HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

1. D.B. Income Tax Appeal No. 205 / 2005

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Plot No. SP 39-40, RIICO Industrial Area Kaladera, Jaipur

----Appellant

Versus

The Commissioner of Income Tax-III, Jaipur

----Respondent

Connected With

2. D.B. Income Tax Appeal No. 206 / 2005

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Plot No. SP 39-40, RIICO Industrial Area Kaladera, Jaipur

----Appellant

Versus

The Commissioner of Income Tax-III, Jaipur

----Respondent

3. D.B. Income Tax Appeal No. 10 / 2007

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Plot No. SP 39-40, RIICO Industrial Area Kaladera, Jaipur

----Appellant

Versus

The Income Tax Officer Ward 7(4), C-95, Sidhanath Bhawan Janpath Road, Lal Kothi Scheme Jaipur

----Respondent

4. D.B. Income Tax Appeal No. 55 / 2007

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Kaladera Tehsil: Chomu, Jaipur

----Appellant

Versus

The Commissioner of Income Tax, Jaipur

----Respondent

5. D.B. Income Tax Appeal No. 6 / 2008

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Kaladera Tehsil: Chomu, Jaipur

----Appellant

Versus

The Commissioner of Income Tax, Jaipur

----Respondent

6. D.B. Income Tax Appeal No. 7 / 2008

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Plot No. SP 39-40, RIICO Industrial Area Kaladera, Jaipur

----Appellant

Versus

The Income Tax Officer Ward 7(4), C-95, Sidhanath Bhawan Janpath Road, Lal Kothi Scheme Jaipur

----Respondent

7. D.B. Income Tax Appeal No. 540 / 2009

M/s Hindustan Coca Cola Beverages Pvt. Ltd., Kaladera Tehsil: Chomu, Jaipur

----Appellant

Versus

The Additional Commissioner of Income Tax (TDS)

----Respondent

8. D.B. Income Tax Appeal No. 1 / 2014

M/s Vodafone Mobile Services Limited (VSML) 5th Floor, Gaurav Towers Malviya Nagar, Jaipur, Through Its Power of Attorney Holder, Ronak Chelaram Kumawat.

----Appellant

Versus

Income Tax Officer, Ward TDS-2, Jaipur.

----Respondent

9. D.B. Income Tax Appeal No. 2 / 2014

M/s Vodafone Mobile Service Limited (VSML) 5th Floor, Gaurav Towers, Malviya Nagar Jaipur Through Its Power of Attorney Holder, Ronak Chelaram Kumawat.

----Appellant

Versus

Income Tax Officer, Ward TDS-2, Jaipur.

----Respondent

10. D.B. Income Tax Appeal No. 3 / 2014

M/s Vodafone Mobile Service Limited (VSML) 5th Floor, Gaurav Towers, Malviya Nagar Jaipur Through Its Power of Attorney Holder, Ronak Chelaram Kumawat.

----Appellant

Versus

Income Tax Officer, Ward TDS-2, Jaipur.

----Respondent

11. D.B. Income Tax Appeal No. 4 / 2014

M/s Vodafone Mobile Services Limited (VSML) 5th Floor, Gaurav Towers Malviya Nagar, Jaipur, Through Its Power of Attorney Holder, Ronak Chelaram Kumawat.

----Appellant

Versus

Income Tax Officer, Ward TDS-2, Jaipur.

----Respondent

12. D.B. Income Tax Appeal No. 124 / 2015

Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Tata Teleservices Limited, Guman-1, Amrapali Circle, Vaishali Nagar, Jaipur

----Respondent

13. D.B. Income Tax Appeal No. 125 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Tata Teleservices Limited, Guman-1, Amrapali Circle, Vaishali Nagar, Jaipur

----Respondent

14. D.B. Income Tax Appeal No. 126 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Tata Teleservices Limited, Guman-1, Amrapali Circle, Vaishali Nagar, Jaipur

----Respondent

15. D.B. Income Tax Appeal No. 131 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Tata Teleservices Limited, Guman-1, Amrapali Circle, Vaishali Nagar, Jaipur

----Respondent

16. D.B. Income Tax Appeal No. 132 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Tata Teleservices Limited, Guman-1, Amrapali Circle, Vaishali Nagar, Jaipur

----Respondent

17. D.B. Income Tax Appeal No. 168 / 2015

Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd. 1-2, Jai Jawan Colony, Tonk Road, Jaipur-302018

----Respondent

18. D.B. Income Tax Appeal No. 169 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd. 1-2, Jai Jawan Colony, Tonk Road Jaipur 302018

----Respondent

19. D.B. Income Tax Appeal No. 170 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd. 1-2, Jai Jawan Colony, Tonk Road, Jaipur-302018

----Respondent

20. D.B. Income Tax Appeal No. 171 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd. 1-2, Jai Jawan Colony, Tonk Road, Jaipur-302018

----Respondent

21. D.B. Income Tax Appeal No. 195 / 2015
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur,

----Respondent

22. D.B. Income Tax Appeal No. 8 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd (Formerly Known As Idea Telecommunication Ltd.), 1-2, Jai Jawan Colony, Tonk Road, Jaipur 302018

----Respondent

23. D.B. Income Tax Appeal No. 45 / 2016
Commissioner of Income Tax (tds) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd (Formerly Known As Idea Telecommunication Ltd.), 1-2, Jai Jawan Colony, Tonk Road, Jaipur 302018

----Respondent

24. D.B. Income Tax Appeal No. 48 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd (Formerly Known As Idea Telecommunication Ltd.), 1-2, Jai Jawan Colony, Tonk Road, Jaipur 302018

----Respondent

25. D.B. Income Tax Appeal No. 49 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Idea Cellular Ltd (Formerly Known As Idea Telecommunication Ltd.), 1-2, Jai Jawan Colony, Tonk Road, Jaipur 302018

----Respondent

26. D.B. Income Tax Appeal No. 96 / 2016

Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur

----Respondent

27. D.B. Income Tax Appeal No. 97 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur,

----Respondent

28. D.B. Income Tax Appeal No. 98 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur,

----Respondent

29. D.B. Income Tax Appeal No. 99 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

30. D.B. Income Tax Appeal No. 100 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

31. D.B. Income Tax Appeal No. 101 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

32. D.B. Income Tax Appeal No. 102 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

33. D.B. Income Tax Appeal No. 103 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

34. D.B. Income Tax Appeal No. 104 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

35. D.B. Income Tax Appeal No. 105 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Vodafone Digilink Ltd. Circle office, 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur

----Respondent

36. D.B. Income Tax Appeal No. 106 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur,

----Respondent

37. D.B. Income Tax Appeal No. 107 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur,

----Respondent

38. D.B. Income Tax Appeal No. 108 / 2016
Commissioner of Income Tax (TDS) Jaipur

----Appellant

Versus

M/s Bharti Hexacom Limited K-21 Malviya Marg, C-scheme, Jaipur.

----Respondent

39. D.B. Income Tax Appeal No. 199 / 2016
Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Idea Cellular Ltd. (Formerly Known As Idea Telecommunication Ltd.), 1-2, Jai Jawan Colony, Tonk Road, Jaipur-302018

----Respondent

40. D.B. Income Tax Appeal No. 200 / 2016

Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s Bharati Hexacom Limited, K-21, Malviya Marg, C-Scheme, Jaipur,

----Respondent

41. D.B. Income Tax Appeal No. 204 / 2016

Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Bharti Hexacom Limited, K-21 Malviya Marg, C-scheme, Jaipur

----Respondent

42. D.B. Income Tax Appeal No. 209 / 2016

Commissioner of Income Tax (TDS), Jaipur

----Appellant

Versus

M/s. Bharti Hexacom Limited, K-21 Malviya Marg, C-scheme, Jaipur

----Respondent

43. D.B. Income Tax Appeal No. 210 / 2016

COMMISIONER OF INCOME TAX(TDS), JAIPUR

----Appellant

Versus

M/S BHARTI HEXACOM LIMITED K-21, MALVIYA MARG, C-SCHEME, JAIPUR

----Respondent

44. D.B. Income Tax Appeal No. 217 / 2016

COMMISSIONER OF INCOME TAX(TDS), JAIPUR

----Appellant

Versus

M/S IDEA CELLULAR LTD. (FORMERLY KNOWN AS IDEA TELECOMMUNICATION LTD.) 1-2, JAI JAWAN COLONY, TONK ROAD, JAIPUR-302018

----Respondent

For Appellant(s) : Mr. Ajay Vohra, senior counsel with Mr. Abhishek Sharma and Mr. Gaurav Jain, Mr. P.K. Verma

Mr. Sudhanshu Kasliwal, senior counsel with Mr. Anant Kasliwal, Mr. Vaibhav Kasliwal and Ms Charu Pareek

Mr. N.M. Ranka, senior counsel with Mr. N.K. Jain

Mr. Sanjay Jhanwar with Mr. Prakul Khurana and Ms. Archana

Mr. Akhil Simlote

For Respondent(s) : Mr. R.B. Mathur with Mr. K.D. Mathur, Mr. Nikhil Simlote, Mr. Prateek Kedawat, Ms. Tanvi Sahai, Ms. Meenal Ghiya & Mr. Prabhansh Sharma

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HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE INDERJEET SINGH

Judgment

Per Hon’ble Jhaveri, J.

11/07/2017

1. All these appeals arise out of the judgments delivered by the Income Tax Appellate Tribunal. In some of the appeals, the assessee is the appellant and in some of the matters, the Department has come by way of appeals. However, time and again the matter was adjourned and all these appeals are clubbed in view of the fact that questions of law involved in all these appeals are somewhat identical.

2. The basic question which was put forth for our consideration is whether the arrangement which has been worked out between the assessee company and the distributor (Agency) claimed by the Income Tax Department are covered under the provisions of Sections 194 H and/or 194 J of the Income Tax Act.

3. To come out all these appeals, first of all, we will give the questions which were posed in different appeals:

3.1 D.B. Income Tax Appeal No.205/2005 admitted on 30.08.2005.

> "(i) Whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S.194H of the Income Tax Act, 1961 amounting to Rs.19,74,842/- (including interest) in respect of sales to its distributors, which are on a principal to principal basis and wherein property in the goods is transferred to the distributors?
>
> (ii) Whether the Tribunal was justified in ignoring the statutory books of accounts, the auditors report and the certificate issued by the auditors and merely relying on the internal Management Information System records in coming to the conclusion on the nature of the dealings with the distributors?

(iii) Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that interest under Ss.201 (1A) and 220 (2) of the Income Tax Act, 1961 should be levied on the appellant when the taxes due had already been paid by the distributor(s)/ when a valid stay of recovery has been obtained? ”

3.2 D.B. Income Tax Appeal NO.206/2005 admitted on 31.08.2005.

"(i) Whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S.194H of the Income Tax Act, 1961 amounting to Rs.42,43,729/- (including interest) in respect of sales to its distributors, which are on a principal to principal basis and wherein property in the goods is transferred to the distributors?

(ii) Whether the Tribunal was justified in ignoring the statutory books of accounts, the auditors report and the certificate issued by the auditors and merely relying on the internal Management Information System records in coming to the conclusion on the nature of the dealings with the distributors?

(iii) Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that interest under Ss.201 (1A) and 220 (2) of the Income Tax Act, 1961 should be levied on the appellant when the taxes due had already been paid by the distributor(s)/ when a valid stay of recovery has been obtained?"

3.3 D.B. Income Tax Appeal NO.10/2007 admitted on 07.02.2007.

"(a) Whether in the facts and circumstances of the case the learned Tribunal was justified in holding the appellant as an assessee in default under section 201 of the Act, for alleged failure to

deduct tax at source under Section 194 H of the Act in respect of sales to its distributors, which are on a principal to principal basis and wherein property in the goods is transferred to the distributors?

(b) Whether on the facts and circumstances of the case, selective reliance can be validly placed by the Tribunal on the management Information System records and other extraneous records on irrelevant considerations, ignoring statutory financial books of account in arriving at any conclusion with regard to the character of dealings between the Appellant and the distributors?

(c) Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that interest under section 201(1A) of the Act should be levied on the Appellant when the taxes due had already been paid by the distributor(s)?"

3.4 D.B. Income Tax Appeal NO.55/2007 admitted on 26.10.2007.

"(i) Whether the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under section 194H of the Income- tax Act, 1961 amounting to Rs.19,74,842/ (including interest) in respect of sales of its distributors, which are on a principal to principal basis and where property in the goods is transferred to the distributors?

(ii) Whether the Tribunal justified in ignoring the statutory books of accounts, the auditors report and the certificate issued by the auditors and merely relying on the internal Management Information System records in coming to the conclusion on the nature of the dealings with the distributors?"

3.5 D.B. Income Tax Appeal NO.6/2008 admitted on 11.03.2011.

"(i). "WHETHER on the facts and circumstances of the case the Tribunal erred in law in not holding that the notice proposing penalty is time barred and consequently the order levying penalty under Section 271 C of the Act was void-ab-initio?

(ii). WHETHER on the facts and in the circumstances of the case the Tribunal erred in law in upholding the levy of penalty under Section 271 C for the alleged failure of the appellant to deduct tax at source under Section 194H of the Act in respect of sale of products to its distributors?"

3.6 D.B. Income Tax Appeal NO.7/2008 admitted on 11.03.2011.

"(i). WHETHER on the facts and circumstances of the case the Tribunal erred in law in not holding that the notice proposing penalty is time barred and consequently the order levying penalty under Section 271 C of the Act was void-ab-initio?

(ii). WHETHER on the facts and in the circumstances of the case the Tribunal erred in law in upholding the levy of penalty under Section 271 C for the alleged failure of the appellant to deduct tax at source under Section 194H of the Act in respect of sale of products to its distributors?"

3.7 D.B. Income Tax Appeal NO.540/2009 admitted on 11.03.2011.

"(i). WHETHER on the facts and circumstances of the case the Tribunal erred in law in not holding that the notice proposing penalty is time barred and consequently the order levying penalty under Section 271 C of the Act was void-ab-initio?

(ii). WHETHER on the facts and in the circumstances of the case the Tribunal erred in law in upholding the levy of penalty under Section 271 C for the alleged failure of the appellant to deduct tax at source under Section 194H of the Act in respect of sale of products to its distributors?"

3.8 D.B. Income Tax Appeal NO.1/2014 admitted on 27.01.2014.

"1. whether on the facts & in circumstances of the case, the Tribunal erred in Taw in upholding the order of the CIT (A) treating the appellant as an assessee in default u/s 201(1), for alleged failure to deduct TDS u/s. 194H of the Act in respect of discount. Allowed on pre-paid SIM cards and Talk time sold to pre-paid distributors by the appellant?

2. whether against a deductor who fails to deduct the tax at source, the liability of payment of tax can also be fastened under section 201 apart from Liability of interest and penalty?

3. Whether, according to section 191 read with section 201, a deductor, who fails to deduct tax at source can be deemed to be an assessee in default without adverting to the issue and recording a finding that the assessee who is liable to pay tax directly had not paid tax?

4. Whether on the facts and circumstances of the case, the Tribunal was correct in holding that the CIT(A) has no jurisdiction to set aside/restore the matter to the assessing officer.

5. Whether on the facts & in circumstances of the case, the Tribunal erred in Law in not independently directing the AO to carry out such verification & delete the demand u/s. 201(1) of the Act in relation to income on which tax had been paid by the prepaid distributors?"

3.9 D.B. Income Tax Appeal NO.2/2014 admitted on 27.01.2014.

"1. whether on the facts & in circumstances of the case, the Tribunal erred in Taw in upholding the order of the CIT (A) treating the appellant as an assessee in default u/s 201(1), for alleged failure to deduct TDS u/s. 194H of the Act in respect of discount. Allowed on pre-paid SIM cards and Talk time sold to pre-paid distributors by the appellant?

2. whether against a deductor who fails to deduct the tax at source, the liability of payment of tax can also be fastened under section 201 apart from Liability of interest and penalty?

3. Whether, according to section 191 read with section 201, a deductor, who fails to deduct tax at source can be deemed to be an assessee in default without adverting to the issue and recording a finding that the assessee who is liable to pay tax directly had not paid tax?

4. Whether on the facts and circumstances of the case, the Tribunal was correct in holding that the CIT(A) has no jurisdiction to set aside/restore the matter to the assessing officer.

5. Whether on the facts & in circumstances of the case, the Tribunal erred in Law in not independently directing the AO to carry out such verification & delete the demand u/s. 201(1) of the Act in relation to income on which tax had been paid by the prepaid distributors?"

3.10 D.B. Income Tax Appeal NO.3/2014 admitted on 27.01.2014.

"1. whether on the facts & in circumstances of the case, the Tribunal erred in Taw in upholding the order of the CIT (A) treating the appellant as an assessee in default u/s 201(1), for alleged failure to deduct TDS u/s. 194H of the Act in respect of discount. Allowed on pre-paid SIM cards and Talk time sold to pre-paid distributors by the appellant?

2. whether against a deductor who fails to deduct the tax at source, the liability of payment of tax can also be fastened under section 201 apart from Liability of interest and penalty?

3. Whether, according to section 191 read with section 201, a deductor, who fails to deduct tax at source can be deemed to be an assessee in default without adverting to the issue and recording a finding that the assessee who is liable to pay tax directly had not paid tax?

4. Whether on the facts and circumstances of the case, the Tribunal was correct in holding that the CIT(A) has no jurisdiction to set aside/restore the matter to the assessing officer.

5. Whether on the facts & in circumstances of the case, the Tribunal erred in Law in not independently directing the AO to carry out such verification & delete the demand u/s. 201(1) of the Act in relation to income on which tax had been paid by the prepaid distributors?"

3.11 D.B. Income Tax Appeal NO.4/2014 admitted on 27.01.2014.

"1. whether on the facts & in circumstances of the case, the Tribunal erred in Taw in upholding the order of the CIT (A) treating the appellant as an assessee in default u/s 201(1), for alleged failure to deduct TDS u/s. 194H of the Act in respect of discount. Allowed on pre-paid SIM cards and Talk time sold to pre-paid distributors by the appellant?

2. whether against a deductor who fails to deduct the tax at source, the liability of payment of tax can also be fastened under section 201 apart from Liability of interest and penalty?

3. Whether, according to section 191 read with section 201, a deductor, who fails to deduct tax at source can be deemed to be an assessee in default without adverting to the issue and recording a finding that the assessee who is liable to pay tax directly had not paid tax?

4. Whether on the facts and circumstances of the case, the Tribunal was correct in holding that the CIT(A) has no jurisdiction to set aside/restore the matter to the assessing officer.

5. Whether on the facts & in circumstances of the case, the Tribunal erred in Law in not independently directing the AO to carry out such verification & delete the demand u/s. 201(1) of the Act in relation to income on which tax had been paid by the prepaid distributors?"

3.12 D.B. Income Tax Appeal NO.124/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.13 D.B. Income Tax Appeal NO.125/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.14 D.B. Income Tax Appeal NO.126/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.15 D.B. Income Tax Appeal NO.131/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.16 D.B. Income Tax Appeal NO.132/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.17 D.B. Income Tax Appeal NO.168/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.18 D.B. Income Tax Appeal NO.169/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.19 D.B. Income Tax Appeal NO.170/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.20 D.B. Income Tax Appeal NO.171/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.21 D.B. Income Tax Appeal NO.195/2015 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.22 D.B. Income Tax Appeal NO.08/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.23 D.B. Income Tax Appeal NO.45/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.24 D.B. Income Tax Appeal NO.48/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.25 D.B. Income Tax Appeal NO.49/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.26 D.B. Income Tax Appeal NO.96/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.27 D.B. Income Tax Appeal NO.97/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.28 D.B. Income Tax Appeal NO.98/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.29 D.B. Income Tax Appeal NO.99/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.30 D.B. Income Tax Appeal NO.100/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled

monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.31 D.B. Income Tax Appeal NO.101/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act.

3.32 D.B. Income Tax Appeal NO.102/2016 admitted on 20.04.2017.

"1. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that whether the assessee is liable to deduct TDS u/s. 194H of the IT Act, as

the relation between assessee and distributor is that of principal to agent.

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.33 D.B. Income Tax Appeal NO.103/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in

deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.34 D.B. Income Tax Appeal NO.104/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.35 D.B. Income Tax Appeal NO.105/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.

4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.

5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

3.36 D.B. Income Tax Appeal NO.106/2016 admitted on 18.10.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.37 D.B. Income Tax Appeal NO.107/2016 admitted on 26.07.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.38 D.B. Income Tax Appeal NO.108/2016 admitted on 26.07.2016.

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

2. Whether in the facts and circumstances of the case, the TDS is applicable u/s. 194-J of the IT Act on roaming charges paid for facility provided by service provider, as this interconnection is managed/ controlled/ monitored by human intervention?"

3.39 D.B. Income Tax Appeal NO.199/2016 admitted on 08.11.2016.

"1. Whether in the facts and circumstances of the case, Tribunal was justified in holding that the provisions of section 194J are not applicable on roaming charges paid for facilities provided by the Service Providers.

2. Whether in the facts and circumstances of the case, the Tribunal was justified in law in holding the payment of roaming charges to other telecom operator is not subject to TDS u/s 194J of the Act as fees for technical services, and accordingly holding that assessee is not in default u/s 201 read with section 194J of the Act."

3.40 D.B. Income Tax Appeal NO.200/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s 201 (1) for non deduction of TDS u/s 194H on commission payment to various distributors.

3. Whether in the facts and circumstances of the case, TDS u/s 194J is applicable on roaming charges paid for facilities provided by service providers."

3.41 D.B. Income Tax Appeal NO.204/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s 201 (1) for non deduction of TDS u/s 194H on commission payment to various dsitributors.

3. Whether in the facts and circumstances of the case, TDS u/s 194J is applicable on roaming charges paid for facilities provided by service providers."

3.42 D.B. Income Tax Appeal NO.209/2016 admitted on 20.04.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s 201 (1) for non deduction of TDS u/s 194H on commission payment to various dsitributors.

3. Whether in the facts and circumstances of the case, TDS u/s 194J is applicable on roaming charges paid for facilities provided by service providers."

3.43 D.B. Income Tax Appeal NO.210/2016 admitted on 28.03.2017.

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

2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s 201 (1) for non deduction of TDS u/s 194H on commission payment to various dsitributors.

3. Whether in the facts and circumstances of the case, TDS u/s 194J is applicable on roaming charges paid for facilities provided by service providers."

3.44 D.B. Income Tax Appeal NO.217/2016 admitted on 20.04.2017.

"1. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of section 194J are not applicable on roaming charges paid for facilities provided by the Service Providers.

2. Whether in the facts and circumstances of the case, the Tribunal was justified in law in holding the payment of roaming charges to other telecom operator is not subject to TDS u/s. 194J of the Act as fees for technical services, and accordingly holding that assessee is not in default u/s. 201 read with section 194J of the Act.

3. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of section 194H are not applicable in the case of respondent assessee despite of the fact that the different between the MRP and dealers price is nothing but "Commission".

4. Whether in the facts and circumstances of the case, the Tribunal was justified in law in deleting the order of demand u/s 201 (1)/201 (A) for non deduction of TDS u/s 194H on payment made for commission by the assessee to its dealers channel partners.

5. Whether in the facts and circumstances of the case, the assessee was in default under section 201(1) for non deduction of

tax at source u/s 194H in respect of commission payments."

Contention of Mr. Ajay Vohra and Mr. Anant Kasliwal appearing on behalf of assessee Hindustan Coca Cola Beverages Pvt. Ltd., and M/s Vodafone Digilink Ltd., Mr. Jhanwar appearing on behalf of M/s Bharti Hexacom Ltd., Mr. N.M. Ranka, senior counsel with Mr. N.K. Jain appearing on behalf of Tata Teleservices Ltd. and Mr. Akhil Simlote on behalf of assessee Idea Cellular Ltd.

4. Counsel for the assessee has pointed out that while framing the questions of law, a mistake has occurred in reproduction of agreement that question regarding penalty which was required to be framed has been framed in the substantive appeal No.7/2008 which is a quantum matter where the question of penalty has been framed in Appeal No.55/2007 is not substantive, therefore, the same being interchangeable be read as it is.

5. The basic contention of counsel for the assessee is that transaction which has taken place is on principal to principal basis and is not covered under the provisions of the Indian Contract Act as claimed by the Department that it is the property of agency as defined under Section 182 of the Contract Act which reads as under:

"182. "Agent" and "principal" defined -

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

6. The word which has been interpreted under Section 182 is that a person is not employed but he was only appointed as a Distributor and it is only on principal to principal basis and the goods which have been delivered were delivered only on the basis of assurance that he will give the amount which is required to be paid as claimed by the Department.

6.1 No commission, which has been claimed as commission where they are claiming that tax is required to be deducted, has ever been paid by the assessee. Even the risk of the goods which has been delivered is of the buyer.

6.2 The transfer is also taken within the custody of the Distributor because he has to keep his own godown at his own risk. The title of the property is also vested with the person who has purchased the goods from the assessee.

6.3 The basis on which the proceedings are initiated under Section 133A are on the basis of Management Information System process data which has been raised and the 10% which is claimed to be commission is never paid by the company. It has also been shown on record that the sales tax deferment or 20% rebate which has been given to the assessee company is claimed by the assessee and that has been shown in the invoices which are issued by the assessee. There is no agreement of agency nor even ingredients which are defined under Section 182 of the Contract Act.

7. The provisions of Section 194H, Section 194J of the Income Tax Act read as under:

194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, 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 :

Provided that no deduction shall be made under this section in a case 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 to the account of, or to, the payee, does not exceed two thousand five hundred rupees :

[Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:]

[Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.]

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, not being securities;

(ii) the expression "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) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iv) 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.]

194J.

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of
(a) fees for professional services, or

(b) fees for technical services, [or][

(c) royalty, or

(d) any sum referred to in clause (va) of section 28,] shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to [ten] per cent of such sum as income-tax on income comprised therein :

Provided that no deduction shall be made under this section—

(A) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or

(B) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—

(I) twenty thousand rupees, in the case of fees for professional services referred to in

clause (a), or

(ii) twenty thousand rupees, in the case of fees for technical services referred to in [clause (b), or]

[(iii)twenty thousand rupees, in the case of royalty referred to in clause (c), or

(iv)twenty thousand rupees, in the case of sum referred to in clause (d) :]

[Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section :]

[Provided also that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.]

(2) [***]

(3) [***]

Explanation.—For the purposes of this section,—

(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;

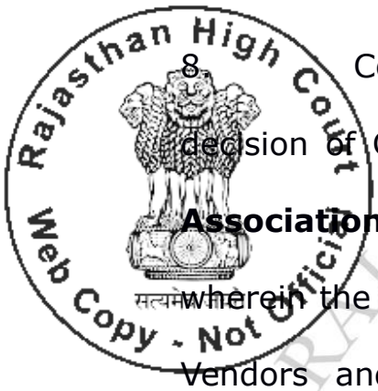
(b)"fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

25[(ba)"royalty" shall have the same meaning as in Explanation 2 to clause

(vi) of sub-section (1) of section 9;

(c) where any sum referred to in sub-

section (1) 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 sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.



8. Counsel for the appellant has first taken us to the decision of Gujarat High Court in **Ahmedabad Stamp Vendors Association Vs. Union of India, (2002) 257 ITR 202 (Guj.)** wherein the Gujarat High Court has considered the case of Stamp Vendors and after considering the different decisions of the Supreme Court has held as under:

"(Page 208) Since the principal controversy in the present petition is whether the stamp vendors are agents of the State Government who are being paid commission or brokerage or whether the sale of stamp papers by the Government to the licensed vendors is on principal to principal basis involving the contract of sale, a brief reference is required to be made to the principles laid down by the Supreme Court in the case of Bhopal Sugar Industries Ltd, v. Sales Tax Officer [1977]3SCR578 , wherein the apex court reviewed all the relevant previous decisions on the subject.

(B at Page 209) In the aforesaid decision, the apex court reiterated the principles laid down by it in the earlier decisions as under (see page 48 of 40 STC) :

"As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is

liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the "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 the goods and will therefore be liable to account for the sale proceeds."

(Page 212) A perusal of the aforesaid rules would certainly indicate that there are several restrictions imposed upon the licensed vendors but as laid down by the apex court in Bhopal Sugar Industries Ltd. v. STO [1977] 40 STC 42, "the concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire by including a transaction within the fold of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e.g., fixation of price, submission of accounts, selling in a particular area or territory and so on. These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incidents of a sale." Hence without being swayed by the aforesaid restrictions imposed by the rules regarding the manner in which the licensed stamp vendors are to carry on their business, we have to examine whether the licensed stamp vendor is an agent of the State Government.

(D at page 213) There is no dispute about the fact that the licensed vendor has to pay the price of the stamp papers less the discount at the rates provided in Appendix III to the Rules, which rates vary from 0.5 per cent to 4 per cent It is not that the stamp vendor collects the stamp papers from the Government, sells them to the retail customers and then deposits the sale proceeds with the Government less the discount. The liability of the stamp vendor to pay the price less the discount is not dependent upon or contingent to sale of

the stamp papers by the licensed vendor. The licensed vendor would not be entitled to get any compensation or refund of the price if the stamp papers were to be lost or destroyed."

8.0.1 Thereafter, the Gujarat High Court observed as under:

"(A at page 215) The very basis of enacting the provision by the State Legislature for giving exemption from sales tax in respect of sale of stamp papers by the licensed vendors was the fact that the sale of stamp papers by the licensed vendors to the customers would have been otherwise exigible to sales tax. The question of levy of sales tax would arise only because the licensed vendors themselves sell the stamp papers on their own and not as agents of the State Government. Had they been treated as agents of the State Government, the question of levy of sales tax on sale of stamp papers by them would not arise."

8.0.2 And the conclusion which was reached by the Gujarat High Court reads as under:

"(B at page 216) In view of the above discussion, we uphold the contention urged on behalf of the petitioner's association that the discount made available to the licensed stamp vendors under the provisions of the Gujarat Stamps Supply and Sales Rules, 1987, does not fall within the expression "commission" or "brokerage" under Section 194H of the Income Tax Act, 1961. The impugned communication dated March 14, 2002, from the Income Tax Officer, TDS 4, Ahmedabad, to the Senior Treasury Officer, Ahmedabad, is, therefore, quashed and set aside, and so also the consequential instructions dated March 19, 2002 (annexure "D" to the petition), issued by the Senior Treasury Officer, Ahmedabad, to the secretary of the petitioner's association are quashed and set aside.

> Rule is made absolute with no order as to costs."

8.1 . The judgment of Gujarat High Court has been confirmed by the Supreme Court in **CIT Vs. Ahmedabad Stamp Vendors Association, (2012) 348 ITR 378 (SC)** which reads as under:

> "1. Heard learned counsel on both sides.
>
> 2. The Respondent in this civil appeal is the Ahmedabad Stamp Vendors Association and the members of the said association are licensed stamp vendors.
>
> 3. We are satisfied that 0.50 per cent. to 4 per cent. discount given to the stamp vendors is for purchasing the stamps in bulk quantity and the said discount is in the nature of cash discount.
>
> 4. In the circumstances, we concur with the impugned judgment that the impugned transaction is a sale. Consequently, Section 194H of the Income-tax Act, 1961, has no application.
>
> 5.The civil appeal filed by the Department is dismissed with no order as to costs."

9. In that view of the matter, he contended that the view taken by the Gujarat High Court is required to be considered in the case of the appellant.

10. He has also relied upon the Calcutta High Court judgment in **Ghasiram Agarwalla Vs. State, AIR 1967 Calcutta 568** and more particularly the observations which are made as under:

> "6. …… In favour of the view that it is an agreement for agency:
>
> 1. The agreement is entitled, "Agreement for distribution of wheat through Fair Price Shops" and not an agreement for sale.

2. The retailer is "appointed" a retail dealer. A purchaser cannot be 'appointed'. An 'appointment' which can be cancelled (Clause 15) is more consistent with agency than with a transaction of sale and purchase.

3. The price of wheat is to be "deposited'' by the retailer and not "paid" (Clauses 4 and 5).

4. There are restrictions on sale, as follows: -

(a) The price at which it is to be sold is fixed.

(b) The wheat can only be sold to consumers within a specified zone and he cannot refuse to sell on demand by a customer within the said zone.

(c) The retailer must comply with directions issued by the Director of rationing or any other officer authorised by Director.

(d) The retailer can sell only during shop hours.

(e) Upon termination or cancellation of agreement, the remaining stock can only be disposed of according to direction of Director.

5. The retailer must maintain appropriate stock registers and sale register and issue cash memo to each customer, noting the name and address of the customer.

6. The retailer must offer inspection to authorised staff to inspect his stock and books of account.

7. If the retailer contravenes any provision of the agreement the Director may without assigning reason suspend supply of wheat to him and cancel his appointment.

8. The Director may at his uncontrolled discretion and without assigning any reason, terminate the agreement upon giving one month's notice, it may similarly be terminated by the retailer.

9. After cancellation or termination of the agreement, any stock of wheat

left can only be dealt with or disposed of according to the direction issued in this behalf of the Director and not otherwise.

In favour of the view that it is an agreement for sale:

1. The wheat is obtained by depositing a price of Rs. 14 per maund and sold to consumers at Rs. 15 per maund (annas six per seer). Obviously the difference is the profit to be enjoyed by the retailer, but there is no provision in the agreement for his retention of this sum. It is therefore more consistent with sale than agency.

2. 'Price' has been defined in Section 2(10) of the Sale of Goods Act as meaning--"the money consideration for a sale of goods". If it is agency, why should the 'price' have to be deposited and not merely the 'value' of the goods?

3. The retailer is obviously selling to his customer, because he charges him a price and issue a 'cash memo'. Under Clauses 8 and 12, he "sells" the wheat. How can he 'sell' anything if he has not become the owner thereof? Before we discuss the respective merits of these two sides of the picture, it is necessary to notice a number of decisions cited by the parties The first case cited is the Supreme Court decision, Narayan Ittirvi Nambudiri v. State of Travancore Cochin. AIR1953SC478 . The facts in that case were as follows: Two receivers including, the appellant were appointed Receivers of a textile mill, by the High Court of Travancore Cochin. At the time that the appellant was appointed Receiver, the prices of textile goods were controlled. Thereafter, by the end of April, 1948, controls were lifted, although by a sort of a gentleman's agreement between the members of the South Indian Mill Owners' Association, the old practice of selling at prices stamped on each piece of

cloth was continued. One Vaidyanath Aver was a dealer holding a quota from the mill. When he approached the Receivers for his quota, he was asked to pay a sum of Rs. 10,000 which was later on increased to Rs. 23,100 The Receivers were prosecuted. At the trial, the prosecution abandoned the case of illegal gratification but the charge pursued was a charge of criminal breach of trust under Section 389 of the Penal Code of Travancore Cochin, corresponding to Section 409 of the Indian Penal Code. The original court acquitted the accused but this was reversed by the High Court and the accused was convicted under Section 389 corresponding to Section 409 of the Indian Penal Code. The case went to the Supreme Court on appeal. Mukherjea, J. said as follows:--

"The other point that requires consideration is whether on the prosecution evidence, as it stands, the accused can be held guilty of criminal breach of trust? As laid down in Section 385, Cochin Penal Code (corresponding to Section 405, I.P.C.) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by some one else which he willingly suffered to do.

It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some

person or in some way for his benefit. In the case before us, it is not disputed that If the sum of Rs. 23,100 was paid by P.W. 1 to the appellant by way of illegal gratification to induce the latter to make an allotment of cloth in his favour, there can be no question of entrustment in such payment. The payee would then receive the money on his own behalf and not on behalf of or in trust for anybody else. The criminality of an act of this character would consist in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same would not arise at all."

It was held that the evidence showed that the money was received by way of illegal gratification and would, therefore, be not the subject-matter of a breach of trust, there being no entrustment of money within the meaning of Section 385 of the Cochin Penal Code."

11. Counsel for the appellant has contended that the assessee and representatives of other State Government Departments except Commissioner, Jaipur accepted the arrangement between the company and the distributor as principal to principal and only in case of this circle Section 194H question has been raised in **Government of Madras Vs. Simpson & Co. Ltd.- (1968) 21 STC 21 (SC)** wherein the Supreme Court has held as under:

"(Page 24-25) In our opinion, these cases are distinguishable. In present case the assessee does not manufacture or fabricate Perkins Engines. The learned Advocate-General brought to our notice a sample of the bills made out by the assessee. This bill reads:

"TO cost of supplying and fitting to your Dodge 192" WB Bus MDB. 1021, one new Perkins P6V Exh. Type engine S. No. 3161322 CAV Pump no. R261 BU complete with one set Dodge 48/51 model conversion kit and flywheel including labour and batteries 9,50500

Less 5% discount on engine price of Rs. 7,215 36100

9,14400

This bill, in our view, evidences an agreement to sell a particular diesel engine, the price of which is separately mentioned in the bill, and to fit it in the customer's Dodge bus. In other words, this engine was contracted to be delivered as an engine and afterwards affixed to the customer's Dodge bus.

The case of State of Gujarat v. Kailash Engineering Co. (Pvt.) Ltd. also does not assist the assessee. In that case this Court held that the respondent-engineering company, under the terms of the contract, was not to be the owner of the ready coach bodies and that the property in these bodies vested in the Railway even during the process of construction. No such terms exist in the present case.

12. He submitted that in view of these provisions, it is very clear that the transaction which has taken place between the company/assessee and the Department is required to be looked into prospectively. The judgment of Bhopal Sugar Industries (supra) which has also referred the judgment of **Sri Tirumala Venkateswara Timber and Bamboo Firm Vs. Commercial Tax Officer, AIR 1968 SC 784** has also been referred by the learned counsel for the appellant which is required to be accepted.

3. In our opinion the real object of the Explanation is to prevent the misuse by the assessee of the relationship of principal

and agent for the purpose of evading tax. The first situation contemplated by the legislature is that covered by clause 2(i) of Explanation III where the agent has sold the goods at one rate and passed on the sale proceeds to its principal at another rate. The second situation is where the agent has purchased the goods at one rate and has passed them on to the principal at another rate. The third situation is where the agent has not accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf of his principal, and the fourth is where it appears that the agent has acted for a fictitious or non-existent principal. It was contended on behalf of the appellant that the State legislature was not competent to convert by a legal fiction a mere entrustment of goods for sale into a sale and to impose a tax thereon. In our opinion, there is no warrant for this argument. The real effect of the third Explanation is to impose the tax only when there was a transfer of title to the goods and not where there is a mere contract of agency. The Explanation says in effect that where there is in reality a transfer of property by the principal to the agent and by the agent in his turn to the buyer, there are two transactions of sale. In our opinion, the phrase, "when the goods are transferred" in cls. (1) and (2) of Explanation III on a proper construction means "when title to the goods is transferred" and so construed it is impossible to say that the Explanation enlarges the scope of the main section. It was pointed out by this Court in The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. : 9 S.T.C. 353 that the expression "sale of goods" in Entry 48 in List II of Sch. VII of the Government of India Act, 1935, cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930. It is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that

agreement. In other words, it is necessary for constituting a sale that there should be an agreement between the parties for the purpose of transferring title in the goods, that the agreement must be supported by money consideration and that as a result of the transaction the title to the property must actually pass in the goods. As we have already pointed out, the third Explanation to s. 2(1)(n) of the Act must be interpreted to mean that where there is in reality a transfer of property in the goods by the principle to the agent and by the agent in his turn to the buyer, there are two transactions of sale. It is therefore impossible to accept the contention put forward on behalf of the appellant that the Explanation has converted what, in fact, is not sale into a sale for the purpose of assessment to sales-tax.

4. It was contended on behalf of the appellant that in any event items No. 2 to 11 of the notice related to goods which the appellant had sent for sale to the commission agents and as the latter had already paid the sales-tax the appellant was not liable to be assessed to tax again on the same transaction as there was only one sale. As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the 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 the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship. For instance, in W.T. Lamb and Sons v. Goring

Brick Company Limited [1932] K.B. 710 there was an agreement in writing by which certain manufacturers of bricks and other building materials appointed a firm of builders' merchants "sole selling agents of all bricks and other materials manufactured at their works". The agreement was expressed to be for three years and afterwards continuous subject to twelve months' notice by either party. While the agreement was in force the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent, and thereafter they effected sales to customers directly. It was held by the Court of Appeal that the agreement was one of vendor and purchaser and not one of principal and agent. The same principle is enunciated in Hutton v. Lippert [1883] 8 A.C. 309, in which there was a contract between the defendant and E, which in its terms purported to be one of guarantee or agency; that is to say, the defendant guaranteed the sale of E's property in whole or by lots at a fixed price, E giving the defendant a power of attorney to deal with the property as he thought fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee. It was held by the Judicial Committee, upon a construction of the agreement, that the transaction was really a sale and that the defendant was liable to pay duty on his purchase-money under Act II of 1863. At page 313 of the Report, Sir Robert P. Collier, who delivered the opinion of the Board, stated as follows :

"Under these circumstances it appears to their Lordships that the Chief Justice was justified in saying that the effect of the transaction was to give Ekstein every right which a vendor could legally claim, and to confer upon the defendant every right which a purchaser could legally demand. Does it make any difference that the parties have called this transaction by the name of a guarantee ? It appears to their

Lordships that because the parties have used this term 'guarantee' in a sense which is unusual and not applicable to this case, - for Lippert really guaranteed nothing, - the nature of the transaction is not thereby changed; and because they have said that Lippert was to be entitled to whatever surplus or balance shall remain on the resale of portions of the property, if any were resold, 'as commission and recompense for the said guarantee,' this expression does not convert him from a purchaser into an agent."

5. It is manifest that the question as to whether the transactions in the present case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the appellant might be able to place before the appropriate authority. The question is not one which can properly be determined in an application for a writ under Art. 226 of the Constitution.

6. It was also submitted on behalf of the appellant that the third Explanation to s. 2(1)(n) of the Act violated the guarantee under Art. 14 of the Constitution since the classification contemplated, i.e., sales through commission agents who account fully for all collection made and sales through commission agents who do not account for collections, was not made on any intelligible differentia and had no rational relationship to the purpose of the statute. In our opinion, there is no substance in this argument as the classification is based upon an intelligible differentia and it has a rational relationship with the object sought to be achieved by the statute. Counsel for the appellant is therefore unable to make good his submission on this aspect of the case."

13. An endeavour is also made to go through the judgment of **Bhopal Sugar Industries Ltd. Vs. Sales Tax Officer, Bhopal, AIR 1977 SC 1275** = **[(1977)3SCC147]** wherein it has been held as under:

"4. We have heard counsel for the parties at very great length and we have also gone through the documents filed by the parties before the Commissioner and incorporated in the paper book. It seems to us that the only point for decision lies within a very narrow compass. The short point to be decided is whether at the time when the appellant was consuming the high speed diesel oil and petrol for its own purposes, was it doing so as owner of these articles or merely as an agent of the Caltex Company ? In other words, if it is held that as a result of the agreement between the Caltex and the appellant and the transactions following thereupon the title to the diesel or petrol passed to the appellant by the delivery of these articles, then from that date the appellant became the owner of these articles and was entitled to use them as he liked, because he had already paid the price of the diesel and petrol received by it. If this be the position, then it is manifestly clear that the user by the appellant for its own purposes may not amount to a sale which had already taken place at a point of time when the goods were delivered by the Caltex Company to the appellant. On the other hand, if it is held that the appellant was a mere agent under the agreement and was selling the articles on behalf of its principal-the Caltex Company--then any user of these articles or properties may amount to a sale so as to be exigible to sales tax. We may add that even then it was contended for the appellant that it would not amount to sale, but it did not press this contention later.

5. The question, therefore, will have to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the documents and the surrounding circumstances and having regard to the course of dealings between the parties. In all the sales tax statutes as also the definition of "sale" in the Act in this case, the definition given in the Sale of Goods Act has been bodily lifted from that Act and inserted in the tax statutes. In the instant case under the Madhya Pradesh Sales of Motor Spirit Taxation Act, 1957, "sale" is

defined thus:

'Sale' with all its grammatical variations and cognate expressions means transfer of motor spirit for cash or deferred payment or for other valuable consideration and includes transfer of motor spirit by a society or club or any association to its members, but does not include a mortgage, hypothecation, charge or pledge ;

Explanation I.-Consumption of motor spirit by a dealer himself or on his behalf shall be deemed to be a 'sale';

Explanation II.-A sale of motor spirit deemed to be a sale inside the State within the meaning of Sub-section (2) of Section 4 of the Central Sales Tax Act, 1956 (74 of 1956), shall also be deemed to be sale inside the State for the purposes of this clause.

Thus it would appear that in order to satisfy the conditions of "sale" under the definition of the Act, the following conditions must be satisfied :

(i) that there should be a transfer of motor spirit from the seller to the buyer;

(ii) that the transfer must be for valuable consideration which may be either cash or deferred payment; and

(iii) that the transfer must not be in the nature of a mortgage, hypothecation, charge or pledge.

Under explanation I, consumption of motor spirit by a dealer himself or on his behalf shall be deemed to be a sale. But this explanation has already been held to be ultra vires by this Court in the previous Bhopal Sugar Industries Ltd.'s case [1963]14 S.T.C.406. Thus the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire by

including a transaction within the fold of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e. g., fixation of price, submission of accounts, selling in a particular area or territory and so on. These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incidents of a sale. A contract of agency, however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the principal. This is yet another dominant factor which distinguishes an agent from a buyer-pure and simple. In Halsbury's Laws of England, Vol. 1, 4th Edn., in para 807, at page 485, the following observations are made:

"The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them, and provided that such expenses and liabilities are in fact occasioned by his employment."

We have mentioned this fact, particularly because under the agreement between the Caltex Company and the appellant the loss sustained by the buyer has to be borne by it after delivery of the goods and the seller is, not responsible for the same. Such a special arrangement between the parties is a factor which taken along with other circumstances points towards the agreement being one of sale.

6. It is well-settled that while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word "agent" or "agency" is used or the words

"buyer" and "seller" are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. Thus the mere formal description of a person as an agent or a buyer is not conclusive, unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent. Learned Counsel for the appellant relied on several circumstances to show that on a proper construction of the agreement it could not, but be, held to be a contract of sale. Learned Counsel strongly relied on a decision of this Court in Sri Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Tax Officer, Rajahmundry [1968]2SCR476 , where this Court held the transaction to be a sale in almost similar circumstances. Speaking for the court, Ramaswami, J., observed as follows:

'As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the 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 the goods and will therefore be liable to account for the sale proceeds.'

It is clear from the observations made by this Court that the true relationship of the parties in such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship. This Court relied on a decision in W. T. Lamb and Sons v. Goring Brick Co. Ltd. [1932] 1 K.B. 710 , where despite the fact that the buyer was designated as sole selling agent, the Court held that it was a contract of sale. Lord Scrutton, with whom

other Lords agreed, observed as follows :

"Now it is well-known that in certain trades the word 'agent' is often used without any reference to the law of principal and agent. The motor trade offers an obvious example, where persons described as 'agents' are not agents in respect of any principal, but are purchasers who buy from manufacturers and sell independently of them; and many difficulties have arisen from this habit of describing a purchaser, sometimes a purchaser upon terms, as an agent."

"21. Clause 8 of the agreement clearly shows that the appellant had been loaned properties belonging to the company like petrol pumps and their accessories, etc., and it was in respect of these properties which had been given to the dealer for working the petrol pumps that the statements of account were called for from the appellant. This appears to be the modus operandi adopted by the seller-company in respect of all its distributors. There is no stipulation in the agreement which requires or enjoins on the appellant to submit accounts of the Hispeedol or petrol which he may have sold to various customers, after having taken delivery of the same from the company. In these circumstances, therefore, this argument of the learned Counsel for the respondent must be overruled.

22. Another circumstance relied upon by the respondent was the fact that the appellant was under the terms of the agreement to sell the goods at a price fixed and not higher or lower than that. We have already indicated that when a company enters into a distribution agreement it always fixes a particular price in order to protect its goodwill and in order to control the market. Such fixation of the price by itself would not be a restriction which would take away the freedom of contract of sale. Such a stipulation is found in almost all the agreements entered into between the monopolist companies and their distributors. The respondent would not, therefore, be justified in treating this circumstance in order to show that the agreement was one of agency."

24. ……. A perusal of this clause as a whole would show that the use of the words "commission and allowances" is not to indicate agency, but to indicate certain special benefits which the company wanted to confer on its distributors. Furthermore, the payment of commission by itself is not conclusive to show that the agreement was one of agency. In Belthezar and Son v. E. M. Abowath A.I.R. 1919 P.C. 166, Lord Dunedin observed as follows :

It comes to this that all the documents show on the face of them a contract between principals. The mere mention of commission in the contract as signed is not in any way, as pointed by the learned Judges of the Court of Appeal, inconsistent with the relation being between principal and principal."

26. The present agreement undoubtedly contains some elements of agency also, but the main question which has to be determined in this case is whether or not at the point of time when the appellant was consuming the Hispeedol or petrol for its own purposes it was acting as an owner of the goods or as agent of the seller-company. From the facts and circumstances discussed above, we have shown that the appellant, after taking delivery of the goods, was the owner of the goods and if it consumed the same for its own purposes it was not doing so as agent but as owner which it was fully entitled to do. In this view of the matter, the quantities of petrol consumed by the appellant for its own purposes would not constitute a sale so as to be exigible to sales tax. We have carefully perused the order of the Commissioner and find that the Commissioner has taken an erroneous view of the law and has drawn legally wrong inferences from the various stipulations contained in the agreement. The Commissioner has also not given effect to well-established legal principles in interpreting the agreement."

14. In the case of **Alwaye Agencies Vs Dy. Commissioner of Agriculatual Income Tax and Sales-tax,**

Ernakulam- AIR 1988 SC 1250 = [(1988) 70 STC 107(SC)],

it has been held as under:

6. In our opinion, since both the parties have proceeded on the footing that the transactions in question were effected pursuant to the said agreement, the primary task to which we must address ourselves is to examine whether under the agreement the assessee firm was an agent of the said company, or whether the assessee firm was really a purchaser of the goods which were booked by it. In this connections, it must be noticed that under Sub-Clause (a) of Clause 2 provides that the distributor has the right of the sale of the product within the stipulated area. Bulk supplies were effected in wagon-load or lorry-load by the said company direct to the consumer, but only provided that the distributor arranged the payment as per the agreement and also took the responsibility to bear entirely the resultant effects and risk from said direct despatches. It is true that the price at which the goods were to be sold to the customers was fixed by the company but that itself does not necessarily lead to the conclusion that the assessee acted merely as an agent of the said company. In fact, it is well settled that the mere fact that the manufacturer fixes the sale price, by itself, cannot lead to the conclusion that the distributor is merely an agent. It is significant that under the agreement what the distributor got is described as a "rebate" and not as "commission", as one would normally expect in an agreement of agency. This is a factor which is by no means conclusive, but to a certain extent indicative of the relationship between the said company and the assessee. What is most important is, however, that the supplies were made to the distributor against payment either immediate or deferred as provided in the agreement, and even when the goods were destined directly to the customer, it was the distributor who had to guarantee to

arrange the payment. Clause 8 makes it quite clear that the arrangement for effecting payment had to be made by the distributor either in case of by demand draft or by irrevocable letter of credit in the company's favour negotiable against R/R or other documents of despatch of goods. It is also significant that where there was some time lag between the sending of the goods and the payment, the goods were to be insured at the cost of the assessee. This circumstance, in our opinion, clearly shows that in respect of the goods dispatched under orders placed by the distributors, the distributors really acted as purchasers of the goods which they in turn sold to the customers and did not merely act as agents of the said company. In respect of the goods in question which were despatched through public carriers, although the invoices were prepared in the names of the consumers of the goods, and the goods were consigned to the destination through public carrier booked to self, as pointed by the Tribunal and the bills were endorsed and handed over to the assessee. When considered in the light of the agreement, these circumstances clearly shows that in respect of these transactions the property in the goods dispatched passed to the distributor on the bills being endorsed and handed over to the distributors.

7. Our attention was drawn by Shri Krishnamurthy Iyer, learned Counsel for the assessee (appellant) to the decision of this Court in The Bhopal Sugar Industries Ltd. v. Sales Tax Officer Bhopal [1977]3SCR578 where the question was whether the contract was one of agency or sale. this Court held that the question will have to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the document and the surrounding circumstances and having regard to the course of dealings between the parties. While interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and

seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. We are in complete agreement with the principles laid down in this decision. We may point out that although we have referred to the assessee being described in the agreement as "distributor" and not as "agent" and to the fact that what they got was described as "rebate" and not "commission", we have not treated these circumstances as in any manner decisive. In our view, however, these descriptions considered in the light of the general tenor of the agreement and the circumstances surrounding the transactions between the parties show that the assesses was not agent, but really a purchaser from the company in respect of the goods in question.

9. We may mention that it was urged by learned Counsel for the respondent, in the alternative, that, although Sub-section 21 of Section 2of the Kerala General Sales Tax Act defines sale in a manner similar to the definition of the said term under the Sale of Goods Act, Explanation 5 to Sub-section 21 of Section provides that two independent sales or purchases shall, for the purposes of that Act, be deemed to have taken place in the circumstances set out in that explanation. A perusal of the said explanation shows that such independent sales or purchases take place, inter-alia, where the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser. It was submitted by him that in view of this explanation, even if the appellant firm was merely the agent of the said company in respect of the transactions in question, there were two sales which must be deemed to have taken place in respect of each of the transactions for the purposes of the said Act; one from the said company to the appellant and the other from the appellant to the respective consumer; and that the sale from the said company to the appellant was liable to be included in the taxable turnover of the assessee. In our view, it is not necessary to consider this

submission, because, according to us, in view of the said agreement, considered in the light of the surrounding circumstances, the assessee as distributor was not an agent of the said company in respect of the transaction in question, but was the purchaser and hence the transactions were liable to be included in the turnover of the assessee."

15. Another decision of Gujarat High Court in **CIT Vs. Rishikesh Apartments Co-operative Housing Society Ltd., (2002) 253 ITR 310 (Guj.)** which has also been sought to be relied in the aforesaid judgment wherein it has been observed as under:

"12. From the legal provisions discussed hereinabove, it is crystal clear that in the instant case Ravi Builder, on whose behalf the tax was to be paid by the assessee, had duly paid its tax and was not required to pay any tax to theRevenue in respect of the income earned by it from the assessee. If the tax was duly paid and that too at the time when it had become due, it would not be proper on the part of the Revenue to levy any interest under Section 201(1A) of the Act especially when Ravi Builder had paid more amount of tax by way of advance tax than what was payable by it. As the amount of tax payable by the contractor had already been paid by it and that too in excess of the amount which was payable by way of advance tax, in our opinion, the Tribunal was absolutely right in holding that the tax paid by the contractor in its own case, by way of advance tax and self-assessment tax, should be deducted from the gross tax that the assessee should have deducted under Section 194C of the Act while computing interest chargeable under Section 201(1A) of the Act. If the Revenue is permitted to levy interest under the provisions of 201(1A) of the Act, even in a case where the person liable to pay the tax has paid the tax on the date due for the payment of the tax, the

> Revenue would derive undue benefit or advantage by getting interest on the amount of tax which had already been paid on the due date. Such a position, in our opinion, cannot be permitted.
>
> 13. In view of the aforesaid reasons, we answer the question in the affirmative, i.e., in favour of the assessee and against the Revenue. The reference is thus answered accordingly and is disposed of with no order as to costs."

16 In the alternative he contended that even the Court is not with the assessee on point of Section 194H, 201 or 201(1A) of the Act, the penalty is not required to be levied in view of the provisions and the judgments which are relied upon. He has also taken us to the judgment of this Court regarding 201(1A) of the Act in the case of **CIT Vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., (2006) 287 ITR 354 (Raj.)** wherein it has been held as under:

> "2(6). ..... The learned authorised representative had relied upon the decision of CIT v. Rishikesh Apartments Co-operative Housing Society Ltd. [2002]253ITR310(Guj). In this case, it was held that there was no question of levying any interest on the assessee as the amount which was payable to the Revenue had been duly paid.
>
> 2 (7). After perusal of the facts of the case and relevant law as on the subject, we are of the opinion that learned Commissioner of Income Tax (Appeals) had rightly held that interest under Section 201(1A) of the Act was to be deleted after due verification by the Assessing Officer from the enclosures with supporting documents. In all the cases, the recipient of the income had claimed refund, which had arisen due to tax deducted at source. Therefore, we find no infirmity in the order of the learned Commissioner of Income Tax (Appeals) and the same is hereby sustained.

3. When the assessee has paid more tax than the tax payable and refund is due, even tax deducted at source is counted, in such case, there is no justification for charging of interest under Section 201(1A).

4. The appeal stands dismissed at the admission stage."

17 Counsel for the appellant has also taken us to the judgment of the Supreme Court in the case of **Hindustan Coca Cola Beverage P. Ltd. Vs. Commissioner of Income Tax, (2007) 293 ITR 226 (SC)** where while considering the question of 201(1A), the Supreme Court observed as under:

"7. ……. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the tax department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (dedicator- assessee) since the tax has already been paid by the recipient of income.

8. The High Court interfered with the order passed by the Tribunal on the ground that the order dated 12.7.2002 of the Income-Tax Appellate Tribunal has attained its finality since the appeal filed against the same by the appellant was dismissed by the High Court on 21.5.2004; the point based on Ground No. 7 was not taken up in the appeal preferred by the appellant in the High Court. The High Court further held that the Income-tax Appellate Tribunal's order dated 12.7.2002 got itself merged into the order passed by it on 21.5.2004 dismissing the appeal of the appellant herein. The High Court came to the conclusion that the Tribunal could not have reopened the matter for any further hearing.

9. We have already noticed that the order passed by the Tribunal to reopen the matter for further hearing as regards

ground No. 7 has attained its finality. In the circumstances, the High Court could not have interfered with the final order passed by the Income-tax Appellate Tribunal.

10. Be that as it may, the circular No. 275/201/95- IT(B) dated 29.1.1997 issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under Section 201(1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deducted-assessee. However, this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deducted-assessee or the liability for penalty under Section 271C of the Income-tax Act."

18. In the case of **CIT Vs. Eli Lilly & Co. (India) P. Ltd., (2009) 312 ITR 225 (SC)** wherein the penalty provisions were considered, the Supreme Court held as under:

"36. **(iv) <u>On the Scope of Section 271C read with Section 273B:</u>**

35. Section 271C inter alia states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In these cases we are concerned with Section 271C(1)(a). Thus Section 271C(1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such person failed to deduct. We cannot hold this provision to be mandatory or compensatory or automatic because under Section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall

be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. It has not be considered by this Court before. Further, in most of these cases, the tax- deductor-assessee has not claimed deduction under Section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under Section 271C because by not claiming deduction under Section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lacs (see Civil Appeal No. 1778/06 entitled CIT v. The Bank of Tokyo-Mitsubishi Ltd.). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. The tax-deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source."

19. He also relied upon the decision in the case of **CIT Vs. Jai Drinks (P) Ltd., (2011) 336 ITR 383 (Delhi)** wherein it

has been held as under:

> "8. A perusal of the agreement shows that the Assessee had permitted the distributor to sell its products in a specified area. The distributor was to exclusively deal in the products of Assessee in a specified territory. The products were to be purchased by the distributor from the Assessee against 100% advance payment, though decision rested with the Assessee to give the products on credit to the distributor. The distributor was to maintain at all times the minimum stock and was to deal only in the products of the Assessee. The distributor was to maintain its operational infrastructure including requisite staff under its employment with liability of PF contribution, ESI contribution, etc. as per the laws. It was specifically stated in Clause 16 that the arrangements under this agreement are on principal-to-principal basis and nothing in this agreement shall be construed to confer the authority of an agent to bind the Assessee. In Clause 17 it was specifically mentioned that the distributor was to purchase the products of the Assessee and was to be allowed discount per case on the printed MRP. In case of any breakage, leakage, etc., it was the distributor who was liable and not the Assessee. Not only this, even all the approvals, consents, registrations, licenses, etc. whatever may be required from departments or authorities were to be obtained by the distributor."

20. He has also relied upon decision of Allahabad High Court in the case of **Jagran Prakashan Ltd. Vs. Deputy Commissioner of Income Tax (TDS), (2012) 345 ITR 288 (All)** wherein after considering the observations of the Supreme Court, the Allahabad High Court held as under:

> "42. The petitioner has brought on the record Rules governing accreditation of advertising agencies and the proforma of the agreement which is entered between

the advertising agencies and the INS. The aforesaid rules have also been referred to in the assessment order. On the basis of Rules of INS of which petitioner is also a member and with whom the advertising agency enters into an agreement, the department has concluded that there is implicit contract between the petitioner and the advertising agencies from which relationship of principal-agent can be found out. The assessment order also refers to Standard of Practice for Advertising Agencies as approved by the Advertising Agencies Association of India, Bombay. Apart from abovesaid two materials, no other material has been referred to in the order impugned. The proposition is well settled that relationship of principal and agent can be founded either expressly or by implication. Even if there is no agreement between the principal and agent, the relationship can exist. To find out the real relationship between the petitioner and the advertising agency, the Rules of INS and the agreement entered between the advertising agencies and the INS has to be carefully looked into. The petitioner has brought on record as Annexure RA- 2, copy of the Rules governing accreditation (INS Press Handbook 2010-11). The aforesaid rules delineate the clear picture of relationship between the newspaper agencies and advertising agencies. It is useful to refer to certain rules of INS which clearly negate the relationship of principal and agent between the newspaper agency and the advertising agency. Under the heading "Rules and Regulations Governing Accreditation of Advertising Agencies", Rule 10 clearly indicates that there is no control of newspapers agency on the advertising agency whereas in a relationship of principal and agent principal retains full control over the activities of agent. Rule 10(1), 10(b) and 10(c) are quoted below:-

10(a). It is free from control or interference of any business or person who owns or controls any newspaper or other advertising medium or media.

(b) Its principal or principals are not the proprietor/partners/salaried employees of

any advertiser or publisher of a newspaper or an advertising medium.

(c) Any of its Directors, Proprietor, Partners or Chief Executives do not hold any share or equity in any publication or any other form of advertising media and have no connection financially or otherwise, with any publication or with any firm of advertising media such as outdoor, hoardings, cinemas, radio, etc. or with any advertiser except as an advertising agent. Such persons can hold a small number of shares in public limited client companies."

21. He also relied upon **CIT Vs. Mother Dairy India Ltd., (2013) 358 ITR 218 (Delhi)** where the Delhi High Court has distinguished the case of Delhi High Court in **Delhi Milk Scheme Vs. CIT (2008) 301 ITR 373 (Delhi)** wherein it has been held as under:

"2. We may first take up the case of M/s Mother Dairy India Ltd. for the assessment year 2004-05. This company hereinafter referred to as "Dairy", was incorporated on 1.4.2003 as wholly owned subsidiary of another company by name Mother Dairy Fruit and Vegetable Ltd. The main objects of the assessee are to act as selling agents, sale organizers and advisors and to undertake activities in connection with procurement, processing, storage and marketing including retail, sale of milk and other products. On 9.12.2004 there was a survey under Section 133A of the Act in the business premises of Ms/ Mother Dairy Food Processing Ltd., which is the other assessee in the appeals before us, at Patparganj, Delhi. In the course of the survey it was found that tax was not being deducted at source on the payment of commission to agents/concessionaires, who sold milk and other products of the assessee from the booths owned by the assessee. According to the revenue, the assessee ought to have deducted tax under Section 194H of the Act from the payments made to the

concessionaires, on the footing that the payment represented commission within the meaning of Explanation (i) below the Section. According to the Explanation commission 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 case of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities. Accordingly, the assessee was called upon to explain why orders cannot be passed under Section 201(1)/201(1A) treating the assessee in default and charging interest for the period of the default in not deducting the taxes.

3. ------

4. ------

5. The Assessing Officer considered the submissions of the assessee. He noted that the booths were constructed by the assessee on its own and they were allotted to the concessionaires at its discretion. The milk and other products were sold from these booths by concessionaires during fixed hours of the day. An agreement was entered into between the assessee and the concessionaires. Clause 43 of the agreement provided that the assessee will sell milk and other products to the concessionaires at the sale price fixed by the Dairy from time to time. The concessionaires cannot sell the milk to consumers for any other sale price and if he is found to be indulging in this, the agreement was liable to be terminated. As per Clause 13, the concessionaire did not have any right, title or interest over the booth or the machinery, equipment, furniture etc. which were all to be provided by the Dairy. This Clause also provided that the possession and control of the shop was with the assessee and the looks were also to be provided by the assessee only. The concessionaire will only be given the duplicate keys. According to Clause 17, the concessionaire was required to record the quantity of unsold milk in the prescribed register within 15 minutes of the close of the scheduled vending timings or before the

supply of milk is taken by the concessionaire from the Dairy, whichever is earlier. It was not open to the concessionaire to make additions or alterations to the balance, quantity and milk recorded by the concessionaire except with the prior permission to the Dairy. Such permission, if required and given, has to be recorded in the register.

12. …….. We have to therefore, proceed on the basis of the terms of the agreement as they have been discussed in the orders of the Income Tax Authorities as well as the orders of the tribunal. The principal question that falls for consideration is whether the agreements between the assessee and the concessionaires gave rise to a relationship of principal to principal or relationship of principal to agent. On a fair reading of all the clauses of the agreement as have been referred to in the orders of the Tribunal as well as those of the income tax authorities, we are unable to say that the view taken by the Tribunal is erroneous. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the concessionaire at the time of the delivery then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent of the Dairy. The clauses of the agreements show that there is an actual sale, and not mere delivery of the milk and the other products to the concessionaire. The concessionaire purchases the milk from the Dairy. The Dairy raises a bill on the concessionaire and the amount is paid for. The Dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that is to the account of the concessionaire and the Dairy is not responsible for the same. These clauses have all been noticed by the Tribunal. The fact that the booth and the equipment installed therein were owned by the Dairy is of no relevance in deciding the nature of relationship between the assessee and the

concessionaire. Further, the fact that the Dairy can inspect the booths and check the records maintained by the concessionaire is also not decisive. As rightly pointed out by the tribunal the Dairy having given space, machinery and equipment to the concessionaire would naturally like to incorporate clauses in the agreement to ensure that its property is properly maintained by the concessionaire, particularly because milk and the other products are consumed in large quantities by the general public and any defect in the storage facilities which remains unattended can cause serious health hazards. These are only terms included in the agreement to ensure that the system operates safely and smoothly. From the mere existence of these clauses it cannot be said that the relationship between the assessee and the concessionaire is that of a principal and an agent. That question must be decided, as has been rightly decided by the Tribunal, on the basis of the fact as to when and at what point of time the property in the goods passed to the concessionaire. In the cases before us, the concessionaire becomes the owner of the milk and the products on taking delivery of the same from the Dairy. He thus purchased the milk and the products from the Dairy and sold them at the MRP. The difference between the MRP and the price which he pays to the Dairy is his income from business. It cannot be categorized as commission. The loss and gain is of the concessionaire. The Dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship. The supervision and control required in case of agency is missing.

13. It is irrelevant that the concessionaires were operating from the booths owned by the Dairy and were also using the equipment and furniture provided by the Dairy. That fact is not determinative of the relationship between the Dairy and the concessionaires

with regard to the sale of the milk and other products. They were licensees of the premises and were permitted the use of the equipment and furniture for the purpose of selling the milk and other products. But so far as the milk and the other products are concerned, these items became their property the moment they took delivery of them. They were selling the milk and the other products in their own right as owners. These are two separate legal relationships. The income-tax authorities were not justified or correct in law in mixing up the two distinct relationships or telescoping one into the other to hold that because the concessionaires were selling the milk and other products from the booths owned by the Diary and were using the equipment and furniture in the course of the sale of the milk and other products, they were carrying on the business only as agents of the Diary.

14. We may refer to the judgment of this Court in the case of Delhi Milk Scheme vs. CIT (Supra.) In that case the facts were different. Under the terms of agreement entered into between DMS and its concessionaires, the milk and other products did not become the property of the concessionaires on delivery. The unsold milk was taken back by the DMS from the concessionaires. The ownership of the milk and other products did not pass from DMS to the concessionaires inasmuch as there was no sale of the milk or milk products to them. Further the unsold milk was to be taken back by the DMS from the concessionaires. The agreement also provided that the daily cash collection of the concessionaires was to be handed over to DMS. On these facts, it was held by the Tribunal that the concessionaires only rendered a service to DMS for selling milk to the customers and, therefore, the relationship between DMS and the concessionaires was that of a principal and an agent. This attracted the provisions of Section 194H. This is apart from the fact, as noticed earlier, that the DMS redrafted the agreements and filed them before the CIT(A) and the Tribunal and such redrafted agreements were found to be different from the agreements found during the survey

under Section 133A. This Court, on the above facts held that Section 194H was attracted. As already pointed out, the terms of the agreement entered into between the present assessees and their concessionaires are different in crucial aspects. Therefore, the judgment of this Court in the case of DMS(Supra) is not applicable to the present cases.

15. We are, therefore, of the view that no substantial question of law arises from the order of the Tribunal. The appeals of the revenue in ITA No. 1925 and 313/2011 are accordingly dismissed with no order as to costs.

16. In ITA Nos. 310, 319 & 312/2011 in the case of Mother Dairy Food Processing Ltd., the facts are identical. The agreements have similar/identical clauses as the concessionaire agreement entered into by the Dairy. The Tribunal has followed its order in the case of Mother Dairy Ltd. Since the facts are the same as in that case, the appeals of the revenue are dismissed with no order as to costs."

22.1. In the aforesaid case, the appeal preferred by the Department was dismissed and issue was held in favour of the assessee.

22.2. While considering provisions of Section 194H and 201(1) read with 1A, the Allahabad High Court came to the following conclusion:

"84. …. Thus, from a combined reading of Section 190, 191, 192, 198, 200, 201, 203 and 204 of the Act, it is clear that as soon as tax is deducted at source by the person responsible to make the payment, the liability of the Assessee to pay the tax gets discharged. If the tax is not deducted, it remains payable by the Assessee direct as provided under Section 191 of the Act. Further, the liability to pay interest under Section 201(1A) is on the person who fails

> to deduct the tax at source is absolute and is upon the person responsible for deducting tax at source till the date it was actually paid."
>
> "89. In view of the foregoing discussions, we are of the considered opinion that in a case where tax has not been deducted at source, the short deducted tax cannot be realised from the deductor and the liability to pay such tax shall continue to be with the assessee direct, whose income is to be charged and a person who fails to deduct the tax at source, at best is liable for interest and penalty only. The above issues thus, are decided in favour of the petitioner."

22.3. After considering the same, he has contended thatthe questions which are posed for consideration are required to be answered in favour of the assessee.

23. Mr. Vohra has also taken us to the provisions of Explanation to Section 194J and Section 201 of the Act and contended that the view taken by the Kerala High Court in the case of Kerala Stamp Vendors Association Vs. Office of the Accountant General (supra) is required to be accepted.

24. Mr. Kasliwal while appearing for another assessee in his appeals, over and above the submissions made by Mr. Vohra, the counsel for the appellants, has taken us to the agreement entered into between the parties from the record of Tax Appeal No.1/2014 which reads as under:

> "DISTRIBUTORSHIP AGREEMENT
>
> THIS AGREEMENT is made at Jaipur on this 1st day of January, 2007.
>
> BETWEEN
>
> Aircel Digilink India Ltd., a company

incorporated under the Companies Act, 1956, and having its registered office at C-48. okhla Industrial Area, Phase-II, New-Delhi-110020, and one of its office at 5th Floor, Gaurav Towers, Malviya Nagar, Jaipur, Rajasthan ("ADIL") which expression shall, unless it be repugnant or contrary to the contest or meaning thereof be deemed to mean and include its successors and assigns of the FIRST PART;

AND

The Distributor whose full name and address is set out in full in the Schedule I to this agreement (" the Distributor") which expression shall, unless it be repugnant or contrary to the context or meaning thereof, be deemed to mean and include its successors of the SECOND PART (ADIL and the Distributor are, wherever the context so requires in this Agreement, collectively referred to as "the parties" and individually as the Party"),

WHEREAS:

(i) ADIL is currently engaged in the business of providing cellular mobile telephone services to its customers throughout Rajastban by virtue of the license granted to it by Department of Telecom and wishes to establish Distributors to distribute its Service Tickets;

(ii) The Distributor has approached ADIL and represented that it has necessary infrastructure, facilities and expertise to operate as distributor for the Service Tickets;

(iii) Based on the representations of the Distributor, ADIL wishes to appoint the Distributor for the purpose and on the terms and conditions as herein reduced in writing.

NOW THIS AGREEMENT WTINESSES and it is hereby agreed by and between the parties as follows:

1. DEFINITIONS

In this Agreement, unless the context

otherwise requires, the following expressions shall have the meanings mentioned there against:

"Brand" means ADIL's brand under which Brand ADIL provides cellular mobile Telephony services.

"Brand image Guidelines" means guidelines (as detailed in the Annexaure-I hereto) prescribed by ADIL from time to time for the purpose of maintaining and improving the image of its Brand and quality of the Service Tickets

"eStock" means value of the Refill in electronic form used for Refilling/Recharging Prepaid card through eTopup.

"eTopup" means facility of Refilling Prepaid Card through electronic mode.

"Intellectual property rights" means patents, trademarks, service marks, registered designs, applications for any of the foregoing, copyright, design rights, know-how, confidential information, trade and business names and any other similar Protected rights in any country.

"Prepaid cards" means card used for accessing or availing cellular mobile telephony service of ADIL.

"Service Tickets" includes the Prepaid SIM Cards of ADIL for providing cellular mobile telephony services, the Refill Slips and such other products & services as the Parties may agree in writing from time to time.

"Refill or Recharge" means loading (Refilling or recharging) of cellular mobile telephony service in the Prepaid Card through a secret code printed on the Refill slip or through the eTopup.

"Refill Slip" means ADIL's product in case of physical form, a preprinted paper slip containing a secret code presently a 16 digit code known as PIN) and a serial number assigned thereto, which is used to Reflll Recharge the Prepaid card.

"SIM Cards" mean cards used for accessing or availing of the prepaid cellular mobile telephony service.

"Stock" means stock of the Service Tickets (including the SIM cards, the Refill Slips).

(a) Words (including the words defined herein) denoting the singular number only shall include the plural and vice versa wherever the context so requires.

(b) Unless the context otherwise requires, references to a clause or Schedule is to a Clause of or Schedule of this Agreement.

(c) The term "Agreement" referred to herein includes all Schedules/Annexure appended to hereto (including any amendment, modification or alteration of any provision hereof from time to time in accordance with the provisions hereof.

2. APPOINTMENT

ADIL hereby appoints the Distributor, and the Distributor hereby agrees to operate as distributor in accordance with the terms and conditions contained herein. The acknowledge that such appointment is non-exclusive and that ADIL may, in its sole discretion, establish other Distributor Associates and appoint such other persons in this behalf

3. SALE AND PURCHASE OF THE SERVICE TICKETS

3.1 The sale and purchase of the service Tickets as between ADIL and the Distributor shall be governed by ADIL's standard terms and conditions of sale as set out in the Annexure -I (including any modification thereof by ADIL from time to time).

3.2 The Distributor agrees to deposit with ADIL as security deposit a sum as mentioned in Part II of the schedule I and keep deposited with ADIL at all times during the subsistence of this Agreement, such sum of money as be decided by ADIL from time to time. The amount of deposit will be refunded on termination of this Agreement after deducting there fom all amounts outstanding, if any, against the Distributor.

4. OBLIGATIONS OF THE DISTRIBUTOR The Distributor shall be responsible for the sale of be service Tickets exclusively for

ADIL as set out hereunder. The Distributor hereby agrees, confirms and undertakes: (i) to carry out its responsibilities with regard to eTopup as detailed in the Annexure-II;

(ii) to strictly adhere to and comply with the Brand-image Guidelines set out in the Annexure-III; and

(iii) to furnish an undertaking to ADIL in such format, and manner as ADIL may prescribe from time to time with regard to due compliance with the rules, regulations and directions of Department of Telecommunications(DoT) and/or any other authority (Central State/Local) in respect of verification of identity of customers (end users of the Prepaid cards)

5. ADIL'S OBLIGATIONS

ADIL shall:

(a) provide the Distributor with such marketing and technical assistance as ADIL may in its discretion consider necessary to assist the Distributor for the promotion of the Service Tickets;

(b) Endeavour to answer as soon as possible all technical queries raised by the Distributor or its customers concerning the use or application of the Service Tickets;

(c) provide the Distributor with adequate quantities of instruction manuals, technical and promotional literature and other information relating to the Service Tickets;

(d) provide the Distributor with all information and assistance necessary to enable the Distributor to perform its obligations here under in respect of any modified or enhanced versions of Service Tickets.

(e) Provide its expertise end to guide and assist the Distributor in the various activities pertaining to the Service Tickets using the latest techniques and skills available to ADIL;

(f) provide assistance (on request from the Distributor) to its staff on service knowledge and updates;

(g) provide and maintain an up-to-date list of the Service Tickets and/or suppliers

from which the Distributor may purchase Stock and/or accessories;

6. TRAINING

6.1 ADIL shall provide training in the use, installation and rendering of after-sale Services in respect of the Service Tickets to the Distributor and its personnel, wherever required.

6.2 Any additional training required by the Distributor shall be provided by ADIL in accordance with is standard scale of charges in force from time to time.

6.3 The Distributor shall offer training in the use of the Service Tickets to all its customers on commercially reasonable terms.

7. CONSIDERATION

7.1 In consideration of the Distributor fulfilling its obligations contemplated under this agreement, ADIL shall sell to the Distributor, the Service Tickets at rate (‘Distributor Price') as may be communicated to the Distributor by ADIL from time to time;

‘Distributor Price here means the price of the Service Tickets offered by ADIL to the Distributor, from time to time.

7.2 ADIL shall, from time to time, declare the Maximum Retail Price of the Service Tickets.

8. TERM

8.1 This Agreement shall be for a term of one year effective from 1st January 2007 and there after will be renewed automatically on an annual basis unless terminated by ADIL as per clause 8.2.

8.2 Notwithstanding the provisions of clause 8.1, ADIL may, at any time, terminate this Agreement by giving 30 days' written notice to the Distributor without assigning any reason whatsoever.

9. DEFAULT AND TERMINATION

Notwithstanding anything contained in this Agreement, ADIL may, by written notice, terminate this Agreement with immediate effect in its sole and absolute discretion, on the occurrence of any of the following events:

(a) any payment by the Distributor is not honoured on first presentation and any replacement payment is not made within 48 hours thereof

(b) any representation given to ADIL by the Distributor pursuant to this Agreement is found to be false, misleading or incorrect in any material matter,

(c) any change in the memorandum and articles of association, directors or change in control of the Distributor without informing ADIL and without ADIL's prior written approval;

(d) the bankruptcy, dissolution or winding up of the Distributor or in the event of any attachment, distress or warrant being issued against the Distributor and not discharged or stayed within 14 days; or

(e) the Distributor (and/or any of its proprietors/partners/ directors/ managers is found involved in any criminal case /illegal activities; or

(f) The Distributor commits any breach or omits to observe any of its obligations or undertakings under this Agreement (other than failure to pay any amount due under this Agreement) and fails to remedy such breach or omission 30 days of ADIL's notification to do so.

10 Effect of termination

10.1 The parties agree that upon termination of this Agreement for any reason the Distributor will return all equipment and furniture supplied by ADIL forthwith upon request and remove all ADIL signage and all other items indicating that the Premises were operated as an ADIL Distributor. The Distributor hereby agrees to grant an irrevocable license to ADIL and its designated employees to enter the premises and remove all ADIL signage if Distributor has not done so itself to the satisfaction of ADIL, within 7 days of termination of the Agreement.

10.2 The Distributor shall not be entitled to any compensation or indemnity (whether for loss of distribution rights, goodwill or

otherwise) as a result of the termination of this Agreement in accordance with its terms.

10.3 obligations of the parties relating to confidentiality and indemnity as contained in this Agreement shall survive the expiration or terminiation of the Agreement

11. CONFIDENTIALITY

The Distributor hereby undertakes that it and each of its affiliates and employees or representatives thereof shall not, at any point of time divulge or communicate in any manner whatsoever, to any third party or any of its customers or use for its own purpose any information about the business and affairs of ADIL or any of its clients which may come to the knowledge of the Distributor pursuant to this Agreement. For the purposes of this clause, confidential information includes (without limitation) subscriber lists, customer information, schemes, operating manuals, data and generated by ADIL and all information received pursuant to on-line data connectivity of ADIL together with all documentation relating to this Agreement. The Distributor acknowledges the highly sensitive nature of information of on-line data connectivity and agrees to make this available to its employees only where absolutely necessary.

12. FORCE MAJEURE

Neither party shall be liable or responsible for failure or delay in performance of its obligations hereunder, if the party is prevented from discharging its obligations hereunder due to any cause arising out of or related to any act of God or act of state, war, riot, civil commotion, terrorism, strikes, lock-outs or any order of any Governmental, semi-governmental or local authority or any similar cause.

13. ASSIGNMENT

The Distributor shall not assign any of its rights or obligations to any third party without the prior written consent of ADIL.

14. AMENDMENTS

This Agreement shall be final and binding between the parties and it constitutes the entire understanding between the parties in respect of the subject matter of this Agreement and supercedes all prior negotiations, discussions and/or documents Agreements exchanged between the parties. This Agreement or any renewal thereof shall not be amended, altered or modified except by an instrument in writing expressly referring to this Agreement and signed by the parties.

15. INDEMNITTY

a "The Distributor agrees to fully indemnify and keep ADIL harmless and indemnified at all times, from and against any and all claims actions, cost and consequences, demands, losses by ADIL or a third party and/or assertions of liability of any kind of nature whatsoever resulting from:

(a) any breach of the representations and conditions or other terms any of the, covenants and conditions or other provisions hereof or any action or omission hereunder,

(b) any failure in complying with all applicable legislation, statutes, ordinances, regulations administrative rulings or requirements of law.

(C) any misuse/tampering of on-line data connectivity by the Distributor its staff agents, employees, consultant, etc or by a third party who may have got access to the same on account of any act/omission of the Distributor, its agents, staff, agents employees, consultants, etc.

16. NOTICES

16.1 All notices, requests or other communication made or required to be given under this Agreement shall be in writing and shall be delivered personally or by prepaid registered AD mail or certified letter to the respective address of the parties mentioned in this Agreement.

16.2 or such address as may notify the other party in writing and shall be deemed to be served:

(A) if it is personally delivered/by courier at the time of delivery, or acknowledgement taken, or

(B) if it is delivered by prepaid registered AD, mail three days after posting thereof

17. No CREATION OF THIRD PARTY OBLIGATIONS

17.1 Notwithstanding anything contrary contained herein, the Distributor shall not, without ADIL prior specific approval/consent in writing, assume or create any obligations on ADIL's behalf or incur any liability on behalf of ADIL or in any way pledge or purport to pledge ADILs credit or accept any contract binding upon ADIL.

17.2 The relationship of the parties is that of seller and buyer and it is hereby expressly agreed and clarified that this Agreement between ADIL and the Distributor is on principal to principal basis and neither party is, nor shall be deemed to be, an agent/partner of the other. Nothing in this Agreement shall be construed to render the Distributor a partner or agent of ADIL.

18. TRADEMARKS AND TRADE NAMES

18.1 The Distributor does not have and ADIL does not grant the Distributor any right to any of its Intellectual Properties including but not limited to a copyright, trade label, trademark or the corporate name of Aircel Digilink India Limited, or its brand names or any other trademark, copyright or any part thereof, registered or unregistered except as authorised in writing by ADIL and for the purpose/period thereof. And in such case, the distributor shall comply with ADIL's requirements and

specifications relating to display or any logo trademark copyright or any other Intellectual Property mark on stationery. Upon expiration or termination of this Agreement for any cause, the Distributor shall immediately cease and desist for all times from any use of or reference to ADIL's Intellectual Properties as aforesaid.

18.2 The Distributor does hereby acknowledge and confirm that

(a) All intellectual Property rights in or relating to the Service Tickets are and shall remain the property of ADIL or its licensors.

(b) The Distributor shall notify ADIL immediately if the Distributor becomes aware of any illegal or unauthorised use of any of the Service Tickets or the Service Ticket Documentation or any of the intellectual property rights therein or relating thereto and will assist ADIL (at ADIL's expense) in taking all steps necessary to defend ADIL's rights therein.

18.3 The provisions of this Clause shall survive the termination of this Agreement.

19. GOVERNING LAW

19.1 This Agreement shall be governed by and construed in accordance with the laws of India.

19.2 All or any dispute, difference, misunderstanding between the parties arising out of or in relation to this Agreement or any provision hereof (including interpretation of any provision hereof) shall, unless otherwise resolved by the parties amicably, be referred to an arbitration as per the provisions of the Arbitration and Conciliation Act, 1996 (including any amendment or re-enactment thereof. The proceedings of such arbitration shall be in English language and be ADIL at Jaipur alone.

19.3 Subject to the above, the parties submit to the exclusive jurisdiction of competent courts of Jaipur.

IN WITNESS WHEREOF the parties have set and subscribed their respective hand on the day and year first herein above written."

25. After taking into consideration the agreement, he has mainly contended with regard of the power of CIT(A) where the Tribunal has held that the CIT(A) cannot reverse the finding of Assessing Officer. He has relied on the decision of Supreme Court in the case of **Union of India & Others Vs. Umosh Dhaimode- (1997) 10 SCC 223** and the decision of this Court in **Commissioner of Income Tax, Udaipur Vs. Hindustan Zinc Ltd.- (2012) 209 Taxman 519 (Raj.)** wherein it has been held as under:

"**Head Note:** Appeal CIT(A) Where AO's order found contrary to Tribunal's directions, whether in CIT(AS) cannot the order and remand back the same to AO-- The assessee's assessment in this case was earlier completed by the AO on 20-1-1983 at nil income. The appeal against this order was decided by the CIT(A) on 8-3-1994. The Assessee's appeal against this order was decided by the Tribunal. In its order, the Tribunal restored essentially two issues to the file of AO for consideration afresh namely, the issue regarding disallowance of the provision for bad debts and written off advances and regarding the assessee's claim for higher depreciation on the building, said to be the part of plant and machinery, after inspection of the building by AO. AO proceeded to decide all the remanded cases by the different orders AO rejected the claim of higher depreciation essentially with the observations that assessee did not file the requisite details for inspection despite granting of sufficient time. CIT(A) found that the AO failed to

carry out the requirements of the orders as earlier passed by the Tribunal issue to the file of AO. Thus, the CIT(A) did not approve of the order passed by the AO and directed that the AO, after inspecting the constructed building and keeping in view the directions of Tribunal, should come to a finding as to whether the building was a part of the plant and allow depreciation accordingly Tribunal also confirmed the order of CIT(A). After amendment to section 251(1)(a), the CIT (A) was having no power or authority to remand the matter to the AO. Assessee contended that the could not be held faulted at directing AO to carry out the compliance of the order of Tribunal that had become final.

Held: CIT(A) found that such directions of Tribunal had not been complied with. The directions were in any case required to be complied with by the AO. The CIT(A) had done nothing more than issuing directions for implementation of the order of the Tribunal. In this position, when the CIT(A) was hearing the appeal against an order of assessment passed after the directions of Tribunal, his power to annul the assessment order if found contrary to the Tribunals directions and directing the AO to carry out the requirements of the order of Tribunal ITAT could not be denied. Even if the amendment in the aforesaid clause (a) of section 251(1) has been made so as to provide that the Commissioner (Appeals) may not set aside the assessment and refer the case back to the AO for making fresh assessment with a view to help bringing an early finalisation of the assessment, it could not be assumed that the CIT(A) was divested of the power to annul the assessment and then to pass appropriate consequential order. In the present case, as observed hereinbefore the fact aspect has been that the order as passed by the AO which was subject of appeal before the CIT(A), was not an original order of assessment but was an order of assessment passed after remand by the ITAT. The directions in remand order having not been complied with, the course as adopted by the CIT(A) cannot be said to be de hors the powers available to him under the statute.

Therefore, it was held that even if the appeal had been filed after amendment to section 251(1)(a), the order as passed by the CIT(A) directing the AO to decide the matter in accordance with the directions of the Tribunal could not be said to be unauthorised."

26 In the case of **Commissioner of Income Tax vs. NIIT Ltd. (2009) 318 ITR 289 (Delhi)**. It has been observed as under:

6. In the facts of the present case, we find that the order of the Tribunal is correct and must be upheld. The relations between the parties in the present case are not of a lessor and lessee as has been sought to be contended by the Revenue. A reference to the Clauses of the agreement which has been placed on record shows that a limited license is granted by the assessee company to Sh. Ashok Arora and Sh. Ashish Bhatia (i.e. the licencee) for use by the licensee of the trademark and trade name of the assessee company for the education centre. The assessee company granted the license for the purpose of the Agreement within the specified territory the use of it's confidential technical knowhow contained in its manuals and any improvements and developments to such know how. The licensee was given the right to operate the education centre in relation to marketing of NIIT courses specified in the agreement. Various other terms and directions could be issued by the licensor to protect its technical knowhow and its trademark/trade name. The agreement further provided for sharing of the fees received from the students. The charges which were payable to the assessee company by the licensee were not fixed and were variable as per the number of students. The assessee company instead of giving a deposit which it would have done if it was a tenant in fact receives a security deposit from the licensee. There are other Clauses with regard to the term of the license agreement, its renewal,

indemnification, effect of default and so on. The assessee never got possession of the premises and there is no minimum guarantee in the agreement.

7. Reading of the agreement therefore clearly shows that the agreement was in fact a franchises agreement and it cannot be said that by the agreement, rent was in fact being paid by the assessee company to the licensee. No doubt, the charges have been broken up under two heads viz that of, marketing claim and infrastructure claim. However, the agreement is an agreement as a whole and such a composite agreement cannot be broken up as is sought to be done and contended by the Revenue. The provision of Section 194I cannot be read to break up composite contracts and when that is not the intention of the parties themselves. If, the interpretation of the Revenue is accepted then, in a case where there is a partnership and one of the partner brings in his capital in the form of his premises from where the partnership business is carried on, then, payment made to such partner by the firm can be stretched to be included in the definition of rent under Section 194I, and which surely cannot be the intention of the legislature.

8. We find that the Tribunal has given the following valid finding and which we uphold:

The appellant is entered into the agreement with the Franchisees for running the education centre at various Metro Cities. The fees was shared between the assessee and the Franchisee as per the Clauses of the agreement. The details of provisions regarding conduct of the business were stipulated in the franchisee. The dominant intention of the parties of the agreement was to conduct the business not mere letting out of the building, furniture and fixture. The amount to be shared with the Franchisee was variable and it was not fixed. There was no minimum guarantee amount which the assessee was to make. The composite arrangement in the essence of the agreement for conducting the business. The essence of agreement is to conduct the business of running education centre jointly. Mere certain rights of the

assessee to protect the business interest stipulated in the agreement would not change the essence of the agreement. The share of the Revenue with the Franchisee is on account of composite services provided by the Franchisee. In view of these facts, we hold that the broad objective of the agreement between the assessee and the Franchisee was to share the revenue and certainly it was not hire the premises provided by the assessee. Therefore, the assessee is not liable to deduct the taxes under Section 194-I of the act in respect of the amount shared by the assessee and remitted to the Franchisee for infrastructure claims."

27. In the case of **Commissioner of Income-Tax vs. Bharti Cellular Ltd. (2009) 319 ITR 139**, Delhi High Court has held as under :

2. The facts in all these appeals are similar. The respondents/asses sees in these appeals are companies engaged in the business of providing cellular telephone facilities to their subscribers. The asses sees/respondents had been granted licences by the Department of Telecommunication for operating in their respective specified circles. The asses sees are required to set up their own equipments and necessary infrastructure for operating and maintaining their networks. The licences granted to the asses sees stipulated that the Department of Telecommunication/MTNL/BSNL would continue to operate in the service areas for which the licences were issued. In respect of subscribers which fell within the specified circles of the asses sees, the calls would be handled exclusively through the asses sees' own networks. However, where calls were to be made by subscribers of one network to another network, such calls are necessarily to be routed through MTNL/BSNL. The inter connection between the two networks is provided by MTNL/BSNL at interconnection points known as Ports. For the purposes of

providing this interconnection, the asses sees have entered into agreements with MTNL/BSNL etc. The agreements are regulated by the Telecom Regulatory Authority of India (TRAI).Under these agreements, the asses sees/respondents are required to pay interconnection, access charges and port charges. As per the policy document of TRAI, interconnection has been understood to mean the commercial and technical arrangements under which service providers connect their equipments, networks and services to enable their customers to have access to the customers, services and networks of other service providers. Interconnection charges are paid by the interconnection seeker to the interconnection provider.

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13. We have already pointed out that the expression "fees for technical services" as appearing in Section 194J of the said Act has the same meaning as given to the expression in Explanation 2 to Section 9(1)(vii) of the said Act. In the said Explanation the expression "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Since the expression "technical services" is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. The said rule is explained in Maxwell on The Interpretation of Statutes (Twelfth Edition) in the following words:

Where two or more words which are susceptible of analogous meaning are coupled together, noscitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

This would mean that the word "technical" would take colour from the words "managerial" and "consultancy", between which it is sandwiched. The word "managerial" has been defined in the Shorter Oxford English Dictionary, Fifth

Edition as:

of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization ,business, establishment, etc.

The word "manager" has been defined, inter alia, as:

a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization etc; a person controlling the activities of a person or team in sports, entertainment, etc.

It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

14. -----

15. From the above discussion, it is apparent that both the words "managerial" and "consultancy" involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a sociis, the word "technical" as appearing in Explanation 2 to Section 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/other companies for interconnection/port access is one which is provided automatically by machines.

20. Before concluding we would also like to point out that the interconnect/port access facility is only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies do not provide any assistance or aid or help to the respondents/asses sees in managing, operating, setting up their infrastructure and networks. No doubt, the facility of interconnection and port access provided by MTNL/other companies is `technical' in the sense that it involves sophisticated

technology. The facility may even be construed as a `service' in the broader sense such as a `communication service'. But, when we are required to interpret the expression `technical service', the individual meaning of the words `technical' and `service' have to be shed. And, only the meaning of the whole expression `technical services' has to be seen. Moreover, the expression `technical service' is not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expressions `managerial service' and `consultancy service' as appearing in Explanation 2 to Section 9(1)(vii) of the said Act. Considered in this light, the expression `technical service' would have reference to only technical service rendered by a human. It would not include any service provided by machines or robots.

28. In the case of **CIT vs. Career Launcher India Ltd. (2013) 358 ITR 179 (Delhi),** it has been observed as under:

35. Let us examine the real nature of the agreement between the assessee and the franchisees and consider the question whether the agreement or contract is for "carrying out any work" by the franchisee, so as to attract the provisions of section 194C relating to tax deduction at source and consequently the disallowance under Section 40(a)(ia) of the Act. On a careful consideration of the issue, it seems to us that it would not be possible to view the agreement as a contract for carrying out any work by the franchisee. The terms of contract which we have referred to show that the arrangement consists of mutual obligations and rights. It is not a simple case of an agreement under which a person is engaged to carry out any work for the other. The essence of the contract appears to us to be one under which the trade name or reputation or knowhow belonging to the assessee in the business of running learning centres, where students are coached for writing

competitive examinations, is permitted to be made use of by the franchisees in different places for a monetary consideration. In the case of a contract for the carrying out of any work as is envisaged by Section 194C, there cannot be any use of a person's trade name or goodwill or knowhow by the other. The contract envisaged by the Section would be one under which one person merely renders certain services to the other person for consideration. It is no doubt true that the word "work" has been defined in a broad and inclusive manner in the Section. Nevertheless its essential feature remains the same namely that it should be a work carried out by one person for another. The terms of the contract between the assessee and its franchisees in the case before us do not satisfy this condition. The income tax authorities have erroneously interpreted the contract as one for carrying out a work by the franchisee for the assessee. It is not a simple case of the assessee engaging certain other person to conduct the learning centres for which they were to be paid. The agreement is much more complex and reflects a business arrangement, as opposed to a simple contract for carrying out a work. The agreement provides for the supervision and control by the assessee of the manner in which the learning centres are conducted by the franchisees. The records and books of account as also the premises from which the learning centres are carried on are subject to inspection and audit by the assessee. The materials for the learning centres are to be supplied by the assessee for which separate charges are to be paid by the franchisee. It is essentially a case of the assessee permitting its goodwill/knowhow/trade name to be utilized by the franchisees.

38. A perusal of the extended definition of the word "work" shows that it covers a simple case of engaging a person to render services of the kind mentioned in the definition. Otherwise every composite transaction which also has an element of work will be covered. Clause (e) is illustrative that this is not the intention of

the legislature. A case of an arrangement under which both sides have joined together by mutual arrangement and to share the profits of the joint enterprise carried on by them is not covered by the definition. They mutually undertake the profit making activity with a stipulation to divide the gains of their collective efforts. The work is undertaken jointly by them for third parties who pay consideration which is shared. Parties do not work for each other. Therefore, the mere fact that the definition of the word "work" is an extended or inclusive definition does not automatically justify the conclusion of the income tax authorities that the activities carried on by the licencees of the assessee in running learning centres amount to the carrying out of any work for the assessee in pursuance of the contract.

29. He has also relied upon the decision in the case of **M/S Gujarat State Fertilizers & chemicals Ltd. & Anr. vs. Commissioner of Central Excise Civil Appeal No. 4066-4067/2015 decided on. 22.11.2016**, wherein the Supreme Court has held as under:

"15. ------ Once these facts are accepted, we find that handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share the expenditure. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC. By no stretch of imagination, it can be treated as common 'service' provided by GSFC to GACL for which it is charging GACL.

16. We are, thus, of the opinion that the second ingredient has not been established in the present case and the question of service tax does not arise. In view thereof, it is not necessary to go into the question as to whether receiving of HCN through the

said common pipeline in the tank which is setup by the GFSC and GACL amounts to 'storage' or not and we leave the said question open.

17. For the aforesaid reasons, the demand of 'service tax' made by the Respondent is unwarranted and is hereby set aside. We, thus, allow these appeals thereby quashing the Adjudicating Authority's order as well as the order of the CESTAT."

30. In the Case of **Commissioner of Income-Tax, TDS, Bangalore vs. Vodafone South Ltd. (2016) 241 Taxman 497**, the Karnataka Hight Court has held as under:

"9. We may record that in the decision of the Apex Court in the case of Bharti Cellular Limited (supra) the Apex Court after having found that whether human intervention is required in utilizing roaming services by one telecom mobile service provider Company from another mobile service provider Company, is an aspect which may require further examination of the evidence and therefore, the matter was remanded back to the Assessing Officer. Further, in the impugned order of the Tribunal, after considering the above referred decision of Bharti Cellular Limited, the Tribunal has further not only considered the opinion, but found that as per the said opinion the roaming process between participating entities is fully automatic and does not require any human intervention. Therefore, we do not find that the aforesaid decision in the case of Bharti Cellular Limited, would be of any help to the appellants – Revenue.

10. In the another decision of the Apex Court, in the case of Kotak Securities Limited, the matter was pertaining to the charges of the Stock Exchange and the Apex Court, ultimately, found that no TDS on such payment was deductible under Section 194J of the Act. But the learned Counsel for the appellants - Revenue attempted to contend that in paragraphs 7 and 8 of the above referred decision of the Apex Court, it has been observed that if a

distinguishable and identifiable service is provided, then it can be said as a "technical services". Therefore, he submitted that in the present case, roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".”

31. He has contended that all the questions which are posed for our consideration are required to be answered in favour of the assessee.

Contentions raised & Judgments relied upon by Mr. N.M. Ranka appearing on behalf of assessee Tata tele Services Ltd.

32.1. Mr. Ranka, counsel for another assessee, over and above the contentions raised and the decisions which are sought to be relied upon by the counsel for the assessee has taken us to agreement entered into between the parties and the definitions which are covered under the agreement and following decisions.

(i) Ahmedabad Stamp Vendors Association Vs. Union of India, 257 ITR 202 (Guj.)

(ii) CIT Vs. Mother Dairy India Ltd., (2013) 358 ITR 218 (Delhi)

(iii) Bharti Airtel Ltd. Vs. DCIT (2015) 372 ITR 33 (Karnataka)

Contentions raised & Judgments relied upon by Mr. Sanjay Jhanwar appearing on behalf of assessee M/s Bharti Hexacom Ltd.

33. Mr. Sanjay Jhanwar, appearing for another assessee has sought to rely upon, three Supreme Court judgments over and above decisions given by the other counsels which are as under:

(i) **Commissioner of Income Tax Vs. Vegetable Products Ltd.- (1973) 88 ITR 0192** wherein it is held as under:

"9. We must first determine what is the meaning of the expression "the amount of the tax, if any, payable by him" in Section 271(1)(a)(i), Does it mean the amount of tax assessed under Section 143 or the amount of tax payable under Section 156. The word "assessed" is a term often used in taxation laws. It is used in several provisions in the Act. Quantification of the tax payable is always referred to in the Act as a tax "assessed". A tax payable is not the same thing as tax assessed. The tax payable is that amount for which a demand notice is issued under Section 156. In determining the tax payable, the tax already paid has to be deducted. Hence there can be no doubt that the expression "the amount of the tax, if any, payable by him" referred to in the first part of Section 271(1)(a)(i) refers to the tax payable under a demand notice. We next come to the question what is the meaning to be attached to the words "the tax" found in the latter part of that provision. It may be noted that the expression used is not "tax" but "the tax". The definite article "the" must have reference to something said earlier. It can only refer to the tax, if any, payable by the assessee mentioned in the first part of Section 271(1)(a)(i). It is true the expression "tax" is defined in Section 2(43) thus :

"tax" in relation to the assessment year commencing on the 1st day of April, 1965 and any subsequent assessment year means income-tax chargeable under the provisions of this Act. and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date.

10. But the difficulty in this case is, as mentioned earlier the expression used is not "tax" but "the tax". That expression can be reasonably understood as referring to the expression earlier used in the provision namely "the amount of the tax, if any payable" by the assessee. At any rate, the provision in question is capable of more than one reasonable interpretation. Two High Courts namely Calcutta and Mysore have taken the view that the expression "the tax" in Section 271(1)(a)(i) refers to "the tax, if any, payable" (by the assessee) mentioned in the earlier part of the section. It is true that Lahore and Delhi High Courts have taken a different view. But the view taken by the Calcutta and Mysore High Courts cannot be said to be untenable view. Hence, particularly in view of the fact that we are interpreting, not merely a taxing provision but a penalty provision as well, the interpretation placed by the Calcutta and Mysore High Courts cannot be rejected. Further as seen earlier, the consequences of accepting the interpretation placed by the Revenue may lead to harsh results."

(ii) **Commissioner of Income Tax Vs. J.K. Hosiery Factory- (1986) 159 ITR 0085** wherein it is held as under:

"13. A case converse to the instant case was before the Division Bench of the Bombay High Court in the case of CIT Vs. Estate & Finance Ltd. (1978) 111 ITR 119 (Bom), where the Division Bench observed that when enacting the provision regarding cary forward and set off of unabsorbed depreciation under s.32(2) of the IT Act, 1961, the legislature could have imposed a condition that unabsorbed depreciation could be set off against the profits of a subsequent year only if the business in relation to which depreciation was allowed continued to exist in such year. The absence of such a restriction had to be construed in favour of the assessee. Where two interpretations were possible, the Court should take the interpretation that is favourable to the assessee bearing in mind that a taxing statute is being construed.

Therefore, under the provisions of s.32(2), for the purpose of setting off unabsorbed depreciation carried forward from a preceding year, it was not necessary that the business in respect of which the depreciation allowance was originally worked out should remain in existence in such succeeding year. It dealt with some other aspect with which we are not presently concerned."

(iii) **Birla Cement Works Vs. Central Board of Direct Taxes & Ors.- (2001) 248 ITR 0216** wherein it is held as under:

'12. Two interpretations are reasonably possible on the question whether the contract for carrying of goods would come or not within the ambit of the expression "carrying out any work". One of the two possible interpretations of a taxing statute, which favours the assessee and which has been acted upon and accepted by the Revenue for a long period should not be disturbed except for compelling reasons. There can be no doubt that if the only view of s.194C had been the one reflected in the impugned circular, then the issue of earlier circulars and acceptance and acting thereupon by the Revenue reflecting the contrary view would have been of no consequence. That, however, is not the position. Further, there are no compelling reasons to hold that Expln. III inserted in s.194C w.e.f. from 1st July, 1995, is clarificatory or retrospective in operation. We hold s.194C before insertion of Expln.III is not applicable to gtransport contracts, i.e., contracts for carriage of goods.

For the aforesaid reasons the appeal is allowed, the impugned circular to the extent it relates to transport contracts is quashed. The parties are left to bear their own costs."

(iv) One of the judgment of this Court in **Ajmer Vidyut Vitran Nigam Ltd. Vs. Authority for Advance & Ors. D.B. Civil Writ Petition No.20195/2012 decided on 19.10.2016** where while

considering the question of 194J of the Act, this Court has considered the question and has held as under:

> "3. The assessee was bound to deduct TDS in lieu of services received by them and for the services received by them was liable to pay tax within the meaning of Explanation 2 to Section 9(1)(vii) of the Act.
>
> 4. However counsel for the petitioner Mr. Jhanwar contended that the issue is concluded in view of the following decisions :
>
> 1. Commissioner of Income Tax Vs. Bharti Cellular Ltd. (2011) 330 ITR 239 (SC),
>
> 2. Union of India Vs. Satish Panalal Shah (2001) 249 ITR 221 (SC),
>
> 3. Commissioner of Income Tax Vs. Jaipur Vidyut Vitran Nigam Ltd. D.B. ITA No. 579/2009, High Court of Judicature for Rajasthan, Jaipur
>
> 4. Commissioner of Income Tax Vs Bharti Cellular Ltd (2009) 319 ITR 139 (Del.),
>
> 5. Skycell Communications Ltd. and Anr. Vs
>
> Deputy Commissioner of Income Tax and Ors. (2001) 251 ItR 53 (MAD.),
>
> 6. M.S. Jewellery Vs. Assistant Commissioner (ASSESSMENT) Agricultural Income Tax and Sales Tax and Anr. (1994) 208 ITR 531 (KER.),
>
> 7. CIT vs. Maharashtra State Electricity Distribution Co. Ltd., (2015) 119 DTR (BOM) 278,
>
> 8. Commissioner of Income Tax-II and Ors. Vs Delhi Transport Ltd. Manu/ DE/ 2199/2015.
>
> 5. We have heard learned counsel for the parties.
>
> 6. In view of the fact that issue is concluded by decision of Bombay High Court and Delhi High Court and SLP against the same has been dismissed. In that view of the matter the issues are required to be answered in favour of the assessee against the department.
>
> 7. Consequently, the writ petition succeeds and is allowed. The impugned order dated

27.8.2012 passed by respondent No.1 is quashed and set aside."

Contentions raised & Judgments relied upon by Mr. R.B. Mathur appearing on behalf of Revenue.

34. Mr. R.B. Mathur, learned counsel appearing for the department has taken us to the judgment of the Tribunal wherein it is held as under:

"4. The brief facts of the case are that the assessee is a company engaged in the manufacturing and distribution of non-alcoholic beverages packed in glass bottles and plastic crates. The Head Office of the assessee is based in Gurgaon while it has a branch office as well as production unit at Kaladera, Jaipur. The assessee has obtained TAN and has been filing its TDS returns in respect of TDS of salary, contract/Sub-contract and interest but no TDS return in respect of commission payment have been filed. A survey under Section 133(A) was conducted on 20.12.2002 at business premises for the purpose of verification regarding TDS being made by the assessee. During the course of survey a trial balance showing affairs of company for the period between 1.1.2002 to 19.12.2002 was obtained. From this trial balance i9t was found that distributor commission a/c has been debited by an amount of Rs. 4,75,22,929/-. However, it is fount that no TDS was deducted and paid on corresponding credit entries or commission payment whatsoever.

5. To go into assessee's actual relationship with its distributors and there by real nature of the transaction between assessee and distributors, survey action us 133(A) were carried out on three of its distributors and statements of relevant persons were recorded during survey. The name of the distributors and persons whose statements were recorded are as follows:

1. Sh. Rajesh Kumar Khandewla Prop. M/s. Om Prakash Rajesh Kumar, Amer

2. Sh. Kedar Pd. Gupta, Prop M/s. R.R. Enterprises, Bassi.

3. Sh. Purusottam Lal Sindhi Prop. M/s. Dilip Kumar Agency, Ratangarh

The assessee was given show cause notice and also copies of statements of relevant persons recorded during the course of these surveys were supplied to the assessee along with this show cause notice and were also offered inspection of various documents.

8. The Ao was not satisfied with the arguments of the assessee's counsel because of the following reasons

(A) In assessee's own accounts margin of Distributor has been included in gross revenue realization by debiting Distributor commission account and crediting Gross revenue account If the transactions were strictly on principat-to-principal basis, there was no reason to give any effect to the distributor margin in its own books of accounts under any circumstances

(B) Assessee has heavily relied upon the sales invoice made by the company and the distributors and corresponding accounting entries to claim that their transactions with the Distributor are principal to principal. However assessee himself has rightly argued that the entries in books of account are not conclusive in determining the real nature of transaction The real nature of transaction is governed by the actual understanding between the two parties and the manner in which the transaction is completed in the reality. In the case of assessee and his distributors, the distributors do not have any substantial independence in carrying out their own transactions which an independent principal always enjoy. The distributor is just acting as an arm of the assessee company in carrying out its business for a margin just like it is done in the case of Principal agent's relationship. This is clear from the following facts:

(a) Distributors are clear that they are commission agents acting on fixed margin and fixed responsibilities:

In the absence of a written agreement what the different parties to oral agreements thinks of their role becomes extremely important All the three distributors whose statements were recorded at different places thinks the same way that they are working on commission basis for the assessee company. In response to question No.8 of Shri No.4 of Shri question No.3 Shri Kedar Gupta and question categorically Rajesh Kumar (statement dated 13.1.2003) have stated above fact.

(b) No independence for fixing the sales price to the distributors;

In principal to principal relationship within the restrictions of MRP, a principal enjoys full freedom of fixing a sale price However, in this case, the distributors do not have any independence whatsoever to do so by reducing their margins. In response to question No.8 & 16 of Shri question No.2 of Shri Kedar Gupta and question No.4 & 5 of Shri Rajesh Kumar (statement dated 13.1.2003) have categorically stated above fact.

(c) Fixed area of operation;

In relationship once the goods are sold there can be no restriction imposed by one principal on the other one as regard to his area of operation. However in this case, the distributors can make sales only in the area precisely specified by the assessee company. In response to question No.7 of Shri Purushottam, question No.2 and 3 of Shri Kedar Gupta and question No.2 of Shri Rajesh Kumar (statement dated 15.1.2003) have categorically stated this fact. In fact, the sales executive of the assessee company ensures that above conditions are strictly adhered to.

(d) Loss on stock due to price fall borne by assessee company;

If assessee company reduces the MRP which has been done recently, then it is compensating the distributors for the loss on the value of stock available with them In

response to question No.10 of Shri Purushottam, question No. of Shri Kedar Gupta and question No.4 of Shri Rajesh Kumar (statement dated 15.1.2003) has explained this practice In principal to principal relationship seller can never be responsible for the loss accruing to the purchaser on account of fall in value of goods already sold by him. This practice also destroys the sanctity of sale price mentioned on the sales invoice prepared by the company for its transactions with the Distributor.

(e) Loss on account of expiry of sold goods borne by assessee company;

If the stock available with the distributor cannot be sold before expiry date, the loss accruing this account is also borne by the company after the claim is submitted by the distributor and is by the company. In response to question No. 10 of Shri and question No.8 of Shri Rajesh Kumar (statement dated 15.1.2003) above fact was confirmed.

(f) Control of sales executives over the operations of distributors;

Sales executives of the assessee company, regularly monitor the operations of distributors, which is neither possible needed in relationship The non of operation by distributors is see to it that area system is strictly adhered to, at the time of sale FIFO maintained etc. Importantly, sales executives send weekly report of stock with distributors to the company. In distant places, Ratangarh, Auditors of company also audit the records and stock of the distributor on monthly basis (question No.7 and 13 of Shri Purushottam) In fact, a copy of such report on the stationery of company itself (Distributors Warehouse Age Survey Form) signed by the representative of assessee company found during the course of survey from the premises of Dilip Kumar Agency is enclosed with AO's order as Annex-A which clearly shows that how even the stock of the distributor is controlled by the assessee company.

(g) Appointment of sub-distributors by assesse Company;

Once the goods are sold to the distributor, how the goods are sold further by him should be solely his discretion in principal to principal relationship. However they have no right to appoint any sub-distributor. At the same time, company can appoint any sub-distributor and direct distributor to supply goods to such sub distributors and importantly the entire margin(commission) receivable by such sub-broker from the company is first paid by the distributor and then only a part from the same is recoverable by the distributor from the company by making a claim of spoke discount(question No.2 of the statement of Shri Rajesh Khandelwal dated 15.1.2003 and question No. 14 of Shri Purushotam)

(h) Different type of claims received by distributors from the company;

A large number of claims, which would never be available in principal to principal relationship are made by the distributors and paid by assessee company. Some of such claims are as follows:

(i)Diesel and petrol claim to meet part of the distribution expenses.

(ii) Vehicle repair to meet part of the distribution expenses.

(iii) Salary of salesman claim to meet part of th expenditure in off-season.

(iv) Leakage and breakage claim in respect leakage and breakage between distributor and retailer. (question No.3 of statement of Shri Rajesh Khandelwal and question No.14 Purshottam Sindhi)

(i) Providing vehicles to the Distributors:

It was also found that assessee company had provided vehicles to some of the distributors for carrying out their distribution operations. Thus, some vehicles owned by assessee company are used by the distributors and the depriciation on these vehicles is claimed by assessee company. Firstly, if the distributors were independent principals why would company provide them with its own vehicle for the sales made by the distributor, which should be and independent operation of an independent principal. Secondly, if the distribution of goods by distributor would have been

independent sales by independent principal, then how the assessee company would claim depreciation on these vehicles, because for making a claim of depreciation in respect of an asset, not only the asset should be owned by the assessee but it should be used by assessee for its own business Thus, it is very clear that in the considered view of assessee company and its management, the distribution of goods by the distributors is an extension of their own business.

26. At the outset on the President demand of the bench, to the Ld. AR to produce the copy of agreement/contract entered into by the assessee and its distributors so that nature of transaction is determined in view of provisions of Indian contract Act and Sale of Goods Act. To the surprise of the bench, it has been categorically denied by the Ld. AR that no such agreement/contract between the assessee and its distributors have been executed and it is argued by Ld. AR that it is the mutual understanding between the two which governs the nature of the transaction and accordingly sale bills and Sales Tax Return filed are the only documents which can be considered as a result of mutual understanding between the two. It cannot be believed that the necessary procedures like no application is invited, no securities are taken though the prices of the sale, responsibilities, area of operation and fixed margin of profit in the nature of commission as per authorities below are fixed. Whereas there is no shelf sale by the assessee that anybody can go and buy the goods and do the necessary transaction of the sale.

27. ……

28. ……..

29. ……..

30. The proposition of law as argued by Ld. AR is not in dispute and is we settled and also is part of Indian contract Act itself. But in reality the transaction between the assessee and its distributor on principal to principal basis are not applicable in the facts and circumstances of the case. There being no agreement or document but from the

circumstances and documents available we are of the considered view that in the case of the assessee following proposition are evident and irrefutable that:-

(i) Distributors are clear that they are commission agents acting margin and fixed responsibilities.

(ii) In principal to principal relationship, within the restrictions of MRP a principal enjoys full of fixing a sale price.

(iii) However, in this case the distributors do not have any independence whatsoever to do so by reducing their margins.

(iv) In principal-to-principal relationship once the goods are sold there can be no restriction imposed by one principal on the other one as regard to his area of operation. However, in this case, the distributors can make sales only in the area precisely specified by the assessee company

(v) If assessee company reduces the MRP which has been done recently, then it is compensating the distributors for the loss on the value of stock available with them. In principal to principal relationship seller can never be responsible for the loss accruing to the purchaser on account of all in value of goods already sold by him. This practice also destroys the sanctity of sale price mentioned on the sales invoice prepared by the company for its transactions with the Distributor.

(vi) If the stock available with the distributor cannot be sold before expiry date, the loss accruing on this account is also born by the company after the claim is submitted by the distributor and is verified by the company.
(vii) Sales executives of the assessee company regularly monitors the operations of distributors, which is neither possible nor needed in principal to principal relationship. They see to it that area of operation by distributors is strictly adhered to, at the time of sale FIFO system is maintained etc. Importantly, sales executives send weekly report of stock with distributors to the company. In distant places like Ratangarh, Auditors of company also audit the records and stock of the distributor on monthly basis.

(viii) Once the goods are sold to the distributor, how the goods are sold further by him should be solely his discretion in principal to principal relationship. However, they have no right to appoint any sub-distributor. At the same time, company can appoint any sub-distributor and direct distributor to supply goods to such sub-distributors.

(ix) A large number of claims, which would never be available in principal-to-principal relationship are made by the distributors and paid by assessee company. Some of such claims are as follows

(a) Diesel and petrol claim to meet part of the distribution expenses.

(b) Vehicle repair to meet part of the distribution expenses.

(c) Salary to salesmen claim to meet part of the penditure in off Season.

(d) Leakage and breakage claim in respect leakage and breakage between and retailer.
(x) It was also found that assessee company had provided vehicles to of the for carrying out their distribution operations. Thus, some vehicles owned by assessee company used by the distributors and the depreciation on these vehicles is by assessee company. Firstly, if the distributors were independent principals why would company by the provide them with its own vehicle for the sales made of an distributor, which should be an independent operation by independent principal. Secondly, if the distribution of goods would have been independent sales by independent principal, then how the assess company would claim depreciation on the vehicles, because for making a claim of depreciation in respect of an asset, not only the asset should be owned by the assessee but it should be used by assessee for its own business. Thus, it is very clear that in the considered view of assessee company and its management, the distribution of goods by the distributors is an extension of their own business.

31. ……..

32. In reply, to the entries of commission and individual a/c of distributors In which commission a/c is credited the Ld. AR replied that it is management information system. The only reliance can be placed on audited books of a/c and not other documents and registers found during course of survey. The Ld. AR the further argued that entries in such books of a/c do not determine the reality of nature of transaction. On this proposition of Ld. AR, how even audited books o account could determine the reality of transaction. This argument of the Ld. AR back fires the assessee itself under these circumstances. The assessee himself has shown commission as expenditure which is being fixed and paid to distributors by the assessee apart from various expenses borne by the assessee and control maintained by the assessee itself. The copy of ledger account of the assessee are available at P.B. 339 to 364 submitted by the Ld. AR and a copy of one page of the Ledger at P.B. 357 is reproduced for clarification as under:

HCCBPL-2002

Distributor commission Ledger Account: 1-Jan-2002 to 31-Dec-2002 Page 2

Date	Particulars	Vch Typ	Debit	Credit
	Brought Forward		1,27, 93,030.00	
26-4-2002	Gross Revenue-Customer J Journal BEING GROSS REVENUE BOOK- ED 114182 C/S FOR THE MONTH OF APRIL 02 FOR SALES MADE FROM UDAIPUR DEPOT AS PER THE ENCLOSED DETAILS		11,61,441.00	
24-5-2002	Gross Revenue-Customer J Journal Gross Revenue for the period 27-04-2002 to 24-05-02 (VKIA+KALADERA)		97,35,943.00	
	Gross Revenue-Customer J Journal being GR booked for 1446-37 cases has been		14,86,999.00	

sold during the m.o. may 2002 as per enclosed reconciliation		
Gross Revenue-Customer J Journal Being reversal entry passed of JV no.763		97,35,943.00
Gross Revenue-Customer J Journal Being reversal entry passed of JV no. 769		14,86,999.00
Gross Revenue-Customer J Journal Being GR booked for 1446-37 cases Has been sold during the MO may 2002 is per enclosed reconcilation	14,88,044.00	
	2,66,65,457.00	1,12,22,942.00

33. From the above it is clear that the assessee has made the entries in its books of account debiting commission account as an expenditure and crediting the same to gross revenue account. This cannot be lost sight in view of judgment in the case of State Bank of Travancore vs CIT Kerala 158 ITR 102 (sc). In that case sticky loans, interest were credited to suspense account by debiting to various sundry debtors and interest was not shown as income in the profit and loss account and the claim of the assessee bank, that there is no accrual or arising of the income in such cases: Hon’ble Justice Sabyasachi Mukharji and concurred by Hon'ble Justice Ranganath Misra, have held (relevant para at page 155 and 156) that:

"After debiting the debtor's account and not reversing that entry but taking the Interest merely in suspense account cannot be such evidence to show that no real income has accrued to the assessee or been treated as such by the assessee."

"Thus by own admission of the assessee bank, the income has accrued or arisen in the mercantile system of accounting".

34. In the present case the assessee is maintaining mercantile system of accounting and in its ledgers the amount of commission have been shown as paid or payable cannot be denied by its own admission by calling it as management information system.

35. …….

36. Moreover the sales bill is in the capacity as customer or consignee has not been made clear on the sales bill. Further the payment is to be made on fortnightly basis, as is evident from sales bills. But it has not been brought on record, whether the sales price collected from retailer is sent to the assessee after deducting comission or indirectly said to be margin of profit or the distributor has the right to use that money to his advantage or benefit. Whether the distributor have their own warehouses or godowns and sells them as an owner has also not been brought on record.

Without bringing on record any material, a said statement that closing stock belongs to distributor, is of no value. Since it is evident from papers found in survey, the distributor is entitled for commission only and hence his right to collect the money from retailer can not be to retain the same but send the same to the assessee. There is an old section 194-H which is in peri Materia with the present section 194-H. The old section came in statute book w.e.f. 1.10.91 and remained effective upto 31.5.92. In pursuance of which there is a Board circular No.619 dated 4.12.1991, which has also been mentioned by the CIT(A) in his order and the relevant para of the circular reads as under:-

"6. A question may raise whether there would be deduction of tax at source under section 194-H where commission or brokerage is retained by the consignee/agent and not remitted to the consignor/principal while remitting the sale consideration. It may be clarified that since the retention of commission by the consignee/agent amounts to constructive payment of the same to him by the consignor/principal, deduction of tax at

source is required to be made from the amount of commission. Therefore the consignor/principal will have to deposit tax deductible on the amount of commission income to the credit of Central Government, within the prescribed time, as explained in succeeding paragraph."

37. …….

38. …….

39. …….

40. The statement of the distributors that they are given fixed commission cannot be retracted by filing affidavit for which the AO had already given sufficient opportunity to the assessee."

35. Taking into consideration, he contended that the facts which are available after the proceedings u/s 133A of the Act and the statement of the distributor, after considering the facts on record, the Assessing Officer, the CIT(A) and the Tribunal have recorded the concurrent finding taking into account every action of making loss of any item which has been found destroyed or damaged or reimbursed to clearly establish that it is nothing but the agency and the company which have not produced the agreement on record. Taking into account the oral conduct of the assessee and the finding arrived at by all the three authorities, the view taken by the Tribunal and the conclusion arrived at is required to be affirmed and when other High Courts have taken into consideration in favour of the assessee except one judgment wherein the view was taken in favour of the department, therefore, the view taken by the Tribunal is required to be accepted and also in the case of Cellular companies and other

agencies, they have not produced any agreement on record, therefore, the view taken is required to be reversed.

36. Reliance has also been placed on the decision of Delhi High Court in the case of **Delhi Milk Scheme Vs. Commissioner of Income Tax and another- (2008) 301 ITR 373 (Delhi)** wherein it is held as under:

> "11. On the facts of the case, it is quite clear that the milk and milk products are not sold by the assessed to the concessionaires. On the contrary, unsold milk is taken back by the assessed from the concessionaires, without any price reduction. Therefore, whichever way one looks at the matter, from the point of view of the definition of the word 'commission', as appearing in the Explanation to Section 194H of the Act or from the meaning of the word 'discount', the transaction between the assessed and the concessionaires is a principal to agent transaction and not a principal to principal transaction.
>
> 12. The Tribunal has found, as a matter of fact, that the milk booths are owned by the assessed; the assessed has a right to enter the milk booth and take charge thereof any time without assigning any reason or without any intimation to the concessionaires; unsold milk is taken back by the assessed from the concessionaires; cash collection is daily handed over to the assessed by the concessionaires; the concessionaires only render a service to the assessed for selling milk to the customers; and finally ownership of the goods does not pass from the assessed to the concessionaires inasmuch as there is no sale of the milk or milk products to the concessionaires. No material has been brought on record to controvert these findings of fact.
>
> 13. We also do not find any perversity in the findings of fact that have been arrived at by the Tribunal on the basis of the agreement entered into between the assessed and the concessionaires and the

terms of their appointment.

14. That being the position, we are of the opinion that no substantial question of law arises.

15. The appeal is dismissed. No costs."

37. He has also relied on the decision of Delhi High Court in the case of **Commissioner of Income Tax-XVII Vs. Idea Cellular Ltd.- (2010) 325 ITR 148 (Delhi)** wherein it has been held as under:

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. The purpose is to ensure that the payment is received in respect of those SIM cards, which are ultimately sold to the subscriber inasmuch as unsold SIM cards are to be returned to the assessee and the assessee is 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…)

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 cases, i.e., principal-to-principal and principal to agents can be a matter of mutual consent between the parties and even a matter of negotiation after the execution of the agreement. There are no hard and fast rules of any legal proposition as far as these matters are 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-company that once delivery of the SIM Card is taken, it is the absolute property of the distributors. No, this is a mis-conception.

56. In the case of post-paid scheme, the assessee-company is treating the benefits enjoyed by a distributor as commission and 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 conformity with the statutory and administrative Rules, no-body can become an Agent of the Government. Further, the Court has considered the subject

transaction as that of purchase and sale of goods. But, in the present case, there is no failure of any procedural 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 assessee's Indoor Management.

(6) Service cannot be sold or purchased and it can only be provided. The

operational features explained by the assessee-company are necessary in running a mammoth system of providing mobile telephone services over a large geographical area. The distributors provide essential services to the assessee-company in running such a huge operational system. The distributors are linking agents in the chain of delivery of services to consumers. Therefore, the relationship is not of a principal to principal.

28. We are in agreement with the view taken by the said Bench. Identical view is taken by Calcutta Bench in the case of Assistant Commissioner of Income Tax v. Bharti Cellular Ltd. (2007) 294 ITR 283(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."

38. He has also relied upon the decision of Kerala High Court in the case of **Commissioner of Income Tax Vs. Director, Prasar Bharti- (2010) 325 ITR 205 (Ker)** wherein it has been held as under:

"5. Even though counsel for the respondent has relied on the decision of the Gujarat High Court in Ahmedabad Stamp Vendors Association v. Union of India (2002) 176 CTR (Guj) 193 : (2002) 257 ITR 202 (Guj) and a decision of learned Single Judge of this Court in M.S. Hameed and Ors. v. Director of State Lotteries and Ors. (2001) 165 CTR (Ker) 481 : (2001) 249 ITR 186 (Ker) and contended that commission payable cannot be subjected to deduction, we are unable to accept this argument because the case decided by the Gujarat High Court pertains to sale of stamp by the Government to stamp vendors at a discount and the case decided by this

Court pertains to sale of lottery tickets to the agents at a discounted price. In both the cases, the purchasers, namely, stamp vendors and lottery agents purchased stamps and lottery tickets respectively at a discounted price and they run the business at their risk. They will get the discount retained by the Government only if stamp paper or lottery ticket is sold and destruction of the stamp paper or lottery ticket before sale in their hands will be a complete loss to them. Therefore the transactions of purchase at discounted price and sale at face value were rightly treated as not agency transactions by the Courts. On the other hand, in this case, on facts and based on terms of agreements between parties, we find that the transaction is pure agency arrangement whereunder respondent allows the agents to canvass advertisement for them at tariff prescribed by the respondent on payment of commission of 15 per cent. We therefore allow the appeals reversing the orders of the Tribunal and restore the orders of assessment confirmed in first appeals. However it is for the respondent to invoke, if permissible, the indemnity clause and recover the levies from the agents."

39. He has relied upon another decision of Kerala High Court in the case of **Vodafone Essar Cellular Ltd. Vs. Assistant Commissioner of Income Tax (TDS)- (2011) 332 ITR 255 (Ker)** wherein it has been held as under:

"6. The very scheme of deduction of tax at source under the IT Act is to trace recipients of income and their accountability to the Department for payment of tax on various transactions. In fact, major portion of the Income Tax collection is through recovery of tax at source and but for the mechanism, there would have been massive evasion of tax by the recipients of various kinds of income. The trend in legislation is to increase coverage for recovery of tax at source and on a steady basis various services are

brought under the TDS scheme so that tax evasion is avoided. We have already taken note of the provision under Section 197 of the Act which mitigates against hardship if any in recovery of tax in as much as a payee is entitled to approach the Department and apply for certificate to receive any amount which would be otherwise subject to deduction of tax at source without recovery of any tax or on recovery at lesser rates. We are of the view that the grievance if any against recovery of tax by the Assessee is on the distributors, and they are already on the roles of the Department because Assessee is making deduction of tax at source for payment of commission made under the post-paid scheme. As already pointed out, if distributors have any grievance against Assessee recovering tax for the commission paid in the form of discount in respect of prepaid services, any such distributor is free to approach the Department for getting his grievance redressed by filing an application under Section 197 of the IT Act. However, we make it clear that this is not the ground on which we have held the Assessee liable for recovery of tax at source under Section 194H which is only 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 Section 194H of the Act. The impugned orders issued under Sections 201(1) and 201(1A) of the Act are only consequential orders passed on account of default committed by the Assessee under Section 194H and, therefore, those orders were rightly upheld by the Tribunal. We, therefore, dismiss all the appeals filed by the Assessee."

40. He has relied upon a decision of Calcutta High Court in the case of **Bharti Cellular Ltd. (now Bharti Airtel Ltd.) Vs. Assistant Commissioner of Income Tax & anr.- (2013) 354**

ITR 507 (Cal) wherein it has been held as under:

> "26. We conclude thus that there has been indirect payment by the assessee to the franchisee of the commission and the same is attractable under section 194H. The decision of the Gujarat High Court in case of Ahmedabad Stamp Vendors Association (supra) is of no assistance in this case as on analysis of fact and interpreting the various provision of law it could be found in that case that it was a transaction of principal to principal and no element of agency was to be found."

41 He has further relied on the decision of Karnataka High Court in the case of **Bharti Airtel Ltd. Vs. Deputy Commissioner of Income Tax- (2015) 372 ITR 33 (Karn)** wherein it is held as under:

> 16. It is in this background we have to understand the telecommunication services provided to the customers by the assessee. It is in two models.
>
> (1) Prepaid: Under the prepaid model, the subscriber is required to take a mobile telephone connection, through a distributor, from a telecom operator. Under this model, the subscriber pays for the talk time in advance (paid through a distributor) and its balance depletes as and when he uses it. When the prepaid amount is used fully, the subscriber is required to get his 'service/talk time' re-charged, for which he buys recharge voucher for a chosen amount/validity. He pays for the talk time purchased in advance. This is called prepaid model.
>
> (2) Postpaid: In the postpaid model, the subscriber signs up an agreement with the telecom operator seeking a telephone connection. He uses the connection and is subsequently billed for the usage on monthly basis (per his billing cycle). The subscriber here makes the payment to telecom company post usage of telecom

services, hence the model is called postpaid service.

In the pre-paid model customer would first re-recharge his connection with the required amount and then, use it for voice or non-voice requirements. As and when the balance available is exhausted after using up, then customer has to re-charge again for a denomination for which Re-charge Vouchers are made available by the telecom operator. In Postpaid model, customer would be permitted to use the services and billed subsequently as per Billing Cycle. In this situation, customer need not re-charge.

43. The principal question that falls for consideration in all these appeals is whether the agreements between the assessee and the distributors gave rise to a relationship of principal to principal or relationship of principal to agent. However, the question arising in a case has to be determined having regard to the terms and recitals of the agreement, the intention of the parties as may be spelt out from the terms of the document and the surrounding circumstances and having regard to the course of dealings between the parties and the statutory provisions and the interpretation placed by Courts in the judgments on the point.

51. From the aforesaid clauses, it is clear that there is no relationship of principal and agency. On the contrary, it is expressly stated that the relationship is that of principal to principal. Secondly the Distributor/Channel Partner has to pay consideration for the Product supplied and it is treated as sale consideration. There is a Clause, which specifically states that after such sale of Products, the Distributor/Channel Partner cannot return the goods to the assessee for whatever reason. It is the Channel Partner and the Distributor who have to insure the products and the godowns at their cost. They are even prevented from making any representation to the retailers unless authorized by the assessee. What is given by the assessee to its Distributor/Channel Partner is a trade discount. It is not

commission.

58. In both the aforesaid cases, the Court proceeded on the basis that service cannot be sold. It has to be rendered. But, they did not go into the question whether right to service can be sold.

"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 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 earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs. 20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer.

However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.

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 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. Therefore, the substantial question of law is answered in favour of the assessee and against the Revenue. Hence, we pass the following order:

"ORDER

1. Appeals are allowed.

2. The impugned orders passed by the authorities are hereby set aside.

3. The matter is remitted back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above, in para 60, Section 194H of the Act is not attracted.

Ordered accordingly."

42. He has also relied upon the decision of Calcutta High Court in the case of **Hutchison Telecom East Ltd. Vs. Commissioner of Income-Tax- (2015) 375 ITR 566 (Cal)** wherein it is held as under:

"12.In consideration of the service to be rendered by him, he shall get a commission at the rates as per the policy to be adopted by the assessee from time to time.

13. The terms and conditions noticed above leave no manner of doubt that the relationship between Poddar Communications and the assessee appearing from the agreement relied upon by Mr. Khaitan is that of an agent and principal. Poddar Communications appears to have been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers.

14. The judgments cited by Mr. Khaitan do not really provide any assistance to him in deciding the matter in one way or the other. In the case of Daruvala Bros. (P) Ltd. (Supra), the question for consideration was whether the compensation received by the assessee was a revenue receipt or a capital receipt. The contention was that the compensation had been received by the assessee because the agency was surrendered for some of the territories. In lieu of such surrender, the compensation was paid by the principal. It is in that context, the question was considered and it was held that the sum paid to the assessee did not partake the character of compensation at all. We do not find any applicability of this judgment to the issue before us."

43. We have heard learned counsel for the parties.

44. Now, the first question which has come up for our consideration is, 'whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S. 194H of the Income Tax Act, 1961 amounting to Rs.19,74,842/- (including interest) in respect of sales to its distributors, which are on principal to principal basis and wherein property in the goods is

transferred to the distributor'.

45. Taking into account the provisions of Section 182 of the Contract Act and the arrangement which has been entered into between the company and the distributor and taking into account the provisions of Section 194H, the Tribunal while considering the evidence on record, in our considered opinion, has misdirected itself in considering the case from an angle other than the angle which was required to be considered by the Tribunal under the Income Tax Act. The Tribunal has travelled beyond the provisions of Section 194H where the condition precedent is that the payment is to be made by the assessee and thereafter he is to make payment. In spite of our specific query to the counsel for the department, it was not pointed out that any amount was paid by the assessee company. It was only the arrangement by which the amount which was to be received was reduced and no amount was paid as commission.

46. In that view of the matter, if we look at the provisions of Section 194H and even if explanation is taken into consideration, there is no occasion of invoking provisions of Section 194H, since the amount is not paid by the assessee.

47. Taking into account the conclusion which has been arrived at by the Tribunal is misdirected in view of the arrangement which has been arrived at between the company and the Distributor. Assuming without admitting, if the contention which has been raised before the Tribunal is accepted, the same can be at the most expenses which are not allowable under the

Income Tax Act, if at all claimed without proper basis but to conclude that they are covered under Section 194H and the income tax or the TDS is required to be deducted is not correct and accordingly disallowance on that basis is not correct. In our considered opinion, from which amount of tax is to be deducted is a doubtful proposition inasmuch as the Management Information System which has been sought to be relied upon for alleging that expenditure has been claimed could not have been relied upon by the Tribunal or the authorities under the Income Tax Act.

(i) The findings which are given by the Tribunal regarding Distributor being Agent in view of the discussion made here-in-above, the arrangement which has been made between the Company and the Distributor is on Principal to Principal basis and the responsibility is on the basis of agreement entered into between the parties.

(ii) Regarding MRP, the findings which are arrived at is a price which has been fixed by the assessee company and other expenses, namely; commission given to the retailer and everything is to be managed by the Distributor.

In that view of the matter, the restrictions which are put forward will not decide the relation-ship of Principal and Agent.

(iii) The Distributor has all rights to reduce his margin. He can increase the margin of retailer and will reduce the margin from 10% to anything between 1% to 10%. There is no restriction by the assessee to give commission amount to the retailer.

(iv) Regarding area of operation, it is the business policy of the assessee to give Distributor-ship for a particular area. Only on that basis, it will be erroneous to held that it is on Principal to Principal basis. For deciding the relation-ship on Principal to Principal basis, the criteria will not be of area of operation but agreement entered into between the parties.

(v) Regarding the change in price it is always between the assessee or the company and the Distributor to decide who will absorb the loss.

In that view of the matter, the findings arrived at by the Tribunal is erroneous.

(vi) Regarding the return of goods after expiry date, it is always the understanding between the manufacturer and company that the product is not for preparation or consumed before expiry date, the consumed items cannot be allowed otherwise manufacturer will invite criminal liability. To avoid any criminal liability or any criminal act is done for taking back the goods, will not deter the relation-ship of Principal to Principal basis.

(vii) Regarding supervision, it is always for the manufacturer and the company to look into the matter that his Distributor or Sub-Distributor or Retailer will not induct in mal practice.

(viii) Regarding goods sold to the Distributor, it is always a matter of contract how further goods will be distributed. Restriction on sub-distributor will not change the transaction from Principal to Principal.

(ix) Regarding expenses which are described by the Tribunal and one of the reason is that it is always for the assessee to allow any special allowance or expenses to promote the sale. In a competitive world to promote the sale, if the Distributor is not given any encouragement, the business will not grow.

In that view of the matter, in view of the observations of the Supreme Court, the Income Tax Officer cannot enter into the shoes of the assessee. (S.A. Builders Vs. Commissioner of Income Tax- (2007) 288 ITR 1 (SC).

(x) Regarding providing a vehicle it was very clear that by providing vehicle and getting list of expenses will not decide the relation-ship of Principal and Agent.

48. In our considered opinion, Section 194H pre-supposes the payment to be made to the third party namely, Distributor or the Agency and if on a close scrutiny of Section 182, Distributor is not an agent, therefore, in our considered opinion, the provisions of Section 194H have wrongly been invoked, and therefore, the first issue is answered in favour of assessee and against the Department.

49. The second issue which has been raised for our consideration, as discussed hereinabove, the Management Information System was not a part of their books of accounts nor could have been relied upon by the Income Tax Authorities. The basis on which the proceedings were initiated, in our considered opinion, the Statutory Audit Report is final conclusion over the authorities under the Income Tax Act, therefore, the second issue

is required to be answered in favour of the assessee.

50. Regarding third issue whether 201A or 201(1A), in view of the decisions of different High Courts, the argument canvassed by counsel for the appellant pre-supposes deduction out of the payment. In our conclusion in issue No.1, the amount was not required to be deducted since they have not made any payment. In that view of the matter any proceedings under Section 201 or 201(1A) are misconceived. In that view of the matter, this issue is also answered in favour of assessee.

51. Contention regarding provisions of Section 271 of the Act,in view of our answer in favour of assessee, this issue is also required to be answered in favour of assessee. Even otherwise as rightly held by the Supreme Court in CIT Vs. Eli Lilly & Co. (India) P. Ltd.(supra), the penalty could not have been levied in all the appeals filed by assessee Coca Cola.

M/s Bharti Hexacom Ltd.

52. Regarding the other appeals of Cellular Companies the questions are required to be answered as discussed hereinabove. The relationship is not of agent. It is principal to principal basis. The payment is received by the company and the amount of commission is never paid to the agent or the Distributor. Therefore, no TDS is required to be deducted. We also accept the contention raised by Mr. Jhanwar that even otherwise in view of divergent judicial views, one in favour of the assessee is required to be adopted as per settled law. Taking into consideration the above conclusion, the first issue is required to be answered in

favour of assessee.

53. Regarding Section 194J of the Act, in view of the Kerala High Court decisions, the issue is answered in favour of assessee and third issue even as per the statutory definition, there is no service and Sections 201 and 194H would not apply in view of the agreement as referred hereinabove.

Tata Teleservices

54. In view of agreement the issue regarding 194H and 194J as held in other cases, both the issues are answered in favour of the assessee.

Vodafone

55. Issues regarding Sections 194H, 194J and 201 of the Act, they are answered in favour of assessee.

56. Additional questions are framed in the case of Department. There are 5 issues in favour of assessee (issue Nos. 1 and 2 are wrongly framed by the Court). However, in view of our above discussion, they are required to be answered in favour of the assessee.

57. In case of appeal preferred by the assessee, issue No.4 is required to be answered in favour of assessee that the CIT (A) has all jurisdiction to restore or set aside the judgment of AO since it is a statutory appeal, the appellate court has all powers to deal with the same. All other issues are answered in favour of the assessee.

Idea Cellular

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

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

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

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

		assessee and against the department	assessee and against the department			
8.	1/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
9.	2/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
10.	3/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
11.	4/2014	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department	In favour of assessee and against the department
12.	124/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	–
13.	125/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
14.	126/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
15.	131/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
16.	132/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
17.	168/2015	Against the department	Against the department	--	--	--

		and In favour of assessee	and In favour of assessee			
18.	169/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
19.	170/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
20.	171/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
21.	195/2015	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
22.	08/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
23.	45/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
24.	48/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
25.	49/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
26.	96/2016	Against the department and In favour of	Against the department and In favour	--	--	--

		assessee	of assessee			
27.	97/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
28.	98/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	--	--
29.	99/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
30.	100/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
31.	101/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
32.	102/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
33.	103/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
34.	104/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee
35.	105/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee

36.	106/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	–	–
37.	107/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	–	--
38.	108/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	–	--
39.	190/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	--	–	--
40.	200/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	–	--
41.	204/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	–	--
42.	209/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	–	--
43.	210/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	–	--
44.	217/2016	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee	Against the department and In favour of assessee

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

A copy of this judgment be placed in each file.

(INDERJEET SINGH),J. (K.S. JHAVERI),J.