REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITA No.145 of 2009
with
ITA No.784 of 2009

Reserved On: 11th December, 2009.
% Date of Decision: 19th February, 2010.

1) **ITA No.145 of 2009**

Commissioner of Income Tax-XVII . . . Appellant

through : Ms. Rashmi Chopra, Advocate.

VERSUS

Idea Cellular Ltd. . . .Respondent

through: Mr. Farookh Irani with Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.

2) **ITA No.784 of 2009**

Commissioner of Income Tax-XVII . . . Appellant

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CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These appeals were admitted on the following question of law:

> "Whether on a true and correct appreciation of the relationship between the assessee and its distributors, the

This question has arisen for determination for the Assessment Y 2003-04 and 2004-05.

2. A survey under Section 133 of the Income Tax Act (hereinafter referred to as 'the Act') was conducted at the premises of the respondent-assessee (hereinafter referred to as 'the assessee'). It revealed that the assessee was not deducting tax at source. It was found that the assessee-company is engaged in the business of providing cellular telephone network through a card called Subscriber Identification Module (SIM). Prepaid or post paid connections are provided to the subscribers through distributors called 'Prepaid Market Associates (PMAs)' appointed by the assessee. The assessee offers discount for prepaid calling services to its distributors. The assessing officer noted that as per the agreement the distributors were required to store the SIM Card and Recharge Coupons in such a way as to clearly indicate at all times that prepaid SIM Card/Recharge Coupons were owned by assessee. They were not allowed to remove, obscure or delete in marks placed on prepaid SIM Card/recharge coupons. The terms of agreement further provided that without written consent of ICL the distributors (PMAs) shall not directly or indirectly:

(i) market, solicit, sell, offer and accept offers for telephony services that compete with ICL's telephony Services.

(ii) induce or refer any actual or prospective subscriber of ICL's telephony services to subscribe to any Competitive Telephony Services.

(iii) provide any Company or Customer information/data to any competitive entity.

From this clause the Assessing Officer came to the conclusion distributors were not free to sell similar products offered by the competitors of the company. PMAs further appointed the retailers after the written approval of the assessee. The maximum price of SIM Cards/recharge coupons was also decided by M/s IDEA CELLULAR LIMITED (ICL). It was also found that under the agreement, it is the responsibility of the PMAs to obtain all relevant informations concerning a subscriber and to forward the same to ICL. Unless that is done, no activation of SIM card can be done. Further ICL has the right to use of service marks, trademarks, trade names, copy rights, logos or any other copyright that might be created in future. PMA has to comply with all requirements of ICL in respect of invoicing and accounts, maintenance of brand image and provide monthly sales reports return and other information relating to business. ICL representative could inspect the things or material of the business which were the subject matter of the agreement. Further, Minimum Performance Targets for the distributors were also set by the company and reserved the right to terminate the agreement unilaterally.

On the basis of these facts and the types of control exercised by ICL on its prepaid distributors, the Assessing Officer came to the conclusion that transaction with ICL and prepaid distributors were that of Principal and Agent at all times and prepaid distributors were selling a prepaid SIM Card/recharge coupon on behalf of the ICL. Consequently, amount of discount offered to prepaid distributor was in nature of commission and liable to tax deduction at source under Section 194H of the Income-tax

201(1) and charged interest under Section 201(1 A) on amou commission so paid by the assessee.

3. The assessee preferred appeals before the CIT (A), but was unsuccessful, as its appeals were dismissed. However, it has succeeded in further appeals preferred before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The decisions of the CIT(A) as well as AO have been reversed and the issue is decided in favour of the assessee company. The Tribunal has opined that the relationship between the assessee and its distributors is that of 'principal and principal' and not 'principal and agent'. Therefore, what was paid to the PMAs was not commission or brokerage and was not subject to deduction of tax at source under Section 194H of the Act. The Tribunal has arrived at the aforesaid findings in the following manner:

> "14. In order to ascertain whether the PMAs were acting as agents of the assessee or were outright purchasers of goods supplied by the assessee, it is necessary to discuss the distinction between the contract of sale or contract of agency. The essence of contract to sale is the transfer of title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of goods as a debtor for the price to be paid and not an agent for the proceeds of the sale. On the other hand, the essence of agency to sell is the delivery of goods to a person, who is to sell them, not as his own property but as the property of the principal who continues to be the owner of goods and who is therefore liable to account for the proceeds. The true legal relationship between the assessee and the PMAs has to be inferred from the nature of contract, its terms and conditions and the nature of respective obligations undertaken by the parties. Clause 3 of the agreement specifically provides that the relationship created by the agreement is that of independent contracting parties and is not, and shall not deem to be any relationship inter-alia employer/employee; principal and agent. Clause 6(b) provides that full legal equitable title and interest in all and any of the prepaid simcard/recharge coupons delivered to PMAs shall remain in ICL and shall not pass to PMAs. However, in case the prepaid SIMCards/recharge coupons with PMAs become unusable, substandard or are destroyed due to natural calamities or occurrences or circumstances beyond the reasonable control of either party or due to negligence of PMA in

the assessee. However, as per the conditions prescribed the PM shall pay the processing fees for such replaced cards. If th relationship between the assessee and PMA was that of principal and agent, there was no need for recovery of processing fee for replacement of cards destroyed or become unusable. In case of a contract of agency the agents acts on behalf of the principle and no question arises for seeking the compensation from the agent in case of loss of property due to natural calamity or occurrence or circumstances beyond the reasonable control of the agent. The agent is required to protect the interest of his principal as a man of ordinary prudence. Another contention of Revenue that Clause 8 of the agreement debars the PMA to enter into agreement with other parties for similar telephony services and therefore he is not to act independently. In our view the restrictions prescribed in Clause 8 deals with the competitors of the assessee. Such terms and conditions are generally found in commercial agreements. Clause 9 provides for appointment of retailer by PMA. Further Clause 10 deals with the price at which PMA shall acquire the prepaid SIM cards/recharge vouchers. The retailers can sell the recharge vouchers to end user at any price not exceeding the maximum retail price. The assessee will receive the fixed amount including service charges. In case of a agent the price collected by him is remitted to the principal after deduction of his commission and expenses relating to sale of the goods. The assessee is not making any reimbursement of the expenditure incurred by the PMA and his retailers. This also suggests that the agreement between the assessee and PMA is that of seller and purchaser. Agreement also provides certain conditions relating to protection of intellectual property rights of the assessee. The other conditions stipulated in the agreement including termination clause do not throw any light so as to suggest that the agreement between the assessee and PMA is that of principal and agent. In the case of Gordon Goodroffe & Co. Madras Ltd. v. Shaik MA Mazid and Co. held that even an agent can become a purchaser when agent pays the price to principal on his own responsibility. In the case before the goods are sold to the PMA who in turn transfer goods to retailer to be sold to the end users. The retailers are appointed by the PMA though with the approval of the assessee but they are working under the instructions of PMAs. Termination of the retailers is co-terminus with the termination of the agreement with PMA. In our considered view the legal relationship between the assessee and PMA is that of seller and purchaser. We do not find any condition in the agreement from which it can be inferred that PMA stands in a fiduciary position in relation to the assessee. It is admitted by the revenue that the agreement in substance is the agreements entered into between the assessee and the PMA is in the nature of contract to sale and not contract of the agency. Therefore, the discount allowed by the assessee to PMA will not fall in the definition of commission of brokerage."

4. Section 194H of the Act reads as under:

"**Section 194H:**

(1) Any person, not being an individual or a Hindu undivide family, who is responsible for paying, on or after the 1st day c 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 1747e , 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."

5. It is clear from the aforesaid provision that taxes 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

(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

6. Counsel for both the parties agreed that element of agency is to be established in all the aforesaid circumstances. It was for this reason that the Tribunal had considered as to whether the transaction in question between the assessee and the PMAs amounted to contract of sale (thereby constituting relationship of 'principal and principal') or it amounted to contract of agency (thereby resulting in 'principal and agent'). Both the parties concur that this was the essence of dispute. However, difference is in the perception inasmuch as according to the Revenue, the agreement constituted contract of agency and, therefore, payment made by the assessee to the PMAs was 'commission' or 'brokerage' attracting the provisions of Section 194H of the Act.

7. Learned counsel for the Revenue submitted that from the nature of services provided by the assessee to its ultimate consumers through the medium of these distributors called 'Prepaid Marketing Associates (PMA)'. It was clear that these distributors were only agent and link between the assessee and the ultimate consumers. She highlighted the nature of the transaction by pointing out that a subscriber uses the cellular telephone network through a card called Subscriber Identification Module (SIM Card). Prepaid or postpaid connections are provided to the subscriber. In this case, the prepaid services are termed as **Idea Chitchat Prepaid.** For rendering its services to the subscriber,

chitchat prepaid services. The main duty of I-CAP is to o subscribers of SIM cards and activate them. In short, sometimes I-CAPs are directly appointed by the company and not through its PMAs. The assessee company offers discounts on prepaid calling services to its distributors. No breakup, however, has been given for the discounts offered on prepaid calling services to PMAs and I-CAPs. The break-up is, however, available for discounts offered on **Starter Packs** and **Recharge Coupons**.

8. Her submission was that the agreement brought out the following significant aspects showing 'principal and agent' relationship:

a) Full legal and equitable title and interest in prepaid SIM Card and recharge coupons delivered to the distributors at all time remains with the assessee.

b) The distributors store the SIM Card and recharge coupons in such a way as to clearly indicate at all times that the prepaid SIM card/recharge coupons are owned by ICL and is not allowed to remove, obscure or delete any mark placed on prepaid SIM card/recharge coupons.

c) The distributor is not free to sell the similar products offered by the competitors company without the written consent of the assessee.

d) PMA is allowed to appoint the retailers only after the written approval from the assessee.

e) The maximum price of SIM Card/recharge coupon is also decided by ICL.

ICL and unless that is done, no activation of SIM card ca done.

g) The ICL has the right to use of service marks, trademarks, trade names, copyrights, logos (collectively the intellectual property) or any other copy right that ICL may create in future.

h) The PMA has to comply with all requirements of ICL in respect of invoicing and accounts, maintenance of brand image and provide monthly sales reports return and other information relating to business.

i) The representative of the ICL, under the agreement, has right to inspect the things material to the business, which is the subject matter of agreement.

j) Minimum Performance Targets for the distributors are also set by the company and company reserves the right to terminate the agreement unilaterally.

9. Highlighting the aforesaid features of the agreement between the ICL and the PMAs, the learned counsel for the Revenue pleaded that the overall control always remained with the assessee. The ownership in the SIM cards were never transferred by the assessee to PMAs and, therefore, the transaction in question was not that of sale and purchase between the assessee and the PMAs and for this reason, no sales tax was even paid. According to her, it was always treated as 'service'. The PMAs were only appointed as distributors and were offered discount on the prepaid calling services/SIM cards. The discounts were, therefore, in the nature of 'commission' or 'brokerage' to the PMAs by the assessee.

to take into account the expression as judicially defined. She referr these definitions, which are even taken note of by the AO. She also argued that after the purchase of SIM card by the ultimate consumers, legal relationship between the said consumer/subscriber and the assessee, is created in the entire deal. She also heavily relied upon the decisions rendered by the Cochin Bench of the Tribunal in the case of ***Vodafone Essar Cellular Ltd.*** Vs. ***Assistant Commissioner of Income Tax*** [(2009) TIOL-630-ITAT-Cochin, decided on 30.04.2009] in addition to more judgments of other Benches of the Tribunal.

11. Mr. Farookh Irani, learned counsel who appeared on behalf of the assessee, countered the aforesaid submissions by making a passionate plea that the approach of the Tribunal is perfectly justified and it was permissible for the Tribunal not to take myopic view of the matter on the basis of trivial aspects of the agreement pointed out by the Revenue, which were not material to determine the controversy. His submission was that the following three conditions were to be fulfilled in order to attract the provisions of Section 194H of the Act:

a) Expenses of principal-cum-agent-relationship, which was lacking in this case;

b) Payment or credit by the assessee to its distributors, which attribute was again missing; and

c) The amount, which the Revenue claims to be subject to TDS under Section 194H must be shown to the income of the recipient, which ingredient again was missing.

12. Dilating on the first ingredient, *viz.*, there was no relationship of

in question between the assessee and the PMAs was that of outrigh in view of the following characteristics:

(i) The fact that payment for goods is made by a distributor to the principal upfront, prior to the realization by the distributor of the proceedings of the sale made by him has been recognized, in the following decisions, as a crucial factor in establishing that the transaction is one of a sale by the principal to the distributor:

1. ***Vijay Traders*** Vs. ***Bajaj Auto Ltd.*** [(1995) 6 SCC 566.
2. ***Commissioner of Central Excise*** Vs. ***DCM Textiles*** [(2006) 195 ELT 129 (SC)].
3. **Moped India Ltd.** Vs. **Asstt. Collector of Central Excise, Nellore and Ors.** [(1986) 23 ELT 8 (SC)].
4. ***Ahmedabad Stamp Vendors Association*** Vs. ***Union of India*** [257 ITR 202)

(ii) The fact that there is a specification of the price at which goods are transferred between the principal and his distributor is indicative of the existence of principal and principal relationship. This has been laid down by the Supreme Court in the case of ***Gordon Woodroffe & Co. Ltd.*** Vs. ***Shaik Majid and Co.*** [AIR 1967 SC 181].

(iii) The fact that the distributor has freedom to sell at his own price without reference to the principal is indicative of the existence of principal and principal relationship. This has been laid down in *ex parte* White in Re Neville.

13. He further submitted that the following prerequisite/conditions necessary to establish relationship of 'principal and agent' as per the

the sale price of the goods, which he sells on behalf of his prir (Section 213 of the Indian Contract Act). The agent is obliged to pay to his principal the sale price of the goods, which he sells on behalf of his principal (Section 218 of the Indian Contract Act).

14. The learned counsel argued that on the contrary, following factors indicated that the relationship between the assessee and its distributors was one of the 'principal and principal' in view of the following factors emerging on record:

(i) The transaction between the respondent and its distributor is one of sale. (Clauses 10, 19 and 25(d) of the PMA Agreement)

(ii) The distributor makes payment to the respondent upfront. (Clause 6(a) of the PMA Agreement.

(iii) There is a specification of the price t which goods are transferred by the respondent to its distributors. (Clause 10 of the PMA Agreement)

(iv) The distributor has freedom to sell at his own price. (Clause 10 of the PMA Agreement)

(v) The distributor is not liable to account to the respondent for the price at which he effects the sale to the retailer/subscriber. (Clause 10 of the PMA Agreement)

(vi) The distributor is not liable to pay to the respondent the price at which he effects the sale to the retailer/subscriber. (Clause 10 of PMA Agreement)

Our attention was also drawn to Clause 3 of the PMA Agreement, which

of the Supreme Court in the case of ***Indian Oil corporatio*** ***Consumer Protection Council*** [(1994) 1 SCC 397].

15. His further submission was that the aspects highlighted by the learned counsel for the Revenue between the assessee and the PMAs were of no consequence inasmuch as it was held by the Supreme Court in the case of ***The Bhopal Sugar Industries Ltd.*** Vs. ***Sales Tax Officer, Bhopal*** [40 STC 42] and Gujarat High Court in the case of ***Ahmedabad Stamp Vendors Association*** (supra) that the following factors would not be relevant to determine as to whether an agency exists:

- The fact that the distributor is subject to operational by his principal;
- The fact that the distributor is subject to geographical controls by his principal;
- The fact that the distributor has to maintain detailed records and accounts; and
- The fact that the distributor has to submit accounts to the principal.

16. Two provisions, which would be relevant for determining the issue and to decide the real nature of transaction between the parties are Section 4 of the Sale of Goods Act and Section 182 of the Indian Contract Act. Section 4 of the Sale of Goods Act defines 'sale'. Therefore this provision becomes material provision to determine as to whether transaction between the assessee and the distributors is that of 'sale' of SIM card as contended by the assessee. Section 182 of the Indian Contract Act, on the other hand, defines an agent, which definition becomes important to

would be necessary to provide the answer. Therefore, we take no these provisions at this stage. Section 4 of the Sale of Goods Act, 1930 reads as under:

> "**4.Sale and agreement to sell.-** (*1*) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (*2*) A contract of sale may be absolute or conditional.
>
> (*3*) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (*4*) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Section 182 of the Indian Contract Act reads as under:

> "An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom said act is done, or who is so represented, is called the principal."

17. The legal position is explained by the AO in his order reproducing the definition of 'commission' in various law disctionary, about which there cannot be any quarrel, is as under:

> " "Commission" has been judicially defined by Davey L. Jas as follows :-
>
> "Commission is prima facie the payment made to an agent for agency work, usually according to a scale, it may be on ad valorem scale, but not necessarily on ad valorem scale. It is the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary" – Drielsma V. Manifold (1894) 3 Ch. 100.107 (C.A.)"
>
> Again, a "commission" is the recompense of reward of an agent, factor, broker or bailee, when the same is calculated as a percentage on the amount of his transaction or on the profit to the principal – Sunderland V. Day 145 N.E. 2d. 39, 41 12III.2d.50.

> "Commission" is compensation paid to another for service rendered in the handling of another's business or property and based proportionately upon the amount or value thereof – Rubinstein Vs. Rubinstein 109 N.Y.S. 2d. 725, 734."

18. Before we part with, we would like to point out that if the cellular operators like the assessee in the present case is asked to deduct tax at source in respect of commissions paid to their agents, *viz*., distributors, it does not affect them. The concerned distributors can always file their income tax returns and claim the credit for the payments already made on their behalf by the assessee. On the other hand, such a provision serves public purpose inasmuch as, *viz*., such distributors who would be otherwise liable to pay tax, but are evading the tax, would come under the Income Tax Act. We may clarify that we have not answered the legal question influenced by this factor and our discussion has proceeded on the basis of legal position. This is only a passing remarks, which justifies the incorporation of such a provision like putting obligation on the payer to deduct the tax at source and the view we have taken subserves this rationale behind such a provision as well.

19. This Court in ***Commissioner of Income Tax, New Delhi*** Vs. ***Singapore Airlines Ltd.*** [2009-ITOL-183-HC-DEL-IT] analyses the aforesaid definition in the following manner:

> "16. It is clear from the definition that an agency comes into existence where one person is vested with the authority or capacity to create a legal relationship between person referred to as a principal and an outside third party. Therefore, the basic and essential requisites of an agency ordinarily would be that:
>
> (i) The agent makes the principal answerable to third persons whereby the principal can sue third parties directly and renders himself, that is, the principal, liable to be sued directly by the third

(ii) The person who purports to enter into a transaction on behalf of the principal would have the power to create, modify or terminate contractual relationship between his principal, that is, the person whom he represents, and the third parties. - P. Krishna Bhatta v. Mundila Ganapathi Bhatta AIR 1955 Mad. 648 at page 651, para 36.

(iii) An agent, though bound by instructions given to him by the principal does not work under the direct control and supervision of the principal. The agent thus uses his own discretion to act on behalf of the principal subject to the limits to his authority prescribed by the principal - Lakshminarayan Ram Gopal & Son Ltd. v. Government of Hyderabad : [1954]25ITR449(SC) . This cited with the approval in Qamar Shaffi Tyabji v. Commissioner of Excess Profits Tax : [1960]39ITR611(SC) .

(iv) There is no necessity of a formal contract of agency, it can be implied which could arise from the act of parties or situations in which parties are put.

20. At this stage itself, we may point out that in the aforesaid case, this Court held relationship between the Airlines and the travel agents as that of 'principal and agent'. After examining in detail the operational aspect of the transaction, the significant aspects which were refereed by the Court, having semblance with the present case as well:

a) The legal relationship was created between the passenger (to whom the travel agents were selling tickets and the concerned airline) as on the basis of said ticket, the passenger was entitled to travel in the concerned airline. Any request made by the passenger was to be forwarded by the agent to the traffic carrier/airline to enable the carrier to extend such services to the customer.

b) By entering into such a legal relationship on behalf of the principal (the airline) by issuing the traffic documents to a third party, *i.e.*, passenger.

c) Similarly, by virtue of such a transaction, *i.e.*, issuance of traffic

principal, *i.e.*, airline to issue the same to the third party, v
is the passenger.

21. Another argument was raised in the said case, *viz.*, that the assessee airline was not paying income by way of commission, as 'the supplementary commission' was retained by the travel agent and thus, Section 194H of the Act was not attracted. This contention was brushed aside in the following manner:

> "23. This brings us to the second leg of the transaction as to whether income by way of commission has been paid by the assessee-airline to the travel agent. It is not disputed that any amount which the travel agent would receive over and above the net fare would be assessed in the hands of the travel agent as profit, gain or income. As a matter of fact one of the submissions of the learned Counsel for the assessee-airline has been that they ought not to be held an assessee-in-default in view of the fact that the supplementary commission, that is, sums received over and above the net fare by the travel agent and retained by them have been disclosed by travel agent as their income on which the travel agents have paid tax. In view of this we find no difficulty in holding that supplementary commission is income within the meaning of Section 194H of the Act.
>
> 28. In view of the above we hold that the supplementary commission which is the amount retained by the travel agent is commission within the meaning of Section 194H read with Explanation (i) to the said section. The assessee-airlines were thus obliged to deduct tax at source at the rate prescribed during the relevant period. The assessee-airline having not deducted the tax at source, they are liable to be held, within the terms of Section 201 (1) as assessee(s)-in-default and also liable for payment of interest in terms of Section 201 (1A) of the Act. In view of the fact that the Tribunal having coming to the conclusion that Section 194H of the Act was not applicable and hence did not examine any other contention of the assessee-airline, as also, the quantum and the period for which assessee-airline would be entitled to pay interest or to what extent the benefit of the certificate issued to them, if any, under Section 197 of the Act would be available. We allow the following appeals and set aside the impugned judgments passed by the Tribunal in each of these appeals and remand the matter to the Tribunal for examining all other aspects of the matter as also the consequences which would flow therefrom."

22. In view thereof, the argument of the learned counsel that Section 194H

must be shown to be the income of the respondent also does not good.

23. We, thus, come back to the central question, which is to be addressed *viz.* the nature of relationship. Reverting back to this aspect, in the present case, we are of the opinion that the legal relationship is established between the assessee and the ultimate consumer/subscriber, who is sold the SIM card by the agents further appointed by the PMAs with the consent of the assessee. It is created by :

a) Activation of the said SIM card by the assessee in the name of the consumer/subscriber.

b) Service provided by the assessee to the subscriber. Further, dealings between the subscribers and the assessee in relation to the said SIM card including any complaint, etc. for improper service/defect in service.

c) Entering into the ultimate agreement between the subscriber and the assessee (Clause 15 of the Agreement).

It is to be borne in mind that the nature of service provided by the assessee to the ultimate consumers/subscribers, whether it is prepaid or postpaid SIM card – remains the same. In the instant case, the SIM cards are prepaid, which are sold by the assessee to the consumers through the medium of PMAs. In the case of postpaid, SIM card transaction is entered into directly between the assessee and the subscriber and the subscriber is sent bill periodically depending upon the user of the SIM card for the period in question. In both the cases, legal relationship is created between the subscriber and the assessee that too

24. In contrast, the legal position when the goods are sold by principal distributors creating 'principal and principal' relationship would be entirely different. On the sale of goods, the ownership passes between the manufacturer and the distributors. It is the responsibility of the distributor thereafter to sell those goods further to the consumers - the ultimate users. The principal/manufacturer does not come in picture at all. Of course, he may be liable for some action by the consumer because of defective goods, etc., which is the result of other enactments conferring certain rights on the consumer or common law rights in his favour as against the manufacturer. We may also point out that in its classic judgment in the case of ***Bharat Sanchar Nigam Ltd. Another*** Vs. ***Union of India and Others*** [AIR 2006 SC 1383], the Supreme Court held that electromagnetic waves or radio of frequencies are not goods and with the sale thereof Sales Tax Act is not attracted, though the decision was rendered in the context of liability of sales tax.

25. No doubt, as per Clause 6(a) of the Agreement, PMA is supposed to make the payment in advance. That would not make any difference to the nature of transaction in view of Clause 25(d) of the Agreement, which stipulates as under:

> "25(d) Upon the termination or expiration of this Agreement for any reason, PMA shall discontinue the marketing/distributing/offering for sale, IDEA CHITCHAT PREPAID SERVICES, and shall forthwith return to ICL the entire stock of PREPAID SIM CARDS/RECHARGE COUPONS remaining with him and/or his Authorized Retailer. ICL shall pay to PMA for such PREPAID SIM CARDS/RECHARGE COUPONS received by it from THE DISTRIBUTOR."

26. Thus, even if advance payment is made by the PMA on receipt of the SIM cards, qua those SIM cards, it does not amount to 'sale' of goods,

unsold SIM cards are to be returned to the assessee and the assess required to make payment against them. This is an antithesis of 'sale'. There cannot be any such obligation to receive back the unsold stocks. Further, clause 25(f) lays down that on termination of agreement, PMA or its authorized retailer appointed by it, is not entitled to any compensation for cost or expenses incurred by it in either setting up or promotion of its business, etc. No such clause was required in case of 'sale'.

(To be taken from AO's Order……..)

27. We may now refer to the three decisions of various Benches of the Tribunal holding which have taken the view contrary to the one held by the Tribunal in impugned decision. In ***Vodafone Essar Cellular Ltd.*** (supra), Cochin Bench has discussed the issue much elaborately in the following manner:

> "33. The assessee-company has made a lot of reliance on the contention regarding the freedom of pricing. It is the case of the assessee-company that the distributors are free to fix the selling price but the price should not exceed the MRP. The revenue says that there is no such freedom in fixing the sale price. As far as the present case is concerned, earlier it was BPL and thereafter BPL Hutch and now it is M/s. Vodafone Essar Cellular Ltd. In the earlier two occasions, there was no clause on pricing in the agreements entered into between the predecessors of the assessee-company and the distributors. It is in the latest agreement between the assessee and its distributors that the clause on pricing has been inserted that the distributors are free to determine the ultimate sale price subject to MRP.
>
> 34. We do not think that this so-called pricing freedom is so crucial in examining the exact nature of the business relation between the assessee-company and its distributors. The pricing factor is also a matter of mutual consent between the parties. Even in the case of an agency, there can be a clause by which an agent is authorized to sell the goods for a price less than the MRP. Even in a case of principal-to-principal, there may be a clause that the distributor cannot sell a product for a price less than the MRP unless a consent is given by the manufacturer. The matter of pricing in both the

and fast rules of any legal proposition as far as these matters ar concerned.

51. It is obvious that a service can only be rendered and cannot be sold. The owner of the SIM Cards and recharge coupons is the assessee-company, M/s. Vodafone Essar Cellular Ltd. This is because the assessee-company is operating under the right of a licence agreement entered into with the Government of India. Nobody else can be given the right to operate as Cellular telephone service providers. The ultimate service is provided by the assessee-company to everyone and everywhere. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or titled of the goods from the assessee-company to the distributor or from the distributor to the ultimate consumer. The distributors are acting only as a link in the chain of service providers. The assessee-company is providing the mobile phone service. It is the ultimate owner of the service system. The service is meant for public at large. In between providing of that service, it is necessary for the company to appoint distributors to make available the pre-paid products to the public as well as to look after the documentation and other statutory matters regarding the mobile phone connection. So, what is the essence of service provided by the distributors? The essence of service rendered by the distributors is not the sale of any product or goods. The distributors are providing facilities and services to the general public for the availability of devices like SIM Cards to have access to the mobile phone network of the assessee-company. Therefore, it is beyond doubt that all the distributors are always acting for and on behalf of the assessee-company. Only for the reason that the distributors are making advance payment for the delivery of SIM Cards and other products and distributors are responsible for the stock and account of those cards, it is not possible to hold that the distributors are not acting for the assessee-company but the distributors are acting on their own behalf. Such a proposition is inconceivable in the facts of the present case. It is always possible for the telephone company itself to provide all these services directly to the consumers as the Department of Telecom was doing; but such a direct service is not feasible now-a-days. Therefore, the assessee has made out a business solution to appoint distributors to take care of the operational activities of the company for providing service. The distributor is one of the important links in that chain of service.

52. Another important feature is that the SIM Cards stocked by the distributors are still the property of the service provider, the assessee-company. The permissive right to use SIM Cards to get access to the phone network of the assessee-company is given only to the ultimate consumer who activates the connection by using the secrete number provided in the SIM Card. It is only for the ultimate consumer or the assessee-company who has the authority to uncover the secret number and bring the card into activation. This unique situation negates the argument of the assessee-

56. In the case of post-paid scheme, the assessee-company treating the benefits enjoyed by a distributor as commission an deducting tax at source. Where the assessee-company itself admits that it is liable to deduct tax at source under section 194H in respect of post-paid services rendered through its distributors, it is the duty of the assessee to prove that the services rendered by the assessee through the distributors on pre-paid package is different from the post-paid package so as to qualify the former for exemption from operation of section 194H.

57. It is beyond any dispute that the essence of service rendered to the pre-paid and post-paid consumers are one and the same. There is no difference. The only difference is technical. The difference exists only in billing system and revenue collection, etc. In both the cases assessee-company is providing the service. Distributors are helping to reach such services to the ultimate consumers. In both the systems, there is documentation. In both the systems, the distributors render similar types of services to the assessee-company. Of course accounting the revenue collection and related matters are different. The essence of post-paid and pre-paid services rendered by the assessee-company is the same and the relationship between the assessee and the customers is also the same. Therefore, if post-paid scheme is subject to section 194H, it is quite unlikely that pre-paid system would be outside the purview of section 194H.

60. The next question is whether the commission/brokerage allowed by the assessee-company at the stage of raising the invoice is equivalent to paying of commission/brokerage to the distributors. The assessee has always raised a contention, that too in the light of the judicial pronouncements including that of M.S. Hammed (supra) that the assessee-company had no occasion to deduct tax at source as the assessee-company was not making any payment to the distributors or crediting the account of the distributors for any services rendered to it. But that occasion was removed by the assessee itself by conscious wordings of the terms of the agreement. The assessee-company can collect the net sale proceeds along with TDS element from he distributors while distributing the pre-paid products to the distributors. The distributors shall file their returns before the concerned authorities and depending upon the working results, they can adjust the TDS collected by the assessee-company against their tax liability or the refund due. The fact that the distributors may some time deliver the products for a price less than the MRP is not at all an impediment in deducting the tax at source. The distributors may deliver the products at a lesser price, but even then for the purpose of section 194H, as in the above example, the margin available to the distributor is Rs.20, which is to be treated as commission, and the assessee has to consider that amount for the purpose of quantifying the element of TDS. The assessee-company has to collect the net price along with the above stated TDS element. Therefore, the argument that there was no occasion as in the case of M.S. Hameed (supra) has no relevance here. The situation considered by the Hon'ble High Court was different. In that case one party is State Government. Without executing an authority in

goods. But, in the present case, there is no failure of any procedur provisions as apprehended by the assessee-company.

65. We have come to the above conclusion specifically on the following grounds:

(1) In the judgment of the Hon'ble High court of Kerala in the case of BPL Mobile Cellular Ltd. (supra) it has been held that in the supply and delivery of SIM Cards and other recharge coupons, there is no sale and purchase of goods, but only of providing services;

(2) The Hon'ble Kerala High court in the case of Kerala Stamp Vendors Association(supra) have treated the subject transactions as transaction of purchase and sale of goods;

(3) The assessee-company as a service provider is always the owner of the above products which is meant only as devices to have access to the Mobile phone network system maintained and operated by the assessee-company;

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

(5) Other matters explained by the assessee as, there was no payment by the assessee in cash or cheque by way of commission to the distributors or not crediting the accounts of the distributors for any commission, delivering the products only after getting the price in full, are all matters of asssessee's Indoor Management.

(6) Service cannot be sold or purchased and it can ony be provided. The operational features explained by the assessee-company are necessary in running a mammoth system of providing mobile telephone services over a large geographical area. The distributors provide essential services to the assessee-company in running such a huge operational system. The distributors are linking agents in the chain of delivery of services to consumers. Therefore, the relationship is not of a principal to principal."

of Income Tax Vs. ***Bharti Cellular Ltd.*** [(2007) 294 ITR (AT) (Kolkata)]. Both these Benches specifically rejected the arguments of the assessee based on ***Ahmedabad Stamp Vendors Association*** (supra), ***The Bhopal Sugar Industries Ltd.*** (supra), ***Kerala Stamp Vendors Association***(supra) and ***Bajaj Auto Ltd.*** (supra) distinguishing those judgments and holding that they are not applicable in the given situation. We agree with the same.

29. We thus answer the question, as formulated, in favour of the Revenue and against the assessee. As a consequence, these appeals are allowed and judgment of the Tribunal on this aspect is set aside. No costs.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

FEBRUARY 19, 2010.
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