last fact finding authority misdirects itself totally in

law. It fails to perform its duty. It has also not rendered a complete decision. Once the Tribunal was obliged in law to examine the matter and reappraise and reappraise all the factual materials, then it should have performed that duty satisfactorily and in terms of the powers conferred by law.

20. Once this duty is not performed, we can safely come to the conclusion that the Tribunal's order is vitiated by not only total non-application of mind but also misdirection in law. We accordingly conclude and proceed to set aside the impugned order. We direct the Tribunal to hear the appeals afresh on the merits and in accordance with law after giving complete opportunity to both sides to place their versions and arguments. The Tribunal shall frame proper points for its determination and consideration and render specific findings on each of them. The Tribunal should carry out this exercise uninfluenced by any observations or conclusions in the impugned order which we have quashed and set aside. We clarify that beyond emphasizing what is the real controversy and which question goes to the root of the matter, we have not expressed any opinion on the rival contentions. All of them are open for being raised before the Tribunal. Once the two appeals succeed and the Tribunal's order is set aside, nothing survives in the writ petitions and the same are disposed of."

3.11. Per contra, the Id. AR vehemently objected to the arguments advanced by the Id. DR by stating the following:-

- a) The agreements entered by the assessee with distributors were never even called for by the Id. AO during the course of original assessment proceedings in as much as the Id. AO had completely closed his eyes in view of the decision of the Hon'ble Delhi High Court which was decided in favour of the Revenue and accordingly, directly proceeded to make disallowance u/s.40a(ia) of the Act.
- b) These agreements together with the explanation for each clause were duly furnished by the assessee before the Id. CIT(A) on its own in the form of additional evidences. These additional evidences were forwarded to the Id. AO for remand report by the Id. CIT(A). The Id. AO objected to the admission of those additional evidences in his remand report which was accepted by the Id. CIT(A). Though the additional evidences in the form of agreements were placed on record by the assessee before the Id. CIT(A) as well as before the

Id. AO in the remand proceedings, the lower authorities in their wisdom, chose not to examine those agreements. Having done so, the Id. DR before this Tribunal cannot request for adjudication of the very same agreements by this Tribunal either on its own or by seeking a remand report from the Id. AO. This request of the Id. DR if accepted, would only tantamount to improving the case of the Revenue, which the Id. DR does not have power to seek before the Tribunal. It is very well settled that the Id. DR before the Tribunal is entitled only to defend the case of the Id. AO and cannot improve the case of the Revenue.

- c) Moreover why should the remand report be called for from the Id. AO to examine the distributors agreement when the very same agreement was directed to be not even admitted as additional evidence by the Id. AO in the remand proceedings.
- d) With regard to reliance placed on the decision of the Hon'ble Jurisdictional High Court in the case of Thyrocare Technologies Ltd by the Id. DR, the Id. AR stated that in the facts of that case, the Tribunal did not look into the order of the CIT(A) and Delhi Tribunal which was relied by CIT(A). This fact is clearly mentioned in para 7 of the order of the Hon'ble Bombay High Court by holding that the Tribunal has reproduced the entire assessment order which is set aside by the first appellate authority but has not made any reference to the order of the first appellate authority and view taken by CIT(A). That view of the first appellate authority is based on the decision of the Tribunal Bench at Delhi. No attempt was made by the Tribunal to distinguish the Delhi Tribunal's decision. In these facts and circumstances, the Hon'ble Bombay High Court had given the aforesaid direction in para 19 of its order which is

reproduced hereinabove. Hence, the reliance placed on this decision would not advance the case of the Revenue.

- e) On the categorical finding given by the Id. CIT(A) that the facts and circumstances of the A.Y.2008-09 are identical with A.Y.2009-10 i.e. the year under consideration and consequently the Id. CIT(A) upholding the disallowance made u/s.40a(ia) of the Act, this Tribunal had reversed the order of the Id. CIT(A) in A.Y.2008-09. Now, the Id. DR on knowing that the said order of the Id. CIT(A) for A.Y.2008-09 has been reversed by this Tribunal, is trying to make out a fresh case with a request for examination of each and every clause in the distributors agreement so as to establish principal to agent relationship between assessee and its distributors. It is pertinent to note that against categorical finding of the Id. CIT(A), the Revenue had not preferred any appeal. Without disturbing that finding, the Id. DR is not entitled to make any fresh arguments before this tribunal.

3.12. The Id. DR stated that the reason for the Revenue not filing appeal against the direction of the Id. CIT(A) that facts and circumstances of A.Y.2008-09 are identical with A.Y.2009-10 was that there was no tax effect involved on that as the issue was decided in Revenue's favour. In this regard, the Id. DR placed reliance on the CBDT Circular No.3/2018 dated 11/07/2018 wherein it was stated that the Revenue would be entitled to file appeal or cross objections before the Tribunal only if there is tax effect on the disputed issue. The Id. DR also placed reliance on the decision of the *Hon'ble Gujarat High Court in the case of Dahod Sahakari Kharid Vechan Sangh Ltd. vs. Commissioner of Income Tax reported in 282 ITR 321* wherein he placed reliance on para 17 & 18 of the said order which is reproduced as under:-

“17. In case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

18. If the inference drawn by the Tribunal is accepted as a correct proposition, it would render rule 27 of the Tribunal Rules redundant and nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be avoided. Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to provisions of section 253(4) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the Commissioner (Appeals) remained unchallenged since the assessee had not filed cross objections.”

3.13. The Id. DR also placed reliance on yet another decision of the *Hon'ble Gujarat High Court in the case of PCIT vs. Chartered Logistics Ltd. reported in 250 Taxman 385.* The Id. DR argued that since the issue was decided in favour of the Revenue by the Id. CIT(A) there was no scope for the Revenue to file any appeal before this Tribunal against that finding in view of the Circular referred to above.

3.14. With regard to the aforesaid arguments, the Id. AR submitted as under:-

- *The reliance on the circular is misplaced by the DR. If DR's version is to be accepted, the department can never file an appeal in any case where tax effect is not involved.*
- *For instance, consider an order passed by the AO u/s 163 of the Act holding a person as an agent of a non resident. This order is an appealable before CIT(A) order u/s 246A(1)(d). Now, where an appeal is filed before CIT(A) and the case is decided in favour of the assessee, there is no tax effect involved in this case. If DR's version is*

to be accepted, the department cannot file an appeal before ITAT even where section 253(1)(a) clearly provides that all orders passed by CIT(A) u/s 250 are appealable before ITAT.

- *Further, in cases where section 12AA registration is cancelled by CIT (Exemptions), appeal lies before the ITAT as per section 253(1)(c). Now, these are cases which do not involve tax effect. Now, if ITAT decides the case in favour of the assessee, will the department lose its right to appeal before High Court since no tax effect is involved? Similar is the case of order passed by PCIT in cases of institutions covered by sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10.*
- *The assessee humbly submits that these instances are expressly envisaged and excluded in para 11 of the said circular. Thus, most humbly, the DR's contention that the Department could not have filed an appeal for the want of tax effect by relying on the circular is misplaced.*
- *Further, the DR has also stated that even a Cross Objection could not have been filed since the circular applies even in cases of cross objection and has relied on para 12 of the Circular.*

3.15. We are in complete agreement with the Id. AR in respect of his argument that the Id. DR before this tribunal would be entitled only to defend the case of the Id. AO and cannot improve the case of the revenue. No power is vested in the statute for the same. The tribunal, being a second appellate authority, could only adjudicate the disputed order before it i.e. the order of Id. CIT(A). That order of Id. CIT(A) had already been passed after considering the assessment order. In this regard, the wordings used in section 254(1) of the Act would also be relevant which reads as under :-

Section 254(1). The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard , pass such orders thereon as it thinks fit.

The crucial words are –

- a) such orders and
- b) thereon

The expressions 'such orders' and 'thereon' used in section 254(1) of the Act restricts the scope of powers of the tribunal to confine only to the orders before it and not to travel beyond it. That is precisely the reason the power of enhancement of income has not been granted by the statute to the tribunal, when the same was given to CIT(A). Hence the legislature in its wisdom had consciously curtailed the powers of the tribunal to adjudicate only those issues that are reflected in the orders of the lower authorities and materials available on record with respect to the facts. Accordingly, the tribunal is bound to pass orders only based on facts and materials available on record. In our considered opinion, this is how the expression 'pass such orders thereon' used in section 254(1) of the Act need to be understood. Hence there is no question of examination of various clauses of agreements entered with distributors at this stage. In any case, the Id. CIT(A) had stated that the facts and circumstances of A.Y. 2008-09 are identical with facts and circumstances of A.Y. 2009-10 i.e. the year under consideration. As stated earlier, it is not in dispute that the agreements with distributors were subject matter of examination by the Id. AO and Id. CIT(A) in A.Y. 2008-09. Moreover, the very same agreements with distributors were placed on record before the Id. CIT(A) as additional evidences and it is the Id. AO who had even objected to admission of those additional evidences by the Id. CIT(A), which has been accepted by the Id. CIT(A). Hence both the lower authorities, in their wisdom, chose not to examine the agreements. While this is so, where is the need for the tribunal, being a second appellate authority, to examine those agreements ? Hence it could be safely

concluded that the verification and examination of agreements in the year under consideration would not advance the case of the revenue in any manner, more so, when the issue on merits after due examination of the agreements, had already been decided in favour of the assessee in A.Y. 2008-09 by this tribunal. We find that the decision relied by the Id. DR in the case of Thyrocare Technologies Ltd of the Hon'ble Jurisdictional High Court referred supra is factually distinguishable as rightly pointed out by the Id. AR which has been stated hereinabove. Hence the reliance placed on the said decision would not advance the case of the revenue.

3.16. With regard to the reliance placed by the Id. DR on the CBDT Circular No. 3/2018 dated 11.07.2018 and reliance on decisions of Hon'ble Gujarat High Court referred supra on the ground that there was no tax effect involved for the revenue pursuant to the decision of Id. CIT(A), we find that the para 4 of the CBDT circular No. 3/2018 defines 'tax effect' to mean difference between tax on assessed total income and the tax that would have been chargeable had such total income been reduced by the issue against which appeal is intended to be filed. Now, in the present case if the department is aggrieved by the observation of Id. CIT(A) in respect of the disallowance made u/s 40(a)(ia) on the ground of non-deduction of tax at source u/s 194H, the tax effect has to be seen with regard to the quantum of this issue which is certainly more than the monetary limits prescribed for revenue preferring appeals before this tribunal. Hence the revenue had an option to prefer cross appeal or cross objections before this tribunal, which was not done. We find that the Id. DR relied on para 12 of the CBDT Circular. On perusal of the same, we find that the said part of para 12 deals with cases where either the tax effect on the issue appealed by the assessee is lower than the prescribed limits applicable to the department appeals or where the department

seeks to file cross objection on an issue other than that agitated by the assessee and the tax effect of such an issue is below the prescribed limits.

3.17. We find that the DR has relied on the decision of Hon'ble Gujarat High Court in case of Dahod Sahkari Kahrid Vechan Sangh Ltd. Vs CIT 282 ITR 321 rendered in the context of Rule 27 of ITAT rules and held that not filing an appeal/CO does not mean that the judgment has been accepted. In this regard, we find that Rule 27 of ITAT rules enables a respondent to support the order on any point/ground which has been decided against it. However, for a ground to be decided against a party, such a contention has to be made before the lower authority in the first place. In the decision relied upon by the DR, it was a case where the assessee had contended before the CIT(A) that the case is not of concealment of particulars of income for the levy of penalty. CIT(A) recorded that practically there is indeed a case of concealment of particulars of income and furnishing of inaccurate particulars of income but ultimately cancelled the penalty and held that it is not a fit case for levy of penalty. The revenue filed an appeal before the Tribunal. Before the Tribunal, the Assessee contended that it is not a case of concealment or furnishing of inaccurate particulars of income. The Tribunal held that the assessee did not challenge the finding of the CIT(A) that there indeed is a concealment and/or furnishing of inaccurate particulars of income since the assessee has not filed a cross objection. On appeal to High Court, it was held that in case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof

which was against the respondent. Hence this decision is factually distinguishable with that of assessee herein.

3.18. We find that for Rule 27 of the ITAT Rules to apply, the contention sought to be pressed before the ITAT by the respondent should have been decided against it by the Id. CIT(A). For something to be decided against the revenue, it has to be so contended by the revenue. However, in case of the assessee, there is no lis before the lower authorities. The Id. AO himself has held in the assessment order that the case of Idea Cellular applies to the facts of the assessee. Even in the remand proceedings, the Id. AO has reiterated that the case of Idea Cellular applies to the facts of the assessee. Having regard to all the facts on record, including the remand report filed by the Id. AO, the Id. CIT(A) in para 5.3.1.2 on page 46 of the order has held that the facts and circumstances are identical and squarely covered by the decision in Idea Cellular Ltd. in AY 2008-09. It is this finding which the Id. DR now seeks to contend that is against the Revenue. Without preferring any appeal or cross objections or even Rule 27 petition, the revenue cannot try to disturb the said findings of the Id. CIT(A) before us. Infact we find that the Id. DR is trying to make out a case which is not even the case of the lower authorities. This aspect has already been addressed by us hereinabove that Id. DR cannot improve the case of the lower authorities before us.

3.19. Further, the Id. DR has relied upon the decision of Hon'ble Gujarat High Court in the case of Chartered Logistics referred supra. We find that was a case where the Tribunal had proceeded on incorrect facts, which is evident from para 6 of the said decision which is reproduced hereunder:-

“6. We do not intend to give final answer to this question in the present petition though prima facie it may appear that even without any specific

powers under the statute, for example, as referred to in sub-section (2) of section 254 for rectification, it would appear that any judicial or quasi-judicial authority would have inherent powers to correct an error which is plainly that of clerical, typographical, arithmetical or factual. If the Tribunal had proceeded on factual basis which was wholly and concededly erroneous, the Tribunal perhaps even in absence of specific provision of sub-section (2) of section 254, had the power to recall the order. However it is not necessary to elaborate this issue any further since the department has challenged not only the subsequent order of the Tribunal dated 13.10.2016 but also the original order dated 13.5.2015 which in any case is subject to examination in exercise of writ jurisdiction by this Court and is challenged before us. When we find that the Tribunal's order dated 13.5.2015 was passed on clearly incorrect factual premise and such factual premise being the very foundation of the order, such order must be set aside and is accordingly set aside.”

3.19.1. However, we find that in the present case there are no incorrect facts. Hence the reliance placed on this decision would not advance the case of the revenue.

3.20. Hence we hold that it was a conscious decision of the Id. PCIT not to suggest any further appeal to this tribunal against the order of the Id. CIT(A). Accordingly, that finding of the Id. CIT(A) that facts and circumstances of A.Y. 2008-09 are identical with A.Y. 2009-10 had attained finality.

3.21. We find that the Id. DR on the next date of hearing placed reliance on the recent decision of the *Hon'ble Supreme Court in the case of Singapore Airlines Ltd. vs. CIT in Civil Appeal No.6964-6965 of 2015 dated 14/11/2022*. By placing reliance on the said decision of the Hon'ble Supreme Court, the Id. DR vehemently argued that the decision rendered by this Tribunal in assessee's own case for A.Y.2008-09 in ITA No.2285/Mum/2014 dated 12/10/2022 would not be applicable and hence, the assessee's case would be invited with disallowance of expenses u/s.40(a)(ia) of the Act. In this regard, the written submission

filed by the Id. DR by placing reliance on certain paragraphs of the decision of Hon'ble Supreme Court are reproduced hereunder :-

“Para 7- similar in our case. Only ceiling is prescribed and distributor is free to sell at any price below that.

Para 14

- *Decision of the Hon'ble ITAT examined and reversed by Hon'ble SC*
- *Amount realized in excess is income in the hands of Assessee doesn't know the eventual price of sale distributor.*
- *No services are rendered to the assessee*
- *Section 194H could not be pressed into operation on the basis of such surmises and without actual figures being proved.*
- *Para 17 - arguments of assessee negated by Hon'ble SC*
- *Para 18- arguments by Revenue*
 - *Passing of title - Ahmedabad Stamp Paper Vendors (Guj HC) - 257 ITR 102-*
 - *In the past, it has been pointed out that title of the prepaid cards/scratch vouchers / recharge vouchers / V top up delivered to the Distributor remain with the appellant only and income is eventually recognised much later.*
 - *At what point does assessee account for the revenue? This is very crucial and has to be addressed by the assessee.*
 - *There was no requirement for TDS to be deducted after every transaction. It was completely practical and permissible for the airlines to assemble the amounts together and make a comprehensive TDS deduction at the end of the month.*
 - *The language of Section 194H is inclusive and covers any "direct or indirect" payments to the agent. Hence, there was no need for the payment to be made directly by the Assesseees to the agents in order for it to fall under the ambit of "Commission" and be subject to TDS. Reliance was placed on a decision of this Court in Director, Prasar Bharati v. CIT (2018) 7 SCC 800.*
 - *The taxing of the auxiliary amounts in the hands of the travel as income, did not cure the default by the assesseees in deduction of TDS.*
- *Para 20-23.*

○ *Para 22 is very important:*

○ *Lakshminarayan Ram Gopal and Sons Ltd. vs. The Government of Hyderabad(1955) 1 SCR 393:*

- *The position is further clarified in Halsbury's Laws of England Hailsham Edition Volume 1, at page 193, article 345 where the positions of an agent, a servant and independent contractor are thus distinguished.*

- *An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency*

- *depending upon the duties or position of the servant."*

- *Para 24: KhedutSahakari Ginning and Pressing Society v. State of Gujarat, (1971) 3 SCC 480: "The true nature of a transaction evidenced by a written agreement has to be ascertained from the covenants and **not merely from what the parties choose to call it.** The terms of the agreement must be carefully scrutinised in the light of the surrounding circumstances".*

- *Para 26: Important criteria:*

- *whether title in the goods, at any point, passed from the Assessee to the travel agents.*

- *whether the sale of the goods by the agents was done under the pretext of them being the property of the agents themselves, or of the assessee o whether the assessee or the agent was liable for any breaches of the terms and conditions, and for failure to fulfil the contractual rights that accrued to the consumer who purchased them.*

- *In our case, Telecom Rules clearly lay the onus on the Telecom Service Provider (TSP) and holds them accountable. (eg. KYC, CAF forms etc)*

- *Compliances related to rules prescribed by Department of Telecommunications are that of the assessee*

- *Para 27: It has been argued by the assessee that transactions between distributor and customer falls outside the ambit of the principal-agent relationship.*
 - *Para 28- The title of goods remain with the assessee which seems to be the case in our assessee as well in terms of DoT regulations. The customer holds the assessee accountable for deficiency in service.*
 - *Para 30-conditions similar to our case*
 - *Para 31- Assessee actually retains title over the property and is responsible for the actual services provided to the final customer. The assessee has the responsibility to provide full and final compensation to the agent for the acts it carries out under the agreement. (similar to DoT rules).. Para 33-Assessee contends that "the prerequisite of a payment on which TDS can be deducted in the first place is not fulfilled."*
 - *Para 34 "Section 194H of the IT Act, as noted earlier, does not distinguish between direct and indirect payments. Both fall under Explanation (i) to the provision in classifying what may be called a "Commission".*
- Para 35*
- *Therefore, if we view the ambit of Section 194H in an expansive manner, the factum of the exact source of the payment would be of no consequence to the requirement of deducting TDS. Even on an indirect payment stemming from the consumer, the Assessee would remain liable under the IT Act. Consequently, the contention of the airlines regarding the point of origination for the amounts does not impair the applicability of Section 194H of the IT Act.*
 - *Para 36 - practicality and feasibility of making the deductions o Argument that assessee doesn't know the commission has not been accepted by the Hon'ble SC.*
 - *Para 37, 43, 51- Qatar Airways decision of Hon'ble Bombay HC 332 ITR 253, has been negated. • Para 42 - Assessee cannot be absolved from its statutory duties under Section 194H, irrespective of the viability of operating in this manner.*
 - *Para 44 - Lack of control over pricing does not determine principal – agent relationship.*
 - *As averted to in Lakshminarayan Ram Gopal & Son Ltd. (1955) 1 SCR 393 a contract of agency does not entail control over the minutiae of the agent's actions. Such a level of oversight would*

more closely resemble a master-servant relationship. In a principal-agent relationship, it is sufficient for the latter to be informed of the responsibilities and duties under the contract and certain guidelines on how to satisfy them. An agent undoubtedly retains a sizeable level of discretion on how to achieve the desired results. This characteristic of a contract of agency was cemented by this Court in Qamar Shaffi Tyabji v. The Commissioner, Excess Profits Tax, Hyderabad (1960) 3 SCR 546.

○ *An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal.*

Para 45- Freedom of pricing by agent does not mean it is principal-principal.

○ *"A contract of agency permits an agent to carry out acts on its own volition provided it does not contravene the purpose of the agency contract and the interests of the principal".*

ITA No.2285/Mum/2014, AY 2008-09 of the assessee decided by

Hon'ble ITAT on 12.10.2022 - Distinction

Some of the key rulings which are no longer relevant in the light of decision by Hon'ble SC in Singapore Airlines case:

- *Para 2.4: "Once the amount of commission income that could be determined in the hands of the distributor is not permissible, there cannot be any obligation of deduction of tax at source that could be casted on the assessee."*
- *Para 2.5: "From the perusal of the distributors agreement, we find that the distributor is allowed to distribute to its retailers at any price between the consideration paid to the assessee and the MRP fixed by the assessee. The distributor possesses complete freedom of pricing. Hence, the first tranche of the transaction is selling of prepaid sim cards and recharge vouchers containing the talk time for a higher value by the assessee to the distributors, on which the distributor does not earn any income at all."*
- *Para 2.6: "First of all, the assessee herein does not make any payment of commission or discount to the distributor in the instant case."*
 - *Patra 2.6.1: CIT vs Qatar Airways reported in 332 ITR 253 (Bom) which has been relied upon: Explicitly overruled by Hon'ble SC.*
 - *Para 2.7: "Though the net effect of both these accounting methods would result in the same profit ultimately, it does present a picture that*

would enable the Revenue to expect assessee to deduct tax at source on the discount portion of Rs.30/- deducted in the profit and loss account."

• Para 2.8.1: "From the perusal of the various clauses of the distributors agreement, we are convinced that the relationship between the assessee and the distributor is only that of principal to principal and not principal to agent as alleged by the Revenue. This is clearly established from the fact that the distributor is merely purchasing the prepaid sim cards and recharge vouchers from the assessee and has got complete freedom of pricing and accordingly, it could sell the sim cards to the retailers at any price of its choice subject to MRP. The MRP had to be fixed by the assessee as it gives the ultimate customer/user the talk time worth the MRP by paying the price equivalent to MRP. This is the reason the assessee is fixing the MRP. This does not tantamount to fixation of pricing of the product by the assessee or exercising control over the distributors on pricing"

Para 2.8.1 "In this regard, we find that assessee in its Accounting Policies vide Point No 9 had stated that revenue is recognised as and when the talk time gets activated. When the retailer sells the sim card to the customer, the customer has to scratch the sim card and there would be a key code reflected thereon. Once the said key code is entered, the talk time gets activated. Actually what is sold by the assessee is only the talk time. The said talk time gets materialised / usable only when it gets activated by the customer by entering the key code. This is what is reflected in Accounting Policies, on which we don't find any infirmity"

All the above issues need a relook in the light of decision of Hon'ble SC above. Also, the principal-agent relationship has to be seen in this light.

3.21.1. We find that the Id. DR before us made further submissions before us stating that the earlier decision rendered by this tribunal for A.Y. 2008-09 is not applicable pursuant to the decision of the Hon'ble Supreme Court in Singapore Airlines Ltd referred supra as under:-

Para 2.1:

The assessee has stated 6 conditions have to be satisfied for deduction tax under S.194H:

<i>Condition</i>	<i>Addressed in Hon'ble SC decision</i>
<i>(a) Income should be in the nature of commission or brokerage</i>	<i>Para 34: both direct and indirect payments fall under commission</i>
<i>(b) Payment should be received by a person acting on behalf of other, in the course of rendering service to third parties</i>	<i>Para 31 coupled with DoT rules Para 44: lack of control does not absolve liability</i>
<i>(c) Such income should be paid or credited by the payer in favour of payee</i>	<i>Para 35: applicable even on indirect payment; expansive ambit; point of origin is immaterial.</i>
<i>(d) The payer should be a person responsible for paying such income to payee.</i>	<i>Para 35: same as above</i>
<i>(e) The amount of commission should actually be ascertainable.</i>	<i>Para 41, 42: not transaction wise but monthly deduction can be made</i>
<i>(f) The time of credit or payment should be known</i>	<i>Para 41, 42: same as above</i>

Para 2.4:

- *"It is pertinent to note that the distributor does not earn any income just by obtaining the prepaid sim cards and recharge vouchers from the assessee. The distributor earns income only if the said sim cards and recharge vouchers were sold further. Hence, there is no fixed amount of commission that could be determined from the agreement entered into by the assessee with the distributors. Once the amount of commission income that could be determined in the hands of the distributor is not permissible, there cannot be any obligation of deduction of tax at source that could be casted on the assessee."*
- *Addressed in para 6, 34, 41, 42 and others of Hon'ble SC decision*

○ *Para 2.5:*

- *"we find that the distributor is allowed to distribute to its retailers at any price between the consideration paid to the assessee and the MRP fixed by the assessee. The distributor possesses complete freedom of pricing. Hence, the first tranche of the transaction is selling of prepaid sim cards and recharge vouchers containing the talk time for a higher value by the assessee to the distributors, on which the distributor does not earn any income at all. As stated supra, the distributors earn income only when the said sim cards and recharge vouchers were sold at a price higher than its purchase price (ie. the price paid by the distributor to the assessee herein). Hence, it is highly impossible to determine the amount of income that would accrue to the distributor on which tax ought to have been deducted by the assessee u/s.194H of the Act. Hence, the entire TDS computation mechanism fails in this case."*
- *Addressed in para 6, 34, 35, 41, 42 and others of Hon'ble Sc decision.*
- *Assessee has been able to determine the amount of TDS down to the last rupee, showing that mechanism exists.*

Para 2.6:

o Similar findings have been given about assessee herein does not make any payment of commission or discount to the distributor; how the assessee could be expected to determine the margins that could be derived by the distributor or the retailer and deduct tax at source; there cannot be any income that would accrue to the distributors and hence there would be no question of deduction of tax at source; the assessee only collects the discounted price of goods from its distributors and does not make any payment thereon.

o All these propositions have been controverted in Hon'ble SC decision

o Assessee has been able to determine the amount of TDS down to the last rupee, showing that mechanism exists.

Para 2.6.1.:

o Hon'ble Jurisdictional High Court in the case of CIT vs Qatar Airways reported in 332 ITR 253 (Bom)

Para 51: Above decision explicitly overruled

• *Para 2.7:*

o Method of accounting

o These arguments were e raised in para 17 by assessee's counsel and have been rejected in the decision.

Para 2.8: Since it is the submission of the undersigned that the agreement has not been produced by the assessee and proved to be the same, the principal - agent relationship does not stand established. This is also in line with the finding of Hon'ble Bom HC referred earlier that this necessarily has to be a question of fact.

Para 2.8.1:

o From the perusal of the various clauses of the distributors agreement, we are convinced that the relationship between the assessee and the distributor is only that of principal to principal and not principal to agent as alleged by the Revenue. This is clearly established from the fact that the distributor is merely purchasing the prepaid sim cards and recharge vouchers from the assessee and has got complete freedom of pricing and accordingly, it could sell the sim cards to the retailers at any price of its choice subject to MRP. The MRP had to be fixed by the assessee as it gives the ultimate customer/ user the talk time worth the MRP by paying the price equivalent to MRP This is the reason the assessee is fixing the MRP. This does not tantamount to fixation of pricing of the product by the assessee or exercising control over the distributors on pricing. Hence, the arguments advanced by the ld. DR in this regard are hereby rejected. Freedom of pricing is already discussed in Hon'ble SC decision and assessee's contentions not accepted. As regards "perusal of the various clauses of the distributors agreement", assessee has not been able to demonstrate the same.

Para 2.8.1:

o We find that as per Clause 4 of the Distribution Agreement which clearly specifies the RELATIONSHIP between assessee and the distributor to be at Principal to Principal.

o This has clearly been addressed in para 24 of Hon'ble SC decision.

o Whether a particular agreement is an agency agreement or an agreement of sale depends upon the terms of the agreement. For deciding that question, the terms of the agreement have got to be examined. The true nature of a transaction evidenced by a

written agreement has to be ascertained from the covenants and not merely from what the parties choose to call it. The terms of the agreement must be carefully scrutinised in the light of the surrounding circumstances."

- *Para 2.8.2, 2.8.2.1:*
 - *Finding of fact as regards agreement will be valid only if assessee demonstrates that agreement are one and the same.*
 - *In para 2.8.2.1, "We find that the Hon'ble Jurisdictional High Court held that once Principal to Principal relationship is established, there could be no commission or discount and consequently no deduction of tax at source in terms of section 194H of the Act is warranted.". This finding of fact has not been controverted by the assessee with any evidence.*
 - *Para 2.8.3.*
 - *With the Qatar airways decision being overruled, this no longer holds good.*

Para 2.8.4, 2.8.4.1, 2.8.5:

o Finding of fact as regards agreement will be valid only if assessee demonstrates that agreement are one and the same.

Para 2.8.6: With Hon'ble SC holding that all direct and indirect payments get covered and also whether actually paid or not, this needs a relook.

Para 2.8.7:

o Finding of fact as regards agreement will be valid only if assessee demonstrates that agreement are one and the same.

In the light of the above, the entire issue needs a fresh relook. Unless the Hon'ble ITAT satisfies itself that the agreement (with emphasis on substance over form) is one of principal - principal, and that no element of commission is involved directly or indirectly, relief cannot be granted to the assessee."

3.22. The Id. AR before us made the following submissions as to how the decision of Hon'ble Supreme Court in the case of Singapore Airlines Ltd. does not apply to the assessee company as under:-

1. *Ld. DR has pointed out extracts of certain paras for submitting that the case of the assessee is similar to that in the Singapore Airlines case.*

2. *However, the assessee most humbly submits that the contention that the decision in Singapore Airlines case is applicable is completely erroneous and some paras cannot be read in isolation. Major distinguishing fact is that in that case the airlines had not disputed the existence of principal-agent relationship and applicability of provisions of section 194H on the portion of standard commission. Secondly, Hon'ble Supreme Court has decided the matter on the facts before it which are peculiar to the airline industry, which facts (majorly, as to principal-agent relationship and the Billing and Payment Settlement) are absent in the assessee's case.*

3. *The assessee humbly submits that the decision of Hon'ble Supreme Court in Singapore Airlines has been rendered in the context of the peculiar facts which do not apply to the facts on hand and also the similar facts in AY 2008-09. The key distinguishing facts in case before the Hon'ble Supreme Court are summarized below:*

- a) The facts under consideration are peculiar to the airline industry*
- b) The relationship between the parties under the agreement was undisputedly that of Principal-agent and applicability of section 194H on the portion of standard commission was not disputed by the parties.*
- c) There was nothing in the agreement to dissect the transaction into two limbs as contended by the airlines.*
- d) Agent held the entire sale proceeds of the tickets, including the supplementary commission that he was entitled to, on behalf of the carrier in fiduciary capacity till the time the settlement was reached.*
- e) The airlines was aware of the actual amount at which the tickets were ultimately sold and the amount of supplementary commission earned by the agents because this data was required to be fed into a system i.e. BPS.*

4. *The assessee draws Your Honour's attention to the following relevant paras of the decision of Hon'ble Supreme Court, in relation to each of the above points, to substantiate that the observations of Hon'ble Supreme Court cannot apply to the assessee's case:*

a) The facts under consideration are peculiar to the airline industry:

Hon'ble Supreme Court has noted the relevant facts in Para 3 to Para 7 of the order. The arrangement between the airlines and the travel agents is governed by Passenger Sales Agency Agreements ("PSA").

Agents are entitled to a fixed commission of 7% once the tickets are sold which is termed as 'Standard Commission' and airlines deduct tax at source u/s 194H on such an amount.

Further, modus operandi of the entire transaction is that IATA sets out a 'Base Fare'. This is the ceiling price and the price cannot exceed this amount. The Airline decides a 'Net fare' which is lower than the Base Fare. This is the minimum price below which tickets cannot be sold and the airline is eligible to get the 'Net Fare' on every sale made by the agent. The Agent is free to sell the tickets above the Net Fare but not exceeding the Base Fare. If the agent sells the ticket above the Net Fare, the excess over the Net Fare becomes the income of the agent and is termed as 'Supplementary Commission'

This entire transaction carried out is recorder by the agent in a Billing and Settlement Plan (BSP), which is an organisation functioning under the aegis of the IATA and manages inter alia logistics vis-a-vis payments and acts as a forum for the agents and airlines to examine details pertaining to the sale of flight tickets and the details of the amounts at which the tickets are sold is transmitted by the travel agents to BSP, BSP stores the data and consolidates the amounts owed by each agent to various airlines following the sale of the tickets by the former. The aggregate amount accumulated in the BSP would then be transmitted to each airline by the IATA in a single financial transaction to smoothen the process and prevent the need to make multiple payments over time.

The dispute before Hon'ble Supreme Court was applicability of provisions of TDS u/s 194H on the Supplementary Commission.

The assessee submits that the facts in the present case, as also those examined by ITAT in case of Idea Cellular Ltd. in AY 2008-09 in ITA No. 2285/Mum/2014, are completely different on the following grounds:

The Agreement entered into between the parties are on principal-to-principal basis.

The assessee does not owe any commission to the distributor. In fact, the distributor pays the entire consideration upfront for purchase of vouchers at discounted price:

The assessee does not have any control or even knowledge of the price at which the vouchers are ultimately sold by the distributors.

b) The relationship between the parties under the agreement was undisputedly that of Principal-agent and applicability of section 19411 on the portion of standard commission was not disputed by the parties,

Hon'ble Supreme Court, in Para 20, has specifically noted that the Assessee's do not dispute that a principal agent relationship existed during the payment of the Standard Commission.

Further, in Para 28, it is noted that at no stage does the PSA indicate that title in the goods i.e. the tickets, transfers from the air carrier to the agent and there is no rebuttal from the assessee on this averment. In Para 29 & 30, Hon'ble Supreme Court has noted the terms of the agreement which clearly point out that the agent acts on behalf of the carrier.

In para 31, it is also noted that the airline has the responsibility to provide full and final compensation to the travel agent for the acts it carries out under the PSA.

The assessee submits that it is in the context of these undisputed facts that Hon'ble Supreme Court has held that the contract is that of agency. Once the contract of agency is not disputed, Section 194H does not distinguish between direct and indirect payments and thus the factum of the exact source of the payment would be of no consequence to the requirement of deducting TDS. Even on an indirect payment stemming from the consumer, the Assessee would remain liable under the IT Act.

However, the assessee contends that in the case before Hon'ble SC, the fact that section 194I applies in that case was not under dispute as regards the standard commission. Once section 194H applies, then the direct or indirect payment both come within the ambit of 'commission'. However, for the purpose of section 194H to apply, the sine qua non is the principal-agent relationship, which was undisputed in that case, but is missing in the assessee's case as held by a series of judgments including that of Hon'ble Jurisdictional High Court in case of Idea Cellular Ltd. and in the order of this Tribunal in case of Idea Cellular Ltd. in AY 2008-09,

c) There was nothing in the agreement to dissect the transaction into two limbs as contended by the airlines:

Hon'ble SC in Para 32 has also noted that the Contract does not distinguish in terms of stages of the transaction involved in selling flight tickets. While Assessee had readily accepted the existence of the principal agent relationship, their consternation had been directed at the so called second limb of the deal that is exclusively between the agent and the customer. Hence, the Hon'ble SC has held that the arrangement between the agent and the purchaser is not a separate and distinct arrangement but is merely part of the package of activities undertaken pursuant to the PSA.

Further, the court, in Para 44 and 45 has held that lack of control over the pricing above the Net Fare cannot in itself make the relationship as

principal to principal as there is a difference between contract of principal-agent and master-servant relationship. In a principal agent relationship, it is sufficient for the latter to be informed of the responsibilities and duties under the contract and certain guidelines on how to satisfy them. An agent undoubtedly retains a sizeable level of discretion on how to achieve the desired results. The accretion of the Supplementary Commission to the travel agents is an accessory to the actual principal-agent relationship under the PSA. In such a commercial arrangement, the benefit gained by an agent is incidental to and has a reasonably close nexus with the responsibilities that were entrusted to it by the principal air carrier.

The assessee submits that these observations are in the context of set of the facts that the original relationship under the PSA is that of principal-agent which is not disputed by the parties. These observations cannot be applied universally and in isolation of the fact that the relationship between the parties is undisputedly that of principal and agent.

These observations cannot be applied to the assessee's case where the relationship is that of principal-principal and the contract is that of sale of right to sell services.

d) Agent held the entire sale proceeds of the tickets, including the supplementary commission that he was entitled to, on behalf of the carrier in fiduciary capacity till the time the settlement was reached:

Most importantly, Hon'ble Supreme Court, in Para 46 and Para 47 has taken note of Clause 7.2 of the PSA sets out that any payments collected by an agent pursuant to sale of air transportation and ancillary services are held in a fiduciary capacity for the Carrier until a proper accounting is made. The contract definitively states that "all monies" received by the agent are held as the property of the air carrier until they have been recorded on the BSP and properly gauged.

*The assessee submits that this is the **most distinguishing fact** from that of the assessee. This clause clearly states that all the amount that the travel agent collects on the sale of the tickets is held on behalf the airline in fiduciary capacity. However, in case of the assessee the distributor pays a purchase price right at the time of purchase of the cards at the discounted price and thereafter all sales made by him are on his own account and he neither holds any money on behalf of the assessee nor is liable to give the proceeds or any portion thereof to the assessee. Also, even the assessee is not required to pay any remuneration by whatever name called for the sales made by the distributor. In fact, it is the distributor which incurs an expenditure of purchase price in order to earn income from resale of the cards.*

f) The airlines was aware of the actual amount at which the tickets were ultimately sold and the amount of supplementary commission earned by the agents because this data was required to be fed into a system i.e. BPS.

Hon'ble Supreme court, in Pare 36 to 43, has discussed the modus operandi which is peculiar to the airline industry i.e. all the travel agents submit all the details with the BPS and ultimately the settlement happens through BPS. Thus, it is noted that the airlines are aware of the ultimate price at which tickets are sold to the consumers and the amount of supplementary commission earned by the agent.

Hon'ble Supreme Court in Para 43 has specifically noted that the mechanism of BSP was not placed before the Bombay High Court in Qatar Airways.

Ultimately, Hon'ble Court has concluded in para 63 that once the relationship of principal to agent is established, the definition of commission u/s 194H stands attracted. Further, the realities of how the airline industry functions has bolstered the conclusion that it was practical and feasible for the assessee to obtain the information from the BSP about the amount of the supplementary commission on which tax is required to be deducted.

Thus, the assessee humbly submits that the decision rendered by Hon'ble SC in specific context of the facts of the airline industry. It is because of the BSP that the airlines are aware of the ultimate price at which the agent sells the tickets. However, there is no such system in the telecom industry. The assessee is neither aware nor concerned about the price at which the distributor sells it vouchers to sub-distributors or retailers. Further, the assessee submits that Hon'ble SC, in the context of peculiar facts of airline industry, has noted that these facts were not before Hon'ble Bombay High Court in case of Qatar Airways and it does not universally overrule the principles laid down in the said case of Qatar Airways, which has been followed by Hon'ble ITAT in case of Idea Cellular Ltd. in AY 2008-09.

5. At the cost of repetition, the assessee reiterates that the decision rendered by Hon'ble SC in context of the undisputed relationship of principal-agent between the parties and the fact that the agents were merely selling the tickets on behalf of the airlines. It is in context of the foregoing facts that the Hon'ble Supreme Court has held that the supplementary commission is an accessory to the actual principal-agent relationship.

The assessee submits that admittedly it is the assessee which has to ultimately provide telephony service to the customer. However, the assessee sells the right to sell the service to the distributor. The distributor may further sell or use it by himself. The further action of the distributor has no bearing on the purchase price paid by the distributor at the time of purchase of cards. The revenue is recognised when the customer actually utilizes the talk- time. However, at no stage is the assessee ever liable to give back the money to the distributor which they paid at the time of purchase of the cards. The revenue is recognised when the telephony service is actually provided to match the costs of the same basis the matching principle of accounting. However, this has no bearing on the commercial arrangement between the assessee and the distributor as the cards once sold, the distributor cannot demand the money back.

Please also read para 59-62 of the decision of Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. Vs. DCIT (2015) 372 ITR 33 wherein the arrangement between a telecom operator and the distributors is discussed at length and it is that it a transaction of sale of 'right to sell the service' between two principals.

The assessee submits that all these aspects are dealt at length in the order of Hon'ble Tribunal in case of erstwhile Idea Cellular Ltd. in ITA 2285/Mum/2014 on page no. 14 and 15 of the Legal Paper Book which squarely applies to the facts of the present case. The facts before Hon'ble Supreme Court are completely different from its facts and thus the order of AY 2008-09 in ITA 2285/Mum/2014 remains unaffected by the order of Hon'ble Supreme Court

III. The assessee humbly submits that it has restricted its submissions in this note only to the two aspects required by Hon'ble Bench. It has argued at length on various other aspects in the course of hearing which are not once again reiterated here for the sake of brevity.

The assessee also submits that the Ld. DR has filed a written submission running into 15 pages and four annexures. Most humbly, the said submission is closely typed without any bullet points or numbering and hence it is difficult to address the same. On a perusal of the same, it is observed that the said submission is largely a repetition of what was argued and decided against the revenue by the ITAT in the earlier years. Thus, the said contentions, which are already addressed in the oral submissions in the course of hearing, are not once again rebutted and the assessee shall be glad to address the same, if required.

3.23. We have gone through the written submissions of both Id. DR as well as Id. AR on the applicability of decision of the Hon'ble Supreme

Court in the case of Singapore Airlines Ltd. referred to supra. At the outset, we find that in the case of Singapore Airlines Ltd, the agreement entered into clearly establish principal – agent relationship. This fact was not in dispute in the case of Singapore Airlines Ltd. Despite this relationship, though assessee argued that there is a secondary relationship between parties, which according to them was principal to principal relationship. The travel agent never pays the ticket cost to airlines before the tickets are sold to customers. The travel agent pays the money to airlines only after sale is made to customers. Hence, relationship of principal to agent is clearly established therein. Whereas in assessee's case herein, distributors pay Rs.70/- upfront to the assessee for a talk time worth of Rs.100/- and whether the distributors sell those prepaid sim cards is not at all relevant. Hence, business model itself is different.

3.24. In the instant case before us, we had categorically held in A.Y.2008-09 in assessee's own case vide our order dated 12/10/2022, that the relationship between assessee and its distributors are only that of principal to principal and not principal to agent. Moreover, the assessee had furnished the copy of agreement entered into with the distributor for territory in Karnataka Circle before the Id. CIT(A) and had also stated that it is a standard agreement for all the distributors entered into all over India. Infact, this Tribunal while rendering its decision for A.Y.2008-09 had also considered the decision of the Hon'ble Karnataka High Court in the case of Bharati Airtel Ltd. vs. DCIT reported in 372 ITR 33 which had also entered into agreement with its distributors on the same lines as that of the assessee. This Tribunal in para 2.5 of its order had relied on the decision rendered by the Hon'ble Karnataka High Court in Bharti Airtel Ltd. case by referring to para 62 of the decision, apart from other

decisions. At the cost of repetition we hold that the agreement entered by the assessee for its distributors is only that of principal to principal and not principal to agent. Hence, the decision rendered by the Hon'ble Supreme Court in the case of Singapore Airlines Ltd. becomes factually distinguishable on this point.

3.25. We find that the decision in the case of Singapore Airlines Ltd. was rendered on the facts which are peculiar to airline industry. The Hon'ble Supreme Court in the case of Singapore Airlines Ltd. had narrated the entire facts in para 3-7 of its order which are peculiar to the airlines industry. These facts are also narrated in the submissions of the Id. AR hereinabove. The core dispute before the Hon'ble Supreme Court was the applicability of TDS provisions u/s.194H of the Act on supplementary commission component. As far as the payment of standard commission, there was no dispute in the case of Singapore Airlines Ltd. as that relationship was established to be principal-agent relationship. For supplementary commission alone, that assessee pleaded that the relationship would be principal to principal. In this regard, the findings of the Tribunal are recorded in para 14 of that order, the findings of the Hon'ble High Court are recorded in para 15 of that order, the submissions of the assessee's Counsel are recorded in para 17 of that order, the submissions of the Revenue's Counsel are recorded in para 18 of that order. Ultimately the Hon'ble Supreme Court laid down three principal tests that are to be satisfied:-

First Test:- *Whether title in the tickets at any point, were passed from the assessee's to the travel agents.*

In the instant case of the assessee before us, once the prepaid sim cards are sold by the assessee to the distributors, the title is duly passed on to the distributor. In para 28 of the order of the Hon'ble Supreme Court, it is noted that at no stage does the PSA indicate that title in the goods i.e. the tickets gets transferred from the air carrier to the agent and this fact was not rebutted from the side of the assessee.

Second Test: *Whether the sale of flight documents by the latter was done under the pretext of them being the property of the agents themselves, or of the airlines.*

In the case of the assessee before us herein, sales of prepaid cards made by the distributors were on their own volition and not on behalf of assessee. In para 29 & 30 of the decision of the Hon'ble Supreme Court, it is noted that the terms of the agreement clearly point out that the agents act on behalf of the air carrier.

Third Test: *Whether the airline or the transfer agent was liable for any breach of the terms and conditions in the tickets and for failure to fulfil the contractual rights that accrued to the consumer who purchased them.*

In the case of the assessee before us, if the scratch card was found faulty, the consumer who bought the simcard would only go to retailer for replacement and not to Vodafone Idea Ltd (assessee herein). In para 31 of the decision of the Hon'ble Supreme Court, it is noted that airline has the responsibility to provide full and final compensation to the travel agent for the acts carried on by the travel agent under the PSA.

3.26. If the aforesaid three tests as contemplated by the Hon'ble Supreme Court in the case of Singapore Airlines are applied, then it is very clear that the decision of the Hon'ble Supreme Court is not applied to the assessee's case at all.

3.27. The Id. DR before us vehemently argued that the decision of the Hon'ble Jurisdictional High Court in the case of Qatar Airways Ltd has been reversed by the Hon'ble Supreme Court in the case of Singapore Airlines Ltd. Consequently, the reliance placed by this Tribunal in A.Y.2008-09 in ITA No. 2285/Mum/2014 dated 12/10/2022 on the said decision of the Hon'ble Jurisdictional High Court while granting relief to the assessee also falls flat and accordingly, the said decision of the Tribunal becomes factually distinguishable because of the decision of the Hon'ble Supreme Court. To buttress this argument, the Id. AR before us drew our attention to paras 42-51 of the decision of the Hon'ble Supreme Court. For the sake of convenience, the relevant paragraphs i.e. 42-51 of the decision of the Hon'ble Supreme Court are reproduced hereunder:-

42. Learned Counsel for the Revenue has rebutted this by highlighting the manner of operation of the BSP where financial data regarding the sale of tickets is stored. According to him, the BSP agglomerates the data from multiple transactions and transmits it twice a month, or bimonthly. The expectation from the Revenue is not that the Assesseees make TDS deductions in real time as the sale of tickets by the agents is recorded on the BSP. Rather, a more reasonable approach is taken whereby the air carriers must simply calculate the accumulated amount of TDS, at the end of each month after having received the requisite data from the IATA and the BSP and make a single comprehensive deduction. It was submitted that the Assessee cannot be absolved from its statutory duties under section 194H, irrespective of the viability of operating in this manner.

43. Having analysed the rival contentions and keeping in mind the principal-agent relationship between the parties, we find significant merit in the arguments by the Revenue. The mechanics of how the airlines may utilize the BSP to discern the amounts earned as Supplementary Commission and deduct TDS accordingly is an internal mechanism that

facilitates the implementation of Section 194H of the IT Act. The specifics of this system were seemingly not placed before the Bombay High Court in Qatar Airways (supra).

44. Further, the lack of control that the airlines have over the Actual Fare charged by the travel agents over and above the Net Fare, cannot form the legal basis for the Assesseees to avoid their liability. As averted to in Lakshminarayan Ram Gopal & Son Ltd. (supra) a contract of agency does not entail control over the minutiae of the agent's actions. Such a level of oversight would more closely resemble a master-servant relationship. In a principal-agent relationship, it is sufficient for the latter to be informed of the responsibilities and duties under the contract and certain guidelines on how to satisfy them. An agent undoubtedly retains a sizeable level of discretion on how to achieve the desired results. This characteristic of a contract of agency was cemented by this Court in Qamar Shaffi Tyabji v. Commissioner, Excess Profits Tax [1960] 3 SCR 546 in the following manner:

"7...An agent has to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given in the course of his work. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. Indeed, learned counsel for the appellant accepts as correct the distinction made above and also accepts that the true relation between the Mills and the Trustees was that of principal and agent; but he contends that as between the Trustees and the appellant the relation was one of master and servant. We consider that this contention is wholly unsound. We have examined the original agreement between the Mills and the Trustees dated April 12, 1934. Clause 9 of that agreement said that "the agents may regulate and conduct their proceedings in such manner as they may from time to time determine and may delegate all or any of their powers, authorities and discretions as secretaries, treasurers and agents of the company to such person or persons and on such terms and conditions as they may think fit, subject to the approval of the Board of Directors of the company." The delegation in favour of the appellant was made under this clause. The position was therefore this: the Trustees as agents had express authority to name another person to act for the principal in the business of the agency, and they named the appellant with the approval of the Board of Directors. Therefore, the appellant, was neither a servant nor a

mere sub-agent. He was an agent of the principal for such part of the business of the agency as was entrusted to him."

45. The fact that the travel agent has discretion to set an Actual Fare which is above the Net Fare has no effect on the nature of the relationship between the parties. A contract of agency permits an agent to carry out acts on its own volition provided it does not contravene the purpose of the agency contract and the interests of the principal. The accretion of the Supplementary Commission to the travel agents is an accessory to the actual principal-agent relationship under the PSA. In such a commercial arrangement, the benefit gained by an agent is incidental to and has a reasonably close nexus with the responsibilities that were entrusted to it by the principal air carrier. Such incidental benefits or actions must come under the ambit of the relationship, subject to any express limitations articulated in the contract itself or under the Contract Act.

46. Apart from this, clause 7.2 of the PSA sets out that any payments collected by an agent pursuant to sale of air transportation and ancillary services are held in a fiduciary capacity for the Carrier until a proper accounting is made. The clause in question is reproduced below:

7.2 All monies collected by the Agent for transportation and ancillary services sold under this Agreement, including applicable remuneration which the Agent is entitled to claim hereunder, are the property of the Carrier and must be held by the Agent in trust for the Carrier or on behalf of the Carrier until satisfactorily accounted for to the Carrier and settlement made.

47. Notwithstanding the lack of control over the Actual Fare, the contract definitively states that "all monies" received by the agent are held as the property of the air carrier until they have been recorded on the BSP and properly gauged. As already mentioned by learned Counsel for the Revenue, and accepted by learned Senior Counsel for the airlines, the BSP demarcates "Supplementary Commission" under a separate heading. Hence, once the IATA makes the payment of the accumulated amounts shown on the BSP, it would be feasible for the Assesseees to deduct TDS on this additional income earned by the agent, and whatever remains after the subtraction under section 194H would count as income for the agents themselves. It is at this point that settlement is made fully and finally, in line with clause 7.2 of the PSA.

48. The only remaining objection from the Assesseees concerns Section 216 of the Contract Act. To appropriately appreciate the scope of the provision, a combined reading of both Sections 215 & 216 is necessary. Both these provisions are reproduced below for ease of reference:

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.—

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

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216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

49. In the facts before us, we find that Sections 215 and 216 of the Contract Act are of no assistance. We have already ascertained that the PSA does not explicitly address the issue of Supplementary Commission at all. Further, an agent acting of its own account does not, in principle, alter the nature of a contract of agency and only gives rise to the consequences mentioned under sections 215 and 216 of the Contract Act if the conditions contained within them exist. We do not consider it helpful to dwell on this point.

50. In any case, given that information regarding the Supplementary Commission was available to the airlines, we have no doubt that the airlines could not have absolved themselves of liabilities under the IT Act attached to the accrual of that additional portion of income by the agent. These amounts were incidental to the transaction by which the flight tickets were sold on behalf of the air carriers and was for their benefit. The old adage that a party to a contract cannot "both approbate and reprobate" is apt for this factual scenario Nagubai Ammal v. B. Shama Rao [1956] 1 SCR 451.

51. From the exposition of law on the ambit of a contract of agency and its resultant effect on the classification of the difference between the Actual Fare and Net Fare as being a "Commission" liable to deduction of TDS, we are left unmoved by the submissions of the Assessee. The interpretation of the PSA, through the prism of Section 182 of the Contract Act and Section 194H of the IT Act, provided by the Revenue appears to be the correct position. Thus, we affirm the conclusion reached by the Delhi High Court in the impugned judgment on the nature of the relationship between the airlines and the travel agents, and the liability that is attached

to deduction of TDS on the Supplementary Commission. As a consequence of our analysis, the view taken by the Bombay High Court in Qatar Airways (supra) stands overruled.

3.28. From the perusal of the aforesaid paragraphs quoted from the decision of the Hon'ble Supreme Court in the case of Singapore Airlines Ltd, we find that in the case of airline industry, there is an operation of Billing and Payment Settlement (in short "BSP") where financial data regarding the sale of tickets are stored and BSP collects the data from multiple transactions and furnishes the details of tax to be deducted by the agents by transmitting the same twice a month or bimonthly. From the data available in the BSP, the air carriers must simply calculate the accumulated amount of TDS at the end of each month and make a single comprehensive deduction thereon. Since, it was practicable in that case to determine the amount of TDS based on the data provided in the BSP which is peculiar only to airline industry, the Hon'ble Supreme Court held that the air carrier cannot be absolved from its liability of deduction of tax at source in terms of Section 194H of the Act on the ground that no payment is made by the air carrier to the agent. In fact, in para 43 of the said decision reproduced supra, there is a categorical finding that the airlines may utilise the BSP to discern the amounts earned as supplementary commission and deduct TDS accordingly is an internal mechanism that facilitates the implementation of Section 194H of the Act. It also goes on further to hold that this specifics of the BSP system prevailing in the airline industry was not placed before the Hon'ble Bombay High Court in the case of Qatar Airways Ltd. To that extent, the decision of the Hon'ble Bombay High Court in the case of Qatar Airways Ltd stands overruled by the decision of the Hon'ble Supreme Court. In other words, the decision rendered by the Hon'ble Bombay High Court in the case of Qatar Airways Ltd would still hold the field as far as the

telecom industry is concerned where the system like BSP which determines the payment of commission is not available. As stated earlier, the BSP system is peculiar and available only to airline industry. In the case of telecom industry i.e. the assessee case before us, there is no mechanism to determine at what rate the distributor will be able to ultimately sell the prepaid simcards to the retailers so as to enable the assessee to determine the TDS component on sale of prepaid simcards. Hence, the concept of no payment made by the assessee resulting in no TDS thereon as was held in the case of Qatar Airways Ltd by the Hon'ble Jurisdictional High Court would still be applicable to the telecom industry and the same would not be applicable only for airline industry. This fine line of distinction is provided in the decision of the Hon'ble Supreme Court itself in the paragraphs reproduced hereinabove.

3.29. Hence, the argument advanced by the Id. DR that pursuant to the decision of the Hon'ble Supreme Court in the case of Singapore Airlines Ltd, the decision rendered by this Tribunal in A.Y.2008-09 referred to supra would not be applicable to the facts of the case for the year under consideration, does not hold any water. We find that this Tribunal in A.Y. 2008-09 had categorically relied on the decision of the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd reported in 372 ITR 33 (Kar) in para 62 of the order thereon which was never the subject matter of adjudication and consideration before the Hon'ble Supreme Court in the case of Singapore Airlines Ltd. Hence, we hold that the decision rendered in the case of Singapore Airlines Ltd by the Hon'ble Supreme Court is factually distinguishable with the assessee's case and hence, does not come to the rescue of the Revenue herein.

3.30. In view of the above observations, we hold that the decision rendered by us in assessee's own case for A.Y.2008-09 in ITA No.2285/Mum/2014 dated 12/10/2022 would be squarely applicable to the facts of the assessee's case before us for the year under consideration also. The relevant operative portion of the said order of this Tribunal is reproduced hereunder:-

“2.8.2. We find that in the case before the Co-ordinate Bench of Pune Tribunal in the case of Idea Cellular Limited vs DCIT (TDS) in ITA Nos. 1041, 1042, 1953 -1955/Pun/2013 and ITA Nos. 1867 -1870 /Pun/2014 dated 04/01/2017, the lower authorities had held that relationship between assessee and its distributors was Principal and Agent. It was only the Pune Tribunal which after examining the distributors agreement came to the conclusion that the relationship is that of Principal to Principal. Infact Pune Tribunal also examined the very same agreement which is the subject matter of agreement before us in the instant case before us, as it is not in dispute that all the distributors agreements are standard agreements across India. We also find that the Pune Tribunal relied on para 62 of the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar). We find that the Pune Tribunal had taken note of the fact that Hon'ble Karnataka High Court in 372 ITR 33 had distinguished all the three High Court judgements (i.e. Kerala, Calcutta and Delhi) relied upon by the ld. DR hereinabove. Effectively Pune Tribunal adopted the decision of Hon'ble Karnataka High Court. The ld. DR relied on para 64 of decision of Hon'ble Karnataka High Court and argued that it is against assessee for the first 7 months since discount is separately shown in the books of the assessee as an expenditure. In our considered opinion, what is to be seen is the broader question raised before the Hon'ble Jurisdictional High Court in Income Tax Appeal No. 1129 of 2017 dated 13/01/2020 in assessee's own case against the order of Pune Tribunal. For the sake of convenience, the entire order is reproduced hereunder:-

“Heard learned counsel for the parties.

2. The Appellant-Revenue challenges the order dated 4 January 2017 passed by the Income Tax Appellate Tribunal in Income Tax Appeal No.1041, 1042 and 1953 to 1955/PUN/2013.

3. This Appeal pertains to the Assessment Year is 2010-11.

4. The Appellant-Revenue has raised the following questions as a substantial questions of law :-

"(a) Whether on the facts and circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in holding the discount given by the assessee to its distributors on prepaid SIM Cards does not require deduction of tax under Section 194H of the Income Tax Act ?

(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in setting aside the case to the Assessing Officer ?"

5. The Tribunal noted the observations of the Assessing Officer that the discount allowed to the distributors by the Respondent - assessee company is on account of principal to principal relationship and not that of principal to agent. The Tribunal followed the decision of the Karnataka High Court in the case of Bharati Airtel Ltd. vs. DCIT [372 ITR 33] and held that the sale of SIM cards/recharge coupons at discounted rate to the distributors was not commission and therefore not liable to deduct the TDS under Section 194H. The Tribunal noted that there was no decision of this Court on this issue on that date.

6. Learned counsel for the parties have tendered the copy of the order passed in Income Tax Appeal No. 702 of 2017 subsequently in the case of Pr. Commissioner of Income Tax-8 vs. M/s. Reliance Communications Infrastructure Ltd., where same issue arose for the consideration of this Court. The Division Bench of this Court while holding against the Appellant - Revenue observed thus :-

"3. Having heard the learned Counsel for the parties and having perused the documents on record, we do not find any error in the view of the Tribunal. The Tribunal, as noted, besides holding that the Commissioner's order setting aside the order passed under Section 201 was not carried in appeal, had also independently examined the nature of the transaction and come to the conclusion that when the transaction was between two persons on principal to principal basis, deduction of tax at source as per section 194H of the Act, would not be made since the payment was not for commission or brokerage."

7. In view of the finding of fact rendered by the Tribunal which we have noted above, the same principle would apply in the present case. Therefore, the questions of law as proposed do not give any rise to substantial question of law. The Appeal is disposed of."

(emphasis supplied by us)

2.8.2.1. It is also pertinent to note that the Distribution Agreement of Maharashtra Circle was subject matter of examination and adjudication by the Pune Tribunal wherein the Pune Tribunal had recorded a finding of fact that the relationship between assessee and distributor is that of Principal to Principal. This Order has been approved by the Hon'ble Jurisdictional High Court. We find that the Hon'ble Jurisdictional High

Court held that once Principal to Principal relationship is established, there could be no commission or discount and consequently no deduction of tax at source in terms of section 194 H of the Act is warranted.

2.8.3. With regard to reliance placed by the ld. DR vehemently on the decision of Hon'ble Delhi High Court in assessee's own case reported in 325 ITR 148 (Del) is concerned, we find that the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd (372 ITR 33) referred supra had after considering the decision of Hon'ble Delhi High Court referred supra and decided the issue in favour of the assessee. We find that the Hon'ble Karnataka High Court had also followed the decision of Hon'ble Jurisdictional High Court in the case of Qatar Airways reported in 332 ITR 253 (Bom). Hence the reliance placed on the decision of Hon'ble Delhi High Court by the ld. DR does not advance the case of the revenue. In any case, the decisions of Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Calcutta High Court referred supra had been considered and distinguished by the Hon'ble Karnataka High Court referred supra.

2.8.4. We further find that the Hon'ble Rajasthan High Court in the case of Hindustan Coca Cola Beverages (P) Ltd vs CIT III Jaipur reported in 402 ITR 539 (Raj) which had rendered a comprehensive judgement on the impugned issue together with various other assesses including Idea Cellular Ltd (assessee herein). The relevant Income Tax Appeal Nos. 168/2015 , 169/2015 . 170/2015 and 171/2015 which were admitted by the Hon'ble Rajasthan High Court on 18/10/2016 relates to assessee herein for Rajasthan Circle in respect of the identical issue. The question no.1 raised before the Hon'ble Rajasthan High Court is as under:-

1. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that whether the assessee is liable to deduct TDS u/s. 194-H of IT Act, as the relation between assessee and distributor is that of Principal to Agent?

2.8.4.1. We find that the Hon'ble Rajasthan High Court after considering the plethora of judgements on the impugned issue of various High Courts (which includes the three High Court decisions of Kerala, Delhi and Calcutta relied upon by the ld. DR before us herein) had rendered its decision as under:-

Idea Cellular

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

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

60. In view of above, all the issues in each appeal are answered in tabular form as follows:

<i>Sr. No.</i>	<i>Appeal No.</i>	<i>Ques.1</i>	<i>Ques.2</i>	<i>Ques.3</i>	<i>Ques.4</i>	<i>Ques.5</i>
<i>1.</i>	<i>205/2005</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>
<i>2.</i>	<i>206/2005</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>
<i>3.</i>	<i>10/2007</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>
<i>4.</i>	<i>55/2007</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>	<i>--</i>
<i>5.</i>	<i>6/2008</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>	<i>--</i>
<i>6.</i>	<i>7/2008</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>	<i>--</i>
<i>7.</i>	<i>540/2009</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>--</i>	<i>--</i>	<i>--</i>
<i>8.</i>	<i>1/2014</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>
<i>9.</i>	<i>2/2014</i>	<i>In favour of assessee and against the</i>	<i>In favour of assessee and against the</i>	<i>In favour of assessee and against the</i>	<i>In favour of assessee and against the</i>	<i>In favour of assessee and against the</i>

		<i>department</i>	<i>department</i>	<i>department</i>	<i>department</i>	<i>department</i>
10.	3/2014	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>
11.	4/2014	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>	<i>In favour of assessee and against the department</i>
12.	124/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
13.	125/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
14.	126/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
15.	131/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
16.	132/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
17.	168/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
18.	169/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--

19.	170/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
20.	171/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
21.	195/2015	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
22.	08/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
23.	45/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
24.	48/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
25.	49/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
26.	96/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
27.	97/2016	<i>Against the department and In favour of</i>	<i>Against the department and In favour of assessee</i>	--	--	--

		<i>assessee</i>				
28.	98/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
29.	99/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
30.	100/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
31.	101/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
32.	102/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
33.	103/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
34.	104/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
35.	105/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>
36.	106/2016	<i>Against the department and In</i>	<i>Against the department and In favour of assessee</i>	--	-	-

		<i>favour of assessee</i>				
37.	107/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
38.	108/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
39.	199/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--	--
40.	200/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--
41.	204/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--
42.	209/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--
43.	210/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	--	--
44.	217/2016	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>	<i>Against the department and In favour of assessee</i>

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

(BOLD PORTION PERTAINS TO ASSESSEE IN THE AFORESAID JUDGEMENT OF HON'BLE RAJASTHAN HIGH COURT)

2.8.5. We further find that the Hon'ble Rajasthan High Court in the case of CIT (TDS) Jaipur vs Idea Cellular Ltd in Income Tax Appeal No. 90/2018 dated 12/04/2018 had taken an identical view on the identical set of facts. Further we find that the Hon'ble Jurisdictional High Court in the case of CIT(TDS) Pune vs Vodafone Cellular Ltd (assessee's own case) in Income Tax Appeal Nos. 1152 , 1274, 1995, of 2017 & Income Tax Appeal Nos. 571, 1266 of 2018 dated 27/01/2020 had also taken an identical view in respect of identical issue.

2.8.6. The ld. DR before us placed heavy reliance on the decision of Hon'ble Supreme Court in the case of Union of India vs Association of Unified Telecom Service Providers of India and Others reported in (2020) 3 SCC 525 dated 24/10/2019 to drive home the point that the assessee had erred in accounting the discounted price of sales as its revenue when sim cards are sold to distributors. We have gone through the said decision and we find that the said decision was rendered in the context of determination of Annual Gross Revenue for the purpose of fixing the licence fee payable to Government by the telecom service providers. It further held that while reckoning the Gross Revenues, no deduction would be available such as discount , commission etc. First of all, we have already held that the assessee had not made any payment of discount to the distributors. In any case, we have already held that the entries in the books of accounts are not determinative of tax liability of an assessee by placing reliance on various decisions of Hon'ble Apex Court. Those decisions still rule the field as they were not overruled by the latest Supreme Court decision relied upon supra by the ld. DR. It is trite law that though the decision of Hon'ble Apex Court would be binding as per Article 141 of the Constitution of India, still the judgement of the Hon'ble Supreme Court should be understood from the issue raised before it. In our considered opinion, this decision has got absolutely nothing to do with the applicability of provisions of section 194H of the Act. Hence we hold that the reliance placed by the ld. DR on the said decision is grossly misplaced.

2.8.7. The ld. DR before us vehemently submitted that the orders of Hon'ble Rajasthan High Courts and Hon'ble Jurisdictional High Courts and Hon'ble Karnataka High Court had not attained finality as they had been appealed by the revenue before the Hon'ble Supreme Court. This

argument of the revenue, in our considered opinion, cannot be a deterrent for this Tribunal to follow those High Court orders. We find that the similarly worded distribution agreement had been subject matter of adjudication and examination by the Hon'ble Rajasthan High Court and Hon'ble Jurisdictional High Court wherein the Hon'ble High Courts had taken a categorical view that the relationship between assessee and distributor is only that of Principal to Principal. Hence this finding cannot be disturbed by this tribunal by respectfully following the judicial hierarchy. Infact no contrary materials on facts were even brought on record by the revenue before us to disturb the findings of Hon'ble High Courts. Hence we have no hesitation in holding that the relationship between assessee and distributor is only that of Principal to Principal and not that of Principal to Agent and accordingly there is no obligation for the assessee to deduct tax at source in terms of section 194H of the Act.

2.8.8. In view of the aforesaid observations and findings given thereon, we do not deem it fit to adjudicate other arguments advanced by the ld. AR on the applicability of second proviso to section 40(a)(ia) read with section 201 of the Act, as it would become academic in nature. This aspect of the issue is left open. “

3.31. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the sale of prepaid sim cards / recharge vouchers by the assessee to distributors cannot be treated as commission / discount to attract the provisions of section 194H of the Act and hence there cannot be any obligation on the part of the assessee to deduct tax at source thereon and consequentially there cannot be any disallowance u/s 40(a)(ia) of the Act. Accordingly, the Ground No. II raised by the assessee is allowed. The Ground No. I raised by the assessee is only supporting the Ground No. II for furnishing of additional evidences, the adjudication of which becomes academic in nature. Hence Ground No. I is also allowed.

4. The ground No.III raised by the assessee is challenging the disallowance of roaming charges amounting to Rs.15,39,23,749/- paid /

payable to other telecom operators u/s.40(a)(ia) of the Act for non-deduction of tax at source u/s.194J of the Act.

4.1. We have heard rival submissions and perused the materials available on record. During the year, the assessee has debited Rs.15,39,23,749/- on account of roaming charges in its profit and loss account which was claimed as deduction. The Id. AO observed that this expenditure was incurred without deduction of tax at source. The Id. AO show-caused the assessee as to why the same should not be disallowed u/s.40(a)(ia) of the Act as the said payment would tantamount to rendering 'fee for technical services' in terms of Section 194J of the Act. The assessee gave a detailed written submissions explaining the entire modus operandi as under:-

1. Roaming facility is a standard facility provided by the OTOs to the assessee and vice versa. When a subscriber is roaming in circles (states) where the assessee's network is not available, he is all able to make and receive calls by using network of OTOS. In such a scenario, since the subscriber is using the network of OTO, ideally such service provider should directly recover charges from that subscriber. But since it is impossible practically to do so, there is a mutual agreement entered between the network operators to allow use of each other's network by each other subscriber and then recover roaming charges from each other, which ultimately would be recovered from the end user subscriber. Thus, in substance, it is in nature of revenue sharing

2. To illustrate, suppose Home Operator CHO") is licensed to provide telecom services only in the Telecom Circle of Karnataka and Visiting Operator (VO) is licensed to provide services only in the Telecom Circle of Mumbai. Further, HO and VO have entered into a roaming arrangement whereby a subscriber of HO, travelling to Mumbai would be able to use the network of VO to avail telecom services and vice versa.

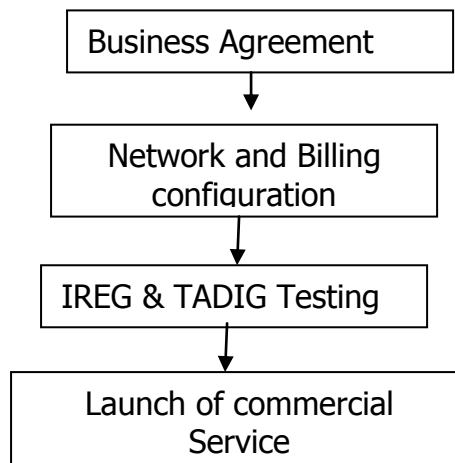
3. Given the above roaming arrangements, when a subscriber of HO travels to Mumbai, he will be able to seamlessly latch on to the network of VO and continue to use telecom services in Mumbai.

Depending upon the usage of the subscriber and the arrangement between HO and VO, VO shall raise an invoice on HO for such usage by the subscriber, and HO shall subsequently recover such charges from the subscriber

4. Thus, each telecom operator would enter into a national roaming agreement with OTO (Refer a specimen national roaming agreement entered with BPL Cellular Limited on page no. 79 to 111 of the FPB-II).

5. Roaming Agreement Process: In order that a subscriber is able to "latch" on to a visited network, a roaming agreement needs to be in place between the visited network and the home network.

Agreement is established after completing of following processes



Aforesaid process is enumerated in be as under:

- Business Agreement - A business agreement is signed between two networks as per GSMA guidelines to setup roaming service.
- Network & Billing configuration - Post business agreement, necessary configures required to be done in visited and home network and billing system.
- IREG & TADIG Testing - Once configuration is done, series of testing is done as per GSMA specified guidelines defined in IREG & TADIO testing document.

(i) IREG (International Roaming Expert Group)-IREG testing is to test the proper functioning of the established communication links.

(1) TADIG (Transferred Account Data Interchange Group) - The TADIG testing is to check the billability of the calls

- Commercial Service Launch - After success testing of all scenarios defined in IREG document and TADIG verification, visited network is opened for commercial subscriber to roam in visited network.

After commercial launch subscriber will automatically latch in visited network and will be able to use the services when they are in visited network coverage area.

6. Effort required for providing roaming service - GSM Service provider has to deploy and maintain a GSM network infrastructure to provide service to its own subscriber. Same infrastructure is used to provide service to roaming subscriber as well, hence service provider does not make any extra effort to provide service to roaming subscribers.

7. On commercial launch of any network, the entire telecommunication services (locally or roaming) is done automatically with negligible human intervention. Factually, it is impossible for the employee of a telecom company to connect lakhs of subscriber to the desired networks.

8. Thus, at the cost of repetition, may the assessee submit that even under the roaming, the entire set up/network infrastructure is the same as would be for the subscriber when using telecom services in his home circle. Only, difference being, due to the roaming agreement, the Home Operator would allow the subscriber of the visited Operator to use his network and make and receive call. The actual process of roaming is completely automated.

9. The assessee's contention that no tax is deductible under section 1943 of the Act on roaming charges paid to the OTOS is based on two separate and distinct propositions:

- I. Any payment for the use of standard facility does not amount to FTS; and
- II. Without prejudice, in absence of any human intervention during the actual roaming process, payment would not be FTS.

4.2. The assessee also placed reliance on the decision of the Hon'ble Madras High Court in the case of Skycell Communications Ltd vs DCIT reported in 251 ITR 53; decision of Chandigarh Tribunal in the case of HFCL Infotel Ltd vs. ITO reported in 99 TTJ 440; decision of Delhi

Tribunal in the case of Idea Cellular Ltd (which is a successor to the assessee pursuant to a scheme of merger w.e.f. 01/02/2010) and in Escotel Mobile Communications Ltd. ITA No.2154 to 2156/Del/2005; decision of the Hon'ble High Court in the case of CIT vs. Estel Communications Pvt. Ltd reported in 217 CTR 102; Decision of Pune Tribunal in the case of Idea Cellular Ltd in ITA No.159/PN/2008; decision of Mumbai Tribunal in the case of Pacific Internet India Pvt. Ltd. vs. ITO reported in 27 SOT 523; and decision of Hyderabad Tribunal in the case of DCIT vs. Excel Media Pvt.Ltd reported in 2010-TIOL-781-ITAT-HYD. The assessee further relied on the decision of the Delhi High Court in the case of CIT vs. Bharti Cellular Ltd reported in 175 Taxman 573. Against this decision of the Hon'ble Delhi High Court, the Revenue preferred an appeal to Hon'ble Supreme Court and the Hon'ble Supreme Court directed the TDS Officer to carryout factual verification to determine whether human intervention takes place when actual roaming traffic takes place. The said decision of the Hon'ble Supreme Court is reported in 193 Taxman 97. The Hon'ble Supreme Court is also directed the Income Tax department to take an expert opinion on the human intervention aspect and also directed that the assessee should be given proper opportunity to examine such experts before arriving at any conclusion thereon.

4.3. The Id. AO however, held that the payment made by the assessee in the nature of 'fee for technical services' involving human intervention and thereby liable for disallowance u/s.40(a)(ia) of the Act.

4.4. The Id. CIT(A) observed that the similar issue had come up in the case of Idea Cellular Ltd for A.Y.2009-10 before the Id. CIT(A), Chandigarh in the Appeal No.22/11-12 dated 01/12/2012 and extracted the findings recorded thereon. The Id. CIT(A) also observed that in the

said proceedings before the Chandigarh case of Idea Cellular Ltd, the Id. AO had recorded the statements of technical experts i.e. Shri Tanay Krishna and Shri Ashok Mittal on 08/01/2014 as per the directions of the Hon'ble Supreme Court in the case of Bharti Cellular Ltd. The photo copies of the said statements were also furnished to that assessee affording an opportunity to cross examine those technical experts. The Id. AO in that case, had carried out detailed investigation by collecting technical evidences, recorded statements of technical experts and decided the issue of applicability of Section 194J of the Act to the payment of national roaming charges, held that human intervention is very much applicable for the purpose of the said facility and hence, the same would fall under 'fee for technical services' liable for TDS u/s.194J of the Act.

4.5. We find that the Id. CIT(A) in the impugned proceedings before us in para 5.4.3 of his order in page 49 had observed that the facts and circumstances of the present appeal (i.e. the case of the assessee herein before us) are identical to the facts and circumstances of the appeal of M/s. Idea Cellular Ltd for A.Y.2009-10 decided by the Id. CIT(A) Chandigarh in Appeal No. 22/11-12 dated 01/12/2012 and respectively following the said decision of the Id. CIT(A) Chandigarh, he held that national roaming process essentially involves decisive human intervention and hence, the same would be liable for TDS u/s.194J of the Act tantamounting to technical services. With these observations, he upheld the disallowance made by the Id. AO u/s.40(a)(ia) of the Act.

4.6. We find that as stated supra, the Id. CIT(A) had merely relied on the decision taken by the Id. CIT(A) Chandigarh in the case of Idea Cellular Ltd in Appeal No. 22/11-12 dated 01/12/2012. In the said order,

the Id. CIT(A) had set aside the issue to the Id. AO to make various examinations as per the directions of the Hon'ble Supreme Court in the case of Bharti Cellular Ltd referred to supra. In the order giving effect passed u/s.250(6) of the Act dated 24/02/2014 by the Id. AO i.e. ACIT (TDS) Chandigarh, the Id AO carried out the directions of the Id. CIT(A) by making due examination of all the technical experts and concluded that human intervention is involved on the aspect of roaming charges. Against this order, the assessee thereof went again in appeal to the Id. CIT(A). The Id. CIT(A) vide his order dated 17/10/2017 in Appeal No. 72/2014-15 relied on the decision of Jaipur Tribunal in the case of Bharti Hexacom Ltd vs. ITO (TDS)-II Jaipur in ITA No.656/JP/2010 dated 12/06/2015, wherein the Jaipur Tribunal had held that for installation / setting up / repairing / servicing / maintenance / capacity augmentation requires human intervention but after completing this process, the main interconnection between the operators is automatic and do not require any human intervention. Accordingly, it held that the roaming charges does not require any human intervention warranting deduction of tax at source u/s.194J of the Act. Similar view was also taken by the Bangalore Tribunal in Idea Cellular Ltd case in ITA No.608-651/BANG/2014 which was confirmed and upheld by the Hon'ble Karnataka High Court in the case of CIT(TDS) Bangalore vs. Vodafone (South) Ltd reported in 72 taxmann.com 347 and the Id. CIT(A) also placed reliance on the decision of Kolkata Tribunal in the case of Vodafone (East) Ltd vs. Addl. CIT(A) reported in 61 taxmann.com 263 and Delhi Tribunal in the case of Bharti Airtel Ltd vs ITO (TDS) reported in 61 taxmann.com 223. Further the Id. CIT(A) also placed reliance on the decision of the Hon'ble Rajasthan High Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd and others in ITA No.205/2005 wherein the issue as to whether TDS is applicable u/s.194J of the Act on roaming charges paid for facilities provided by the

service provider, as this interconnection is managed / controlled / monitored by human intervention was the subject matter of adjudication and the Hon'ble Rajasthan High Court vide its order dated 11/07/2017 dismissed the departmental's appeal on this issue. By placing reliance on all the aforesaid decisions, the Id. CIT(A) Chandigarh decided this issue in favour of the Idea Cellular Ltd for A.Y.2009-10 in the second round of proceedings in Appeal No.72/14-15 dated 17/10/2017. Against this order, the Revenue preferred the appeals before Chandigarh Tribunal.

4.7. We find that the Chandigarh Tribunal in the case of DCIT vs. Idea Cellular Ltd in ITA Nos. 21-24/CHD/2018 for A.Yrs.2005-06, 2006-07, 2008-09 and 2009-10 respectively dated 28/06/2018 (second round of proceedings) decided the issue in favour of the assessee by holding as under:-

7.1 We have gone through the material available on record and we note that the assessee before the CIT(A) made the following submissions on facts and law which have been summarized by the CIT(A) in para 5.3 of his order as under:

5.3 During the course of the appellate proceedings the appellant filed written submissions dt. 24.03.2017 and 22.06.2017 and claimed that the payments made by it for roaming facilities do not attract provisions of section 194I of the Act since they are not in the nature of payment, for technical services. In its support, the appellant relied upon various decisions including decisions on the issue in question in its own case as well as the following ones

- 1. M/s Bharti Hexacom Ltd. vs ITO (TDS) (ITA No. 656/JP/2010)ITAT Jaipur);*
- 2. M/s Idea Cellular Ltd. vs ITO (ITA No. 94 to 96/JP/2013 and 917JP2012)(ITAT Jaipur).*
- 3. M/s Hindustan Coca Cola Beverages Pvt Ltd. and Others vs CIT(2017) (ITA No. 205/2005XHC, Rajasthan)*
- 4. M/s Idea Cellular Ltd. vs ACIT (ITA No. 648 to 65 UBang/2014XITAT, Bangalore);*

5. *CIT vs M/s Vodafone South Lad. (241 Taxmann.com 496) (HC. Karnataka);*
6. *M/s Vodafone East Ltd. vs Addl. CM2015X61 Taxmann.com 263(ITAT Kolkota);*
7. *M/s Bharti Airtel Ltd. vs ITO (TDS) (67 Taxmann.com 223)ITAT, Delhi); Accordingly, the appellant made the following submissions:*

Thus the appellant humbly submits that following the view taken by High Court and Tribunals, especially the latest decisions of the Hon'ble Jaipur Tribunal & Hon'ble Bangalore Tribunal in appellant's own case(supra) and also in the case of Bharti Hexacom (supra) and the Hon'ble Chennai Tribunal in case of Dishnet Wire less (supra) and the Hon'ble Kolkata Tribunal in the case of Vodafone (supra) after considering the judgment of the Hon'ble Supreme Court in case of Bharti Airtel (supra) as discussed in Proposition-I and Proposition-II, and also in the absence of any contrary judgments at on date of any of the Hon'ble High Courts, no tax is deductible at source w 1943 of the Act on payment of roaming charges to the OTOs "

7.2 We further find that considering this the issue was decided by the CIT(A) in the following manner:

5.4. I have gone through the order of AO, the decisions that the appellant has relied upon in support and have carefully considered the various submissions made by the appellant. Since the grounds of appeal preferred by the appellant are inter-connected as well as consequential to each other, they are not dealt separately and are considered together. It would not be out of comfort to reproduce the observation and findings of Hon'ble ITAT. Jaipur in the case of M/s Bharti Hexacom Ltd Vs ITO(TDS)-II, Jaipur in its order dt. 12.6.2015 in ITA No. 656/JP/2010 at under

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through border of the assessing officer, Ld. CITA): submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT, TDS New Delhi in the case of M/s Bharti Cellulare Ltd: thereafter cross examination made by M/s Bharti Cellulare Ltd; also opinion of Hon'ble the then Chief Justice of India Mr. S.H.Kapadia dated 03/09/2013 and also various judgment is given by the ITAT, Ahmedabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance/capacity

augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and do not require any human intervention. The term Interconnecting User Charges (IUC) also signifies charges for connecting two entities. The coordinate bench also considered the Hon'ble Supreme Court decision in the case of M/s Bharti Cellular Ltd in the case of I-Gate Computer Systems Lad and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in section 194I read with section 9(1) (vii) read with Explanation-2 of the Act Respectfully following above judicial precedents, we hold that the charges are not fees for rendering any technical services as envisaged in section 194I of the Act

The above finding of fact was again reiterated by Hon'ble ITAT, Jaipur in appellant's own case in ITA-Nos. 94 to 96/JP/2013 as well as by Hon'ble ITAT Bangalore in appellant's own case in ITA Nos. 608 to 651/Bang/2014. This was also confirmed and upheld by Hon'ble Karnataka High in the case of CIT, TDS, Bangalore vs Vodafone South Lid (2016) 72 Taxmann.com 347 in which their lordship held that-

"Reading of the above order clearly show that fact-situation was essentially similar to the one here in the case of the assessee. Assessee was also treated as one in default for failure to deduct tax at source on roaming charges paid to other distributors. Therefore the coordinate bench of the Tribunal in the case of Bharti Hexacom Ltd (supra) would squarely apply. We also find that the said decision has been followed by Ahmedabad bench in the case of Vodafone Essar Gujarat Lid v. ACIT (TDS) (ITA NO.386/Add/2011, dt.07.07.2015). Following these, we are of the opinion that assessee could not have been deemed as one in default for non-deduction of tax at source on roaming charges paid by it to other service providers, Ground 3 it allowed"

Similar findings are also rendered by Home ITAT Kelana in the case of Vodafone Ea Lad v Add CIT (2015) 61 Taman.com 263 as well as by Hon'ble ITAT, Delhi in the case of Bharti Airtel Lads ITO, TDS (2016) 67 Tom.com 223. More recently, in the case of Hindustan Coca Cola Beverages Pot Lid and others (D.B. ITA No. 205/2005), the Hon'ble Rajasthan High Court had the occasion to examine the issue as to whether TDS is applicable w/s 194I of the Act on roaming charges paid for facilities provided by service provider, as this interconnection is managed/controlled/monitored by human intervention. In their order dt. 11.07.2017, while disposing off a bunch of appeals involving various mobile service providers including the appellant, M/s Tata Teleservices

Ltd, Ms Bharti Hexacom Ltd. and M/s Vodafone Digilink Ltd the Hon'ble High Court dismissed the Departmental appeals on this issue. The facts and the issues involved in the present appeal are identical to the issues considered by Hon'ble High Courts of Karnataka and Rajasthan as has been discussed above. Accordingly, respectfully following the decisions of Hon'ble Karnataka High Court in the case of CIT, TDS. Bangalore vs Vodafone South Ltd, Hon'ble Rajasthan High court in the case of case of Hindustan Coca Cola Beverages Pvt. Ltd and others as well as in the decision of Hon'ble Jaipur Tribunal & Hon'ble Banglore tribunal in appellant's own case (supra) it is held that payments made for interconnection are not fees for rendering any technical services as envisaged in section 194I of the Act. Therefore, no tax is deductible at source u/s 194I of the Act on payment of roaming charges to the OTOs and the appellant therefore can't be treated as an assessee in default.

8. On a careful reading of the impugned order wherein consistently there are orders of Co-ordinate Benches in similar set of facts in the case of the assessee itself, which we note, have not been distinguished either on facts or in law nor have been upset by any higher Forum. In these peculiar facts and circumstances, we find that departmental appeals are without any merit. The facts taken on record which have not been upset are that for installation/setting up/repairing/servicing/maintenance/capacity augmentation etc. human intervention is required, however after this process is complete, the interconnection between the operators is automatic and at that stage, no human intervention is required. These conclusions have been arrived after considering the Reports of the technical experts, their cross-examination etc. We note that Interconnecting User Charges (IUC) which signifies charges for connecting two entities. The Co-ordinate Benches have relied upon the order in the case of i-Gate Computer Systems Ltd where decision of the Apex Court in the case of M/s Bharti Cellulars Ltd. has been considered and also on the decision of Data Link transfer wherein considering similar facts, it has been held that it does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in section 194J read with section 9(1) (vii) read with Explanation-2 of the Act. We find that in the absence of any change in facts or law, the payments made for interconnection are not fees for rendering any technical services as envisaged in section 194J of the Act. Therefore, no tax is deductible at source u/s 194J of the Act on payment of roaming charges to the OTOS and the assessee therefore cannot be treated as an assessee in default. Apart from the various decisions of High Courts and ITAT orders cited, the issue stands concluded in favour of the assessee by the consistent orders of ITAT Bangalore and Jaipur Benches in own case. In the absence of any distinction on facts, circumstances or position of law, the departmental appeals are dismissed.

9. In the result, the appeals of the Revenue are dismissed.

4.8. As in the present appeal before us, the Id. CIT(A) had relied on the decision of the Id. CIT(A) Chandigarh in the case of Idea Cellular Ltd by stating that the facts and circumstances are identical in both the cases when the said order of Id. CIT(A) Chandigarh had been reversed by the decision of the Chandigarh Tribunal referred to supra vide order dated 28/06/2018, we do not find any case in the argument advanced by the Id. DR before us in support of the orders of the lower authorities. Hence, respectfully following the aforesaid decision of the Chandigarh Tribunal which has dealt the decision on the impugned issue, the ground No.III raised by the assessee is hereby allowed.

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

Order pronounced on 24/02/2023 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai; Dated 24/02/2023
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai