IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

I.T.A. Nos.6923 to 6926/Mum/2012
(Assessment Years: 2009-10 to 2012-13)

Tata Sky Limited Unit 301 to 305, 3rd Floor, Windsor, Off. CST Road, Kalina, Santacruz (East), Mumbai-400 098	Vs.	Asst. CIT (TDS), Range 3(1), [Now Jt. CIT (OSD)(TDS) Range 2(3)], Charni Road, Mumbai – 400 002
PAN/GIR No. AAGCS 9294 M		
(Assessee)	**:**	**(Revenue)**

and

I.T.A. Nos.6798, 6799, 6803 & 6804/Mum/2012
(Assessment Years: 2009-10, 2011-12, 2012-13 & 2010-11)

ITO, Mumbai	Vs.	Tata Sky Limited Mumbai-400 098
PAN/GIR No. AAGCS 9294 M		
(Assessee)	**:**	**(Revenue)**

Assessee by	:	Shri Sunil M. Lala
Revenue by	:	Shri R. Manjunatha Swamy

Date of Hearing	:	19.07.2018
Date of Pronouncement	:	12.10.2018

O R D E R

Per Shamim Yahya, A. M.:

These are cross appeals by the assessee and the Revenue directed against the order by the Commissioner of Income Tax (Appeals) dated 29.08.2012 and pertain to the assessment years 2009-10 to 2012-13 respectively. Since the issues are common and the appeals were heard together these have been disposed of by this common order.

2. The common grounds of appeal raised by the assessee read as under:

Levy of demand

1. On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) -14, Mumbai ['CIT(A)'] erred in not

deleting the entire demand of Rs. 5,36,33,572 raised on the Appellant under section 201(1) / 201(1A) of the Income-tax Act, 1961 ('the Act').

Discount on sale of Set-Top Box treated as Commission income

2. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding that the Appellant is liable to deduct tax at source under section 194H of the Act on discount of Rs.8,41,99,124 offered to distributors on sale of Set-top box by the Appellant.

Discount on sale of Recharge Coupon Vouchers treated as Commission income

3. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding that the Appellant is liable to deduct tax at source under section 194H of the Act on discount of Rs.10,39,94,496 offered to distributors on sale of Recharge Coupon Vouchers by the Appellant.

4. Without prejudice to Ground No. 2 and 3 above, as the Assessing Officer has already made disallowance under section 40(a)(ia) on account of non deduction of tax on discount in respect of sale of Set-Top Box and Recharge Coupon Vouchers, the same amount cannot be again subject to the provisions of TDS to raise demand under section 201(1) / (1 A) of the Act.

Levy of interest under Section 201(1A)

5. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the levy of interest under section 201(1A) of the Act on the ground of non-deduction of tax at source by the Appellant.

6. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in directing the TDS officer to levy interest under section 201(1A) of the Act upto the date of furnishing of return of income by the deductees rather than upto the date of payment of taxes by the deductees / recipient (i.e. distributors).

All the above grounds of appeal are without prejudice to one another.

3. The common issue raised in Revenue's appeal read as under:

1. The Ld. CIT(A) has erred in law and on facts by holding that the provisions as contained in 194C are applicable to the payment pertaining to Installation Service Providers and document management charges, without properly appreciating the factual and legal matrix brought out by the A.O. in the order u/s.201(l)/201(lA).

2. The Ld.CIT(A) has erred in law and on facts in holding that the payment made to installation service provider comes within the purview of section 194C and not under the provisions of section 194J without appreciating the factual perspective which clearly shows that these payments made by the assessee deductor in on account of specialized technical services such as installation work of Dish Antennae and incidental hardware i.e. DTH apparatus, at the premises of the subscriber, requiring highly skilled personnel and cannot be done by any layman after reading the installation manual.

3. The Ld.CIT(A) has erred in law and on facts in holding that the services of installation of set top boxes and antenna are covered under the definition of "work" as defined in section 194C without appreciating that the TDS was to be deducted U/S.194J and not u/s.194C of the I.T.Act, 1961.

4. The Ld.CIT(A) has erred in law and on facts in holding that the payment made for Document Management Charges be treated as covered u/s.!94C and not U/S.194J of the I.T.Act without appreciating that these charges were paid for rendering services of highly technical nature, such as using of its software for tracking stored documents, access control system, CCTV system, closed circuit television monitoring for entries, bar coding of physical docket.

5. The Ld.CIT(A) has erred in law and on facts in deleting the interest u/s.201(lA) on the issues of installation service provider and document management fees as these short deduction has been deleted by him and interest deletion is consequential to quantum deletion of short deduction, which is the subject matter of further appeei as per Ground No.3 & 4 above.

6. The Ld.CIT(A) has erred in law and on facts in holding that the interest u/s.201(lA) on the short deduction confirmed by him, on the issue of set top boxes and recharge vouchers to be calculated, from the date of deduction till the return of income filed by the deductee as per the amended provisions of section inserted in the Finance Act, 2012 without appreciating that the amendment has propective effect w.e.f. 1.7.2012.

Assessee's appeal:

4. Since facts are similar we are referring to facts and figures from common order for assessment year 2009-10 and 2010-11.

5. From the grounds raised, the following issue is identified and adjudicated as under:-

(i) Non deduction of TDS on discount sale of Set Top Boxes (STBs) and recharge vouchers (RCVs):

The assessee in this case is a Public Limited Company engaged in the business of Direct to Home (DTH) services in the name of TATA SKY .

6. The AO has held that the assessee is in default for non-deduction of tax at source on the said discount and incentives allowed to the distributors/dealers on the following grounds:

- The distributor is entitled to appoint dealers within his territory and shall be solely responsible that they conform to rights and liabilities under the agreement.
- In the transaction of sale, the purchaser is at liberty to deal with the product once it is purchased by him and goods are not taken back. In the case of the appellant there are various restrictions imposed on the distributor for selling the product, its territory appointment of stockists, etc. The transaction clearly establishes the relationship of 'principal and agent'.

- The maximum retail price (MRP) is mentioned on every product and distributors are not permitted to sell the products to the customers beyond the MRP.

- The nature of the appellant's services is different from sale of ordinary physical goods/commodities. Set top boxes and the recharge coupons are only devices used for accessing or availing of the prepaid DTH services and items involved are services that include access to DTH service network. Starter kits and Recharge coupons/ vouchers are not tradable goods in the ordinary meaning of the expression "Goods" and "Sale".

- A service can only be rendered and not sold. The distributors are acting for and on behalf of the appellant company.

- The items involved are inextricably linked to a set of services, which are identified and sold under a brand name. The distributors do not sell the prepaid vouchers as their own property but as that of the company.

- Distributorship Agreement indicates that there is a principal to Agency relationship between the appellant and the distributor in as much as the distributors are merely conduits who facilitate the conveyance of services of the appellant company to the end user.

- The AO has relied upon various decisions of the High Courts and the ITAT to observe that the decisions cited by the appellant have already been considered by these higher judicial authorities.

7. The AO has referred to various decisions, including:

(a) *CIT Vs. Singapore Airliner & Other Airlines*, 213 Taxman 441 (Del.)
(b) *ACIT Vs. Bharati Cellular Ltd*, 294 ITR (AT) 283, (Kolkata ITAT)
(c) *Bharti Cellular Ltd. Vs. ACIT*, 244 CTR 185 (Cat.)
(d) *BPL Mobile Cellular Ltd*, Writ Petition No. 29202/2005 (Ker. HC)
(e) *Vodafone Essar Cellular Vs. ACIT*, 332 ITR 255 (Ker.)
(0 *CIT Vs. idea Cellular Ltd*, 325 ITR 148 (Del.)
(g) *CIT Vs. Durga Prasad More*, 82 ITR 540 (SC)

8. The AO thereafter held that the facts of the present case are identical to the facts of above cases, where the courts have held that the nature of payment by telecom operators to the distributors for recharge coupons, prepaid SIM cards etc. is on account of commission as defined u/s. 194H of the Act and hence liable to deduction of tax at source. Hence he held that the appellant was liable to deduct tax at source in respect of payments under consideration. He therefore, treated the appellant as assessee in default as per the provisions of section 201(1) for non-deduction of tax at source in respect of the payments made to the distributors as discount/commission for sale of set top boxes, recharge coupons.

9. Upon the assessee's appeal, the ld. CIT(A) elaborately referred to the submission of the assessee. He observed that the assessee company is engaged in business of providing Direct to Home (DTH) services in the brand name of Tata Sky' for which license is given by Ministry of Information & Broadcasting, Government of India. Thus, the assessee is a Service Provider. The provision of this service requires installation of set top box and dish antenna at the customer's premises, That the assessee has entered into agreement with distributors for sale/ distribution of set-top boxes. Further, the provision of DTH services is mainly by way of sale of prepaid vouchers, recharge vouchers etc. for

which also, the assessee has entered into agreements with 'distributors at various locations. That as per the agreements, STBs and RCVs are sold to distributors at a discounted price as agreed between the parties i.e. the authorized price/ invoice price. That the distributors/ dealers sell these items to customers/ subscribers of the assessee company at a price not exceeding the MRP mentioned for the product, there are various decisions on this issue of applicability of Section 194H to the discount allowed to distributors or dealers or franchisees.

10. Thereafter, the ld. CIT(A) referred to the various case laws referred by the A.O. and the assessee. The ld. CIT(A) was of the opinion that to ascertain the applicability or otherwise section 194H in this regard, it was necessary to find out whether the payments are in the nature of commission or brokerage as envisaged in the said section. He referred to the relevant part of section 194H. He was of the opinion that the transactions under consideration would fall within the provision of section 194H only if :

> (i) A principal agent relationship between the appellant and its distributors/dealers;
> (ii) The payments made by the appellant to its distributors/dealers are in the nature of income by way of commission;
> (iii) The income by way of commission should be paid by the appellant for services Rendered by the distributors/dealers or for any services in the course of buying or selling of goods;
> (jv) The income by way of commission may be received or be receivable by the distributors/dealers from the appellant either directly or indirectly; and
> (v) The point of time at which, the obligation to deduct tax at source on the part of the appellant will arise is that when credit of such income by way of commission is made to, the account of the distributors/dealers or when payment of income by way of commission is made by way of cash, cheque or draft or by any other mode, whichever is earlier.

11. Thereafter, the ld. CIT(A) proceeded to ascertain that whether there is a principal agent relationship between the assessee and its distributors/dealers. He referred to the provision of section 182 of the Contract Act for the definition 'Agent'. He stated that the basic and essential requisites of an agency ordinarily would be that:

> (i) The agent makes the principal answerable to third persons where-by the principal can sue third parties directly and renders himself, i.e. the principal liable to be sued directly by third parties.
> (ii) The person who purports to enter into a transaction on behalf of the principal would have the power to create, modify or terminate contractual relationship between the principal, i.e. between the person whom he represents and the third parties.
> (iii) An agent, though bound by the instructions given to him by the principal, does not work under the direct control and supervision of the principal. The agent thus uses his own discretion to act on behalf of the principal subject to the limits to his authority prescribed by the principal.
> (iv) There is no necessity of a formal contract of agency; it can be implied which could arise from the act of the parties or situations in which parties are put.

12. Thereafter, the ld. CIT(A) proceeded to apply the above test to the transaction under consideration. He observed that it is evident that when a distributor/dealer provides the DTH connection to a customer, he does so, on behalf of the assessee. This connection involves installation of set top box and dish antenna at the customer's premises. Thereafter, the Set-Top Box (STB) at the premises of the customer receives television signals directly through the dish antenna and such signals are viewed on the television by the customer. That it is obvious that the concerned distributor/dealer, by providing the DTH connection to the customer, creates a legal relationship between the assessee and the customer (i.e. the third-party). That similarly, when a recharge voucher (RCV) is sold by the distributor/dealer the customer to the customer becomes entitled to receive

services from the assessee to the extent of the value of the recharge voucher and again the third-party contractual relationship is created by this act of the distributor/dealer between the assessee and third-party i.e. the customer of the assessee. That at all times, whether it is the sale of STB or that of RCV by the distributor, the customer is always the customer of the assessee and not that of the distributor which would not be the case, had it been a transaction of sale of goods. That also, any further modification in the package or even the termination of the connection (by the assessee) is carried out through the concerned distributor/dealer. That such modification or termination cannot be carried out by the distributor/dealer on his own, without the approval/involvement of the assessee.

13. After some discussion in this regard, the ld. CIT(A) observed that from the facts discussed above, it is evident that the sole business of the assessee is providing DTH services to its subscribers, no matter what business model is followed by the assessee in this regard. That in the assessment years under consideration, although a cost has been assigned to the STB, so far as the initial subscription amount charged from the subscribers is concerned, in reality what is charged by the assessee in terms of the subscription charges, is only the consideration for the DTH services. That in the subsequent year i.e. FY 2011-12, the business model has been changed, and as expected, in the subscription amount (which would either remain the same or be marginally changed), no cost has been assigned to the STB. In FY 2011-12, the STBs are being given free of cost to the subscribers on entrustment basis and the initial subscription amount is only for the value of DTH services. In the relevant years under consideration,

although a cost has been assigned to STBs out of the initial subscription amount, it can be understood from the above facts that the real business of the assessee is that of providing DTH services to its customers and not that of 'sale of "goods'.

14. Ld. CIT(A) further observed that in the case of the assessee, the distributors sell the services of the assessee and by virtue of that the distributors are acting on behalf of the assessee by selling the assessee's services. Obviously, when the distributors create a third-party relationship of the subscribers with the assessee, the risks and rewards are that of the assessee only. That as already clarified, the stipulation in the agreement regarding principal to principal relationship is of no consequence because, it is the act and the situations in which the parties are put in the conduct of the business, that will decide the said relationship.

15. Ld. CIT(A) proceeded to observe that the principal agent relationship would arise from the Act of the parties or the situation in which the parties are put and that the stipulations in the contract/agreement and any other documentation between the parties in this regard, would be of no consequence. He observed that the Assessee states that "RCVs are a medium to collect subscription charges from subscribers. However, RCV itself is not a 'means' to provide the DTH service by the Assessee to subscribers. Rather the DTH services are provided through electronic mode". That this statement of the assessee is not wholly correct so far as the financial transactions are concerned. That a financial transaction cannot be linked to the technical mode and procedure through which the DTH service is provided. That so far as the "business of the assessee and the financial

transactions are concerned, there is no other mode and medium than sale of STBs and RCVs, through which the revenue is collected by the assessee. And in return, the assessee provides its services to the subscribers.

16. The ld. CIT(A) further observed that nevertheless, even the agreement between the assessee and the distributors/dealers contains some such clauses/stipulations which also indicate that the distributors/dealers, while granting DTH connections to the assessee's customers, are acting on behalf of the assessee only and therefore they are acting in the capacity of the agents of the assessee.

17. The ld. CIT(A) proceeded to refer certain parts of the agreements with the distributors and dealers. He proceeded to hold that most of the other stipulations in the agreement would also indicate that the distributor/dealers are not doing business of their own, rather it is the assessee's business, i.e., being carried out at all times. Hence, he held that it was evident that the first condition for application of section 194H is satisfied. He further observed that the other conditions (as outlined above in Para 5.27) in regard to provisions of Section 194H, are that a) The payments made by the assessee to its distributors/dealers should be in the nature of income by way of commission; b) The income by way of commission should be ' paid by the assessee for services rendered by the distributors/dealers or for any services in the course of buying or selling of goods; c) The income by way of commission may be received or be receivable by the distributors/dealers from the assessee either directly or indirectly. Hence, the CIT(A) opined that there is no doubt that all these three conditions are satisfied so far as

the relationship between the assessee and its distributors/dealers as well as the facts and circumstances of the case are concerned. Hence it is evident that the assessee was required to deduct tax at source in respect of the commission retained by the distributors/dealers, because the payment made by the assessee to the distributors/dealers is in the nature of 'commission or brokerage' and the same is income in the hands of distributors/dealers for services rendered to the assessee.

18. Thereafter, the ld. CIT(A) referred to Circular No. 619 dated 04.12.1991 issued by the CBDT for the proposition that in cases of retention by the consignee/agent of the commission or brokerage from out of the sale price, the same amounts to constructive payment by him by the consignor/principal. Hence, deduction of tax at source is required to be made from the amount of commission. Thereafter, the ld. CIT(A) referred to and held that in his view the three decisions i.e. i) CIT vs. Idea Cellular Ltd, ii) *Bharti Cellular Ltd. v. ACIT* and iii) *Vodafone Essar Cellular Ltd. v. ACIT* (all supra) cited by the AO are squarely applicable to the facts and circumstances of the present case.

He elaborately referred to the decision of the Hon'ble Delhi High Court decision in the case of Idea Cellular Ltd. Thereafter, the ld. CIT(A) proceeded to hold that the decision referred by the assessee are not applicable in the facts of the present case.

19. As regards the decision of the Hon'ble jurisdictional High Court in the case of Qatar Airways relied upon by the ld. Counsel of the assessee, the ld. CIT(A) proceeded to distinguish the same by referring to several case laws and held that “the decision of the Hon'ble Bombay High Court in the case of *Qatar Airways* (supra) becomes ‘per-

incuriam' as it is delivered in ignorance of the decision of other High Courts". He further held that it may also be noted that the judgment of Hon'ble Bombay High Court in the case of CIT vs. Qatar Airways (supra) is brief and such aspects which were required to be considered in respect of the disputed issue have not been considered. Thereafter, the ld. CIT(A) referred to certain extracts from the judgment of Hon'ble Delhi High Court decision in the case of *CIT vs. Singapore Airlines Ltd*. He further observed that the assessee also argues that 'the STBs are hardware and nowhere similar to SIM card and recharge coupons and hence the Delhi High Court decision in the case of *CIT Vs. Idea Cellular Ltd.* (supra), cannot be applied to the transactions in respect there-of. Ld. CIT(A) held that in this regard, it may be noted that the discount provided by the assessee to its distributors in respect of STBs is not for sale of the physical goods or tangible assets in terms of STBs but for procuring the customers for the services being offered by the assessee. He held that as already stated above, the assessee is not engaged in the business of sale of goods; rather the assessee is in the business of providing DTH services to its customers. He concluded as under:

> 5.55 In the case of the appellant, the income in the form of commission earned by the distributors/dealers is inextricably linked to the sale of the set-top boxes and recharge vouchers by them which are the appellant's mediums for providing services to its ultimate customers. The distributors are the appellant's link with its customers. The distributors neither have any license in respect of the DTH services, nor do they have any ownership of such services. The STBs and RCVs are only the tools utilised by the appellant for delivering its services to the doorstep of its customers. Hence It is evident that the distributors/dealers act as agents of the appellant and the income which they receive from the appellant is in the nature of 'commission[1] on which the tax is liable to be deducted by the appellant under the provisions of section 194H of the Act. The important facts which establish that the distributors/dealers of the appellant are in reality the agents of the appellant are as under:

a) The agreement between the appellant and its distributor/dealer provides that the distributor/dealer is authorised to sell the appellant's STBs and RCVs. This also means that at the time of providing DTH connection to the third party (i.e. the customer), the distributor/dealer creates a legal relationship between the appellant and the third party (i.e. the customer). The documentation work carried out by the distributor, either on his own behalf or on behalf of the appellant in this regard, is not so material to the issue at hand.

b) The nature of the transactions between the appellant and its distributors/dealers can be understood if it is understood that the appellant is a service provider and not a 'seller of goods' as the term is understood in common parlance. Therefore, the appellant sells only its services through electronic medium. Hence the appellant's distributors/ dealers also cannot, but only sell these services on behalf of the appellant. The price charged for the DTH connection is therefore not really the price charged for the set-top box and reality it is the price charged for the DTH connection. The .discount provided by the ippellant to its distributors in respect of STBs is not for sale of the physical goods or tangible assets in terms of STBs but for procuring the customers for the services being offered by the appellant.

c) The relationship between the appellant and its distributors/dealers creates the third-party contractual relationship between the appellant and its ultimate customers, the moment a subscriber subscribes to the services of the appellant or thereafter purchases the recharge vouchers for further/extended services of the appellant. It is the distributor/ dealer who is responsible for selling the DTH services of the appellant to the customers of the appellant and in reality therefore it is the distributor who creates the contractual relationship between the appellant and the customer.

d) The essence of service rendered by the distributors/dealers is not the sale of any product or goods. They are providing facilities and services to the general public for the availability of devices like STBs .and RCVs to have access to the DTH service of the appellant company. Therefore, it is beyond doubt that all the distributors/dealers are always acting for and on behalf of the appellant.

e) There are a number of limiting parameters for distributors/ dealers, which deny the existence of principal to principal relationship between them and the appellant. The distributor/dealer shall not make any representations or give any warranties in respect .of the Products other than those contained in the appellant's conditions of sale as prevalent and operating at the time of the offering of the sale, or the sale. This limits the parameters of the functioning of the distributor/dealers although within these parameters, he is free and independent to organise his business.

f) The distributors/dealer is also not authorised to vary or modify the terms of the package deal offered by the appellant at the time of providing connection to the consumer through installation of STBs and dish antenna or thereafter. Similarly, the distributor/dealer is not authorised to vary or iru^g'jfythe terms of

the package deal 'ered by the appellant at the time of recharge through RCVs. Any such modification is only at the instance of the appellant.

g) The distributor/dealer is not authorised to sell any of the products of the appellant. through any unauthorized party as well i.e. through a sales agent or otherwise, without the express written permission of the appellant. :

h) The distributor/dealer is required to provide the appellant on a monthly basis, with a report of sales of the appellant's products, in such form and containing such other information as the appellant requires.

i) The above conditions also limit the authority of the distributor/dealer to act as per his own discretion within the parameters of above terms,.although he does not work under 'the direct control and supervision of the appellant. . .

j) For implementation of the provisions of section 194H, the appellant can collect the net sale proceeds along with TDS element from the distributors/dealers while collecting payments in respect of its products distributed to them [refer circular No. 619 dated 04.12.1991 (supra)]. The distributors/dealers can claim credit of such TDS on the basis of TDS certificates issued by the appellant to them when they file their returns before the concerned authorities. There is no procedural constraint in this regard.

5.56 Therefore, in view of the above discussion as well as the judgments of Delhi. Calcutta and Kerala High Courts in the cases of CIT vs. Idea Cellular Ltd. Bharti Cellular Ltd, v. ACIT and Vodafone Essar Cellular Ltd, v. ACIT (ail supra), which have been cited by the AO. I hold that the discount allowed and incentive given by the appellant to its distributors/ dealers on sale of STBs and RCVs is in the nature of Commission and the same attracts the provisions of Section 194H of Act. The above grounds of appeal are therefore liable to be rejected.

20. Against the above order, the assessee is in appeal before us.

21. We have heard both the ld. Counsel of the assessee and perused the records. The ld. Counsel for the assessee submitted that section 194H of the Act is not applicable as neither the assessee is responsible for paying any income nor has it made any payment of income by way of commission. He submitted that infact it is the other way round that is the distributor makes payment to assessee and the money received from the distributor is booked as income in the books of the assessee towards sale of its products. In this regard the ld. Counsel placed reliance on the decision of Hon'ble Jurisdictional High Court in the

case of *CIT vs. Piramal Healthcare Ltd*. (230 Taxman 505 (Bom.) and the decision of Hon'ble Bombay High Court in the case of *CIT vs. Qatar Airways* (332 ITR 253 (Bom.). Referring to the ratios from these decisions the ld. Counsel submitted that ratio of the above decision is directly applicable to its case since it has not made any payment to the distributor and that the assessee only received sale price on sale of products to the distributors. He further submitted that TDS provisions are not applicable in cases where there is no payment made by the assessee and it is not relevant whether the assessee was engaged in the business selling of goods or rendering services. Ld. CIT(A) further relied on the decision of Hon'ble Rajasthan High Court in the case of *Hindustan Coca Cola Beverages (P.) Ltd. vs. CIT* (402 ITR 539).

22. The ld. Counsel further submitted that the difference between the sale price to retailer and the discounted price which the distributor pays to assessee cannot be categorised as commission for the purpose of section 194H of the Act or otherwise. That though Explanation (i) to section 194H of the Act inter alia states that "commission or brokerage" includes any payment received or receivable directly or indirectly the said section makes it clear that payment has to be of income by way of commission. That in the present case the assessee has not made any such payment. He contended that the ratio of Hon'ble Jurisdictional High Court in the case of *CIT vs. Qatar Airways* (332 ITR 253 (Bom.) is relevant here.

23. The ld. Counsel further submitted that CBDT Circular No.619 dated 04/12/1991 is not applicable since no income accrues to the distributor when he purchases products

from the assessee. That when distributor makes payment to the assessee it cannot be held that there is retention on the part of the distributor which has not even accrued to him. The ld. Counsel for the assessee submitted that constructive payment principle can apply if there is retention of payment in hands of distributor. This is not applicable in case of the assessee since the assessee received upfront payment from them/distributor for the products purchased by them. He also submitted that the AO has relied on the decision of ITAT in *Hindustan Coca Cola Beverages (P.) Ltd. vs. ITO* (97 ITD 105). The ld. counsel submitted that the above decision of Jaipur Tribunal has been reversed by the Hon'ble Rajasthan High Court in the case of *Hindustan Coca Cola Beverages (P.) Ltd. vs. CIT* (402 ITR 539). Without prejudice the ld. Counsel for the assessee submitted that with respect to non-applicability of deeming fiction of constructive payment as well as the CBDT Circular No.619 relating thereto he submitted that CBDT Circulars are binding on authorities under the Act and not on the assessee and Hon'ble High Courts.

24. The ld. Counsel further submitted relationship between the assessee and the distributor is on principal to principal basis and discount given by the assessee to the distributor is not in the nature of commission. In this regard he referred to the decision of Hon'ble Gujarat High Court in the case of *Ahmadabad Stamp Vendors Association* (257 ITR 202) . This decision was upheld by the Hon'ble Supreme Court in *Ahmadabad Stamp Vendors Association* (348 ITR 378). Thereafter, the ld. Counsel for the assessee referred to several case laws. Without prejudice the ld. Counsel for the assessee submitted that if two views are possible on the issue under consideration the view favourable to the

assessee should be followed. Hence, he submitted that the decision of Hon'ble Rajasthan High Court in the case of *Hindustan Coca Cola Beverages (P.) Ltd. vs. CIT* (402 ITR 539) being favourable to the assessee should be followed and not the case of Hon'ble Delhi High Court in the case of *CIT vs. Idea Cellular Ltd.(*325 ITR148). Thereafter the ld. Authorized Representative of the assessee placed reliance on several decisions of ITAT Mumbai including that of *M/s. Bharat Business Channels Limited* (ITA No.7047 & 7048/Mum/2012). He also referred to entries passed by the assessee and submitted that entries passed by the assessee regarding discount cannot be considered in the nature of commission liable u/s. 194H. In this regard he referred to scheme of entries.

25. In this regard the ld. counsel for the assessee referred to *Bharti Airtel Ltd. vs. DCIT* (372 ITR 33). He referred to the decision of Hon'ble High Court and submitted that the matter may be 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 accounts are not reflected as set out above section 194 is not attracted. He submitted that book entries passed by the assessee are in line with Bharti Airtel Ltd.

26. The ld. Counsel for the assessee submitted that in addition to the normal (primary) discount given to the distributors, the distributors are also given occasional (secondary) discounts like festival discount, quantity discount etc. to encourage them to sell higher quantities of products. The occasional discounts are provided to the distributors as per the trade schemes announced by the assessee from time to time. These discounts are given to

the distributors by way of credit notes to be redeemed against subsequent sale of products. Thus there is no payment made by the assessee to the distributors even in case where discount is given by way of credit notes. Therefore ld. Counsel referred to scheme of book entries with respect to the discount

27. Referring to those entries, he pleaded that the discount is credited to the distributor's account. However, the discount is finally netted off from the Sales /Revenue at the year end and it does not appear in the financial statement.

28. He reiterated that the above fact is also evident when a reference is made to the note on significant accounting policies applied by the Assessee which forms part of Notes to the financial Statement. -: page No.46 & 47 of the Paper book containing the said note wherein the revenue recognition policy of the assessee is laid down, it is clearly stated that the Subscription Revenue, Activation Revenue, Revenue on account of sale of accessories, Installation Revenue as well as Service Revenue are recognised net of discount. The aforesaid note forms part of the Financial Statements audited by the Statutory Auditors.

29. He further submitted that the decision in the case of *Bharti Airtel Ltd. vs. DCIT* (2015) 372 ITR 33 (Kar) is not applicable to discount given to the distributors by way of credit notes as the Court in the said decision was only seized with the question as to whether the assessee was liable to deduct TDS on the discount amount shown in the invoice.

30. In this regard ld. counsel again referred to the decision of Hon'ble Rajasthan High Court in the case of *Hindustan Coca Cola Beverages (P.) Ltd*. Without prejudice the ld. Counsel further submitted the demand arising from tax liability of the deductee cannot be recovered from the deductor. In this regard he placed reliance on the decision of Allahabad High Court in the case of *Jagran Prakashan Ltd. vs. DCIT* (345 ITR 288). Ld. Counsel alternatively without prejudice also prayed that if the assessee is an assessee in default and appeal may be set aside to the file of Assessing Officer to find facts relating to non-payment of any amount by the assessee to the distributor, the terms of distribution agreement, entries passed in light of various decisions referred by him.

31. Per contra, the ld. Departmental Representative (ld. DR for short) relied upon the order of the AO and the ld. CIT(A) relied on the case law referred by them.

32. Upon careful consideration, we find that we may gainfully refer to the provision of section 194H of the Act as under:

> **Commission or brokerage**.
>
> **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 five 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 fifteen thousand 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.

33. The CBDT Circular no. 619 also can be referred as under:

SECTION 194H OF THE INCOME-TAX ACT, 1961 - DEDUCTION OF TAX AT SOURCE-COMMISSION OR BROKERAGE ETC - INSTRUCTIONS FOR DEDUCTION OF TAX AT SOURCE FROM COMMISSION, BROKERAGE, ETC.
CIRCULAR NO.619, DATED 4-12-1991

1. The Finance (No. 2) Act, 1991 has introduced a new section 194H, into the Income-tax Act, 1961, which provides that any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of October, 1991, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten per cent.

2. For the purposes of this section, 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.

3. It may also be stated that credit of any income to any account whether called "Suspense account" or by any other name shall be deemed to be credit of such income to the account of the payee and the provisions of section 194H shall apply accordingly.

4. The tax so deducted at the rate of ten per cent is required to be increased by surcharge at the rate of twelve per cent where the payee is a resident person (other than a company) and at the rate of fifteen per cent where the payee is a domestic company.

5. No deduction is, however, required to be made in the following cases :

(*i*) Where the aggregate amount of commission income credited or paid or likely to be credited or paid by a payer to a payee during a financial year does not exceed two thousand five hundred rupees.

(*ii*) Where the payment is made by an individual or a Hindu undivided family.

(*iii*) In cases of such persons or class or classes of persons (whether payer or payee) as the Central Government may, having regard to the extent of inconvenience caused or likely to be caused to them, and being satisfied that it would not be prejudicial to the interests of revenue, by Notification in the Official Gazette, specify, in this behalf.

(*iv*) Where payment of commission income is made for "professional services". For this purpose, professional services mean services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy to technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA of the Income-tax Act. So far, only two professions, namely, of film artists and authorised representatives, have been notified.

6. A question may raise whether there would be deduction of tax at source under section 194H 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 the tax deductible on the amount of commission income to the credit of the Central

Government, within the prescribed time, as explained in the succeeding paragraphs.

7. The responsibilities, obligations, etc., under the Income-tax Act of a person deducting income-tax at source are as follows :

(*a*) According to the provisions of section 200, any person deducting tax at source under section 194H shall pay, within the prescribed time (as laid down in rule 30 of the Income-tax Rules, 1962), the tax so deducted to the credit of the Central Government. In the case of deduction by or on behalf of the Government, the sum has to be paid on the day of the deduction itself. In other cases, payment is normally to be made within one week from the last day of month in which the deduction is made. However, with the permission of the Assessing Officer, tax deducted at source can also be paid to the credit of the Central Government on quarterly basis. If a person fails to deduct tax at source, or, after deducting, fails to pay tax to the credit of the Central Government, he shall be liable to action under the provisions of section 201. Sub-section (1A) of section 201 lays down that such person shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which the tax was deductible to the date on which it is actually paid. Further, section 271C lays down that if any person fails to deduct tax at source, he shall be liable to pay by way of penalty a sum equal to the amount of tax which he failed to deduct at source. In this regard, attention is also invited to the provisions of section 276B which lays down that if a person fails to pay to the credit of the Central Government the tax deducted at source by him, he shall be punishable with rigorous imprisonment for a term which shall not be less than 3 months but which may extend to 7 years and with fine.

(*b*) According to the provisions of section 203, every person responsible for deducting tax at source is required to furnish a certificate to the effect that tax has been deducted and to specify therein, the amount deducted and certain other particulars. This certificate has to be furnished in Form No. 16A (copy enclosed) within the prescribed period of one month and fourteen days to the person to whose account credit is given or to whom payment is made or cheque is issued. The certificate can be issued on the tax deductor's own stationery. If a person fails to furnish this certificate, he shall be liable to pay by way of penalty under section 272A, a sum which shall not be less than Rs. 100, but which may extend to Rs. 200 for each day during which the failure continues.

(*c*) According to the provisions of section 203A, it is obligatory for all persons responsible for deducting tax at source to obtain and quote the Tax-deduction Account Number (TAN) in the various challans, TDS certificates, returns, etc. Detailed instructions in this regard are available

> in this Department's Circular No. 497, dated 9-10-1987 for reference and guidance. If a person fails to comply with the provisions of section 203A, he shall be liable to pay by way of penalty under section 272BB, a sum up to Rs. 5,000.
>
> These instructions are not exhaustive and are issued with a view to helping the persons responsible for making deduction of tax at source under section 194H. Where there is any doubt, a reference may be made to the relevant provisions of the Income-tax Act, 1961 and the Finance (No. 2) Act, 1991. In case any assistance is required, the Assessing Officer concerned or the local Public Relations Officer of the Income-tax Department may be approached.

34. After careful consideration we note that the assessee in this case is engaged in business of providing direct to home (DTH) services. The assessee enters into agreement with the distributor for sale of Set Top Box (STB) and recharge coupon vouchers. As per agreement products are sold to distributor at discounted price, as agreed. The distributor/dealer sells these items to customers/subscribers at a price not exceeding MRP on the product. As per the agreement payment of each order for the above items is to be made by distributor either at the time of placing the order or at the time of delivery. Apart from the above assessee also provides festival/seasonal discounts to the distributors. For these discounts assessee does not make any payment rather it issues credit notes and same is subsequently adjusted from the payment due from the distributor. The expenditure of discount is recognized in books of account. But the same is netted from sale, so in the financial statements the discount amount is not reflected.

35. In this factual scenario the Assessing Officer has held the assessee to be in default as per section 201(1) of the Act for non deduction of tax at source u/s.194H in respect of the discount offered to distributor and consequently making the assessee liable for interest u/s. 201(1A) of the Act. In the above factual background the issue has been dealt

with by the Assessing Officer and CIT(A).They have found the assessee to be liable for deduction of tax at source on a variety of planks as mentioned hereinabove in detailed the order of CIT(A) referred by us.

36. We find that various case laws have been referred by the authorities below and the ld. ld. Counsel of the assessee. We have carefully considered the same. Some of them can be gainfully referred hereunder:

1) in the case of *CIT vs. Piramal Healthcare Ltd.* [2015] 55 taxmann.com 534 (Bom) has referred to the decision of the Hon'ble Bombay High Court itself in the case of *CIT vs. Qutar Airways* [2011] 332 ITR 253 (Bom) and has held as under:

> 8. The submission on behalf of the Revenue that this a mere device to evade the obligation to deduct tax at source is a mere conjecture as it is not supported by any evidence and/or facts on record. Once it is accepted / admitted position that there is sale of drugs by the respondent to M/s.Zivon and no amount is paid by the respondent to M/s.Zivon, there can be no occasion to apply Section 194J of the Act. There has admittedly been no credit of any sum to the account of M/s.Zivon in its books of accounts nor any payment made by the respondent either in cash or cheque or draft or any other mode. Where the sales of any goods are covered under the M.R.P. system, the M.R.P. is fixed and the seller is entitled to sell the goods to a stockist at a price lesser that the M.R.P. as mutually agreed between the parties. In such a case, what should be the sale price or what should be the margin available to the stockist is entirely at the discretion of the parties. In the present case, the assessee has received the sale price at the rate fixed under the agreement. In such a case, where the assessee has received the amount of sale price, the question of the assessee deducting tax at source under Section 194-J of the Act does not arise, because the assessee is not making any payment to the stockist. Therefore, whatever be the margin made available to the stockist, so long as the assessee is not making any payment to the stockist, the question of invoking Section 194-J against the assessee does not arise. Hence, we see no reason to entertain question (b) raised by the Revenue.

2) in the case of Qutar Airways (supra), the Hon’ble High Court was considered the question of TDS on commission on brokerage u/s. 194H and the Hon’ble Apex Court has held as under:

1 The question of law as raised in this appeal is as under:

> *"Whether on the facts and in the circumstances of the case and in law, the difference in amount between commercial price and published price is special commission in the nature of commission or brokerage within the meaning of Explanation (i) to section 194H of the Income-tax Act 1961 ?"*

2. It is not in dispute that the airlines have a discretion to reduce the published price to their tickets. In the present case, the airlines had an agreement with their agents to sell their tickets at a minimum fixed commercial price which was lower than the published price but was of a variable nature and could be increased by the agent, at his discretion, to the extent up to the published price. It is not in dispute that under rules of ITAT, the commission payable to the agent was 9 per cent, of the published price. It is an admitted position that the TDS has been deducted while payment of this commission of 9 per cent. It is the contention of the Revenue that the difference between the published price and the minimum fixed commercial price amounts to an additional special commission and therefore TDS is deductible on this amount under section 194 H of the Income-tax Act.

3. On a perusal of the order of the Income-tax Appellate Tribunal, we find that it proceeded on the basis of its earlier decision in the case of *Korean Air* v. *Dy. CIT* in which, in similar circumstances, it was held that TDS w-as not deductible. He finds that though an appeal was preferred against the aforesaid decision the same has been rejected by this court for non-removal of the office objections under rule 986. Be that as it may. for section 194H to be attracted, the income being paid out by the assessee must be in the nature of commission or brokerage. Counsel for the Revenue contended that it was not the case of the Revenue that this difference between the principal price of the tickets and the minimum fixed commercial price amounted to payment of brokerage. We find however. that in order to deduct tax at source the income being paid out must necessarily be ascertainable in the hands of the assessee. In the facts of the present case, it is seen that the airlines would have no information about the exact rate at which the tickets were ultimately sold by their agents since the agents had been given discretion to sell the tickets at any rate between the fixed minimum commercial price and the published price and it would be impracticable and unreasonable to expect the assessee to gel a feed back from their numerous agents in respect of each ticket sold. Further, if the airlines have discretion to sell the tickets at the price lower than the published price then the permission granted to the agent to sell it at a lower

price, according to us can neither amount to commission nor brokerage at the hands of the agent. We hasten to add any amount which the agent may earn over and above the fixed minimum commercial price would naturally be income in the hands of the agent and will be taxable as such in his hands. In this view of the matter, according to us. there is no error in the impugned order and the question of law as framed does not arise. The appeal is therefore, dismissed in limini.

3) We may also refer to the decision of the Hon'ble Karnataka High Court in the case of *M/s. Bharti Airtel Limited vs. DIT* (in ITA Nos. 637-644 of 2013 vide order dated 14.08.2014, where similar issue was considered by the Hon'ble High Court as under:

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 lime 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 m 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 distributer. 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 m 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 riot 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 i.s 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 lax 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.

37. In the case of *Jt. CIT (TDS) vs. Bharat Business Channels Ltd.* [2018] 92 taxmann.com 216 (Mum-Trib), the ITAT, Mumbai on similar issue following the decision of the Hon'ble Karnataka High Court in the case of *Bharti Airtel Ltd.* (supra) had decided the same issue in favour of the assessee.

In a similar issue, this Tribunal in the case of *CIT vs. M/s. Tata Tele Services (Mah) Ltd.* (in ITA No. 3857/Mum/2016 vide order dated 08.06.2018) has held as under:

> 6. We have perused the order of the coordinate bench of the Tribunal, i.e. ITAT "D", Bench Mumbai, in the assessee‟s own case viz. M/s Tata Tele Services (Maharashtra) Ltd, Navi Mumbai, Vs. ACIT-TDS-3(1), Mumbai (ITA No. 2043 to 2046/Mum/2014; dated 27.05.2016) for A.Ys 2009-10 to 2012-13. We are of the considered view that the Tribunal had after deliberating at length on the issue as to whether the assessee remained under any statutory obligation to deduct tax at source on the discounts allowed to the distributors on the sale of starter kits/pre-paid sim cards and recharge vouchers, had answered in the negative, and concluded that as the assessee remained under no obligation to deduct tax at source on the said discounts, thus it could not be held as being in default under Sec. 201(1) and 201(1A) of the Act. We find ourselves to be in agreement with the view taken by the Tribunal that as the sale of starter kits/sim cards is purely a purchase/sale transaction on principal-to-principal basis and there is no relationship of agency, hence no obligation was cast upon the assessee to have deducted tax at source under Sec. 194H in respect of the discounts given to the distributors on the sale of the same. We thus, are of the considered view that as observed by us hereinabove, in the absence of any obligation cast upon the assessee to have deducted tax at source in respect of the discounts given to the distributors on the sale of the prepaid starter kits/sim cards, no disallowance under Sec.40(a)(ia) of Rs.66,03,56,590/- was called for in the hands of the assessee. We thus finding no infirmity with the order of the CIT(A), uphold the same.

In the case of *CIT vs. Intervet India (P.) Ltd.* [2014] 49 taxmann.com 14 (Bom) the Hon'ble Bombay High Court has held as under:

> 6. We have perused the concurrent orders with the assistance of the learned counsel for both the parties. The assessee had undertaken sales promotional scheme viz., product discount scheme and product campaign as discussed hereinabove under which the assessee had offered an incentive on case to case basis to its stockists/dealers/agents. An amount of Rs. 70,67,089 was claimed as a deduction towards expenditure Incurred under the said sales promotional scheme.

> The relationship between the assessee and the distributors/stockists was that of principal to principal and in fact the distributors customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributors/stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee's product. The distributors/stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be commission payment within the meaning of Expln. (i) to s. 194H of the II Act, 1961. The contention of the Revenue in regard to the application of Expln. (i) below s. 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Expln. (i) below s. 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case. We are satisfied that in the facts of the present case that as regards sales promotional expenditure in question, the provisions of Expln. (i) below s, 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers/stockists of the assessee is appropriately held to be not a payment of any commission in the concurrent findings as recorded by the CIT(A) and the Tribunal.
>
> 7. Having considered the findings recorded by the CIT(A) and the Tribunal and taking into consideration the provisions of Expln. (i) to s. 194H of the Act, we do not find that the appeal gives rise to any substantial question of law. It is accordingly dismissed.

38. We further note that the Hon'ble Rajasthan High Court in the case of *Pr. CIT vs. Shri Bhim Sain Garg and others* (in D.B. Income Tax Appeal No. 101/2015 vide order dated 11.10.2017) has held as under:

> 10. We have gone through the order and proceedings of the matter. It is not in dispute that the amount which has been received by the assessee was after deducting the commission, stock brokerage or whatever term is awarded and the same has been shown in the books of accounts and as stated by Mr. Mathur, if the details are to be given reads as under:
>
> > " The advertisement are to be procured by such agencies at the rates and terms decided between them and advertiser, assessee has no involvement therein. In the case of Kerala State Stamp Vendors Association vs. Office of the Accountant General, the Hon'ble Kerala High Court held that what is

liable for TDS is commission of brokerage and not the incentives given on the basis of principal to principal relations."

11. The assessee also furnished that they ought not to have been added in the income of the assessee in spite of making ground under section 194H or 40(a)(ia) of the I.T. Income Tax Act, 1961.

12. In our considered opinion, the Tribunal while considering the matter has righlty come to the conclusion that it is on the basis of principal to principal and does not constitute commission. Hence, no other view than the one taken by the Tribunal is possible.

39. A cohesive reading of the above case laws particularly that of the Hon'ble Bombay High Court in the case of *Piramal Healthcare Ltd*. (supra), *Qatar Airways* (supra) and *Intervet India (P.) Ltd.* (supra) would show that the ld. Counsel of the assessee's plea that the assessee should not be visited with the liability to deduct TDS for non deduction of tax at source u/s. 194H on the difference between the discounted price at which it is sold to the distributors and the MRP upto which they are permitted to sell, is cogent and is sustainable view. As noted hereinabove the Hon'ble Jurisdictional High Court in the case of *Piramal Healthcare Ltd*. (supra) and *Qatar Airways* (supra) has found that the difference between MRP and the price at which item is sold to the distributor cannot be held to be commission or brokerage. Similarly in the case of *Intervet India (P.) Ltd.* (supra), the Hon'ble Bombay High Court has held that when the assessee had introduced sales promotion scheme for distributors to boost sale of its product when it passed on incentives to distributors/dealers/stockists through sale credit notes and claimed it, then since the relationship between assessee and distributors/stockists was that of principal to principal and infact distributors were customers of assessee to whom sales were effected either directly or through consignment agent, it cannot be treated as commission payment under section 194H. Thus it follows on similar facts it has been held that the distributors

are customers of the assessee to whom sales are affected. The discounts and credit notes credited cannot be considered to be commission payment u/s. 194H. Similarly we note that on similar facts, the Hon'ble Karnataka High Court in the case of *Bharti Airtel Ltd.* (supra) which has been duly followed by the ITAT Mumbai in *Business Channels Ltd.* (supra) has decided the same issue in favour of the assessee. Though we are aware that the ld. CIT(A) has referred to the decisions in favour of the Revenue on similar issue of Hon'ble Delhi High Court, but however as held by the Hon'ble Apex Court in the case of *CIT v. Vegetable Products Ltd.* [1973] 88 ITR 192 (SC) if two views are possible, one in favour of the assessee should be adopted. Moreover, as we have already found that the ratios of decision of Hon'ble jurisdictional High Court as mentioned hereinabove are also in favour of the assessee. Hence, there is no question of taking a contrary view following the other high courts. The remarks of the ld. CIT(A) on the jurisdictional High Court decision are totally uncalled for, neither permissible nor sustainable.

40. Hence, in the background of the aforesaid discussion and precedent, we hold that the assessee was not liable to deduct the tax at source on the impugned amounts in this case.

41. In the result, the assessee' appeal stands allowed.

Revenue's appeal:
(i) TDS on payment made to installation service provider

42. Brief facts of the case are as under:

The assessee is engaged in the business of providing DTH services. The assessee enters into agreement with third party Installation Service Providers ('ISPs') for the installation of Tata Sky hardware at the premises of the subscribers. The Assessee

transfers the Tata Sky hardware to the I3P for storage at the ISP's premises. When a potential customer purchases the Tata Sky connection, the Assessee informs the ISP to install the Tata Sky hardware at the premises of the subscriber. Thus, the relevant activity carried out by an ISP is to install the Dish Antenna and incidental hardware at the premises of the subscriber For this service, the assessee company paid installation charges of Rs. 15,44,53,432/-, Rs. 41,27,138/- and Rs. 14,84,82,077/- respectively in the three previous years relevant to the three assessment years under consideration. The assessee deducted tax at source on the said payments as per the provisions of section 194C of the Income Tax Act, 1961. The AO on perusal of details in this regard was of the view that the work relating to installation of hardware at the customer's/subscriber's premises is carried out by a technically skilled person as the software is to be synchronized with the TV set to provide the DTH services and other technical services are also to be rendered. According to the AO the work involves professional services by technical manpower and is therefore within the ambit or section 194J of the Act for the following reasons:

- That the installation of DTH apparatus needs technical personnel and expertise. Common man or labourers cannot install a dish and other electronic apparatus, decide the place to fix the dish after checking the signals, explain the operation of the system, etc. Thus, skilled technical personnel are required to carry out the said job.
- That the agreement with the ISPs states that ISP has to render services as to rectify any default in the installation,
- That based on the assessee company's, qualification requirement, the ISP shall nominate its employees/associates for providing the services and inform the assessee of the same. .
- That the appellant imparts training to the employees of the ISP.

43. The AO thus held the assessee to be an assessee in default under section 201(1) for deducting TDS at a lower rate in respect of the payment made to Installation Service Providers.

44. Upon the assessee's appeal, the ld. CIT(A) deleted the disallowance raised by the A.O. by holding as under:

> 6.8 A have considered the facts of the case, the written submissions of the appellant as well as the order of the AO on this issue. In this case, it has to be decided whether the payments made by the appellant would constitute 'fees for technical services' as defined in the Explanation 2 to Section 9(1)(vii) of the Act. The AO is of the view that activity of Installation of DTH apparatus needs certain skills and technical expertise. On the other hand, the case of the appellant is that from the nature of services being rendered by ISPs, it is evident that they do not fall within the scope of technical services.
> 6.9 The job of the Installation Service Provider is to go to the premises of the subscriber, to install dish antenna and Set-Top Box. Thereafter, the Installation Service Provider has to connect the Set-top Box to the Television of the subscriber by making few basic wiring connections. This can be done by any sound person after reading the installation manual carefully. So far as the training given by the appellant is concerned, it is seen that basic training/ instructions are provided for a short period to make them understand the process of Installation so that they can apply the same at the place of the subscriber. Further, the payment per installation is not very high and it is a few hundred rupees. It may be noted that services from skilled and technically qualified persons cannot be obtained at such a meager amount considering that the work has to be carried out at the place of the subscriber. The work, as is evident, is repetitive in nature. I agree with the appellant that in respect of these services/works outsourced, it cannot be said that the ISPs have rendered any managerial, technical or consultancy services to the appellant within the meaning of Explanation 2 to Section 9(1)(vii) of the Act. These services involve carrying out of "work" within the meaning of section 1S4C of the Act. The appellant has therefore, correctly deducted tax at source under the said section and the provisions of section 194J are not applicable. I hold accordingly and the demands of tax u/s 201(1) raised by the AO are hereby deleted.

45. Against the above order Revenue is in appeal before us.

46. We have heard both the Counsel and perused the records. The ld. Counsel of the assessee has inter alia placed reliance upon the order of the ld. CIT(A) and has submitted that its case is squarely covered by the decision of the Tribunal in the case of *M/s. Bharat Business Channels Ltd.* (ITA Nos. 7047 & 7048/Mum/2012). Bharat Business Channels Ltd is a DTH operator, same as the Assessee. In this case, Bharat Business Channels had also obtained services of Installation Service Providers to install Dish Antenna, Set-Top Box, etc. at the subscriber's premises similar to Tata Sky. That the Hon'ble Tribunal observed that the installation work does not require any special technical expertise and can be done by any sound person on reading through the installation manual. That the Hon'ble Tribunal also noted that the installation services providers were given basic training to make them understand the process of Installation. That having regard to the facts, the Hon'ble Tribunal held that the assessee had correctly deducted tax under section 194C of the Act and tax was not required to be deducted under section 194J of the Act.

The relevant para has been reproduced as under;

> "We observe that the work of installation of Set-Top Boxes and Antenna at the premises of the end-user is given as per the contract with Installation Service Providers (ISPs). The job of the Installation Service Provider is to go to the premises of the subscriber, to install Dish Antenna and Set-Top Box and connect them to the Television of the subscriber. The Installation Service Provider has to connect the Set-top Box to the Television by making few basic wiring connections. It does not require any special technical expertise or any technical degree and it can be done by any sound person on reading through the installation manual. Also, there is no specific qualification or recognized course required for installation Service Provider to become eligible for installation of Dish and Set^Top Box. They are given basic training/instructions for a short period to make them understand the process of Installation so that they can apply the same at the place of the subscriber. Accordingly, the CIT(A) was justified in holding that assessee was required to deduct tax u/s.194C of the Act. The CIT(A) has dealt with the issue threadbare and after relying on various judicial pronouncements

held that work of installation of Set-Top box amounts to 'works contract. The detailed finding so recorded by CIT(A) are as per material on record which has not been controverted by Id. DR by bringing any positive material. Accordingly, we do not find any reason to interfere in the order of CIT(A) holding that installation of Set-Top Box amounts to works contract and no technical expertise are required so as to make the assessee liable under the provisions of Section 194Jofthe IT Act."

47. Upon careful consideration we find ourselves in agreement with the finding of ld. CIT(A), which is also in consonance with ITAT decision as mentioned above .Hence, we uphold the order of ld.CIT(A) on this issue.

TDS on payment of document management charges:

48. Brief facts of the case are as under:

On this issue, the assessee's submission was that its subscribers are required to sign-up a contract with the Assessee for availing the DTH services. All these contracts along with work orders generated for executing various jobs for subscribers and correspondence received from the subscribers are required to be kept for life time with the assessee as per TRAI guidelines. The assessee has entered into an Agreement with IRON Mountain ('IM') to provide services in relation to secure maintenance of the Assessee's documents like Agreements, invoices, work order, etc. For this service the assessee company paid installation charges of Rs. 10,80,620/-, Rs. 10,80,620/- and Rs. 48,14,142/- respectively in assessment years under consideration. The assessee deducted tax at source on the said payments as per the provisions of section 194C of the Income Tax Act, 1961.

49. The AO on perusal of details in this regard was of the view that the work relating to Document management is carried out by technically skilled persons as it requires the use of store minder or alternate record management using its software for tracking stored documents; the documents are to be stored with various security measures, access control systems, CCTV systems, closed-circuit television monitoring of entries, cataloging and bar coding of physical dockets etc. According to the AO, the work involved professional services by technical manpower and is therefore within the ambit of section 194J of the Act. Therefore, since the assessee had not deducted the tax at source under the provisions of section 194J of the Act, the AO held the assessee to be an assessee in default and raised demand of tax being the difference between the tax liable to be deducted under section 194J and the tax deducted by the assessee under section 194C of the Act.

50. Upon the assessee's appeal, the ld. CIT(A) deleted the disallowance raised by holding as under:

> 7.6 I have considered the facts of the case, submissions and the arguments of the Ld. ARs. The Appellant has made payment towards document management charges on which it has deducted tax u/s 194C of the Act. The document storage/ retrieval work is done by the third party. For providing document management services, a service provider is not required to possess any high level of technical knowledge and it is akin to routine filing/ maintenance of documents and maintenance work. Thus, such service provider is not rendering any technical services. Thus, section 194J of Act is not applicable on payments made towards document management charges and it is in the nature of 'work[1] and will fail under section 194C of the Act.
>
> 7.7 In view of the above, I do not agree with the stand adopted by the AO. Since the Appellant has already deducted TDS under section 194C of the Act on the document management charges, the AO is directed not to consider the Appellant as assessee in default under Section 201(1) of the Act as there is no short deduction of tax by the Appellant. The demands of tax under section 201(1) are hereby deleted.

51. Against the above order Revenue is in appeal before us.

52. We have heard both the counsel and perused the records. The ld. Counsel of the assessee *inter alia* placed reliance upon the order of the ld. Commissioner of Income tax(Appeals) and has submitted that this issue is also covered in its favour by the Hon'ble Jurisdictional Mumbai Tribunal in the case of *Reliance Life Insurance Co. Ltd.* (ITA No. 3009 to 3011/M/2013). That in this case, the assessee was engaged in the life insurance business. That it had obtained document management services which inter alia included document management services, document delivery and collection services and document storage, etc. That the assessee had deducted tax under section 194C while making payment for these services and the Income-tax Authorities alleged that these are technical / managerial services and should be subject to TDS under section 194J of the Act. That on appeal, the CIT(A) had held in favour of the assessee. That on appeal by the Income-tax Authorities to the Tribunal, the Hon'ble Tribunal noted that the work assigned to the service provider was not a technical or professional work which required special skills but simple, basic and repetitive nature of work and accordingly subject to tax under section 194C of the Act.

53. The relevant observations of the Hon'ble Tribunal are reproduced herein below:

> "The assessee made the payment for these services after deducting TDS under the provisions of section 1 94C of the Act believing these are basic type of services involving no technical or professional qualification whereas the AO came to the conclusion that these are technical services and were required to be subjected to TDS under the provisions of section194J of the Act and finally treated the assessee in default under the provisions of section 201(1) of the Act and raised the demand accordingly. The Id CIT(A) after having examined and perused agreements with the service providers and after going into the various services provided reached a

> conclusion that the outsourced services do not require any kind of technical and professional expertise and are just simple and repetitive nature of work such as document storage, documents delivery and collection services and documents management services. The Id CIT(A) examined the contract with Writer Information Management Services and found that very basic services were contracted and rendered by the said party involving no special technical skill or professional qualification. On the basis of the rival arguments and perusal of the various records as placed before us we find that the work assigned to the service provider was not a technical or professional work which required special skills but simple, basic and repetitive nature of work and we are inclined to opine that the order of CIT(A) is correct and deserved to be upheld. In view of the above facts, we dismiss the ground no 1 raised by the revenue by upholding the order of FAA on this point."

54. Upon careful consideration we find ourselves in agreement with the finding of the ld.CIT(A), which is also in consonance with the ITAT decision as mentioned above. Hence, we uphold the order of ld.CIT(A) on this issue.

(iii) No liability on deductor to pay tax when tax is already paid by deductee:

55. On this issue the ld. CIT(A) has granted some relief to the assessee on the issue of TDS deduction u/s. 194H on discount and incentive on sale of STBs and RCVs on the ground that the recipients would have paid the applicable tax on the respective taxable income. Hence, in view of the decision of the Hon'ble Apex Court decision in the case of *Coca Cola Expt. Corpn. Vs. ITO* [1998] 231 ITR 200 (SC) the taxes cannot be recovered from the assessee.

56. In view of our adjudication in assessee's appeal that the assessee is not liable for tax deduction at source under section 194 H, adjudication of this ground is now only of academic interest, hence we are not engaging into the same.

57. In the result, the assessee's appeal is allowed and the Revenue's appeal stands dismissed.

Order pronounced in the open court on 12.10.2018

Sd/-	Sd/-
(Amarjit Singh)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 12.10.2018
Roshani, Sr. PS/JV,Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai