

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A'**

**BEFORE SHRI N. BARATHVAJA SANKAR, VICE-PRESIDENT
And
SHRI N.V.VASUDEVAN, JUDICIAL MEMBER**

ITA Nos.308 to 310(Bang)/2011
(Assessment years: 2006-07 to 2008-09)

ITA Nos.1285, 1287, 1289 (Bang)/2012
(Assessment years: 2006-07 to 2008-09)

AND

ITA No.1286, 1288, 1290(Bang)/2012
(Assessment years: 2006-07 to 2008-09)

M/s.Tata Teleservices Ltd.,
'A' Block, Silicon Terraces,
30/1, Hosur Main Road, Koramangala,
Bangalore-560095. ... Appellant
PAN:AAACT2438A

Vs.

Deputy Commissioner of Income-tax (TDS)
Circle 18(1),
Bangalore. ... Respondent

ITA Nos.393 to 396(Bang)/2011
(Assessment years: 2005-06 to 2008-09)

ITA Nos.1014, 1016, 1018, 1020(Bang)/2012
(Assessment years: 2005-06 to 2008-09)

AND

ITA Nos.1015, 1017, 1019, 1021(Bang)/2012
(Assessment years: 2005-06 to 2008-09)

Deputy Commissioner of Income-tax (TDS)
Circle 18(2),
Bangalore. ... Appellant

Vs.

M/s.Tata Teleservices Ltd.,
Bangalore. ... Respondent

Appellant by: Shri S.S.Nagananda, Advocate.
Respondent by : Shri P.K.Ambastha, CIT(DR).

Date of hearing: 05-11-2012.

Date of pronouncement: 27-11-2012.

O R D E R

Per BENCH:

All the appeals arise out of orders passed u/s 201(1) and 201(1A) of the Income-tax Act, 1961 [the Act]. The above appeals arise under the following facts and circumstances:

2. The assessee is a company. It is engaged in the business of providing telecommunication services across the country. The telecommunication services include basic telephones, ISD, NLD, Broadband and CDMA mobile services. The assessee is duly licensed to establish, maintain and operate telecommunication services and other value added services in various telecom circles in India under licenses granted by the Government of India through Department of Telecommunications (DOT).

3. To market its products and services the assessee appoints persons who are called "Channel Partners" ['CP' for short]. The CPs are appointed for specified geographical areas. The terms of the Agreement between the assessee and CP need to be specified as the same is of importance for deciding the issues that arise for consideration in these appeals. A copy of Channel Partner Agreement [CPA] dated 16-4-2008 between assessee and one

M/s.Aastha Distributors represented by Prop. Mr. Muneer Ahmed was filed before us and it was submitted that the said Agreement is a standard form adopted in the case of all CPs. The terms of the CPA, in so far as it is relevant for the present case, are as follows:

a) CPs are appointed to market products and services of the assessee.

b) Products and services are defined in clause 1(n) as follows:

'Products' and/or 'Service' shall mean one or more of the telecom products and services provided by TTSL either directly or through its distributors, in the Service Area, which includes distribution of mobile handsets, telephone instruments, telecom equipment, network interface units (NIU), SIM cards, RUIM cards, USB modems, v-data cards, recharge vouchers, calling cards, provision of all unified access telecommunication services and other value added services under the Unified Service Licenses issued by DoT and all other services within the purview of the said licenses, as may be included/specified by TTSL, from time to time.

c) Clause 2.1 of the Agreement mentions that Channel Partner is being appointed for the purpose of distributing/selling/reselling of products and services.

d) Clause 2.2 provides that the appointment is non-exclusive and other persons can be appointed as CP in the same area.

e) Clause 2.4 of the Agreement reads as follows:

"2.4 Channel Partner acknowledges that it is acting for the limited and exclusive purpose of this Agreement, which does not constitute Channel Partner as a servant or employee or partner or joint venture or affiliate or group company of TTSL. Channel Partner shall have no authority to bind TTSL in any respect whatsoever and shall not hold itself out as owned by or associated with TTSL other than as an independent channel partner on a principal to principal basis authorized and permitted to market the Products and Services under these presents. None of the employees of Channel Partner shall be construed or deemed to be the employees of TTSL at any time and Channel Partner shall indemnify and keep indemnified TTSL, its directors and

officers against any claim, demand, loss or whatsoever in this connection."

- f) Within his area the CP is permitted to have different outlets.
- g) The expression 'consideration' has been defined in clause 1(c) of the Agreement as follows:

"1(c) 'Consideration shall mean the trade discounts, commissions and other monetary compensation that Channel Partner is entitled to receive for distributing the Products and Services, which will keep changing periodically due to various factors including changing nature of market and the same will be informed by TTSL to Channel Partner from time to time, as set forth in the Schedule B".

- h) The responsibilities, duties and obligations of the assessee and that of the CP are as follows:

"7. Responsibilities, duties and obligations of TTSL

TTSL shall be responsible for the following and accordingly shall:

7.1 Endeavour to provide Channel Partner with such marketing information and periodic Products and Service features which in TTSL's opinion will assist Channel Partner in the performance of its/his/her obligations hereunder.

7.2 Use its best efforts to provide good coverage and grade of Service consistent with market requirements.

7.3 Endeavour to make available and provide to Channel Partner, Products and Service consultations and brochures and other aids, as have been published by TFSL. The quantities will be established by TTSL.

7.4 Make the Consideration to Channel Partner, as contemplated in the Schedule B of this Agreement.

7.5 Communicate/ inform Channel Partner on an ongoing basis of all changes in the rates, conditions and Service Areas, as soon as practicable after any such change.

7.6 Assign a representative of contact in TTSL to assist Channel Partner for resolving problems, to support Channel Partner's service efforts or to provide Channel Partner with information pertinent to the Products and

Service or other information that 'TTSL would deem necessary/important.

8. Responsibilities, Duties and Obligations of Channel Partner

8.1 Channel Partner shall be responsible for various duties and obligations set forth in this section and undertakes to perform the same and all other duties and obligations under scope of service for channel partner arrangement as set forth in Schedule A hereto, as amended, modified from time to time by TTSL, in letter and spirit.

8.2 Channel Partner acknowledges and agrees that strict compliance with the standards and requirements as set out in this Agreement and the Manuals that may be supplied and as are modified and amended time to time by TTSL, is necessary for Channel Partner to maintain its/his appointment as a channel partner of TTSL. Channel Partner without limiting to the generality of the foregoing shall comply with those responsibilities duties and obligations set forth herein.

8.3 Channel Partner acknowledges and agrees that it is its/his responsibility for deployment of necessary resources, equipments, facilities and to appoint dealer/retailers to work under its/his supervision and control, who will run the outlets in the Service Area, as contemplated above and as may be stipulated by TTSL, from time to time. In such cases Channel Partner shall have absolute control over such dealers/retailers functioning in terms of the guidelines/stipulations/instructions of TTSL. Channel Partner shall be fully responsible for the remuneration/wages/salary/any other payment/discount that may be payable to its dealer/retailers/personnel in respect of the services rendered by them and TTSL shall not be held responsible for any such payments, whatsoever. Channel Partner shall be liable to ensure that the personnel identified/appointed by Channel Partner do not commit any act or omission, which may result in violation of this Agreement or of the agreement between Channel Partner and such dealers/retailers and/or of any applicable law/s.

8.4 Channel Partner agrees to and accordingly shall:

i) Obtain necessary license, permits and the like from the concerned statutory and/or local bodies in respect of Channel Partner's operation under this Agreement, including any specific licenses/permits required for playing channel/pipe music in the Outlets and other business outlets in connection

herewith and ensure its continued validity and strict compliance thereof;

ii) Diligently and faithfully can out all its/his/her obligations and duties as a channel partner and at all times protect and promote the interest of TTSL;

iii) Not commit breach or violate any of the terms and conditions of this Agreement and shall also honors and follow such instructions as may be issued by TFSL from time to time;

iv) Accept and abide by any change in the terms and conditions of this Agreement including but not limited to the scope of service, which may in the absolute discretion of TTSL become necessary due to any change in law, rules and regulations or due to market dynamics, or due to any change in the terms or conditions of the said licenses granted by the DOT including any change in- the tariff or which change may be necessary to ensure that the Subscribers, general public get better Service and range of Products;

v) For all times to come, keep strictly confidential all information, data, details, customer lists, Manuals and all other documents, which Channel Partner may receive or acquire from TTSL, by virtue of it/him/her being appointed as TTSL channel partner;

vi) Appoint dealers/retailers/operators to work under it/him/her in the Service Area depending upon the requirements and/or as may be instructed/advised by TTSL from time to time;

vii) Have complete control over such dealers/retailers/operators and ensure their strict compliance of statutory obligations and rules, regulations and all other guidelines/instructions etc from TFSL, in their operation by means of thorough supervision of their activities;

viii) Pay applicable commissions/service charges in terms of the agreement between Channel Partner and the dealers/retailers/operators and ensure uninterrupted service in distribution of Products and Services;

ix) Follow the guidelines/stipulations that are outlined in the Manuals that may be supplied by TFSL, from time to time, Channel Partner agrees to and accordingly shall

8.5 Channel Partner agrees to and accordingly shall

i) Be liable to pay all the taxes such as sales tax, service tax applicable and payable in respect of the subject matter of this Agreement and any statutory increase in respect thereof;

ii) Maintain such marketing and distribution standards as are, in the opinion of TTSL, appropriate considering the quality and reputation of Products and Service;

iii) At all times promptly, efficiently and in businesslike manner provide top quality service to the Subscribers, potential subscribers and respond to any and all Customer/public enquiries regarding the Products and Service;

iv) Employ a fully trained service staff in accordance with the standards set by TTSL. The number of trained sales personnel shall be adequate to provide prompt and efficient services keeping in view the TTSL's service standards.

v) Advertise the Products and Services using the promotional materials or literature either supplied by or approved in advance in writing by TTSL and shall maintain stock of Point of Purchase (POP) material or any other printed material, advertisement material, etc. as specified by TTSL from time to time, which shall be used for the purpose of promotion and distribution of Products and Services. All such POP materials shall have TTSL logo and shall be printed' only after specific written approval of TTSL. However, any tax liability/ies, as may be applicable from time to time with respect to display of such POP materials in the Outlets shall be borne by the Channel Partner;

vi) Participate in all programmes and promotions and other activities, which TTSL may require Channel Partner to participate from time to time;

vii)At all times co-operate with and render all assistance to the representatives TTSL and report promptly to TTSL within 24 hours of any information, which may come to Channel Partner's notice regarding customer complaints or claims or feedback with respect to the Products and Services, Customer needs and interests and local market conditions and shall maintain a separate registers in respect of the same and the communications to TFSL.

viii) Provide a interest free security deposit as may be decided by TTSL from time to time, as a security for due performance and observance of all the terms and conditions of this Agreement, all the instructions from TTSL relating to the rules and regulations governing the Products and Services and any orders in connection therewith by the statutory authorities;

ix) Immediately inform TTSL, if at any point of time in future, any relative of Channel Partner/ persons in charge/control of Channel Partner/partners/associates of Channel Partner engaged in any Competing Service. Channel Partner has assured TTSL that at present no such person of Channel Partner is engaged in any business or activity in Competing Service;

x) Be responsible for the rent, rates, taxes and other expenses pertaining to the maintenance of the Outlets and provision of the distribution services thereat;

xi) Comply with all requirements/obligations/guidelines/instructions, established by TTSL for Channel Partners from time to time;

xii) Promptly inform TTSL forthwith in case of any change in the constitution of the Channel Partner and shall submit a copy of revised constitutional documentation to TTSL, within reasonable time. However this provision shall not apply if the Channel Partner is a proprietary concern.

8.6 Statutory Compliance

i) Channel Partner acknowledges and agrees that it/he/she having to associate with T under these presents, which is always demonstrating to be a good and responsible corporate citizen, shall have to conduct business at all times in strict compliance with all applicable laws, rules, regulations and other governmental/statutory/regulatory requirements, which is mandatory to maintain its association with TFSL as a channel partner. Accordingly, Channel Partner shall be responsible various labour enactments, including but not limited to the provisions of Provident Fund and Miscellaneous Provisions Act, Employees State Insurance Act 1948, Minimum Wages Act, Payments of Wages Act 1936, Shops and Establishments Act, Child Labour Act, other provisions under corporation/municipal & other local laws, and shall ensure that no person below the age of 18 years will be engaged directly or indirectly for execution of the terms of this Agreement. Channel Partner confirms that TTSL shall not be liable in any manner whatsoever for any non-compliance on the part of Channel Partner of the applicable laws and in the event of any adverse claims/actions/demands/proceedings of whatsoever nature arising thereof, the entire burden including costs and expenses shall be strictly borne by Channel Partner. Channel Partner agrees to indemnify and keep TTSL indemnified in respect hereof.

ii) Channel Partner shall maintain all requisite records, registers, account books etc. which are obligatory

under any applicable law and shall provide such information as may be required under any law to any authority.

iii) Channel Partner shall furnish a mandatory indemnity to TTSL in the format provided in Appendix 2 herein.

8.7 Channel Partner shall ensure that neither Channel Partner nor the dealers/retailers appointed by Channel Partner or anyone under any of them:

i) Make/s or give/s directly or indirectly, orally or in writing, any guarantees, representations or warranties, express or implied, with respect to the Products and Services, rate packages in the Products and Services, to the Customers or any Person, save and except as may have been expressly authorized by TTSL.

ii) Offer the Products and Service to anyone at rates or prices other than those specified by TTSL or provides incentives or subsidies, which have the effect of doing so.

iii) Engage or do or cause to be done or be a party to any unfair or unethical trade practices or any other business practice with respect to the distribution service or indulge in any illegal or unlawful activities.

iv) Carry on or allow anyone to carry on, at any time in its/his Outlets or any part thereof any other business including the business of any Competing Service or otherwise howsoever associating with any Competing Service.

8.8 Channel Partner expressly agrees that in view of rapidly changing market dynamics, TTSL shall have the right and option to revise the scope of the services to be rendered by Channel Partner from time to time based on the operational requirements and the same shall be final and binding on Channel Partner.

8.9 Channel Partner shall procure the Products from TTSL or such Person/s authorized TTSL. Channel Partner shall ensure that there is no sale of spurious and unauthorized Products from Channel Partner outlet(s) and/or the retails outlets under the control of Channel Partner.

8.10 It shall be the responsibility of Channel Partner to effect the sales and service through proper invoices or as may be advised by TTSL. In case of invoices, it shall serially numbered, dated and detailing the material particulars of the Products and Services, name and address of purchasers and after reasonable verification that such purchase is for subscribing for TTSL Service in

the circle in which the Channel Partner is appointed. If Channel Partner has been paid cash by TTSL or any Person at the instance of TTSL, on any Product sold to the Channel Partner by TTSL or any authorized dealer of TTSL, any lethargy, negligence in observing this condition or malafide act on the part of the Channel Partner would entitle TTSL to terminate this Agreement without notice and recover from Channel Partner the amount of subsidy/support on the quantity of the Products, which in the reasonable opinion of TTSL has been diverted to uses and/or areas not intended under this Agreement or in violation of uses/areas intended under any agreement signed by Channel Partner with authorized dealers/vendor/s of TTSL. This is without prejudice to right Of TTSL to take any other legal action including action for criminal breach of trust.

8.11 Channel Partner warrants that no officer, director, employee of TTSL or immediate family member thereof (collectively "TTSL personnel") has received or will receive anything of value of any kind from Channel Partner or its officers, directors, employees or agents (collectively "Channel Partner personnel") in connection with this Agreement and that no TTSL personnel have a business relationship of any kind with Channel Partner or Channel Partner personnel.

- i) Clause 10 of the Agreement provides for consideration payable by assessee to CP. The gist of this clause in so far as it relates to starter packs and RCVs is that the assessee will supply Starter Kits and RCVs to Channel Partner under sale invoices at a discount from the Maximum Retail Price (MRP). Clause 10.4 of the CPA provides that CP is liable to pay State and local taxes including Sales-tax in relation to the Agreement.
- j) Clause 15.2 provides that assessee shall have no obligation to take back products sold to CP.

4. As far as the present appeals are concerned, we are concerned only with mobile telephone services provided by the assessee to its customers through CP. In particular, we are concerned with the Starter Kits and RCVs that are provided by the assessee to CP who, in turn, provide them to the customers to enable them to use the mobile telephone services provided by the assessee. The

nature of these services provided by the Assessee needs to be explained. A mobile phone (also known as a cellular phone, cell phone and a hand phone) is a device that can make and receive telephone calls over a radio link while moving around a wide geographic area. It does so by connecting to a cellular network provided by a mobile phone operator, allowing access to the public telephone network.

5. A common component found on all phones is a Subscriber Identity Module SIM card and *Removable User Identity Module (RUIM)*. The SIM has information like the phone number and payment account and this is needed to make or receive calls. A **subscriber identity module (SIM)** is an integrated Circuit that securely stores the International Mobile Subscriber Identity (IMSI) and the related key used to identify and authenticate subscribers on mobile telephony devices (such as mobile phones and computers). A SIM is embedded into a removable SIM card, which can be transferred between different mobile devices. A SIM card contains its unique serial number (ICCID), international mobile subscriber identity (IMSI), security authentication and ciphering information, temporary information related to the local network, a list of the services the user has access to and two passwords: a personal identification number (PIN) for ordinary use and a personal unblocking code (PUK) for PIN unlocking. SIM cards store network-specific information used to authenticate and identify subscribers on the network. The most important of these

are the ICCID, IMSI, Authentication Key (KI), Local Area Identity (LAI) and Operator-Specific Emergency Number. The SIM also stores other carrier-specific data such as the SMSC (Short Message Service Center) number, Service Provider Name (SPN), Service Dialing Numbers (SDN), Advice-Of-Charge parameters and Value Added Service (VAS) applications.

6. The network is the company that provides the phone service. In most areas there will be more than one mobile network. Customers choose networks based on how well the different networks work in their area, or by price.

7. There are two main ways to pay for use of mobile telephone services:

Post paid: If you pay by contract you will pay the network money every month so that you can make calls.

Prepaid: If you pay as you use, you will pay for a fixed amount of call time credit which you then use up when phoning people. Once the credit is used up you must buy some more to use the phone.

8. As explained above, it is the card which enables the Assessee to provide and the customer to use the pre-paid/post-paid mobile telephone services.

9. As already explained, the Assessee to enable customers to avail of the services it provides appoints persons who are called "Channel Partners" (CP for short). CPs are appointed for various areas or regions. A customer who wishes to use the services of the Assessee approaches the CP. The CP gets all the required details of the customer. The customer is then given a starter pack which contains the terms and conditions subject to which the services will be provided and availed by the customer. It also contains the SIM card and the telephone number correlating to a particular SIM card number.

10. When the customer avails of prepaid mobile telephone services, he can purchase recharge vouchers from the CPs. The recharge vouchers will enable the customer to use the mobile telephone services equivalent to the value of the recharge vouchers.

11. Apart from Starter packs and Recharge vouchers, the CP also renders services whereby the mobile telephone services are activated, i.e., the customer is linked to the network of the Assessee and can also use the network of other mobile telephone service providers as well as telephone service providers. There is no dispute in these appeals that the charges paid by the Assessee to CP for services rendered for activating the SIM card is in the nature of commission paid by the Assessee attracting the provisions of Sec.194-H of the Act.

12. The assessee to enable its customers to use its services gives Starter packs as well as recharge vouchers to its CPs. The Assessee raises commercial invoices in respect of each and every sale of product to the CP. While the MRP value of the products are fixed at the time of raising invoices the products are priced at the discounted price agreed to between the assessee and the CP. The CPs, however are free to sell the products to retailer at any price (but not exceeding the MRP) and retain the margin with them as their share of profit.

13. The Assessing Officer i.e. the Income-tax Officer, TDS Ward, considered the terms and conditions of the agreement and also going by the nature of services provided, concluded that the actual relationship in regard to this transaction between the assessee and the Distributor is that of Principal and Agent. He also concluded that the difference between the price fixed (i.e. MRP) and the price charged for them by the assessee, constitutes only Commission payment. Therefore, the stand of the Assessing Officer is that the difference denotes deemed payment of Commission which falls under the realm of the provisions of Section 194H of the Act. The assessee on the other hand took the stand that on the basis of the terms and conditions entered into with the Distributors, the relationship was not that of Principal and Agent as has been held by the Assessing Officer. It was the stand of the assessee that the difference between the invoiced price and

the MRP is only in the nature of sales/trade discount. The relationship between the assessee and Distributor is nothing but Principal to Principal. The AO did not agree with the submissions of the Assessee. Consequently order u/s.201(1) & 201 (1A) was passed treating the Assessee as Assessee in default in respect of tax not deducted at source u/s.201(1) of the Act and also passed order levying interest u/s.201(1A) of the Act. The CIT(A) concurred with the view of the AO. Aggrieved by the order of the CIT(Appeals) upholding the applicability of section 194H in respect of difference between the MRP of Starter Kit/packs and RCVs and the price at which they were given to the CP, the assessee preferred appeals being ITA Nos.308 to 310/Bang/2011 for assessment years 2006-07 to 2008-09.

14. Apart from the above, the assessee has arrangement with several banks whereby the customers of the assessee, who also hold Credit Card of such banks, can make payment for services utilized by them from the assessee through Credit card. The banks agree to render payment processing services to the assessee in consideration for the assessee making payment of fee to the bank. The assessee does not make any payment to banks. When a customer makes payment by credit card of a bank, the bank processes payment to the assessee after retaining for it the fees for processing the payment and remits the remaining sum to the assessee. According to the Revenue the fee retained by the bank is also in the nature of commission and therefore the

assessee ought to have deducted tax at source on such payment u/s 194H of the Act. An order u/s 201(1) and 201(1A) of the Act was passed by the AO for assessment years 2005-06 to 2008-09 treating the assessee as assessee in default for not deducting tax at source on the tax so not deducted and levying interest thereon from the date on which tax sought to have been deducted till actual payment of such taxes to the Government.

15. On appeal by the assessee, the CIT(Appeals) held that provisions of section 194H of the Act were not attracted in respect of such payments. The relevant observations of the CIT(Appeals) were as follows:

"7. The next ground of appeal is with regard to TDS on credit card payments. The A.O noticed that the appellant company was collecting its payments from the customers through credit card companies and in that process these credit card companies are earning commission from the appellant company. The A.O felt that the appellant company is liable to deduct tax at source U/s 194 H of the IT act 1961 and accordingly raised demands U/S-201(1) & 201(IA) of the IT Act.

The arguments of the appellant are as under.

'The appellant had arrangements with banks, wherein the appellant used to get the payments made by its subscribers through credit cards discounted. The procedure is as under.

i. The appellant takes EDC machines (Card Swipe Machines,) from designated banks. Each machine is having a Merchant Establishment (ME) number.

ii A specific percentage rate called Merchant Discounting Rate(MDR,) will be negotiated.

iii. These machines are installed at various collection locations.

iv. The subscriber walks in and swipes his card. Through online authorization process, the payment can be approved/rejected.

v. For approved payments, designated bank gives credit to appellant's bank account in the agreed time. The credit will be net amount (Gross amount paid by customer - MDR)

vi. After the collections are credited to appellants account, the designated bank, in turn collects the amount from various bank based on the card issuer bank. This settlement will take some time lag. As a result the designated bank collects the discount charges from the appellant's payments.

The appellant further argued that there is no principle to agent relationship between the appellant and time banks and hence provisions of section 194H of the IT Act 1961 are not applicable. The MDR charges are nothing but Bill Discounting Charges and would fall within the definition of the term interest as envisaged U/S-2(28A) of the IT Act 1961. Thus ordinarily, if at all any TDS provisions apply, it could be only 194A. However clause (iii) to sub section (3) to section 194A specifically provides that the provisions of sub section (1) shall not apply to such income credited or paid to any banking company.

8. I have carefully considered the arguments of both the A.O and the appellant. I found that the stand taken by the appellant is in order and accordingly the demands raised by the A.O U/S-201(1) & 201(1A) as mentioned below are cancelled.

Assessment Year : 2005-06	Demand raised U/S 201(1) Rs. 38,940/- Interest U/S 201(1A) Rs. 18,922/- Total Rs. 57,862/-
Assessment Year : 2006-07	Demand raised U/S 201(1) Rs. 69,449/- Interest U/S 201(1A) Rs. 26,016/- Total Rs. 95,465/-
Assessment Year : 2007-08	Demand raised U/S 201(1) Rs. 58,253/- Interest U/S 201(1A) Rs. 14,808/- Total Rs. 73,061/-
Assessment Year : 2008-09	Demand raised U/S 201(1) Rs. 77,111/- Interest U/S 201(1A) Rs. 10,130/- Total Rs. 87,241/-"

16. Aggrieved by the order of the CIT(Appeals) in holding that provisions of sec.194H of the Act are not applicable to Credit card payments to banks, the Revenue has filed appeals before the Tribunal being ITA Nos.393 to 396/Bang/2011 for assessment years 2005-06 to 2008-09.

17. When the above appeals of the assessee and the revenue came up for hearing, it was pointed out by the Bench that separate appeals have to be filed in respect of liability arising out of order u/s 201(1) and levy of interest u/s 201(1A) of the Act, though common orders have been passed by the AO as well as the CIT(Appeals) u/s 201(1) and 201(1A) of the Act. Consequent to such directions of the Tribunal, the assessee filed six appeals which are ITA Nos.1285 to 1290/Bang/2012. The Revenue has also filed eight appeals being ITA Nos.1014 to 1021/Bang/2012. Though these appeals have been filed beyond the period prescribed for filing appeals before the Tribunal against the order of the CIT(Appeals), since these appeals were filed on directions by the Bench, the delay, if any, in filing these appeals is purely technical and deserves to be condoned. We, therefore, proceed to consider these appeals on merits.

18. As far as the original appeals filed by the revenue being ITA Nos.393 to 396/Bang/2011 and by the assessee being ITA Nos.308 to 310/Bang/2011, the substance of these appeals is identical to another appeals filed by the revenue and the assessee. These appeals are, therefore, treated as superfluous and dismissed as not requiring any consideration.

19. We shall take up for consideration the appeals by the Assessee. The provisions of Sec.194-H of the Act read as under:

"Section 194H: COMMISSION, BROKERAGE, ETC.

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of October, 1991 but before the 1st day of June, 1992, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten per cent.

(2) The provisions of sub-section (1) shall not apply -

(a) To such persons or class or classes of persons as the Central Government may, having regard to the extent of inconvenience caused or likely to be caused to them and being satisfied that it will not be prejudicial to the interests of the revenue, by notification in the Official Gazette , specify in this behalf;

(b) Where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person referred to in sub-section (1) to the account of, or to, the payee, does not exceed two thousand five hundred rupees.

Explanation : For the purposes of this section, -

(i) "Commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing;

(ii) "Professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of

accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(iii) Where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

20. It is clear from the aforesaid provision that taxes have to be deducted at source by a person responsible for paying any income by way of commission or brokerage. The expression "commission" or "brokerage" has been defined in the explanation, which includes any payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying and selling of goods or in relation to any transaction relating to following:

- (i) For services rendered (not being professional);
- (ii) For any services in the course of buying and selling of goods or in relation to any transaction relating to any asset, valuable article or thing

21. Sec. 201(1) of the Act provides that where a person is obliged to deduct tax at source in accordance with the aforesaid provisions fails to deduct tax at source or after deducting tax at source fails to pay it to the Government then such person will be deemed to be an Assessee in default and is liable to pay the tax not so

deducted or not paid. Further Sec.201(1A) provides that such person shall also be liable to pay interest on the tax not so deducted or paid from the date on which such tax ought to have been paid to the Government till such time such taxes are paid to the Government.

22. The main contention of the learned counsel for the assessee before us was that the relationship between the assessee and the CP was purely principal to principal relationship and there was no element of agency involved whatsoever. It was submitted that there was outright sale on starter kit and recharge vouchers by the assessee to CP and in this regard our attention was drawn to several clauses in the CPA which refers to the fact that the CP has to pay sales tax. It was also highlighted that the CP is liable for all loss, pilferage, damage to the products and was also liable to take insurance on the products. The above features in the CP, according to the learned counsel for the assessee, clearly show that there was no contract agency between the assessee and the CP. It was also argued that the assessee gives the product to the CP at a particular price which is less than the MRP. The assessee does not have control on the price at which the CP sells the products to the customers. It was therefore argued that assessee does not know as to what is the commission in respect of which it has to deduct tax at source u/s 195H of the Act. Our attention was drawn to the invoice, a copy of which is placed at page 328 of the assessee's paper book. It was pointed out that the invoice

clearly declares that the goods are being sold by the assessee to CP. It was pointed out that on delivery of RCV (recharge vouchers) starter kit, there is a transfer of ownership in goods from the assessee to the CP. It was also submitted that SIM card is specific and ascertained goods and on delivery to the CP, ownership in SIM card is transfer to the CP. The learned counsel for the assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of *Ahmedabad Stamp Vendors Association* (2012) 25 Taxman 201 (SC) wherein the decision of the Hon'ble Gujarat High Court was affirmed. The decision of the Hon'ble Gujarat High Court is reported in 257 ITR 202. The question before the Hon'ble Gujarat High Court was as to whether the difference between the face value of the stamps and the price at which the licensed stamp vendors get stamps from the Government is commission. On the question as to whether the difference between face value of the stamp and the price at which the Government gives the same to the stamp vendor was commission within the meaning of section 194H of the Act, it was held that there was no contract of agency between the Government and the stamp vendor and that it was a case of sale and there is no element of service involved whatsoever and the provisions of sec.194H of the Act were not attracted. Besides the above, the following decisions were also referred to viz., *ACIT vs Samaj* (2001)77 ITD 358 (Cuttack) which was a case of sale of newspapers by a newspaper publisher to its sales agents. It was held that there was an outright sale of the newspaper to the sales

agent at a discounted price and therefore sec.194H of the Act did not apply. The learned counsel for the assessee also relied on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Jai Drinks Pvt. Ltd.* (336 ITR 383). It was a case where the question involved was as to whether the difference between the MRP and the price at which manufacturer of soft drinks gave it to the distributor of soft drinks was commission within the meaning of sec.194H of the Act. The Hon'ble High Court held that there was no principal-agency relationship between soft drink manufacturer and the distributors and the provisions of sec.194H of the Act were not attracted. The learned counsel for the assessee fairly admitted that the Hon'ble Delhi High Court, in the case of *CIT vs. IDEA Cellullor Ltd.* (230 CTR 43) and the Hon'ble Kerala High Court in the case of *Vodafone Essar Cellular Ltd. vs. ACIT* (332 ITR 255)(Ker) have taken a view that the difference between the MRP at which SIM card were given by the Telecom Service Provider to the distributors was in the nature of commission of attracting the provisions of sec.194H of the Act. He pointed out that in the aforesaid cases on the terms of the Agreement between the distributor and the Telecom Service Provider, the court found that there was relationship of principal-agent and therefore applicability of sec.194H was upheld. It was his submission that in the present case there was transfer of ownership in the SIM card from the assessee to the CP and therefore those decisions will not have any application to the facts of the present case.

23. The learned Departmental Representative submitted that Starter kits and SIM card are not tangible properties. It was his submission that SIM card merely enables the customer to avail services provided by the Telecom Services Provider. According to him, SIM card and RCV cannot be considered as goods. He placed strong reliance on the decision of the Hon'ble Delhi High Court in the case of *IDEA Cellullor Ltd. (supra), Vodafone Essar Cellular Ltd. (Ker.)*. His submission was that the attempt by the learned counsel for the assessee to distinguish those cases on the ground that the business model in those cases was different, cannot be accepted. In this regard, it was his submission that one has to see the substance of the transaction over the form in which the transaction is sought to be projected. According to him, the substance of the transaction for sale of SIM card and RCV is nothing but a medium through which the customer can avail the services provided by a telecom service provider. Except such use, SIM card and RCV have no intrinsic value and the distributor purchasing the same from the Telecom operator will have no use whatsoever of the SIM card and RCV. It was the learned DR's submission that the agreement between the parties cannot be conclusive in such matters. In substance, difference between the MRP and the price at which the SIM card and RCV are sold to the distributor is only a commission for services rendered by the distributor to enable the Telecom service provider to sell his services to the ultimate customer.

24. We have considered the rival submissions. Before we deal with the various contentions of the parties before us, it should be mentioned that the issue that arises for consideration in these appeals has already been considered and decided by various Hon'ble High Courts and different benches of the Tribunal. It would be better to refer to those decisions and the ratio laid down therein so that we can appreciate the contentions put forth by the parties before us which were based on the aforesaid decisions.

25. As we have already seen there is a process of activation of the SIM cards for which charges are collected by the telecom service provider from the customers. Service tax on such charges were payable by the telecom service provider. On sale of SIM cards the telecom service provider was paying sales tax. The sales tax authorities included the activation charges as part of the sale consideration of the SIM cards on the ground that such activation was nothing but a value addition of the goods and thus covered under the definition of 'goods' under the relevant sales tax law. On the other hand, the service tax authorities proceeded on the basis that a mere SIM card, without activation, was of no use and consequently held that the appellants were liable to pay service tax on the value of the SIM cards as well. Thus, both the sales tax and the service tax authorities proceeded to charge their respective taxes on the entire value of the transaction relative to SIM cards, including the activation charges.

26. There was a challenge to double taxation of the transactions relating to SIM cards. The Hon'ble Supreme Court in BSNL vs. UOI (2006) 3 SCC 1 dealt with this issue. The Hon'ble Supreme Court held that the question as to what a SIM card actually represented was a question of fact and in determining the issue, the principle to be kept in mind was as to what was the intention of the parties regarding the SIM card transaction. If the parties intended that the SIM card would be a separate object of sale, it will be open to the sales tax authorities to levy the tax. However, if the sale of the SIM card was merely incidental to the services being provided and only facilitated the identification of the subscriber and other details, it would not be assessable to the sales tax. Consequently, the Supreme Court held that both taxes could not possibly apply to the transaction in question and based on the above determination of intent, only one or the other tax would apply. Accordingly, the Supreme Court remanded the matter in the above decision in the BSNL case to the sales tax authorities. M/s. Idea Mobile Communication Ltd., a telecom service provider was also party to the proceedings in the case of BSNL (supra). They challenged the levy of service tax including the value of the SIM card before the Hon'ble Supreme Court. They had also filed appeals before the Central Excise and Service Tax Tribunal (Tribunal) challenging the levy of service tax which were pending when the Hon'ble Supreme Court decided the case of BSNL (supra). After the order of the Hon'ble Supreme Court in the case of BSNL (supra), the Central Excise and Service Tax

Tribunal (Tribunal) set aside the imposition of the service tax which decision was, in turn, set aside by the Kerala High Court, which reinstated the original service tax demand. Against the order of the Hon'ble Kerala High Court, M/S.Idea Mobile Communication filed appeal before Hon'ble Supreme Court. In the meanwhile their case was duly taken up by the sales tax authorities who took the view that SIM cards had no intrinsic sale value and dropped the proceedings. Thus, the transactions relating to SIM cards were held not taxable to sales tax and these proceedings stood concluded.

27. Again the question came up for consideration before the Hon'ble Supreme Court regarding double taxation viz., service tax as well as sales tax on the same transaction. In CIVIL APPEAL No. 6319 OF 2011 [Arising out of SLP(C) No. 24690 of 2009] in the case of IDEA MOBILE COMMUNICATION LTD. Vs.C.C.E.C.,COCHIN rendered on 4.8.2011, the Hon'ble Supreme Court has again addressed the issue of the chargeability of such transactions to the appropriate indirect tax, i.e, the service tax or sales tax/VAT.

28. The Hon'ble Supreme Court examined the nature of SIM Card and observed as follows:

"11. We have examined the materials on record in the light of the facts placed before us and also the decisions referred to and relied upon by the counsel appearing for the parties.

12. A SIM Card or Subscriber Identity Module is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into cell phones at the time of signing on as a subscriber. The SIM Card holds the details of the subscriber, security data and memory to store personal numbers and it stores information which helps the

network service provider to recognize the caller. As stated hereinbefore the Kerala High Court had occasion to deal with the aforesaid issue and in that context in its Judgment pronounced on 15th February, 2002 in Escotel Mobile Communications Ltd. vs. Union of India and Others, reported in (2002) Vol. 126 STC 475 (Kerala), it was stated in paragraph 36 that a transaction of selling of SIM Card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber. The Kerala High Court in the facts and circumstances of the case observed at paras 36 and 47 as under: -

"36. With this perspective in mind, if we analyse the transaction that takes place, it appears to us that there is no difficulty in correctly understanding its facts. The transaction of selling the SIM. card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber, Hence, while the State Legislature is competent to impose tax on "sale" by a legislation relatable to entry 54 of List II of Seventh Schedule, the tax on the aspect of "services" rendered not being relatable to any entry in the State List, would be within the legislative competence of Parliament under Article 248 read with entry 97 of List I of the Seventh Schedule to the Constitution. We are, therefore, unable to accept the contention of Mr.Ravindranatha Menon that there is any possibility of constitutional invalidity arising due to legislative incompetence by taking the view that "sale" of SIM card is simultaneously exigible to sales tax as well as service tax. Once the "aspect theory" is kept in focus, it would be clear that the same transaction could be exigible to different taxes in its different aspects. Thus, we see no reason to read down the legislation as suggested by Mr. Menon.

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47. Conclusions:

(a) The transaction of sale of SIM Card is without doubt exigible to sales tax under the KGST Act. The activation charges paid are in the nature of deferred payment of consideration for the original sale, or in the nature of value addition, and, therefore, also amount to parts of the sale and become exigible to sales tax under the KGST Act.

(b) Both the selling of the SIM Card and the process of activation are "services" provided by the mobile cellular telephone companies to the subscriber, and squarely fall within the definition of "taxable service" as defined in section 65(72)(b) of the Finance Act. They are also exigible to service tax on the value of

"taxable service" as defined in Section 67 of the Finance Act."

29. The Hon'ble Supreme Court thereafter noticed that the sales tax authorities did not levy sales tax on sale of SIM cards accepting the plea of the telecom service provider that SIM card merely enables providing telecom service to customers and cannot be considered as goods. The Hon'ble Supreme Court noticed that the CESTAT took a view that value of SIM card sold should not be treated as part of taxable service which was reversed by the Hon'ble Kerala High Court. The Hon'ble Supreme Court finally concluded as follows:

"17. The High Court has given cogent reasons for coming to the conclusion that service tax is payable inasmuch as SIM Card has no intrinsic sale value and it is supplied to the customers for providing mobile service to them. It should also be noted at this stage that after the remand of the matter by the Supreme Court to the Sales Tax authorities the assessing authority under the Sales Tax Act dropped the proceedings after conceding the position that SIM Card has no intrinsic sale value and it is supplied to the customers for providing telephone service to the customers. This aforesaid stand of the Sales Tax authority is practically the end of the matter and signifies the conclusion.

18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM Card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or not. It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are

generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

19. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.

20. That being the position, we find no infirmity with the findings and reasoning in the Judgment and Order passed by the High Court and therefore the appeal has no merit and the same is dismissed."

30. Thus the Hon'ble Court concluded that the amount received by the telecom company from its subscriber towards the SIM card would form part of the taxable value for the levy of service tax in relation to the activation charges, which were undeniably in the nature of a service, since the SIM card was never sold independent from the above service and was hence considered part and parcel of such service. The dominant intent of the transaction was clearly to provide services and not to sell any goods. It was thus held that value of the SIM card formed part of

the activation charges since no activation was possible without a valid functioning SIM card. The Supreme Court opined that it was precisely for this reason that the sales tax authorities had withdrawn their attempt to tax such services to the sales tax. Consequently, it held that the sale and supply of SIM cards to subscribers, including the activation charges, was indeed intended and dealt with by both parties as services and not as sale of goods. Therefore, the charge of service tax in this regard was upheld by the Court.

31. The aforesaid judgment of the Hon'ble Supreme Court should be considered as settling the issue as to whether the transactions relating to supply of SIM cards between telecom operators and the subscribers would be charged to just the one tax i.e. the service tax and not the sales tax.

32. As far as the decisions relied upon by the learned counsel for the assessee are concerned, we are of the view that in the light of the later decision of the Hon'ble Supreme Court, those decisions can no longer be considered as binding. We are of the view that the decision of the Hon'ble Delhi High Court in the case of *Jai Drinks Pvt. Ltd.* (supra) as well as the decision of the Hon'ble Gujarat High Court in the case of *Ahmedabad Stamp Vendors Association* (supra) stand on a different footing. Inasmuch as in both the aforesaid cases, there was a tangible asset which was subject matter of sale. As we have already seen, the Hon'ble

Supreme Court has held that SIM card has no tangible value and it is merely a medium through which the customer enjoys the services provided by a telecom service provider. The Hon'ble Supreme Court has taken a view that there is no element of sale involved. In view of the aforesaid decision of the Hon'ble Supreme Court, we do not think that the decisions relied upon by the learned counsel for the assessee and arguments based on the terms of CP Agreement, will be of any assistance. We, therefore have, no hesitation in upholding the order of the CIT(Appeals).

33. The learned counsel for the assessee had made a submission before us that in any event, determination of tax payable u/s 201(1) of the Act should be done after taking into consideration the decision of the Hon'ble Supreme Court in the case of *Hindustan Coca Cola Beverages P. Ltd. vs. CIT* (293 ITR 226)(SC) wherein it was held that if the payee has made payment of taxes then to that extent, the assessee should not be considered as an assessee in default. We are of the view that it would be just and appropriate to direct the AO to consider the claim of the assessee only with regard to determination of the liability u/s 201(1) of the Act. To this extent, the appeals of the assessee challenging the order u/s 201(1) stand partly allowed for statistical purposes. The appeals of the assessee, challenging levy of interest u/s 201(1A) of the Act, however, stand dismissed.

34. As far as the appeals of the revenue are concerned, we find that the question involved in the aforesaid appeals is as to whether the payments on account of credit card charges should be treated as commission within the meaning of sec.194H of the Act. On this issue, we find that the Hon'ble ITAT, Hyderabad, has held as follows:

"4. We heard the Learned Departmental Representative and perused the orders of the lower authorities and other material on record. Assessee is a company engaged in the business of direct retail trading in consumer goods. Assessee claimed deduction of Rs.16,34,000 on account of commission paid to the credit card companies, which has been disallowed by the assessing officer in terms of S.40(a)(ia) on account of the failure of the assessee to deduct tax at source in terms of S.194H of the Act, while making the said commission payments. It was the contention of the assessee before the lower authorities that the assessee only receives the payment from the bank/credit card companies concerned, after deduction of commission thereon, and thus, this is only in the nature of a post facto accounting and does not involve any payment or crediting of the account of the banks or any other account before such payment by the assessee. Considering these submission of the assessee, the CIT(A) accepted the claim of the assessee for deduction of the amount of Rs.16,34,000 on the following reasoning-

'9.8 On going through the nature of transactions, I find considerable merit in the contention of the appellant that commission paid to the credit card companies cannot be considered as falling within the purview of S.194H. Even though the definition of the term "commission or brokerage" used in the said section is an inclusive definition, it is clear that the liability to make TDS under the said section arises only when a person acts behalf of another person. In the case of commission retained by the credit card companies however, it cannot be said that the bank acts on behalf of the merchant establishment or that even the merchant establishment conducts the transaction for the bank. The sale made on the basis of a credit card is clearly a transaction of the merchants establishment only and the credit card company only facilitates the electronic payment, for a certain charge. The commission retained by the credit card company is therefore in the nature of normal bank charges and not in the nature of commission/brokerage for acting on behalf of the merchant establishment. Accordingly, concluding that there was no requirement for making TDS on the 'Commission retained by the credit card companies, the disallowance of Rs.16,34,000 is deleted....'

We find no infirmity in the above reasoning given by the CIT(A). We accordingly uphold the order of the CIT(A) and reject the grounds of the Revenue which are devoid of merit."

35. In light of the aforesaid decision of the Hon'ble Hyderabad Bench, we are of the view that payments to banks on account of utilization of credit card facilities would be in the nature of bank charge and not in the nature of commission within the meaning of sec.194H of the Act. We, therefore, confirm the order of the CIT(Appeals) on this issue and dismiss the appeals of the Revenue.

36. In the result, appeals bearing ITA Nos.1285, 1287 & 1289/Bang/2012 are treated as partly allowed for statistical purposes while all other appeals are dismissed.

Order pronounced in the open court on 27th November 2012.

Sd/-
(N.Barathvaja Sankar)
VICE-PRESIDENT

Sd/-
(N.V.Vasudevan)
JUDICIAL MEMBER

eksrinivasulu

Copy to :

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

By Order

Senior Private Secretary
Income-tax Appellate Tribunal,
Bangalore