Income Tax Appellate Tribunal - Ahmedabad
Vodafone Essar Gujarat Ltd.,, ... vs Assessee on 7 July, 2015

I.T.A. No.: 386 /Ahd/11
Assessment year: 2008-09

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD A BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and S.S. Godara JM]

I.T.A. No.: 386/Ahd/11
Assessment year: 2008-09

Vodafone Essar Gujarat Limited .....Appellant
Vodafone House
Corporate Road, Prahlad Nagar
Off C G Road, Ahmedabad 380 051
[PAN: AAACF1190P]

Vs.

Assistant Commissioner of Income Tax
TDS Circle, Ahmedabad .....Respondent

Appearances by:

S N Soparkar and Dhinal Shah, for the appellant
Subhash Bains, for the respondent

Date of concluding the hearing: April 21, 2015
Date of pronouncing the order: July 7, 2015

O R D E R

Per Pramod Kumar AM:

1. By way of this, the assessee appellant has called into question the correctness of order dated 31 st December 2010 passed by the learned CIT(A), in the matter of tax withholding demand raised under section 201(1) and 201(1A) read with Section 194 H of the Income Tax Act, 1961, for the assessment year 2008-09.

2. In the first ground of appeal, the assessee has raised the following grievance:

> The CIT(A) has erred in upholding the tax liability of Rs 6,00,99,245 (excluding interest under section 201(1A) of the Act determined by the Assistant Commissioner

> of Income Tax -TDS by treating the appellant as an assessee in default in respect of non deduction of I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 tax at source on trade discount of Rs 51,67,60,486 granted to prepaid distributors by holding the same as commission and hence liable for deduction of tax at source under the provisions of Section 194H of the Act.

3. The assessee, engaged in the business of providing mobile telephone services, was subjected to a survey on its business premises on 26 th August 2008. During the course of this survey, it was noted that the assessee sells "pre-paid vouchers, of various face value, to its distributors, at a rate lower than its face value". It was also noted that the "the difference (between the face value and the price at which is sold) is nothing but commission on which no tax has been deducted". It was also noted "the relationship between the .... (appellant) and the distributor was on principal and agent basis, and, therefore, any amount paid to the agent by way of the margin is commission". It was also noted that under section 194H, a person making payment for commission has the obligation to deduct tax at source, but the assessee has not complied with this statutory obligation. It was in this backdrop that the assessee was that the proceedings for treating the assessee as an assessee in default, in this respect, were initiated against the assessee. During the course of these proceedings, it was explained by the assessee that there is no principal agent relationship between the assessee and its distributors, and that the assessee sells the products, on the outright sale basis though at a discounted price, to its distributors who, in turn, are free to sell the same to the retailer at such price, as they may deem expedient, within the MRP. It was also explained that the distributors are making advance payments to the assessee, that the distributors are free to decide their terms and conditions of doing business with the retailers, and that, as per specific provisions in the agreement entered into by the assessee and the distributors, the assessee is not responsible for created by the distributor. The relationship between the assessee and the distributors, it was thus highlighted, is on principal to principal basis. It was submitted that since distributor does not render any service to the assessee, the difference between the sale p rice and the MRP cannot be treated as discount for the purposes of Section 194H. Certain I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 judicial precedents were also cited by the assessee to support his case but, for the reasons we will set out in a short while, it is not really necessary to go into that aspect of the matter. None of these submissions, however, impressed the Assessing Officer. He proceeded to reject these submissions and hold the assessee as an assessee in default, for not deducting tax at source from commission on sale of prepaid airtime, under section 201 of the Income Tax Act, 1961. While doing so, the Assessing Officer observed as follows:

> The above submission of the assessee have been duly considered. However, the same is not acceptable on the following grounds: -
>
> Before making any conclusion that difference between MRP and Sale Price to distributor is commission or riot it is necessary to ascertain that whether the nature of business entered into between the company and distributor are sale and purchase of goods or providing service through various distributors/ agents.

The Hon'ble High Courts of Kerala WP No. 29202/2001 in the case of BPL Mobile Ltd. held that sim card as well as recharge company delivered by BPL Mobile Cellular Ltd is to be considered as transaction between Service Provider & Distributors and the said transaction is only that of service and not sale and purchase of goods.

