IN THE INCOME TAX APPELLATE TRIBUNAL
` D' Bench Chennai

Before Shri N. S. Saini, Accountant Member
and Shri V. Durga Rao, Judicial Member

ITA Nos. 1560 & 1561/Mds/2011
Assessment years : 2009-10 & 2010-11

M/s. Cellular Mobile Telecom Services, Chennai Telephones (Wing of BSNL), No. 78, Purasawalkam High Road, Chennai-600 010.	v.	The Income Tax Officer, TDS Ward-I(1), Chennai.
(PAN : CHECO5110A) (Appellant)		(Respondent)

Appellant by	:	Shri Philip George, Advocate
Respondent by	:	Shri K.E.B. Rengarajan, Jr. Standing Counsel
Date of Hearing	:	17.10.2012
Date of Pronouncement	:	30.10.2012

O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

These appeals by the assessee are directed against the order of the CIT(Appeals)-IV, Chennai dated 30-06-2011 for the assessment years 2009-10 and 2010-11.

2. The facts in brief are that the assessee company is selling SIM cards and recharge coupons of Cellone of the Chennai Telephones to various wholesale dealers and paying commission to them upto the financial year 2007-08. M/s. Chennai Telephones has followed the provisions of section 194H of the Income Tax Act, 1961 ('the Act' for short). From the financial year 2008-09 onwards the assessee company has distinguished the sale of SIM card and recharge coupons. In respect of sale of recharge coupons the commission paid to the dealers has been treated as discount offered and no TDS u/s 194H was deducted. In the assessment order the Assessing Officer has observed that upto the financial year 2007-08 the assessee has deducted TDS on amounts paid on sale of recharge coupons by treating the same as commission. Immediately from next year the assessee stopped deducting TDS on the ground that it is not commission but only discount. There were no circumstances warranting such a decision and the Assessing Officer issued a show cause notice to the assessee dt. 15-09-2009 u/s 201/201(1A) of the Act calling for explanation from the assessee for failure to deduct TDS u/s 194H of the Act. It was submitted before the Assessing

Officer that the transaction between BSNL and purchase dealer was principal to principal and not principal to agent. Therefore, no TDS is necessary to be deducted. The assessee further submitted that SIM Card supplied by the distributor is still the property of the service provider, i.e. the assessee company. It is only for the ultimate consumer or the assessee company who has the authority to uncover the secret number and bring the card into activation. The Assessing Officer after considering the submissions of the assessee observed that the assessee has never explained the reason for not deducting TDS from the financial year 2008-09 onwards in respect of sale of recharge coupons even though the assessee has correctly and promptly deducted TDS upto the financial year 2007-08. Accordingly, the Assessing Officer held that the assessee, M/s. Cellular Mobile Telecom Services, Chennai Telephones, is an assessee in default as per the provisions of section 201(1) of the Act for ₹ 45,12,636 which was the amount omitted to be deducted from the commission amount disbursed. In addition to the above, the assessee was also held liable to pay interest u/s 201(1A) of the Act amounting to ₹ 8,62,787/-. Ultimately the total amount as determined by the Assessing Officer was ₹

53,75,423/- u/s 201(1) and 201(1A) of the Act and taxed accordingly.

3. On being aggrieved, the assessee carried the matter before the CIT(Appeals). Before the learned CIT(Appeals) it was submitted that the amount paid to the dealer is principal to principal basis. It is only discount and not commission and therefore no TDS is necessary to be deducted. Recharge coupon is different from SIM card. The learned CIT(Appeals) after considering the submissions of the assessee observed as under :

> 6. I have, considered the written submissions filed by Id. AR, assessment order of A.O. and proceed to decide the issue. I am of the considered view that TDS is deductible on the c9mmission payments made by BSNL while selling SIM cards/recharge coupons, to its franchisees, for the following reasons:
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> (a) The assessee company deducted the TI?S on these payments upto AY 2007·08 and from the AY 2008·09 onwards, they stopped deducting tax. Before the Assessing Officer, the assessee company did not give any proper reason as to why there is a sudden change,as mentioned by Assessing Officer in his assessment order page 6, penultimate para. The facts and circumstances remaining the same, the assessee company cannot take an administrative unilateral decision of not deducting the tax, when there is no change in the law.
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> (b) This issue of making TDS u/s 194H on sale of SIM cards/recharge coupons came up ·for hearing before Hon'ble HAT Chennai recently in the case of Vodafone Essar Cellular Limited ITA No.1415 & 1416/Mds/2009, 'A' Bench dated 01/04/2011. The facts in our case on hand are exactly, the same. Elaborate argul1iients were adduced by Id. Counsel of assessee, Shri S.E. Dastur and Niraj Sheth, which were considered by Hon'ble ITAT and then only held that the TDS provisions u/s 194H are applicable

for sale of SIM cards and recharge coupons sold by assessee company Le. the differential portion should be treated as "commission" and on these commission payments, tax is to be deducted at source as per sec. 194H of I.T.Act.

(c) The assessee company made an argument before this appellate authority, alternatively that TDS provisions to be made applicable only for SIM cards but not recharge coupons because the assessee company is the owner of sim cards whereas for the recharge coupons, they are not the owners, Le. once recharge coupons are sold to franchisees, they don't come back to assessee nor do they have any control over recharge coupons. But, this argument is not correct since there is no independent existence of recharge coupons without sim cards. Unless sim card is issued to a subscriber, recharge coupon cannot be issued ie. they are inter-linked and cannot be separated. In other words, the recharge coupon is an extension of original sim cards i.e. a recharge coupon cannot exist or work without sim card being activated i.e. a recharge coupon cannot work once the sim card (which assessee admits that TDS is to be deducted) is deactivated. So, the sim card and recharge coupon will go together. If there' is a defect in recharge coupon, the subscriber goes to franchisee/retailer who in turn will complain to assessee company. Thus, the link between the assessee company with franchisee very much exists for both sim cards and recharge coupons and the umbilical chord is never cut. Moreover, Hon'ble ITAT of Chennai in the above mentioned case has categorically held that sec. 194H is applicable for both sim cards and recharge coupons (para 11, page 37 of Hon'ble ITAT's order). Similarly, both Hon'ble Delhi High Court and Hon'ble Kerala High Court in the case of Idea Cellular Limited 325 ITR 148(Del.) and Vodafone Essar Limited 235 CTR:393(Ker.) have held that TDS is applicable u/s 194H on both sim cards and recharge coupons. Hence, this alternate argument of assessee company is also rejected.

(d) The assessee company relied on Idea Cellular decision of Delhi ITAT before the A.C. and argued that the provisions u/s 194H are not applicable for the "discount" given by assessee company to its franchisees. Actually, the amount paid to franchisees is "commission", but the assessee company chose to term it as "discount" to come out of the provisions of section 194H. Since there is no other incentive payable to franchisees by assessee company, the amount paid at reduced price is actually "commission" only and the assesee company accepted this proposition till AY 1997·98. There being no change in facts, circumstances and law, the assessee company should have continued to deduct tax as in earlier years. Moreover, the decision relied on by assessee company before the Assessing Officer was set

aside by Hon'ble Delhi High Court in the same case which shows that assessee's logic of non-deduction of tax is incorrect. In this context, I rely on Delhi Milk Scheme Vs ITO 300 ITR 373(Del.) where the consideration was paid to its agents for selling milk through booths and claimed it as "discounted sale", but Hon'ble High Court of Delhi has held it to be "commission" as defined in section 194H relying on explanation 1 of section 194H. It is quite usual for assessees to claim the amount as "discount" and not as "commission", even though it is commission only to come out of section 194H of the LT. Act. I also rely on the decision of Hon'ble Delhi High Court, in this context, CIT Vs Singapore Airlines 319/29 (Del) where the travel agents collected fare from passengers and agents collected fare from passengers and remitted it to airlines subject to deduction of commission due to them and claimed it to be "discount". Even in such cases, where commission is retained by distributors, the Board has clarified in para 16.2 of its Circular No.619 dated 04.12.1991, 193 ITR (St.) 17 that the retained amount is a constructive payment by the principal and required tax deduction at source. In the present case of ours also, the appellant BSNL is selling sim cards/recharge coupons at reduced price to its franchisees and claimed the reduced price as "discount". Applying the above analogy, it is held that the reduced price is treated as' "commission", but not "discount" as claimed by appellant company. I also rely on the decision of Hon'ble Kolkata ITAT's decision ACIT Vs Bharti Cellular Limited 108 TTJ(Kol.) 38, 294 ITR 283 (Kol.)(AT) where it was held that the payments made by assessee company are in the nature of commission payments, but not discounts and adjudicated the issue in favour of Revenue by stating that section 194H is applicable. The Kolkata Bench followed Hindustan Coca Cola Beverages Private Limited 98 TTJ l(Jp) where assessee sold prepaid cards to distributors and claimed the same as "discounted sale". In this case, Hon'ble Bench has held that since the amounts are fixed margins and further held that there is a principal to agent relationship. It was held that section 194H is applicable.

(e) The assessee company in its written submissions relied on the decision of Ahmedabad Stamp Vendors Association Vs Union of India 257 ITR 202 to support his argument of non-deduction of tax. This case was considered by Hon'ble Delhi High Court in the case of CIT Vs Idea Cellular Limited 325 ITR 148 (Del.) and since the facts and circumstances were different, it was held that section 194H was applicable for the differential portion while selling sim cards/recharge coupons. So, this argument of assessee company is decided against it on merit.

(f) The assessee company argued that there is only a principal to principal relationship but not principal to Agent relationship and hence 194H is not applicable. This is not correct. The Agreement between BSNL and franchisee clearly shows that there is one-way flow i.e. it is only assessee company sells to franchisees and franchisees never sells goods to assessee company nor the franchisee companies give discount/commission to assessee company. This argument of principal to principal relationship was repelled by Hon'ble Delhi High Court in the case of Idea Cellular Limited 325 ITR 148 (Del.) by stating that all the services were rendered by assessee company and hence the relationship between assessee company and franchisee is that of principal to Agent and not principal to principal as claimed by assessee company.

The services provided by the assessee company through various distributors are regulated by law. Carrying on the business of providing service is subject to so many statutory compliance requirements, like verification of the identity of the consumer and the related documentation, etc. The assessee company is having all lawful obligations to a prepaid consumer, even though the direct deal is between the distributor and the consumer. This is because the distributor does not have anything to provide 'as service' to the consumer. These are all features of agency relationship.

Service cannot be sold or purchased and it can only be provided. The operational features explained by the assessee company are necessary in running a mammoth system of providing mobile telephone services over a large geographical area. The distributors provide essential services to the assessee company in running such a huge operational system. The distributors are linking agents in he chain of delivery of services to consumers. Therefore, the relationship is not of a principal-to-principal, but essentially that of principal to Agent only. Moreover, Circular No.131dated 15/04/2008 issued by Chief General Manager of BSNL, at para 2 clearly states that all the franchisees of BSNL are acting as an .agenl of BSNL while selling BSNL products and services and the amount paid to franchisees shall be treated as commission expenditure of BSNL.

It was further held by Hon’ble Delhi High Court that in the above case of Idea Cellular Limited 325 ITR 148 (Del.) the logic remains same for pre-paid and post paid recharge coupons i.e. effectively 194H is applicable to sim cards (admitted by the assessee company also), pre-paid and post paid recharge coupons. While holding that 194H provisions are applicable to assessee company, Hon’ble Delhi High Court has held that it is following its decision of CIT Vs Singapore Airlines Limited 224 CTR 168

(Del.). Hon'ble Delhi High Court, while coming to this conclusion, relied on the Apex Court's decision of BSNL Vs. Union of India 201 CTR 346(SC). Since Hon'ble Delhi High Court relied on Hon'ble Supreme Court's decision, it has a binding effect on the people and Courts of all over India as per Article 141 of Constitution of India.

(g) The assessee company relied on Kerala Stamp Ventors Association Vs Office of Accountant General 150 TM 30(Ker.), in his written submissions to argue that TDS provisions are not applicable for his case also. Hon'ble Kerala High Court in the case of Vodafone Essar Limited 235 CTH 393 (Ker.) has considered and distinguished the above case relied on by assessee stating that in that case, stamp vendors are licenced distributors of Government and moreover specific exemption was granted to them by State Government from S.T. Act. Since the facts and circumstances in that case are different, Hon'ble Kerala High Court has held that the case relied on by assessee will not come to the rescue of assessee. In other words, since the case relied on by assessee company was discussed and distinguished by Hon'ble Kerala High Court in the above case and held in favour of Department, this argument of assessee company also is liable to be rejected.

(h) The assessee company has also argued that from this Assessment Year onwards, they have changed their accounting system and. not deducting tax as per section 194H. Now, it is a settled law and accounting entries in the books of account of assessee cannot alter the legal position nor can override the statutory provisions as held by Hon'ble Supreme Court in the cases reported Commissioner of lncome-tax Vs Panipet Woollen & General Mills Co. Limited [103 ITR 66(SC)] and Sutlej Coton Mills Limited Vs Commissioner of Income-tax [116 ITR l(SC)]. As long as the law is not changed, the same procedure as per law but not as per books of account is to be followed by assesee company.

(i) The assessee company has argued that 80% of the commission given to franchisees should go to retailers and hence, alternately TDS is applicable to 20% of total amount only. This argument is incorrect and not logical. The Act prescribes different rates of TDS for contractors and sub-contractors. When the TDS is to be made for a transaction between assessee company and payee, those provisions are only to be reckoned i.e. the moment commission is paid to

franchisees, relevant TDS provisions are only applicable but not what will happen subsequent to payment to franchisee. Subsequent TDS payment by franchisee is the issue to be adjudicated in the case of a franchisee and not in this case. For example, if a person awards a contract to one person, Act says that 2% of that amount is to be deducted, even though the contractor again gives it as sub-contractor to other person. When, a contractor gives the same as sub-contract 1% of TDS is to be made by him again and the original person who awards the contract cannot say that he will deduct only 1% of the receipts as TDS because the contractor is further giving it as sub-contract. The two transactions are separate and independent and hence the Assessing Officer is correct in applying section 194H for the entire amount. In this connection, I rely on commission paid by travel again to its agent selling airlines tickets on his behalf but also on agent discount and special commission passed on to them. Thus, TDS to be deductible on whole amount. CIT Vs Dex Travel (P) Limited 172 TM 142(Del.). While assessee company is giving sim cards/recharge coupons to various franchisees at reduced rate and correctly treated it as "commission".

(j) The assessee company argues that there is no loss of revenue because franchisees/retailers are all assessed to tax. This argument is totally illogical and if this argument is accepted, there is no need of applicability of TDS provisions for all LT. assessees when the, Hon'ble Parliament passed the Income-tax Act with the chapter of "Tax Deducted at Source" provisions, the same are to be followed and if the assessee company wants to challenge the "vires" of a provision/section, the appropriate forum is High Court or Supreme Court, but not this appellate authority. Moreover, it is a settled law that provisions of TDS are legal and constitutional.

(k) Payment of tax by payee is not relevant for charging of interest u/s 201(1A) which is mandatory - 243 ITR 13 (Ker.) Dhanalaxmi Weaving Works ; Crescent Housing &0 ITD 317(Mad.) and Air Canada 88 ITD 545(Del.) where Hon'ble Delhi ITAT followed the decisjon of Hon'ble Supreme Court in the case of K.K. Engg. Recently, Hon'ble Supreme Court in the case of Hindustan Coca Cola 293 ITR 226(SC) has held that interest u/s 201(1A) is mandatory even if the payee admits the income in his return of income.

> 7. In view of the above legal position, facts and circumstances, the entire addition of Rs.53,75,423/- for the Assessment Year 2009-10 and Rs.85,13,970/- for the Assessment Year 2010-11 is hereby confirmed."

4. On being aggrieved, the assessee carried the matter before the Tribunal. The learned counsel for the assessee has submitted that there is a difference between SIM card and Recharge coupon. The SIM card is the property of theassessee. Recharge coupon is not the property of the assessee. Therefore on the discount paid on the recharge coupon no TDS is required to be deducted u/s 194H of the Act. Alternatively, it was submitted that at the time of purchase no income has accrued to the assessee. Therefore he is not under obligation to deduct TDS u/s 194H of the Act.

5. On the other hand, the learned DR has submitted that the issue involved in this appeal is already covered by various decisions of the High Courts and I.T.A.T. and the learned CIT(Appeals) by following the same confirmed the order of the Assessing Officer He strongly supported the order passed by the learned CIT(Appeals).

6. We have heard both the sides, perused the records and gone through the orders of the authorities below. The

assessee is a cellular company selling SIM cards and recharge coupons. The assessee has deducted TDS on both the sale, i.e. SIM cards as well as recharge coupons upto the financial year 2007-08. Thereafter TDS was deducted only on SIM cards and no TDS was deducted insofar as the recharge coupons are concerned. It was explained before the Assessing Officer that because of change of policy decision TDS was not deducted. The amount paid on selling of recharge coupons was not commission but only a discount. This argument was considered elaborately by the learned CIT(Appeals) by considering various decisions of the High Courts and the Tribunal. The learned CIT(Appeals) accordingly confirmed the order passed by the Assessing Officer. We are not able to agree with the submissions of the learned counsel for the assessee that the amount paid to the dealers for the recharge coupons was not amounting to commission but only discount. It was not explained how the same payment in earlier year is commission and subsequent year it is discount. Further we are unable to agree with the submission of the learned counsel for the assessee that no income has been accrued to the assessee at the time of purchase of recharge coupons. Under

very similar set of facts the Hon'ble Delhi High Court has considered the issue in the case of CIT v. Idea Cellular Ltd. (325 ITR 148) and held in the head note as under :

"TDS – Under s./ 194H- Commission or discount to distributors of SIM cards/recharge coupons – Assessee, a cellular operator, provides prepaid connections to the subscribers through distributors called prepaid market associates (PMAs) appointed by it – It offers discount for prepaid calling services to its distributors – Legal relationship is established between the assessee and the ultimate consumer/subscriber, who is sold the SIM card by the agents further appointed by the PMAs with the consent of the assessee – Fact that the PMA is supposed to make the payment in advance as per the agreement does not make any difference to the nature of the transaction in view of the other terms of the agreement – Even though advance payment is made by the PMA qua SIM cards, it does not amount to 'sale' of goods in as much as unsold SIM cards are to be returned to the assessee and it is required to make payment against them – This is an antithesis of 'sale' – Therefore, the discount offered by the assessee to the distributors on payments made by the latter for the SIM cards/recharge coupons which are eventually sold to the subscribers at the listed price is commission and it is subject to TDS under s. 194H – Contention of the assessee that s. 194H is not applicable as there is no 'payment or credit' by the assessee to the distributor cannot be accepted."

7. In view of the above decision of the Hon'ble Delhi High Court and considering the facts and circumstances of the present case, we find no infirmity in the order passed by the learned CIT(Appeals). Therefore, this ground of appeal raised by the assessee for both the assessment years under consideration is dismissed.

8. In the result, the appeals filed by the assessee are dismissed.

Order pronounced on Tuesday, the 30th of October, 2012, at Chennai.

Sd/-	Sd/-
(N. S. Saini)	(V.Durga Rao)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai,
Dated the 30th October, 2012.

H.

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