REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7257 OF 2011

BHARTI CELLULAR LIMITED
(NOW BHARTI AIRTEL LIMITED) ..... APPELLANT

VERSUS

ASSISTANT COMMISSIONER OF INCOME
TAX, CIRCLE 57, KOLKATA AND ANOTHER ..... RESPONDENTS

W I T H

CIVIL APPEAL NOS. 2652-2653, 4949-4950 AND 4947-4948 OF 2015; 7455 OF 2018; 111 AND 2860 OF 2021; 8902 OF 2022; 7729, 7735, 7736, 7737, 7738, 7739, 7740, 7741, 7742, 7743, 7679, 7680, 7681, 7682, 7744, 7745, 7746, 7747, 7748, 7848, 7849, 7852, 7853, 7854, 7855, 7856, 7857 AND 7859 OF 2023; AND 3514, 3515, 3516 AND 3517 OF 2024

J U D G M E N T

SANJIV KHANNA, J.

This common judgment decides the aforestated appeals preferred by the Revenue and the assessees, who are cellular mobile telephone service providers. The issue relates to the liability to deduct tax at source under Section 194-H of the Income Tax Act, 1961[1] on the amount which, as per the Revenue, is a commission

[1] "The Act", for short.

payable to an agent by the assessees under the franchise/ distributorship agreement between the assessees and the franchisees/distributors. As per the assessees, neither are they paying a commission or brokerage to the franchisees/distributors, nor are the franchisees/distributors their agents. The High Courts of Delhi and Calcutta have held that the assessees were liable to deduct tax at source under Section 194-H of the Act, whereas the High Courts of Rajasthan, Karnataka and Bombay have held that Section 194-H of the Act is not attracted to the circumstances under consideration.

2. To avoid prolixity and repetition, we are not referring to the facts and arguments in the beginning, and will preface our judgment by reproducing Section 194-H of the Act and explaining its contours. The relevant portion of Section 194-H reads as under:

> "**194-H. Commission or brokerage.—** 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 194-D) 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:
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> 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 one crore rupees in case of business or fifty lakh rupees in case of profession 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.
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> 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.
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> xx xx xx"

3. Section 194-H of the Act imposes the obligation to deduct tax at source, states that any person responsible for paying at the time of credit or at the time of payment, whichever is earlier, to a resident any income by way of commission or brokerage, shall deduct income tax at the prescribed rate The expression “any person (...) responsible for paying” is a term of art, defined *vide* Section 204[2] of

[2] **204. Meaning of “person responsible for paying”**.—For the purposes of the foregoing provisions of this chapter and Section 285, the expression “person responsible for paying” means—
(*i*) in the case of payments of income chargeable under the head “Salaries” other than payments by the Central Government or the Government of a State, the employer himself or, if the employer is a company, the company itself, including the principal officer thereof;
(*ii*) in the case of payments of income chargeable under the head “Interest on securities” other than payments made by or on behalf of the Central Government or the Government of a State, the local authority, corporation or company, including the principal officer thereof;
(*ii-a*) in the case of any sum payable to a non-resident Indian, being any sum representing consideration for the transfer by him of any foreign exchange asset, which is not a short-term capital asset, the authorised person responsible for remitting such sum to the non-resident Indian or for crediting such sum of his Non-resident (External) Account maintained in accordance with the Foreign Exchange Management Act, 1999 (42 of 1999)], and any rules made thereunder;
(*ii-b*) in the case of furnishing of information relating to payment to a non-resident, not being a company, or to a foreign company, of any sum, whether or not chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof;
(*iii*) in the case of credit or, as the case may be, payment of any other sum chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof.
(*iv*) in the case of credit, or as the case may be, payment of any sum chargeable under the provisions of this Act made by or on behalf of the Central Government or the Government of a State, the drawing

the Act. As per the clause (iii) of Section 204, in the case of credit or in the case of payment in cases not covered by clauses (i), (ii), (ii)(a), (ii)(b), "the person responsible for paying" is the payer himself, or if the payer is a company, the company itself and the principal officer thereof.

4. Explanation (i) to Section 194-H[3] of the Act defines the expressions 'commission' or 'brokerage', as:

> "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;"

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and disbursing officer or any other person, by whatever name called, responsible for crediting, or as the case may be, paying such sum.

(*v*) in the case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent under Section 163.]

Explanation. —For the purposes of this section, —

(*a*) "non-resident Indian" and "foreign exchange asset" shall have the meanings assigned to them in Chapter XII-A;

(*b*) "authorised person" shall have the meaning assigned to it in clause (*c*) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

[3] Sub-section 1 to Section 194-H of the Act can be interpreted as requiring deduction of tax at source on commission and brokerage, even when the principal and agent relationship does not exist between the parties. Explanation (i) to Section 194-H of the Act can be read as expanding and widening the scope of the provision of sub-section (1) to include in the ambit of brokerage and commission, payments made by the principal to the agent, when covered under the four corners of the said explanation. We would not like to pronounce on this aspect as it has not been argued by the Revenue, and it appears that the requirement of relationship of principal and agent has been read into the main section. Further, applying common or commercial parlance meaning to the terms 'brokerage' or 'commission', given the wide divergence in which it is understood, would lead to confusion and has pitfalls. Deduction of Tax provisions should be pragmatically and realistically construed, and not as enmeshes or by adopting catch-as-catch-can approach. When doubts exist, the Central Board of Direct Taxes may examine this question and may issue appropriate instructions/circular after ascertaining the views of assessees and other stakeholders. The decision should be clear, and we trust and hope that an obligation, if imposed, will be prospective. (See paragraph 34 of the judgment.)

Payment is received when it is actually received or paid. The payment is receivable when the amount is actually credited in the books of the payer to the account of the payee, though the actual payment may take place in future. The payment received or receivable should be to a person acting on behalf of another person. The words “another person” refers to “the person responsible for paying”. The words “direct” or “indirect” in Explanation (i) to Section 194-H of the Act are with reference to the act of payment. Without doubt, the legislative intent to include “indirect” payment ensures that the net cast by the section is plugged and not avoided or escaped, *albeit* it does not dilute the requirement that the payment must be on behalf “the person responsible for paying”. This means that the payment/credit in the account should arise from the obligation of “the person responsible for paying”. The payee should be the person who has the right to receive the payment from “the person responsible for paying”. When this condition is satisfied, it does not matter if the payment is made “indirectly”.[4]

[4] We are unable to visualize ‘indirect’ credit in the books of the payer to the account of the payee. Credit entry is required even in cases of set-off. Nevertheless, this judgment should not be read as laying down that ‘indirect’ credit in the books shall not require deduction of tax under Section 194-H of the Act.

5. The services rendered by the agent to the principal, according to the latter portion of Explanation (i) to Section 194-H of the Act, should not be in the nature of professional services. Further, Explanation (i) to Section 194-H of the Act restricts application of Section 194-H of the Act to the services rendered by the agent to the principal in the course of buying and selling of goods, or in relation to any transaction relating to any asset, valuable article, or thing, not being securities. The latter portion of the Explanation (i) to Section 194-H of the Act is a requirement and a pre-condition. It should not be read as diminishing or derogating the requirement of the principal and agent relationship between the payer and the recipient/payee.

6. It is settled by a series of judgments of this Court that the expression 'acting on behalf of another person' postulates the existence of a legal relationship of principal and agent, between the payer and the recipient/payee.[5] The law of agency is technical. Whether in law the relationship between the parties is that of principal-agent is answered by applying Section 182 of the Contract Act, 1872[6]. Therefore, the obligation to deduct tax at source in terms of Section 194-H of the Act arises when the legal relationship of

[5] *Singapore Airlines Ltd. and Another* v. *Commissioner of Income Tax*, (2023) 1 SCC 497, ¶¶ 23-29.
[6] "Contract Act", for short.

principal-agent is established. It is necessary to clarify this position, as in day to day life, the expression 'agency' is used to include a vast number of relationships, which are strictly, not relationships between a principal and agent.

7. Section 182 of the Contract Act, defines the words 'agent' and 'principal' and 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 dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal"."

Agency in terms of Section 182 exists when the principal employs another person, who is not his employee, to act or represent him in dealings with a third person. An agent renders services to the principal. The agent does what has been entrusted to him by the principal to do. It is the principal he represents before third parties, and not himself. As the transaction by the agent is on behalf of the principal whom the agent represents, the contract is between the principal and the third party. Accordingly the agent, except in some circumstances, is not liable to the third party.

8. Agency is therefore a triangular relationship between the principal, agent and the third party. In order to understand this relationship, one has to examine the *inter se* relationship between the principal and the third party and the agent and the third party. When we

examine whether a legal relationship of a principal and agent exists, the following factors/aspects should be taken into consideration:

(a) The essential characteristic of an agent is the legal power vested with the agent to alter his principal's legal relationship with a third party and the principal's co-relative liability to have his relations altered.[7]

(b) As the agent acts on behalf of the principal, one of the prime elements of the relationship is the exercise of a degree of control by the principal over the conduct of the activities of the agent. This degree of control is less than the control exercised by the master on the servant, and is different from the rights and obligations in case of principal to principal and independent contractor relationship.

(c) The task entrusted by the principal to the agent should result in a fiduciary relationship. The fiduciary relationship is the manifestation of consent by one person to another to act on his or her behalf and subject to his or her control, and the reciprocal consent by the other to do so.[8]

(d) As the business done by the agent is on the principal's account, the agent is liable to render accounts thereof to the

[7] F.E. Dowrick, *The Relationship of Principal and Agent,* 17 MLR 24, 37 (1954).

[8] RESTATEMENT (THIRD) OF AGENCY (AMERICAN LAW INSTITUTE PUBLISHERS 2007).

principal. An agent is entitled to remuneration from the principal for the work he performs for the principal.

9. At this stage, three other relevant aspects/considerations should be noted. First is the difference between ‘power’ and ‘authority’. The two terms though connected, are not synonymous. Authority refers to a factual position, that is, the terms of contract between the two parties. The power of the agent however, is not, strictly speaking, conferred by the contract or by the principal but by the law of agency. When a person gives authority to another person to do the acts which bring the law of agency into play, then, the law vests power with the agent to affect the principal’s legal relationship with the third parties. The extent and existence of the power with the agent is determined by public policy. The authority, as observed above, refers to the factual situation. The second consideration is that the primary task of an agent is to enter into contracts on behalf of his principal, or to dispose of his principal’s property. The factors mentioned in clauses (b) to (d) in paragraph 8 above flow, and are indicia of this primary task. Clauses (b) to (d) of paragraph 8 are useful as tests or standards to examine the true nature or character of the relationship. Lastly, the substance of the relationship between the parties, notwithstanding the nomenclature given by the parties to the relationship, is of primary importance. The true nature

of the relationship is examined by reference to the functions, responsibility and obligations of the so-called agent to the principal and to the third parties.

10. An agent is distinct from a servant, in that an agent is subject to less control than a servant, and has complete, or almost complete discretion as to how to perform an undertaking. As Seavey said, ‘‘a servant (...) is an agent under more complete control than is a non-servant’’.[9] The difference is “in the degree of control rather than in the acts performed. The servant sells primarily his services measured by time; the agent his ability to produce results.”[10] This distinction can be criticised, for servants may have very wide discretion, and may not really be subject to control at all in practice, while agents may have their power to act circumscribed by detailed instructions.[11]

11. This Court in ***Bhopal Sugar Industries Limited*** v. ***Sales Tax Officer, Bhopal***[12]***,*** has expounded the difference between principal-agent and principal-principal relationship, in the following words:-

> “5. … 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

[9] Warren A. Seavey, The Rationale of Agency, 29 YALE L.J. 859, 866 (1920).
[10] *Ibid.*
[11] G.H.L. FRIDMAN, THE LAW OF AGENCY 33 (Butterworths, 7 ed. 1996).
[12] (1977) 3 SCC 147.

> 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 p. 485, the following observations are made:
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> > "807. Rights of agent. —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."

12. The aforesaid judgment in the context of distinction between a contract of sale and contract of agency observes that the agent is authorised to sell or buy on behalf of the principal, whereas the essence of contract of sale is the transfer of title of goods for the price paid or promised to be paid. In case of an agency to sell, the agent who sells them to the third parties, sells them not as his own

property, but as a property of the principal, who continues to be the owner of the goods till the sale. The transferee is the debtor and liable to account for the price to be paid to the principal, and not to the agent for the proceeds of the sale. An agent is entitled to his fee or commission from the principal.

13. This distinction and test was referred to by this Court in ***Commissioner of Income Tax, Ahmedabad and Others*** v. ***Ahmedabad Stamp Vendors Association***[13], which is a case relating to Section 194-H of the Act. This Court had approved the decision of the High Court in ***Ahmedabad Stamp Vendors Association*** v. ***Union of India***[14]. We may also refer to two more decisions of this Court. In the case of ***Director, Prasar Bharati*** v. ***Commissioner of Income Tax, Thiruvananthapuram***[15], this Court has observed that the explanation appended to Section 194-H of the Act defining the expression 'commission or brokerage' is an inclusive definition giving wide meaning to the expression 'commission'. The second decision is in the case of ***Singapore Airlines Limited*** v. ***Commissioner of Income Tax, Delhi***[16], which we shall refer to subsequently in some detail as to its exact purport

[13] (2014) 16 SCC 114.
[14] (2002) 257 ITR 202 (Guj.).
[15] (2018) 7 SCC 800.
[16] (2023) 1 SCC 497.

and ratio. However, at this stage, we would like to examine in some detail commercial relationships in the nature of an independent contractor, that are legally, principal to principal dealings.

14. The passage from ***Bhopal Sugar Industries Limited*** (supra) highlights the principles and the complexities involved in determining the correct nature of the legal relationship between a principal and an agent. Law permits individuals to enter into complex contracts incorporating multiple rights and obligations. The relationships between contacting parties have become multi-dimensional, which may not strictly fall within an employer-employee, principal-agent or principal-principal relationship. A singular contract may create different legal relationships and obligations. Independent contractors on occasion act for themselves, and at other times may be creating legal relations between their employers and third persons. For example, a solicitor may start by giving advice (independent contractor), and then as a consequence make a contract for his employer with another person (agent).

15. In ***Labreche*** v. ***Harasymiw***[17], Valin J. delineated the question of what an agency involves, stating that: (i) it refers to the power of the

[17] (1992) 89 DLR (4th) 95 at 107.

agent to affect the principal's position. However, this is not the sole test, though it still remains one of the main criteria in determining whether someone is an agent. There are several features in the definition of an agent[18]. There can be several situations where one person represents or acts for another, but this does not create the relationship of principal and agent. It is only when the representation or action on another's behalf affects the latter's legal position, that is to say his rights against, or his liability towards, other people, that the law of agency applies; (ii) the second feature is the importance of the way in which law regards the relationship which is created. The effect of the law is that it regulates the way in which parties conduct themselves. The conduct of the parties is considered in terms of law, regardless of the language or nomenclature used by the parties. The true factual position must be investigated to determine whether a relationship of agency has come into existence between a set of parties or individuals.

16. The significant observation in the aforesaid judgment is that all kinds of interactions with third parties or interested parties, resulting from the introduction of the third parties with one who wishes a particular undertaking to be performed, may not be a result of an agency. For instance, a retail dealer or supplier of goods, obtains

[18] *See* ¶8 of the judgment.

goods from a wholesale supplier or a manufacturer for subsequent resale to retail customers or suppliers who, in turn, deals with retail dealers or shopkeepers. Such ‘middlemen’ are sometimes referred to as ‘agents’, when in fact they are franchisees of the manufacturer or supplier, or are distributors of the manufactures’ goods, perhaps with a ‘sole agency’ or special dealership for his goods. Such ‘agents’ can be real buyers, acting as principals on their own behalf. Consequently, they are not liable to the manufacturer or supplier in the way an agent might be for failure of duty, nor do their contracts with other parties – whether it be suppliers, retail dealers or individual customers – hold the party who sold to them, liable, for any breach including misrepresentation or sale of defective goods. The seller’s contractual or tortious liability is different from the manufacturer’s liability on account of warranty/guarantee, statutory liability or even obligation to a third party who purchases the goods or avails services from/through the independent contractor. An agent renders service to the principal, who he/she represents, and therefore the principal, and not the agent, is liable to the third parties. Further, the money received by an independent contractor from his customers will belong to the independent contractor and not to the party who sold to him. The money will be a part of such independent contractor’s property in the event of his bankruptcy or

liquidation. This may be the case even if the contract of sale is one of 'sale or return'. It is important to avoid confusion, by applying the legal tests, that may arise where the functions of the 'buyer' – described as an 'agent' – is really as that of a 'middleman', and the necessary elements for creation of principal and an agent relationship are absent. Two level commercial transaction can result in an tripartite arrangement/agreement with respective rights and obligations, without any of the two parties having principal-agent relationship.

17. Clause (d) in paragraph 8 observes that the agent is liable to render accounts to the principal as the business done by the agent is on principal's account. The agent is entitled to remuneration from the principal for the work he performs. To decide whether a contracting party acts for himself as an independent contractor, we may examine whether in the course of work, he intends to make profits for himself, or is entitled to receive prearranged remuneration. If the party is concerned about acting for himself and making the maximum profits possible, he is usually regarded as a buyer, or an independent contractor and not as an agent of the principal. This would be true even when certain terms and conditions have been fixed relating to the manner in which the seller conducts his business. We shall subsequently further elucidate on the

characteristics of an independent contractor, and differentiate them from the principal-agent relationship.

18. We now turn to the facts of the present case. The assessees, as noticed above, are cellular mobile telephone service providers in different circles as per the licence granted to them under Section 4 of the Indian Telegraph Act, 1885[19] by the Department of Telecommunications[20], Government of India. To carry on business, the assessees have to comply with the licence conditions and the rules and regulations of the DoT and the Telecom Regulatory Authority of India.[21] Cellular mobile telephone service providers have wide latitude to select the business model they wish to adopt in their dealings with third parties, subject to statutory compliances being made by the operators. As per the business model adopted by the telecom companies, the users can avail post-paid and prepaid connections. In the present case, we are only concerned with the business operations under the prepaid model.

19. Under the prepaid business model, the end-users or customers are required to pay for services in advance, which can be done by purchasing recharge vouchers or top-up cards from the retailers.

[19] The '1885 Act', for short.
[20] 'DoT', for short.
[21] 'TRAI', for short.

For a new prepaid connection, the customers or end-users purchase a kit, called a start-up pack, which contains a Subscriber Identification Mobile card[22], commonly known as SIM card, and a coupon of the specified value as advance payment to avail the telecom services.

20. The assessees have entered into franchise or distribution agreements with several parties, the terms and conditions of which we would refer to subsequently. It is the case of the assessees that they sell the start-up kits and recharge vouchers of the specified value at a discounted price to the franchisee/distributors. The discounts are given on the printed price of the packs. This discount, as per the assessees, is not a 'commission or brokerage' under Explanation (i) to Section 194-H of the Act. The Revenue, on the other hand, submits that the difference between 'discounted price' and 'sale price' in the hands of the franchisee/distributors being in the nature of 'commission or brokerage' is the income of the franchisee/ distributors, the relationship between the assessees and the franchisee/distributor is in the nature of principal and agent, and therefore, the assesses are liable to deduct tax at source under Section 194-H of the Act.

[22] 'SIM card', for short.

21. In order to decide the dispute in question, we would like to refer to some of the relevant clauses of the franchisee/distributor agreement between Bharti Airtel Limited and the franchisee/distributors, which read as under[23]:

Bharti Airtel Limited

> "WHEREAS THE FRANCHISEE has approached BML and have expressed their keen desire to be one of the FRANCHISEE's to undertake the job of promoting and marketing of Pre Paid and also other related services all under the brand name of "MAGIC" to the potential subscribers, under the terms of this Agreement. The FRANCHISEE has also represented that they have infrastructure, manpower and experience in the above area and they possess the financial to perform the above functions and such other functions as may be assigned to them by BML from time to time.
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> xx xx xx
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> A. It is expressly understood that the Agreement does not confer any exclusive right to the FRANCHISEE to market the Services nor does the Agreement gives any territorial right to the FRANCHISEE. The BML expressly reserves its right to enter into similar arrangements with other party(ies) to market and promote the Services and to market the Services directly to the customers if considered appropriate in terms of business exigency and market requirements.
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> xx xx xx
>
> 2.1 Subject to the terms and conditions of this Agreement, BML hereby appoints Central Supply Corporation, as its FRANCHISEE to promote and market the Pre Paid Services of BML and more particularly in terms of the policies of BML as shall be informed by BML from time to time and the FRANCHISEE hereby accepts the appointment as the FRANCHISEE of BML.

[23] Agreements in the case of assessees Vodafone Idea Limited (formerly known as Vodafone Mobile Services Limited) and Idea Cellular Limited (now known as Vodafone Idea Limited) are somewhat different. To avoid repetition or prolixity, we are not reproducing the said clauses.

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2.3 The parties recognize that it is commercially prudent and desirable for the FRANCHISEE in the performance of the obligations under this Agreement to appointment (sic) Retailers/outlets for the retail promotion and marketing of Pre Paid services. In such an event the FRANCHISEE shall obtain the prior approval of BML for appointment(s) of Retailers/outlets, and also to the terms and conditions of such appointment.

2.4 The FRANCHISEE acknowledges that the business of cellular mobile services is extremely competitive and exists in an ever expanding market. The FRANCHISEE agrees and acknowledges that during the term of this Agreement it shall not undertake the activities under this Agreement for any other provider of Cellular Mobile Telephone Services or any similar competitive business.

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3.1 The FRANCHISEE warrants and represents that:

(a) It has all necessary statutory, regulatory and municipal permissions, approvals and permits for the running and operation of its establishment and for the conduct of its business, more particularly for the business as provided for in this Agreement.

(b) It is in compliance of all laws, regulars and rules in the conduct of its business and the running of its business establishment.

3.2 The FRANCHISEE shall indemnify and keep indemnified BML from and against all and any costs, expenses and charges imposed on BML as a result of any action by a statutory, regulatory or municipal authority arising out of non-compliance by the FRANCHISEE of laws, rules or regulations in the running, operation and conduct of its business and business establishment, more particularly with respect to the conduct of its business provided for in this Agreement.

xx xx xx

4.1 The FRANCHISEE shall maintain a suitable establishment for the conduct of its business and the performance of its obligations under this Agreement. The FRANCHISEE shall use its best efforts to actively provide effective ways to market and promote the Pre Paid Services and shall always act in the interest of both BML and the subscribers to the Services of BML.

4.2 As covenanted for in clause 2.4, the FRANCHISEE shall not involve himself in any manner either directly or indirectly in any business or activity which is competitive with the business of activities of BML. The FRANCHISEE acknowledges that the adherence to this provision is a material obligation of the FRANCHISEE under this Agreement.

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4.4 The FRANCHISEE shall, in the conduct of its business and performing its obligations under this Agreement, conform and adhere to the policies of BML communicated to the FRANCHISEE from time to time. The FRANCHISEE shall not charge the customers of BML for the services anything more than the rates specified by the BML from time to time.

4.5 The FRANCHISEE shall employ adequate employees for performing its obligations under this Agreement and in the promoting and marketing of the Pre Paid Services. All contractual and statutory payments, including wages and salaries to the employees of the FRANCHISEE, shall be the sole liability and responsibility of the FRANCHISEE.

4.6 The FRANCHISEE in respect of its business establishment shall, if so desired by BML, in order to effectively project the Franchisee, make alterations, modifications in and install such furniture, fixture and air conditioning equipment, fax, computer, with internet connection as required necessary and mutually agreed upon and the cost of such alterations, renovation shall be borne exclusively by the FRANCHISEE.

4.7 The FRANCHISEE agrees and undertakes to maintain proper and sufficient quantities of the prepaid start up packs and recharge coupons in respect of the Pre Paid service in order to meet the market requirements at all times and in accordance with the guidelines and instructions issued by BML from time to time.

4.8 The FRANCHISEE shall use its best efforts and endeavours to market and promote the Pre Paid Services to meet the growing demands of the Subscribers. At no point of time shall any right, title or interest pass to the FRANCHISEE in respect of the Pre-Paid Cards for the Pre Paid Services given to the subscribers for connection to the Service and all right, title, ownership and property rights in such cards shall at all times vest with BML.

4.9 The FRANCHISEE shall seek prior written approval from BML for its promotional literature campaign (including promotional material which bears the Trademarks, logos and trade names of BML) for the Pre Paid Services. BML will not share the expenditure incurred by the FRANCHISEE for such advertising and publicity of the Services unless agreed to earlier in writing. Any share of the expenditure stated above and the ratio for the same shall be decided by BML from time to time at its sole discretion.

4.10 The FRANCHISEE shall be solely liable and responsible, at its business premises, for the safety and storage of all pre paid start up kits, recharge cards and other material in respect of the Pre Paid Services. BML shall not be liable for any loss, pilferage or damage to the items as stated here above and the FRANCHISEE shall indemnify BML from all loss caused to BML arising out of any loss, pilferage or damage to the items as stated here above.

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4.12 The liability to insure and keep insured the items as stated in Clause 4.10 at the business establishment of the FRANCHISEE shall be of the FRANCHISEE and the liability for any loss or damage due to any fire, burglary, theft, etc. will be that of the FRANCHISEE.

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4.14 The FRANCHISEE shall be responsible for collection of all necessary agreement/contract forms and other related forms, and for obtaining the signature of the customer on these forms. The FRANCHISEE shall forward all such forms, duly completed in all respects and signed by customers to BML for its verification and records.

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5.1 From time to time, BML will review with the FRANCHISEE minimum subscription, targets for the Pre Paid Services, taking into account the market development and market potential and other relevant factors. The achievements of these prescribed targets by the FRANCHISEE is a material obligation of the FRANCHISEE under this Agreement.

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6.2 The FRANCISEE shall employ a fully trained service staff whose training has been completed in accordance with the standards set out by BML.

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8.1 The FRANCHISEE's price and payment for services will be specified by BML from time to time. The rates are subject to variation during the terms of this Agreement at the sole discretion of BML and shall be intimated to the Distributor from time to time.

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8.3 All other tax liabilities arising in connection with or out of the agreement transactions pertaining to the FRANCHISEE shall be the responsibility of the FRANCHISEE.

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10.1 The FRANCHISEE accepts for all purposes that all trademarks, logos, trade names or identifying marks and slogans used by BML in respect of the Service and the Pre Paid Services, whether registered or not, constitute the exclusive property of BML or their affiliated companies as the case may be, and cannot be used by the FRNCHISEE except in connection with the promotion and marketing of the Services of BML and that too with the express written consent of BML. The FRANCHISEE shall not contest, at any time, the right of the BML or its affiliated companies to any such Trademark or trade name used or claimed by BML or such affiliated companies in respect of the Service or Pre Paid Services.

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11.2 During the term of this Agreement, the FRANCHISEE is authorised to use BML's trademarks, logos and trade names only in connection with the FRANCHISEE's use of such trademarks, logos and trade names as set out in this Agreement. The FRANCHISEE's use of such trademarks, logos and trade names shall be in accordance with the guidelines issued by BML. Nothing herein shall give the FRANCHISEE any right, title or interest in such trademarks, logos or trade names, in the event of termination of this Agreement, however caused, the FRANCHISEE'S right to use such Trademarks, logos or trade names shall cease forthwith. The FRANCHISEE agrees not to attach any additional trademarks, logos or trade designation to the Trademarks of BML.

11.3 For as long as this Agreement continues in force but not thereafter, the FRANCHISEE may identify itself as an authorised FRANCHISEE of BML, but shall not use the Trademarks, logos and trade names of BML as part of its proprietorship name/corporate/partnership name or otherwise indicate to the public that it is an affiliate of BML.

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11.5 BML shall allow the FRANCHISEE to use its logo to be displayed on the sign board to be placed at the FRANCHISEE's outlet(s) and on the each memos and/or official business documents issued by the FRANCHISEE towards the services effected from the outlet(s). However, the intellectual property rights associated with Trademarks, logos and trade names are and shall remain the sole property of BML.

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14.1 BML shall not be liable to the FRANCHISEE or any other party by virtue of the termination of this Agreement for any reason whatsoever, including but not limited to any claim for loss of profits or compensation or prospective profits or on account of any expenditure, investments, leases, capital improvements or any other commitments made by the FRANCHISEE in connection with the business made in reliance upon or by virtue of FRANCHISEE's appointment under this Agreement. It is expressly agreed that no compensation whatsoever shall be payable by BML to the FRANCHISEE upon the termination of this Agreement.

14.2 Upon receipt of any notice of termination of this Agreement the FRANCHISEE shall conduct all its operations until the effective date of termination mentioned in such notice in the manner which is consistent with the obligation of the FRANCHISEE hereunder and the FRANCHISEE shall not prejudice the reputation or goodwill of BML and the interests of the subscribers in any manner whatsoever.

14.3 Upon termination of this Agreement for any reason, the FRANCHISEE shall cease to represent himself as the authorised FRANCHISEE of BML and shall not act in a manner, which is likely to cause confusion or to deceive the public. The FRANCHISEE shall promptly remove all Trademarks, signs, words, trademarks (sic), logos and any other representations connected with BML. In the event the FRANCHISEE fails to comply with the above, BML shall have the right to enter upon the FRANCHISEE's premises and remove, without liability, all Trademarks, signs, logos, trademarks (sic), materials written documents and any other representations connected with BML and the FRANCHISEE shall reimburse to BML all costs and expenses incurred thereof.

14.4 In the event of termination of this Agreement, FRANCHISEE shall return to BML by the effective date of termination all advertising and promotional materials, marketing aids and other documents and materials received and all Confidential Information received under this Agreement.

14.5 Both parties agree that goodwill created with respect to Service and Pre Paid Services is the exclusive property of BML. Any expenditure for promotion, advertising and other efforts by FRANCHISEE is made with the knowledge that this Agreement may be terminated pursuant to Article 13 hereof. Under no circumstance shall BML be obliged to pay to the FRANCHISEE upon termination of this Agreement any termination pay or compensation for subscriber acquisition, special indemnification, or any other termination compensation.

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16.1 The FRANCHISEE understands that it is an independently owned business entity and this Agreement does not make the FRANCHISEE, its employees, associates or agents as employees, agents or legal representatives of BML for any purpose whatsoever. The FRANCHISEE has no

express or implied right or authority to assume or to undertake any obligation in respect of or on behalf of or in the name of BML, or to bind BML in any manner. In case, the FRANCHISEE, its employees, associates or agents hold out as employees, agents, or legal representatives of BML, the FRANCHISEE shall forthwith upon demand make good any/all loss, cost, damages, including consequential loss, suffered by BML on this account.

16.2 It is understood that the relationship between the parties is solely on principal-to-principal. FRANCHISEE shall not acquire, by virtue of any provision of this Agreement or otherwise, any right, power or capacity to act as an agent or commercial representative of BML for any purpose whatsoever. Nothing contained in the contract shall be deemed or construed as creating a joint venture relationship or legal partnership etc. between BML and the FRANCHISEE.

16.3 The FRANCHISEE shall not obtain/offer the pre paid cards and/or recharge coupons for the Pre Paid Service from any other source other than BML unless such permission is granted in writing by BML in order to meet the specific needs of the market and subscribers as determined by BML.

xx xx Xx”

22. As per the agreement, the franchisee/distributor is appointed for marketing of prepaid services and for appointing the retailer or outlets for sale promotion. It is pertinent to note that the retailers or outlets for sale promotion are appointed by the franchisee/ distributor and not the assessee. The franchisees/distributors have agreed not to undertake activities mentioned in the agreement for any other competitive cellular mobile telephone service provider in the business. The franchisees/distributors have to comply with statutory, regulatory and municipal permissions while conducting

the business. The franchisees/distributors have agreed to indemnify and keep indemnified the assessee against any and all costs, expenses and charges imposed on the assessee because of any action by a statutory, regulatory or municipal authority due to non-compliance by the franchisee/distributor. The franchisee/ distributor has to maintain a suitable establishment for the conduct of business and performance of obligations. While doing so, the franchisee/distributor shall conform and adhere to the policies communicated to it from time to time by the assessee. The franchisee/distributor shall employ adequate employees for performing its obligations, and all contractual and statutory payments, including wages, are to be paid by the franchisee/distributor. The assessee can, if it so desires, call upon the franchisee/distributor to make alterations, modifications in furniture, air conditioning equipment etc., as required and necessary and mutually agreed. Costs of such alternations and distributions are to be borne by the franchisee/distributor.

23. The franchisee/distributor has to maintain proper and sufficient quantities of prepaid start-up packs and recharge coupons to meet the market requirements. The franchisee/distributor shall follow the guidelines and directions issued by the assessee from time to time. At no point of time, the right, title, or interest in the prepaid cards

shall pass on to the franchisee/distributor. All rights, title ownership and property rights in the cards shall rest with the assessee. The franchisee/distributor shall be solely responsible and liable for safety and storage of prepaid start-up kits, recharge cards and other material. The assessee will not be liable for any loss, pilferage or damage to the pre-paid coupons/starter-kits. The franchisee/ distributor is to indemnify the assessee for any loss caused on this account. The franchisee/distributor is to insure the prepaid start-up kits/ recharge coupons. The liability for any loss or damage due to fire, burglary, theft etc. is that of the franchisee/distributor.

24. On termination of the agreement, the franchisee/distributor shall continue its operation till the effective date of termination mentioned in the notice. Upon termination, the franchisee/distributor is required to return all advertising and promotional material, etc. to the assessee by the effective date of termination. Further, the assessee is not liable to the franchisee/distributor or any other party for any loss of profits or compensation or prospective profits or on account of any expenditure, etc. in the event of termination.

25. The assessee is to review the minimum subscriptions/targets for prepaid services taking into account market development and potential and other relevant factors. The franchisee/distributor is to

employ a fully trained service staff, who have undergone training in accordance to the standards set out by the assessee. The franchisee/distributor will be responsible to collect all necessary agreement/contract forms and other related forms, after obtaining signatures of the customers on the said forms. These forms, duly completed in all respects and signed by the customers, will be forwarded to the assessee for its verification and record.

26. The franchisee's/distributor's price and payment for services will be specified by the assessee from time to time. The rates can be varied during the terms of the agreement at the discretion of the assessee and such variation is to be intimated to the franchisee/distributor. All tax liabilities in connection with, or arising out of, the transactions pertaining to the agreement shall be the responsibility of the franchisee/distributor.

27. The trademarks, logos, trade names or identifying marks and slogans used by the assessee, whether registered or not, are exclusive property of the assessee or the affiliated companies. The use of such marks, logos etc. will be in accordance with the guidelines issued by the assessee. As long as the agreement is in force, but not thereafter, the franchisee/distributor shall identify itself as an authorised franchisee, but shall not use trademarks,

logos, tradenames, as part of its proprietorship name/corporate/ partnership name or otherwise. The franchisee/distributor is entitled to use its logo on the side door at its outlets and on its memos and official business documents towards the services effected from the outlet.

28. On the question of actual business financial model adopted and followed, it is an admitted position that the franchisees/distributors were required to pay in advance the price of the welcome kit containing the SIM card, recharge vouchers, top-up cards, e-tops, etc. The abovementioned price was a discounted one. Such discounts were given on the price printed on the pack of the prepaid service products. The franchisee/distributor paid the discounted price regardless of, and even before, the prepaid products being sold and transferred to the retailers or the actual consumer. The franchisee/distributor was free to sell the prepaid products at any price below the price printed on the pack. The franchisee/distributor determined his profits/income.

29. The Revenue has highlighted that the prepaid SIM cards were not the property of franchisee/distribution and no right, title or interest was transferred to them. These were always to remain the property of the assessee. This is correct, but it is equally true that this is a

mandate and requirement of the licence issued to the assessee by the DoT. In actual practice, the right to use the SIM card and its possession is handed over and given to the end-user, that is, the customer who installs the SIM card in his phone to avail the telecommunication services. Similarly, the franchisees/distributors are to ensure that the post-paid customers/end-users fill up the form as prescribed along with the documents which are given and submitted to the assessee. These are mandates prescribed by the licence issued by the DoT to the assessees. The contractual obligations of the distributors/franchisees, do not reflect a fiduciary character of the relationship, or the business being done on the principal's account.

30. The franchisees/distributors earn their income when they sell the prepaid products to the retailer or the end-user/customer. Their profit consists of the difference between the sale price received by them from the retailer/end-user/customer and the discounted price at which they have 'acquired' the product. Though the discounted price is fixed or negotiated between the assessee and the franchisee/distributor, the sale price received by the franchisee/ distributor is within the sole discretion of the franchisee/distributor. The assessee has no say in this matter.

31. It is not the case of the Revenue that the tax at source under Section 194-H of the Act is to be deducted on the difference between the printed price and the discounted price. This cannot be the case as the Revenue cannot insist that the franchisee/distributor must sell the products at the printed price and not at a figure or price below the printed price. The obligation to deduct tax at source is fixed by the statute itself, that is, on the date of actual payment by any mode, or at the time when income is credited to the account of the franchisee/distributor, whichever is earlier. In the context of the present case, the income of the franchisee/distributor, being the difference between the sale price received by the franchisee/distributor and the discounted price, is paid or credited to the account of the franchisee/distributor when he sells the prepaid product to the retailer/end-user/customer. The sale price and accordingly the income of the franchisee/distributor is determined by the franchisee/distributor and the third parties. Accordingly, the assessee does not, at any stage, either pay or credit the account of the franchisee/distributor with the income by way of commission or brokerage on which tax at source under Section 194-H of the Act is to be deducted.

32. Faced with the above situation, the Revenue has relied upon the use of the expression “payment received or receivable directly or

indirectly by a person acting on behalf of the other person", that is, 'the principal'. It is argued that even if the franchisee/distributor receives payment in the form of income from the retailer/end-user/customer, it would require deduction of tax at source as payment received or receivable, directly or indirectly, is to be subjected to deduction of tax. In support of the argument, reliance is placed upon decision in the case of ***Singapore Airlines Limited*** (supra).

33. The decision in ***Singapore Airlines Limited*** (supra) is required to be understood in the context of the contract in the said case, which was in terms of the rules/agreement set up by the International Airport Transport Association[24]. IATA would fix a ceiling price, and the price an airline could charge from its customers with a discretion to the airlines to sell their tickets at a net fare lower than the base fare but not higher. The air carriers were required to furnish a fare list to the Director General of Civil Aviation. The arrangement between the airlines and travel agents was covered by the Passenger Sales Agency Agreement[25], which would set out the conditions under which the travel agent carried out sale of tickets along with other ancillary services. The travel agents were entitled

[24] 'IATA', for short.
[25] 'PSA', for short.

to 7% commission on sale of the tickets for its services as the standard commission based on the price bar set by the IATA. The airlines were deducting tax at source under Section 194-H of the Act on the 7% commission. In addition to the 7% commission, the travel agents were also entitled to additional/supplementary commission on the tickets sold by them. The additional/supplementary commission and the amount at which the tickets were sold were computed by the travel agents and transmitted to the billing and settlement plan (BSP). The BSP, functioning under the aegis of the IATA, managed, *inter alia*, logistics vis-à-vis payments, and acted as a forum for agents and airlines to examine details pertaining to the sale of the flight tickets.

33.1 This Court examined the operation of the BSP where the financial data regarding sale of tickets was stored. The BSP agglomerated the data from multiple transactions. Thereupon, this data was transmitted either bimonthly or twice a month to the airlines. It is on the basis of this data that the airlines/air carriers were required to pay the additional commission to the travel agents. These are the striking distinguishing features in ***Singapore Airlines Limited*** (supra) case.

33.2 Having considered the aforesaid mechanism and the nature of relationship between a principal and an agent[26], this Court found considerable merit in the argument of the Revenue that the airlines/ air carriers utilised the BSP to discern the amount earned as additional/supplementary commission and accordingly arrive at the income earned by the agent to deduct tax at source, in accordance with the provisions of Section 194-H of the Act. If the aforesaid mechanism is understood, then it is not difficult to appreciate and understand the conclusion arrived at by this Court in the said case.

33.3 Thus, the question whether there was relationship of principal and agent was not in dispute, but nevertheless the assessees in the said case disputed liability to deduct tax at source on the additional/supplementary commission. However, the judgment does refer to the difference between the legal relationship of master and servant, principal and agent, and between principal and principal. In this context, reference is made to the statement of law in Halsbury's Law of England[27], which reads:

> "The difference between the relations of master and servant and of principal and agent may be said to be this: a principal has the right to direct what work the agent has to do: but a master has the further right to direct how the work is to be done."

[26] As stated above the airlines were deducting tax at source under Section 194-H on the 7% commission (standard commission). The dispute only related to whether the airlines were liable to deduct tax at source on the additional commission (supplementary commission).
[27] Vol. 22, p. 113, ¶ 192 and Vol. 1, at p. 193, Article 345.

xx xx xx

> "An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

34. We have already expounded on the main provision of Section 194-H of the Act, which fixes the liability to deduct tax at source on the 'person responsible to pay' – an expression which is a term of art – as defined in Section 204 of the Act and the liability to deduct tax at source arises when the income is credited or paid by the person responsible for paying.[28] The expression "direct or indirect" used in Explanation (i) to Section 194-H of the Act is no doubt meant to ensure that "the person responsible for paying" does not dodge the obligation to deduct tax at source, even when the payment is indirectly made by the principal-payer to the agent-payee. However, deduction of tax at source in terms of Section 194-H of the Act is not to be extended and widened in ambit to apply to true/genuine business transactions, where the assessee is not

[28] *See* ¶ 5 of the judgment.

the person responsible for paying or crediting income. In the present case, the assessees neither pay nor credit any income to the person with whom he has contracted. Explanation (i) to Section 194-H of the Act, by using the word “indirectly”, does not regulate or curtail the manner in which the assessee can conduct business and enter into commercial relationships. Neither does the word “indirectly” create an obligation where the main provision does not apply. The tax legislation recognises diverse relationships and modes in which commerce and trade are conducted, *albeit* obligation to tax at source arises only if the conditions as mentioned in Section 194-H of the Act are met and not otherwise. This principle does not negate the compliance required by law.

35. Deduction of tax at source is a substantial source of the direct tax revenue. The ease of collection and recovery is obvious. Deduction and deposit of tax at source checks evasion and non-payment of tax. It expands the tax base. However, the assessee as a deductor is not paying tax on his/her income, and collects and pays tax otherwise payable by the third party. Liability of the third party to pay tax when not deducted remains unaffected. Failure to deduct tax at source has serious and quasi-penal consequences for an assessee. The deduction of tax provisions should be programmatically and realistically construed, and not as enmeshes

or by adopting catch-as-catch-can approach. In case of a legal or factual doubt in a given case, the assessee can rely on the doctrine of presumption against doubtful penalisation.[29] Whether or not the said doctrine should be applied[30], will depend on facts and circumstances of the case, including the past practice followed by the assessee and accepted by the department. When there is apparent divergence of opinion, to avoid litigation and pitfalls associated, it may be advisable for the Central Board of Direct Taxes to clarify doubts by issuing appropriate instruction/circular after ascertaining view of the assesses and stakeholders.[31] In addition to enhancing revenue and ensuring tax compliance, an equally important aim/objective of the Revenue is to reduce litigation. The instructions/circular, if and when issued, should be clear, and when justified – require the obligation to be made prospective.

36. Notably, the Delhi High Court in ***Commissioner of Income Tax*** v. ***Singapore Airlines Ltd.***[32] had held that tax under Section 194-H

[29] *See Securities and Exchange Board of India* v. *Sunil Krishna Khaitan and Others*, (2023) 2 SCC 643. However, in the present case doctrine of presumption against doubtful penalisation is not applicable. The assessees were earlier deducting tax at source under Section 194-H of the Act, though the amount on which tax was being deducted is unclear. On legal opinion they stopped deducting tax at source.
[30] This would include the question of prospective or retrospective application.
[31] We do acknowledge that the Central Board of Direct Taxes has on several occasions quelled doubts and issued instructions/circulars.
[32] (2009) 319 ITR 29.

of the Act is not required to be deducted on the discounted tickets sold by the airlines/air carriers through travel agents. Revenue did not challenge the decision of the Delhi High Court to this extent and therefore, this dictum attained finality. As noted, it is not the case of the Revenue that tax is to be deducted when payment is made by the distributors/franchisees to the mobile service providers. It is also not the case of the revenue that tax is to be deducted under Section 194-H of the Act on the difference between the maximum retail price income of the distributors/ franchisees and the price paid by the distributors/franchisees to the assessees. The assessees are not privy to the transactions between distributors/franchisees and third parties. It is, therefore, impossible for the assessees to deduct tax at source and comply with Section 194-H of the Act, on the difference between the total/sum consideration received by the istributors/ franchisees from third parties and the amount paid by the distributors/ franchisees to them.

37. The argument of the Revenue that assessees should periodically ask for this information/data and thereupon deduct tax at source should be rejected as far-fetched, imposing unfair obligation and inconveniencing the assesses, beyond the statutory mandate. Further, it will be willy-nilly impossible to deduct, as well as make payment of the tax deducted, within the timelines prescribed by law,

as these begin when the amount is credited in the account of the payee by the payer or when payment is received by the payee, whichever is earlier. The payee receives payment when the third party makes the payment. This payment is not the payment received or payable by the assessee as the principal. The distributor/franchisee is not the trustee who is to account for this payment to the assessee as the principal. The payment received is the gross income or profit earned by the distributor/franchisee. It is the income earned by distributor/ franchisee as a result of its efforts and work, and not a remuneration paid by the assessee as a cellular mobile telephone service provider.

38. We must, therefore, reject the argument of the Revenue relying upon the decision of this Court in ***Singapore Airlines Limited*** (supra) that assessees would be liable to deduct tax at source even if the assessees are not making payment or crediting the income to the account of the franchisee/distributor. When the obligation, and the time and manner in which the tax is mandated by law to be deducted at source, is fixed by the statute, the same cannot be shifted/altered/modified or postponed on a concession in the court by the Revenue. The concession may be granted, when permissible, by way of a circular issued in accordance with Section 119 of the Act. We do not think that the decision in ***Singapore***

Airlines Limited (supra) can be read in the manner as suggested by the Revenue.

39. Coming back to the legal position of a distributor, it is to be generally regarded as different form that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as *sui generis*, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services. There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement. Franchise agreements are extremely detailed and complex. They may relate to distribution franchises, service franchises and production

franchises. Notwithstanding the strict restrictions placed on the franchisees – which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices – the relationship may in a given case be that of an independent contractor. Facts of each case and the authority given by 'principal' to the franchisees matter and are determinative.

40. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons. An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer.

41. Thus, the term ‘agent’ denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term ‘agent’ should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal’s property; *viz*. an independent contractor who may, *incidentally*, also affect the legal position of his principal in other ways. This can be ascertained by referring to and examining the indicia mentioned in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to Section 194-H of the Act.

42. In view of the aforesaid discussion, we hold that the assessees would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the

distributors/franchisees from the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors. Section 194-H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeal(s) filed by the assessee – cellular mobile service providers, challenging the judgment of the High Court at Calcutta are allowed and the judgment is set aside. The appeals filed by the Revenue challenging the judgments of High Courts of Rajasthan, Karnataka, Bombay and Orissa are dismissed. There would be no orders as to cost.

Pending applications, if any, shall stand disposed of.

.....J.
(SANJIV KHANNA)

.....J.
(S.V.N. BHATTI)

NEW DELHI;
FEBRUARY 28, 2024.