In the present case the deductor is doing exactly the same business. Therefore, it is not possible to hold that sim card and recharge coupon delivered by the company to distributors are goods because the relationship between the company and distributors is to provide service to customers through distributors. It is quite apparent that service can only be rendered and not sold. This is because the company has right to operate of cellular telephone service provided and ultimate service is provided by the company to every customers. The distributors are acting and link in the chain of providing Mobile service. Ultimate service are provided by company to the public at large. Therefore, essence of service rendered by the distributors are not sale of any product or goods. Since it is not possible for the company to provide all these services directly to the customers, the deductor has made out business solution to appoint distributors to take care of operational activity of the company to provide service and the distributor is important link in that chain of service. Moreover, the essence of prepaid card and postpaid card, sim card etc are same to provide service to customers and difference is of billing.

I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 In prepaid card amount are received in advance whereas, in postpaid card bills are being raised after providing the service. Therefore, if postpaid card is subject to section 194H, it is quite unlikely that prepaid system would be outside the purview of section 194H. This view has also been upheld by The Hon'ble Delhi High Court in the case of CIT v/s Idea Cellular Limited in appeal No.2010-TIOL-139-HC-DEL-IT in which it is held that it is a case of Principal and Agent relationship and the commission offered in form of Discount on pre paid SIM Cards is liable to TDS u/s 194H of the IT Act.

In view of the above facts and considering the findings in the case of M/s. BPL Mobile Cellular Limited (WP No. 29202 of 2005), and also in view of finding of Delhi High Court, the essence of the contract between company and distributors is that of service and margin between MRP and sale price is nothing but commission. This view has also been upheld by the Hon'ble ITAT, Cochin in ITA No. 106 to 113/Coch/2007 in the case of Vodafone Essar Cellular Limited vs. ACIT, Cochin (in the case of deductor itself). The Hon'ble ITAT has taken into consideration all relevant facts and the decision cited by the company and held that there is no relationship of principal to principal and difference of price -is nothing but commission.

In view of the above, I am of the considered view that deductor is liable to deduct the tax at source u/s.194H on amount of difference between MRP and sale price paid by the distributors. The such difference is works out to Rs.51,67,60,486/-. Therefore, the deductor is treated as deemed defaulter u/s,201(1) of the I.T. Act to the above extent

and also liable to charge interest u/s.201(1A) of the I.T. Act.

4. Aggrieved by the stand so taken by the Assessing Officer carried the matter in appeal before the CIT(A) but without much success. Learned CIT(A) extensively reproduced from the written submissions filed by the assessee and then proceeded to dismiss the grievance of the assessee on the basis of the following reasoning:

> 2.09 I have considered the facts of the case and the submissions as advanced by the AR carefully and I have also gone through th e various decisions cited by the AR. The dispute in this ground is whether discount offered to distributors by the assessee can be considered to be commission so as to subject to TDS under provisions of Section 194H of the Act.
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> I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 2.10 In my view, the case of the appellant is squarely covered by the judgment of the Kerala High Court in the case of Vodafone Essar Cellular Limited reported at 235 ITR 393. The Kerala High Court has, in paragraph 6, categorically held as under:
>
> .....because we have clearly found that the discount paid to the distributors is for service rendered by them and the same amounts to "commission" within the meaning of that term contained under Expln. (i) to s. 194H of the Act. The impugned orders issued under ss. 201(1) and 201(1A) of the Act are only consequential orders passed on account of default committed by the assessee under s. 194H and, therefore, those orders were rightly upheld by the Tribunal. We, therefore, dismiss all the appeals filed by the assessee.
>
> Thus, respectfully following the above judgment of Hon'ble Kerala High Court (in the case of the group company of the appellant), I am of the view that discount offered by the appellant to its prepaid distributors is in the nature of commission within meanings of Explanation (i) to Section 194 H of the Act. I, therefore, hold that the learned AO has rightly held that the appellant was required to deduct tax at source under section 194 H of the Act on commission given by the assessee.

5. The assessee is not satisfied with the stand so taken by the learned CIT(A) as well, and is in further appeal before us.

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

7. We find that what is sold by the assessee is airtime, whether through the physical vouchers or through the electronic transfer of refill/ recharge value, to its distributors. It is this transaction which is subject matter of different perceptions, so far as tax withholding obligations of the seller are concerned, of the parties before us. As a matter of fact, the assessment order itself states that the assessee has sold the "pre-paid vouchers, of various face value, to its distributors, at a rate lower

than its face value ", and that "the difference (between the face value and the price at which is sold) is nothing but commission on which no tax has been deducted ". The short I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 issue that we are required to adjudicate in this appeal is whether the provisions of section 194H will come into play in respect of the difference between the price at which the airtime is thus sold to the distributors and its recommended retail price to the end consumers.

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

9. This issue is covered, in favour of the assessee, by Hon'ble Karnataka High Court's common judgement in the cases of Bharti Airtel Limited, Tata Teleservices Limited and Voadfone South Limited, reported as Bharti Airtel Limited vs. DCIT [(2015) 372 ITR 33 (Kar)] wherein their Lordships have, inter alia, observed as follows:

> "62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these 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 assessees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a sub distributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit 86 earned by the distributor, sub-distributor and the retailer would be dependent on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow 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.

63. It was contended by the revenue that, in the event of the assessee deducting the amount and paying into the department, ultimately if the dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.

64. In the case of Vodafone, it is necessary to look into the accounts before granting any relief to them as set out above. They I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 have accounted the entire price of the prepaid card at Rs.100/ - in their books of accounts and showing the discount of Rs.20/- to the dealer. Only if they are showing Rs.80/- as the sale price and not reflecting in their accounts a credit of Rs.20/- to the distributor, then there is no liability to deduct tax under Section 194H of the Act. This exercise has to be done by the assessing authority before granting any relief. The same exercise can be done even in respect of other assessees also.

65. In the light of the aforesaid discussions, we are of the view that the order passed by the authorities holding that Section 194H of the Act is attracted to the facts of the case is unsustainable."

10. As we take note of the views so expressed by Hon'ble Karnataka High Court, we may also note that this issue has been decided against the assessee by, amongst others, Hon'ble Kerala High Court, in the case of Vodafone Essar Cellular Ltd vs. ACIT [(2010)332 ITR 255 (Ker)]. The same approach has been adopted by some various other Hon'ble non jurisdictional High Courts as well, such as in the cases of Bharti Cellular Limited Vs ACIT [(2013) 354 ITR 507 (Cal)] and CIT Vs Idea Cellular Limited [(2010) 325 ITR 148 (Del)]. In the case of Vodafone Essar Cellular Ltd (supra) Their Lordships have, inter alia, observed as follows :-

> 4. The main question to be considered is whether Section 194H is applicable for the "discount" given by the assessee to the distributors in the course of selling Sim Cards and Recharge coupons under prepaid scheme against advance payment received from the distributors. We have to necessarily examine this contention with reference to the statutory provisions namely, Section 194H ....
>
> What is clear from Explanation (i) of the definition clause is that commission or brokerage includes any payment received or receivable directly or indirectly by a person acting on behalf of another person for the services rendered. We have already taken note of our finding in BPL Cellular's case (supra) abovereferred that a customer can have access to mobile phone service only by inserting Sim Card in his hand set (mobile phone) and on assessee activating it. Besides getting connection to the mobile network, the Sim Card has no value or use for the subscriber. In other words, Sim Card is what links the mobile subscriber to the assessee's network. Therefore, supply of Sim Card, whether it is treated as sale by the assessee or not, is only for the purpose of rendering continued services by the assessee to the subscriber of the mobile phone.

I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 Besides the purpose of retaining a mobile phone connection with a service provider, the subscriber has no use or value for the Sim Card purchased by him from assessee's distributor. The position is same so far as Recharge coupons or E Topups are concerned which are only air time charges collected from the subscribers in advance. We have to necessarily hold that our findings based on the observations of the Supreme Court in BSNL's case (supra) in the context of sales tax in the case of BPL Cellular Ltd. (supra) squarely apply to the assessee which is nothing but the successor company which has taken over the business of BPL Cellular Ltd. in Kerala. So much so, there is no sale of any goods involved as claimed by the assessee and the entire charges collected by the assessee at the time of delivery of Sim Cards or Recharge coupons is only for rendering services to ultimate subscribers and the distributor is only the middleman arranging customers or subscribers for the assessee. The terms of distribution agreement clearly indicate that it is for the distributor to enroll the subscribers with proper identification and documentation which responsibility is entrusted by the assessee on the distributors under the agreement. It is pertinent to note that besides the discount given at the time of supply of Sim Cards and Recharge coupons, the assessee is not paying any amount to the distributors for the services rendered by them like getting the subscribers identified, doing the documentation work and enrolling them as mobile subscribers to the service provider namely, the assessee. Even though the assessee has contended that the relationship between the assessee and the distributors is principal to principal basis, we are unable to accept this contention because the role of the distributors as explained above is that of a middleman between the service provider namely, the assessee, and the consumers. The essence of a contract of agency is the agent's authority to commit the principal. In this case the distributors actually canvass business for the assesssee and only through distributors and retailers appointed by them assessee gets subscribers for the mobile service. Assessee renders services to the subscribers based on contracts entered into between distributors and subscribers. We have already noticed that the distributor is only rendering services to the assessee and the distributor commits the assessee to the subscribers to whom assessee is

accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee. The terminology used by the assessee for the payment to the distributors, in our view, is immaterial and in substance the discount given at the time of sale of Sim Cards or Recharge coupons by the assessee to the distributors is a payment received or receivable by the distributor for the services to be rendered to the assessee and so much so, it falls within the definition of commission or brokerage under Explanation

(i) of Section 194H of the Act. The test to be applied to find out whether Explanation (i) of Section 194H is applicable or not is to see whether assessee has made any payment and if so, whether it is for I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 services rendered by the payee to the assessee. In this case there can be no dispute that discount is nothing but a margin given by the assessee to the distributor at the time of delivery of Sim Cards or Recharge coupons against advance payment made by the distributor. The distributor undoubtedly charges over and above what is paid to the assessee and the only limitation is that the distributor cannot charge anything more than the MRP shown in the product namely, Sim Card or Recharge coupon. Distributor directly or indirectly gets customers for the assessee and Sim Cards are only used for giving connection to the customers procured by the distributor for the assessee. The assessee is accountable to the subscribers for failure to render prompt services pursuant to connections given by the distributor for the assessee. Therefore, the distributor acts on behalf of the assessee for procuring and retaining customers and, therefore, the discount given is nothing but commission within the meaning of Explanation (i) on which tax is deductible under Section 194H of the Act. The contention of the assessee that discount is not paid by the assessee to the distributor but is reduced from the price and so much so, deduction under Section 194H is not possible also does not apply because it was the duty of the assessee to deduct tax at source at the time of passing on the discount benefit to the distributors and the assessee could have given discount net of the tax amount or given full discount and recovered tax amount thereon from the distributors to remit the same in terms of Section 194H of the Act.'

11. There is no, and there cannot be any, dispute about the fundamental legal position that in the hierarchical judicial system, that we have in our country, lower tiers of judicial hierarchy has to respectfully follow the views expressed by the higher tiers of judicial hierarchy. In the case of ACIT Vs Dunlop India Limited [(1985) 154 ITR 172 (SC)], Hon'ble Supreme Court has observed, quoting the House of Lords, as follows:

> We desire to add and as was said in Cassell & Co. Ltd. vs. Broome (1972) AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of Courts" which exists in our country, "it is necessary for lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". "It is inevitable in a hierarchical system of Courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted" (See observations of Lord Hailsham and Lord Diplock in Broome vs. I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 Cassell). The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system

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

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

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

> 3. What is contended by the learned advocate for the Revenue is that the Tribunal decided the appeal on 26th Oct., 1976. By that time, the Andhra Pradesh High Court had upheld the validity of s. 140A(3). He drew our attention to the judgment of the Andhra Pradesh High Court in Kashiram vs. ITO (1977) 107 ITR 825 (AP).
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> I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 From the report, it appears that the said judgmen t was delivered on 10th Dec., 1975. Therefore, the Tribunal was not right in proceeding on the basis that only the Madras High Court judgment was in the field and, therefore, it was open to it to proceed on the basis that s. 140A(3) was non-existent. He also submitted that for that reason, the Tribunal was not right in following the judgment of the Bombay High Court in Godavaridevi's case (supra).
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> 4. In our opinion, the legal position is correctly stated by the Punjab & Haryana High Court in CIT vs. Ved Prakash (1989) 77 CTR (P&H) 116 : (1989) 178 ITR 332 (P&H) when it observed that "unless and until the Supreme Court or the High Court of the State in question, under Art. 226 of the Constitution, declares a provision of the Act to be ultra vires, it must be taken to be constitutionally valid and treated as such".
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> 5. In our opinion, the Tribunal of another State would be justified in proceeding on the basis that the provision has ceased to exist because it has been declared as ultra vires by the High Court o nly when there is some material to show that the said

decision has been accepted by the Department. .....

(Emphasis by underlining supplied by us)

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

> ..... At the time when the Tribunal decided the appeal, that was the only decision in the field and, therefore, in view of what the Bombay High Court has held in CIT vs. Smt. Godavaridevi Saraf (1978) 113 ITR 589 (Bom) and CIT vs. Smt. Nirmalabai K. Darekar (1990) 186 ITR 242 (Bom), the Tribunal was bound to follow the said judgment of the Madras High Cour. It, therefore, can not be said that the Tribunal committed an error in following the said judgment of the Madras High Court. In view of the said decision of the Madras High Court, the only course which the Tribunal could have followed was to direct the ITO to consider the pa rtial partition on the merits and pass an order under s. 171 first and then under s. 143(3) of the Act

15. It is clear that, except on the issue of legality of the statutory provision itself, the decisions of even the non-jurisdictional High Courts are binding on I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 the lower tiers of judicial hierarchy such as this Tribunal. As we hold so, we are alive to the school of thought that non jurisdictional High Courts are not binding on the subordinate courts and Tribunals, as articulated by Hon'ble Punjab & Haryana High Court in the case of CIT vs. Ved Prakash [(1989) 178 ITR 332 (P&H)] but then that was a case in the context of validity of a statutory provision, i.e. 140A(3), covered by the rider to the general proposition. This exception does not come into play in the present case as we are not, and we cannot be, dealing with the constitutional validity of a provision. Clearly, therefore, the views expressed by Hon'ble non jurisdictional High Court, in the absence of a direct decision on that issue by the Hon'ble jurisdictional High Court, deserve utmost respect and deference.

16. The difficulty, however, arises in the case in which Hon'ble non jurisdictional High Courts have expressed conflicting views and the subordinate courts and Tribunals donot have the benefit of guidance from Hon'ble jurisdictional High Court.

17. In our humble understanding of the legal position and of the propriety, it will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the Hon'ble High Courts- something diametrically opposed to the very basic principles of hierarchical judicial system. Of course, when the matter travels to Hon'ble jurisdictional High Court, Their Lordships, being unfettered by the views of a non-jurisdictional High Court, can take such a call on merits. That exercise, as we understand, should not be carried out by us.

18. The choice of which of Hon'ble High Court to follow must, therefore, be made on some objective criterion. We have to, with our highest respect of all the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT vs. Vegetable I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 Products Ltd. [(1972) 88 ITR 192 (SC)]. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted" Although this principle so laid down was in the context of penalty, and Their Lordships specifically stated so in so many words, it has been consistently followed for the interpretation about the statutory provisions as well. In another Supreme Court judgment, Petron Engg. Construction (P) Ltd. & Anr. vs. CBDT & Ors. [(1989) 175 ITR 523 (SC)] the above principle of law has been reiterated by observing as follows:

> "……Counsel submits that when two interpretations are possible to be made, the interpretation which is favourable to the assessee should be adopted. In support of that contention, learned counsel has placed reliance upon a few decisions of this Court in CIT vs. Madho Prasad Jatia (1976) 105 ITR 179 (SC); CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192 (SC) and CIT vs. Kulu Valley Transport Co. P. Ltd. (1970) 77 ITR 518 (SC) : .....The above principle of law is well-established and there is no doubt about that....."

19. Having noted the legal position as above, it is appropriate, for the sake of completeness, to note the exception to this general rule as well. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of tax-payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman vs. Barron 1952(2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax - payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception has been also reiterated by Hon'ble Supreme Court in the case of Oil & Natural Gas Commission Vs CIT (Civil Appeal no. 730 of 2007, judgment dated 1 st I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 July 2015; reported in www.itatonline.org). However, in the present case, this exception has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614. That is what Hon'ble jurisdictional High Court has also held in the case of Shah Electrical Corporation (supra). None of these exceptions, however, admittedly apply to the situation that we are dealing with at present.

20. There can be no dispute on the proposition that irrespective of whether or not the judgments of Hon'ble non jurisdictional High Courts are binding on us, these judgments deserve utmost respect which implies that, at the minimum, these judgments are to be considered reasonable interpretations of the related legal and factual situation. Viewed thus, when there is a reasonable

interpretation of a legal and factual situation, which is favourable to the assessee, such an interpretation is to be adopted by us. In other words, Hon'ble non jurisdictional High Court's judgment in favour of the assessee, in the light of this legal principle laid down by Hon'ble Supreme Court, is to be preferred over the Hon'ble non jurisdictional High Court not favourable to the assessee. In our humble understanding, it is only on this basis, without sitting in value judgment on the views expressed by a higher tier of judicial hierarchy, that the conflicting views of Hon'ble non jurisdictional High Courts can be resolved by us in a transparent, objective and predictable manner.

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

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22. We may also mention that a single member bench of this Tribunal, in the case of ITO Vs Bharat Sanchar Nigam Limited and vice versa (ITA No 170/Hyd/2010 and CO No 10/Hyd/10; order dated 5 th June 2015) has reached the same conclusion but the reasoning adopted, for following Hon'ble Karnataka High Court's judgment in the case of Bharti Airtel Limite d (supra), was stated to be that "Since no jurisdictional High Court decision is available as on date, the latest decision of Karnataka High Court, which has considered and distinguished earlier rulings of other High Courts, deserves to be followed". Our conclusion is the same but our decision to follow Hon'ble Karnataka High Court's judgment is simply this judgment is to be preferred over, in the light of settled legal principles set out above, other Hon'ble High Court judgments, because it is favourable to the assessee. With utmost respect and reverence to all the Hon'ble Courts, it is not for us to choose which decision is to be followed because of its merits because of what it has discussed or because of how it has distinguished other Hon'ble High Courts or because of its timing i.e. of its being latest. Even when a non- jurisdictional High Court distinguishes all other decisions of Hon'ble High Courts but holds a view unfavourable to the assessee, that decision cannot normally be preferred over a decision from another Hon'ble non jurisdictional High Court decision, of equal stature, in favour of the assessee. That is, as we understand, correct approach to the matter and that is the reason why we come to the same conclusion as the SMC did but for altoget her different reasons.

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

Sl. Disclosure in the Agreement as Corresponding clause in the agreement of the assessee No. highlighted in the Hon'ble Karnataka with its pre-paid distributors High Court's judgment - relevant extracts I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 1 'The agreement stipulates that the Clause 17.2 specifically provides that the relationship created distributors have to represent to the by the agreement is that of a buyer and seller and that the customers that the distributor's agreement agreement is on a 'principal to principal' basis and neither with the customers/its dealers is on party is, nor shall be deemed to be, an agent/partner of the Principal-to-Principal basis and assessee

other. It Is also provided that nothing in the Agreement shall is no way concerned or liable to the be construed to render the distributor a partner or agent of the customers/dealers of the Distributor' - assessee Page 68.

2 "Distributor shall not make any promise, Clause 1e of Annexure III to the agreement provides that the representation or to give any warranty or distributor shall not make any promises or representation or guarantee with respect to services and give any warranties or guarantees in respect of the service products, who are not authorized by the tickets except such as are consistent with those which assessee' - Page 69. accompany the Service Ticket or as expressly authorized by the assessee in writing.

3 That the insurance liability for the entire As per clause (iv) of Annexure II to the agreement, the stock in trade in the premises at the assessee is not liable for any loss, pilferage or damage to the address under reference will be of the recharge vouchers/service tickets post-delivery of the same to Distributor and the liability for any loss or the distributors. The assessee does not compensate the damage due to any fire, burglary, theft distributors for any unsold stock etc., will be of the Distributor.' - Page 69.

4 'The Distributor has no express or implied Distributor does not have an authority to assume or create any right or authority to assume or undertake obligations VWL's behalf or incur any liability on behalf of VWL any obligation in respect of or on in the or accept any contract binding upon VWL (clause 17.1 of the name of the assessee.' Page 70. Agreement).

5 'Channel Partner be liable to pay all the The distributor shall pay all licenses, fee, taxes, duties, sales taxes such as sales tax, service tax tax, service tax and any other charges, assessments penalties applicable and payable in respect of the whether statutory or otherwise levied by any authority in subject matter of this agreement and connection with the operation of distributor's office (Clause statutory increase in respect therof' - III(b) of Annexure III to agreement). Page 72.

6 'After sale of products distributor/channel The assessee shall not be responsible for any post delivery partner cannot return goods to the defect in the service tickets. No request of refund of any assessee for whatever reason' - Page 74. money shall be entertained by the assessee in any circumstances (Clause e-Annexure I).

7 'Distributors are even prevented from The distributor shall not make any promises or representations making any representation to the retailers or give any warranties or guarantees in respect of the products unless authorized by the assessee'. (i.e. SIM cars and pre-paid vouchers) (Clause 1e Annexure III).

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

Airtlel's case (supra), and hold as follows:

> (a) On the facts of the case, and as is evident from a reading of the agreements before us, the assessee has sold, by way of prepaid vouchers, e-top ups and prepaid SIM cards, the 'right to service' on principal to principal basis to its distributors. As evident from the terms and conditions for sale, placed at page 136 of the paper-book, not only that the sale was final and the assessee was not responsible for any post-delivery defects in the services, it was specifically agreed that "no request of refund of any money shall be entertained by VEGL (i.e. the assessee) under any circumstances".
>
> (b) The fact that there are certain conditions and stipulations attached to the sale of this right of service by the assessee to his distributors does not affect the character of sale on principal to principal basis.
>
> (c) Section 194 H comes into play only in a situation in which "any person, ……..responsible for paying….. to a resident, any income by way of commission" pays or credits such "income by way of commission" . However, since at the time of the assessee selling these rights for a consideration to the distributor, the distributor does not earn any income, the provisions of Section 194 H donot come into play on the transaction of sale of the right to service by the assessee to his distributors. The condition precedent for attracting Section 194H of I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 the Act is that there should be an income payable by the assessee to the distributor
>
> (d) So far as the transaction of sale of 'right to service' by the assessee to his distributor is concerned, while it has income potential at a future points of time (i.e. when this right to service is sold at a profit by the distributor), rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Therefore, at the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Accordingly, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise .
>
> (e) In a situation in which the assessee has credited the sale proceeds at the transaction value (in contrast with the transaction being shown at face value and the difference between face value and the transaction value credited to the distributor), the tax deduction liability under section 194H does not arise. While learned counsel for the assessee has stated at the bar that the sale proceeds are credited at the transaction value, this aspect of the matter is to be verified by the Assessing Officer, and in case the sales is accounted for at the face value, to that extent, the tax withholding liability is to be sustained,

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

26. In ground no. 2, the assessee has raised the following grievance:

> Applicability of provisions of Section 194J of the Act on payments towards national roaming charges The CIT(A) has erred in not holding that in the facts and circumstances of the case, the providing of roaming facilities to the appellant by the other telecom operators are not in the nature of technical services and hence the provisions of Section 194 J I.T.A. No.: 386 /Ahd/11 Assessment year: 2008-09 are not applicable to the payments made3 towards national roaming charges.

27. We have noted that this issue has been remitted by the CIT(A) to the file of the Assessing Officer for the purposes of redeciding the issue in the light of Hon'ble Supreme Court's judgment in the case of CIT Vs Bharti Cellular Limited [(2010) 330 ITR 239 (SC)]. As held by Hon'ble Supreme Court, in a situation in which no human intervention is involved, these services cannot be considered to be technical services in nature. That aspect, however, is to be examined by the AO, as was directed by Hon'ble Supreme Court in the said case as well. We, therefore, see no infirmity in the order of the CIT(A). We confirm his findings and decline to interfere in the matter.

28. Ground no. 2 is thus allowed.

29. In ground no. 3, the assessee has raised grievance against CIT(A)'s directions for certain verifications in respect of payments of taxes by the distributors, but, as we have upheld the grievance of the assessee against the very applicability of Section 194 H on the facts of this case, that aspect of the matter is rendered wholly academic and infructuous. We, therefore, see no need to deal with that aspect of the matter at this stage.

30. Ground no. 3 is dismissed as infructuous.

31. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on 7 th day of July, 2015.

Sd/xx
S. S. Godara
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

Ahmedabad, the 7 th day of July, 2015

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Copies to: (1) The appellant (2) The respondent
(3) Commissioner (4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order etc

Assistant Registrar

Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad