

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI**

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA Nos. 4511, 4512, 4513, 4514 & 4515/MUM/2012
Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04 & 2004-05**

M/s Vodafone India Limited (Formerly known as Vodafone Essar Limited), Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai - 400013 PAN: AAACH5332B	Vs.	The Income Tax Officer, (OSD) (TDS), Range 3(1), 10 th Floor, Smt. K G Mittal Ayurvedic Hospital Bldg. Charni Road, Mumbai - 400002
(Appellant)		(Respondent)

**ITA Nos. 4637/MUM/2013, 4638, 4639, 4633, 4640/MUM/2012
Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04, 2004-05
and**

**ITA No. 5293, 5294, 5295, 5296 & 5297/MUM/2012
Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04, 2004-05
&**

ITA No. 4808/MUM/2013 Assessment Year 2007-08

The Income Tax Officer, (OSD) (TDS), Range 3(1), 10 th Floor, Smt. K G Mittal Ayurvedic Hospital Bldg. Charni Road (W), Mumbai - 400002	Vs.	M/s Vodafone Essar Ltd., Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai - 400013 PAN: AAACH5332B
(Appellant)		(Respondent)

Assessee by : Shri Deepak Chopra & Mansvini
Bajpai (AR)

Revenue by : Shri Padmaja & Shri Rajesh Kumar
Yadav (DR)

Date of Hearing: 14/12/2017
Date of Pronouncement: 12/03/2018

ORDER

PER BENCH

These cross appeals have been filed by the assessee and the revenue challenging the orders dated 27.04.2012 and 30.03.2013 passed by the Ld. Commissioner of Income Tax (Appeals), Mumbai and they pertain to the Assessment Years 2000-01, 2001-02, 2002-03, 2003-04, 2004-05 and 2007-08.

(a) Vide ITA Nos.4511, 4512, 4513, 4514 & 4515/MUM/2012, the assessee has challenged the impugned orders dated 27.04.2012 passed by the Ld. CIT (A) pertaining to the Assessment Years 2000-01 to 2004-05 respectively, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against order passed by the AO u/s 201(1) of the Income Tax Act (for short 'the Act').

(b) The Department has filed cross appeal vide ITA Nos. 4637/MUM/2013, 4638, 4639, 4633, 4640/MUM/2012 against the aforesaid impugned orders passed by the Ld. CIT (A) challenging the relief granted by Ld CIT(A).

(c) Vide ITA No. 5293, 5294, 5295, 5296 & 5297/MUM/2012, the department has challenged the impugned orders dated 11.05.2012 passed by the Ld. CIT (A) for the Assessment Years 2000-01 to 2004-05, whereby the Ld. CIT (A) has directed the AO to re-compute interest u/s 201(1A) of the Act.

(d) Vide ITA No. 4808/Mum/2013, the revenue has challenged the appellate order passed by the Ld. CIT (A), whereby the Ld. CIT (A) has held that the order passed by TDS officer is barred by limitation.

Since, all the appeals pertain to the same assessee for the different assessment years all the appeal were clubbed, heard together and are being dispose of by this common and consolidated order for the sake of gravity and convenience.

2. The appellant/assessee engaged in business of providing Cellular Services in the Mumbai Telephone Circle. A survey u/s 133A of the Act was conducted on the premises of the appellant on 25.02.2004 in order to verify the compliance of TDS provisions on payments made by the assessee. It was noticed that the assessee has not deducted tax at source on Inter connect charges paid by it and it was further noticed that the assessee has started deducting TDS from Financial year 2003-04 only. Consequently, Financial Years 1999-2000 to 2003-04 relevant to the assessment year 2000-01 to 2004-05 were identified for verification regarding compliance of TDS provisions. Accordingly a letter dated 08.03.2004 was issued to the assessee by the TDS officer asking for details regarding deduction of tax at source on payments made to various agencies/third parties, service providers and also to furnish reasons for non-deduction of taxes at source from those payments. In response to the notice, the assessee furnished certain details. The correspondences between the TDS officer and the assessee continued for some time. In some of the letters, the ITO mentioned that these details are required to complete the proceedings u/s 201(1) of the Act.

3. The TDS Officer issued letters dated 22.11.2004, 10-01-2005, 22-02-2005, 15-10-2007 and called for details. Then the TDS officer issued a letter dated 29-09-2009 fixing the hearing on 08-10-2009. In some of the letters, the TDS Officer has mentioned that the details were called by him in connection with the proceedings u/s 201(1) /201 (1A). Subsequently on 02.12.2010, a proper show cause notice u/s 201(1)/201(1A) of the Act was issued directing

the assessee to furnish balance details asked for by letter dated 10-01-2005 and the AO fixed the date of hearing on 23.12.2010. Vide letter dated 22.03.2011, the assessee filed preliminary objections with regard to the notice dated 02.12.2010 contending that the proceeding is barred by limitation and, therefore, the same is unsustainable in law. The assessee further requested the AO to first dispose of the objection in accordance with the principles of law laid down by the Hon'ble Supreme Court in *GKN Driveshaft (India) Ltd. 259 ITR 19* and to proceed further. The assessee also filed Writ Petition before the Hon'ble Bombay High Court on 25.03.2011 agitating the re-initiation of proceedings by the AO, vide notice dated 02.12.2010 issued u/s 201 (1)/201(1A) on the ground that re-initiation of proceeding is without jurisdiction, being barred by limitation.

4. Subsequently, rejecting the contentions of the assessee, the AO passed a common order dated 24-03-2011 u/s 201 (1) of the Act raising an aggregate demand of Rs. 38,41,04,984/- for the assessment years 2000-01 to 2004-05 against the assessee on account of non-deduction of taxes/short deduction of taxes on inter connection charges paid by the appellant to other telecom operators during the financial years 1999-2000-01 to 2003-04. The demand for short deduction of tax at source was raised in FY 2003-04 relevant to AY 2004-05.

5. Vide separate order dated 28-03-2011, the AO raised interest demand u/s 201(1A) of the Act for assessment years 2000-01 to 2004-05.

6. Aggrieved by the orders passed by the TDS officer u/s 201(1) and 201(1A) of the Act for the assessment years 2000-01 to 2004-05, the assessee filed appeals before the Ld. CIT (A). In the meantime, the Hon'ble Bombay High Court disposed of the Writ filed by the assessee directing the appellant to

pursue its remedy before the CIT (A). The Hon'ble High Court further directed the CIT (A) to dispose of the appeal within a period of three months.

7. The grounds raised by the assessee in the first appeal filed before Ld. CIT(A) against the demand raised u/s 201(1) of the Act and the gist of findings given by the Ld. CIT(A) are summarised as under:

(a) Vide Ground No. 1 and 2, the assessee challenged the order passed u/s 201 (1) contending that the proceedings are barred by limitation and AO has passed the impugned order without following the law laid down by the Hon'ble Supreme Court in the case GNK Driveshaft (India) Ltd. (supra). The assessee contended that the proceedings u/s 201 (1) of the Act were initiated by issuing notice on 08.03.2004 and the assessee furnished the details called for by the AO from time to time, however, no order was passed. Subsequently, the AO issued another notice dated 02.12.2010 and re-initiated the proceedings u/s 201 (1A) of the Act and directed the assessee to appear on 23.12.2010. The assessee opposed the action of the AO on the ground that the proceeding is barred by limitation. However, the Ld. CIT (A) rejected the contention of the assessee and decided both the grounds against the assessee holding that the proceedings are valid in terms of the amendment brought in section 201(3) w.e.f. 01.04.2010.

(b) Vide Ground No. 3, the assessee contended that the assessee was not liable to deduct tax u/s 194J of the Act on inter connection charges. After hearing the assessee, the Ld. CIT (A) by following the decision of his predecessor, who had passed the order based on the judgment of the Hon'ble Supreme Court passed in the case of CIT vs. Bharti Cellular Ltd.

and others, restored the issue to the file of the AO with the direction to decide the issue afresh on the applicability of section 194J to the payment of inter connect charges in accordance with the law laid down by the Hon'ble Supreme Court in CIT vs. Bharti Cellular Ltd. and others.

(c) Vide Ground No. 4, the assessee challenged the order of the TDS Officer in applying provisions of section 194J of the Act on the incorrect amount of inter connection charges. The Ld. CIT (A) after hearing the assessee directed the AO to consider the correct amount of inter connect charges after giving effect to his decision in respect of Ground No. 3.

(d) Vide Ground No. 5, the assessee challenged the action of TDS Officer in treating the assessee as an assessee in default despite the fact that tax had already been paid by the payees either by way of advance tax or self assessment tax at the time of filing the return. Without prejudice to the said grounds, the assessee also submitted that no tax demand u/s 201 (1) of the Act can be collected from the deductor; where taxes have been directly paid by the recipient. The Ld. CIT (A) after hearing the assessee directed the AO to take action in this regard after giving effect to his decision in respect of Ground No. 3 aforesaid.

(e) Vide Ground No. 6, the assessee contended that the TDS Officer has erred in levying consequential interest u/s 201 (1A) of the Act considering that the taxes in respect of the income earned by the third parties service providers on account of inter connect charges would have already been paid by the payees and hence the assessee should not be treated as assessee in default. The Ld.CIT (A) dismissed this ground holding that since no interest u/s 201 (1A) of the Act has been charged

by the AO and this issue has been raised by the assessee through separate appeals, this ground is not sustainable.

(f) Vide Ground No. 7 the assessee challenged the initiation of penalty proceedings, u/s 271(c) of the Act. The Ld. CIT (A) dismissed this ground being premature.

8. In respect of appeals filed by the assessee challenging the interest charged u/s 201(1A) of the Act, the Ld CIT(A) restored the issues to the file of the AO for deciding the same afresh, since the issues relating to demand raised u/s 201(1) was restored his file.

9. Against the orders passed by the Ld. CIT(A) in respect of orders passed u/s 201(1) of the Act, both the parties are in appeal before the Tribunal. Against the orders passed by Ld CIT(A) in respect of orders passed u/s 201(1A) of the Act, the revenue is in appeal before us.

ITA Nos. 4511, 4512, 4513, 4514 & 4515/MUM/2012
(Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04 & 2004-05)

10. Since the facts of the aforesaid five appeals filed by the assessee are similar and the issues involved in the said appeals are identical, we take up these appeals together. The grounds raised in AY 2000-01 are extracted below:-

“Ground No. 1- Order passed under Section 201 (1) of the Act though the proceedings are barred by limitation

a) *Erred in upholding the jurisdiction assumed by the ITO (OSD) TDS-3(1) (‘hereinafter referred to as ‘TDS officer’) for passing an order dated 24*

March 2011 under Section 201 (1) of the Act for the AY 2000-01, which is barred by limitation of law and liable to be struck down due to long delay in completion of proceedings.

- b) Failed to appreciate that the provisions contained in Section 201 (3) of the Act have been made effective from 1 April 2010 and therefore cannot be given retrospective application so as to rekindle a stale proceedings which is already barred by limitation.*
- c) Failed to appreciate that the proviso to Section 201 (3) of the Act in any event cannot extend the scope, ambit and the inherent time limit of Section 201 of the Act and*
- d) Failed to appreciate that the period of limitation cannot be extended by a subsequent amendment.*

Ground No. 2- Non-adjudication on the issue of applicability of Section 194J to Interconnect Usage Charges ('IUC')

- a) Erred in exceeding his jurisdiction by not deciding the matter on applicability of the provisions of the Section 194J of the Act to IUC, paid by the Appellant to other telecom companies but remanding the issue back to the TDS officer for taking a fresh decision.*

Ground No. 3- Recovery of taxes from the Appellant when taxes on same income have been already paid by the deductees.

- a) Erred in directing the TDS officer to recover the taxes from the Appellant where the Appellant is not able to produce a certificate from the auditor of the respective IUC payees confirming that taxes have been paid by them, without appreciating the fact that the Appellant has provided the Permanent Account Number ('PAN') for all the IUC deductees and*
- b) Erred in not accepting and applying the ratio laid down by the Hon'ble Mumbai Tribunal in the Appellant's own case for AY 2007-08 to AY 2009-10 (45 SOT 82) for the subject AY. In the said case, the Hon'ble*

Mumbai Tribunal held that where the Appellant had provided the PAN and also furnished declaration from the various deductees, to the extent possible, the Appellant had discharged its obligation as regards payment of taxes by the payees and that the onus was then on the TDS officer to verify payment of such taxes by the deductees.

Each of the above grounds are independent and without prejudice to one another”.

11. Vide ground No. 1 of the appeal the assessee has challenged the jurisdiction assumed by the ITO (OSD) TDS -3(1) for passing order dated 24.03.2011 u/s 201(1) of the Act for all the years under consideration contending that the proceedings were barred by limitation. The Ld. Counsel submitted that the Income tax Act, prior to 1.4.2010, did not prescribe any time limit for initiation or completion of TDS proceedings. Hence the Courts were constrained to prescribe time limits for initiation of proceedings as well as for completion of proceedings. He submitted that the Hon'ble Delhi High Court has prescribed a time limit of four years from the end of financial year (or 3 years from the end of assessment year) for initiation of TDS proceedings in the case of *CIT Vs. NHK Japan Broadcasting Corporation (2008)(305 ITR 137)(Delhi)*. He further submitted that the Special Bench, in the case of *Mahindra and Mahindra Ltd Vs. DCIT (2009)(122 TTJ 577)(SB)* has prescribed time limit for completion of the TDS proceedings as one year from the end of the financial year in which proceedings u/s 201(1) of the Act was initiated. The decision of special bench has since been upheld by Hon'ble Bombay High Court in the same case reported in 365 ITR 560.

12. The Ld. counsel further submitted that the impugned orders u/s 201(1) of the Act has been passed for assessment years 2000-01 to 2004-05 on 24-03-2011. He submitted that the Income tax officer issued first notice on 08-03-

2004 in the form of a letter calling for details relating to TDS compliance. Subsequently the ITO issued a show cause notice on 02-12-2010. The Ld A.R submitted that if the letter dated 08-03-2004 is considered to be a valid notice, then the orders should have been passed by 31.3.2005 as per the decision rendered in the case of *Mahindra and Mahindra* (supra), i.e., within one year from the end of financial year in which the proceedings were initiated. In that case, the impugned orders passed on 24.03.2011 will become time barred.

13. However, if the show cause notice issued on 02-12-2010 is considered as a proper notice, then the initiation of proceedings itself shall become time barred, since the proceedings have been initiated after expiry of four years from the end of financial year or 3 years from the end of the assessment year. He submitted that proceedings could have been initiated by 31.3.2004, 31-03-2005, 31-03-2006, 31-03-2007 and 31.3.2008 respectively for assessment years 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05. Accordingly the Ld. counsel contended that the initiation of proceedings is required to be cancelled as time barred, if the date of show cause notice is taken as 02-12-2010. The impugned orders passed by the TDS officer are required to be cancelled, if the date of notice is taken as 08-03-2004, as the orders have been passed beyond 31.3.2005. Accordingly he contended that the Ld. CIT(A) was not justified in upholding the validity of the orders therefore the entire proceedings including the impugned orders passed by the Ld. CIT(A) are liable to be quashed.

14. The Ld. counsel further submitted that both the assessing officer and the Ld CIT(A) has taken support of the above said proviso to hold that the orders passed for AY 2000-01 to 2004-05 are valid. He submitted that the provisions of section 201 (3) of the Act were inserted by Finance Act, 2009 w.e.f. 01.04.2010, providing time limit for passing an order under sub section(1) of

section 201 of the Act. Prior to insertion of this sub-section, as stated earlier, no limit was provided for passing an order under section 201(1) of the Act by the Statute. The time limits for initiation of proceedings and time limit for completion of proceedings were fixed by the Courts. The newly inserted sec.201(3) was having following proviso:-

“Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011”.

15. Relying upon the above said proviso, the tax authorities have held that the impugned orders passed by the TDS officer were valid in law.

16. The Ld. counsel submitted that the proceedings have become time barred for the impugned assessment years prior to the insertion of sub-section 3 in Sec. 201 by Finance Act 2009 w.e.f. 1.4.2010, as per the time limits prescribed by the Courts. He contended that the above said amendment will not revive the limitation. The Ld. counsel further submitted that the question of “applying amended provision retrospectively” was examined by Hon’ble Gujarat High Court in the case of *Tata Teleservices Vs. Union of India (2016)(385 ITR 497)*. The time limit for passing order u/s 201(1) for FY 2007-08 and FY 2008-09 has expired on 31.3.2011 and 31.3.2012 as per the provisions then existing. By subsequent amendments made in sec. 201(3), the time limit was extended by the Statute. The dispute that arose was whether the subsequent amendments brought in sec. 201(3) extending the time limits prescribed therein will revive the time limits already expired under old provisions. The Hon’ble Gujarat High Court relied upon the decision rendered by Hon’ble Supreme Court in the case of *S.S.Gadgil vs. M/s Lal & Co. (AIR 1965*

SC 720), wherein it was held that the notice issued relying on amended provisions is invalid, as the amended section should not be given greater retrospectivity than is expressly mentioned. Accordingly the Hon'ble Gujarat High Court held that no order u/s 201(1) of the Act can be passed for the years for which limitation had already expired prior to amended section 201(3) as amended by Finance Act No.2 of 2014. The Ld counsel contended that the ratio of above said decisions will equally apply to the cases under consideration.

17. The Ld. counsel also placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of *Vodafone Essar Mobile Services Limited & Anr Vs. Union of India & Ors. (2016)(385 ITR 436)(Delhi)*. He submitted that the question before Hon'ble Delhi High Court was whether proceedings u/s 201(1) of the Act can be initiated for periods earlier than four years prior to 31.3.2011 could be initiated by taking support of the proviso to sec. 201(3) of the Act inserted by Finance Act 2009 w.e.f. 1.4.2010. The Hon'ble Delhi High Court took note of the fact that it has prescribed a time limit of four years from the end of financial year for initiating proceedings u/s 201(1) in its decision rendered in the case of *CIT vs. NHK Japan Broadcasting Corporation (supra)*. The Court also noted its decision rendered in the case of *CIT (TDS)-I vs. CJ International Hotels Pvt Ltd (ITA No.57/2015)*, wherein it was held that the its decision prescribing time limit of four years for initiation of proceedings in the case of *NHK Japan Broadcasting Corporation (supra)* does not require re-consideration. It was also held in *CJ International hotels Pvt Ltd (supra)* that the amendment brought in sec. 201(3) will not overrule its decision rendered in the case of *NHK Japan Broadcasting Corporation (supra)*.

18. On the other hand, the Ld. Departmental Representative (DR) relying on the order passed by the Ld. CIT(A) submitted that since the proceedings

against the assessee were pending before 01.04.2007, proviso to the old section (3) was applicable and hence the TDS officer was competent to pass order before 31st day of March 2011. The Ld. DR relied on the decision rendered by the 'A' Bench of ITAT Lucknow in *ITO (TDS) Kanpur vs. Uttar Pradesh Financial Corporation [2016] 71 taxmann.com 370 (Lucknow-Trib.)*. In the above said case, the AO initiated proceedings u/s 201(1) of the Act for assessment year 2005-06 on 09-02-2007. The AO passed the orders on 10-03-2011. The assessee contended the same is barred by limitation, as the order was passed beyond the period of 3 years from the end of the relevant assessment year. The Tribunal rejected the contentions of the assessee by holding that the proceedings were initiated within 3 years from the end of the assessment year, i.e., within permissible time limit. The Ld D.R also placed reliance on the Circular issued by CBDT explaining the amendments brought in by Finance (No.2) Act, 2009, through which sub-section (3) to sec. 201 and proviso thereto were initially inserted. The Ld D.R contended that the proviso to sec. 201(3) has provided a window to complete the proceedings by 31-03-2011 for the financial years beginning from 1st April, 2007 and earlier years. Accordingly, the Ld D.R contended that the orders passed by Ld CIT(A) on the validity of proceedings do not call for any interference.

19. We have heard the rival contentions and carefully gone through the material on record including the cases relied upon by the parties. As noticed earlier, in the present case, a letter was issued on 08.03.2004 and the assessee was asked to submit details and information regarding deduction of tax at source on by the assessee on payments made to various agencies/third party service providers and reasons for non deduction of taxes at source from the payments in respect of charges paid for interconnect usage (IUC) and roaming. As noticed earlier, the ITO issued letters from time to time calling for the

details. Since then the assessee was seen furnishing the details as asked by the TDS officer in response to the various letters issued. We notice that the TDS Officer was only calling for details through letters dated 22.11.2004, 10-01-2005, 22-02-2005, 15-10-2007 and called for details. Then the TDS officer issued a letter dated 29-09-2009 fixing the hearing on 08-10-2009. In some of the letters, the TDS Officer has mentioned that the details were called by him in connection with the proceedings u/s 201(1) /201 (1A). However, we notice that the AO did not seem to have issued a show cause notice u/s 201(1) of the Act.

20. We notice that a show cause notice dated 02.12.2010 was issued under section 201(1)/201(1A) of the Act for the first time to the assessee with the direction to appear on 23.12.2010 along with details. In that show cause notice also, the ITO has requested the assessee to submit balance details called for by him, vide letter dated 10-01-2005. This fact would show that the ITO himself has considered the letters issued from 08-03-2004 to 29-09-2009 as mere letters issued by him, meaning thereby, a proper show cause notice u/s 201(1) of the Act was issued for the first time for the years under consideration only on 02-12-2010.

21. In the light of the aforesaid facts, the fundamental question raised by the assessee needs to be adjudicated first as to whether the order passed by the TDS officer is *void ab initio* and bad in law being passed beyond limitation period as contended by the assessee or the same had been passed within limitation as contended by the Ld DR.

22. As per the discussions made in the foregoing paragraphs, we are of the view that the TDS Officer was only collecting required details by issuing various

letters starting from 08.03.2004. We have also noticed that the ITO himself refers the letter dated 10-01-2005 as mere letter in the show cause notice issued on 02-12-2010. There should not be any dispute that the letter calling for required details is different from "Show cause notice". Accordingly we are of the view that No show cause notice u/s 201/201(1A) was issued by the TDS Officer prior to 02.12.2010 and it was issued for the first time on that date only.

23. Sub-Section 3 to section 201 was inserted by Finance Act, 2009 w.e.f. 01.04.2010. The same reads as under:-

"No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of-

- (i) *Two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed.*
- (ii) *Six years from the end of the financial year in which payment is made or credit is given, in any other case:*

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011".

24. It is the contention of the Ld. Counsel for the assessee that when this section was inserted the Finance Act, 2009, the then TDS Officer taking advantage of proviso to the said section issued another notice dated 02.12.2010 in order to bring the assessee's case under the said proviso. It was further contended that the proceedings initiated on 08.03.2004 for the financial years under consideration was finally disposed of on March 24, 2011 when the order was passed u/s 201(1) of the Act. Prior to insertion of the said

sub section, no limit had been provided for initiation proceedings u/s 201(1) or passing an order under section 201(1) of the Act. Accordingly it was contended by the Ld A.R that the time limit prescribed by the Hon'ble Delhi High Court in the case of *NHK Japan Broadcasting Corporation (supra)* for initiation of proceedings and the time limit prescribed in the case of *Mahindra & Mahindra Ltd (supra)* by the Special bench & approved by Hon'ble Bombay High Court for completion of proceedings would apply to the years under consideration.

25. The Hon'ble Delhi High Court in *Vodafone Essar Mobile Services Ltd (supra)* has held that the time limit of four years prescribed for initiating the proceedings u/s 201(1) of the Act by its decision rendered in the case of *NHK Japan Broadcasting Corporation (supra)* does not require reconsideration. Accordingly it was held that the ITO could not initiate proceedings u/s 201(1) for periods earlier than four years prior to 31st March 2011. The Hon'ble Delhi High Court has held in the case of *Tata Teleservices vs. Union of India (supra)*, by placing reliance on the decision rendered by Hon'ble Supreme Court in the case of *S.S. Gadgil vs. M/s Lal & Co. (supra)*, held that the amendment brought in to sec. 201(3) by Finance Act No.2 of 2014 extending the time limits will not apply to AY 2007-08 and 2008-09, which has become time barred as per the pre-amended provisions.

26. In our view, the ratio of the decision rendered in the case of *S.S. Gadgil vs. M/s Lal & Co. (supra)* by Hon'ble Supreme Court and the decision rendered by Hon'ble Delhi High Court in the case of *Vodafone Essar Mobile Services Ltd (supra)* can be conveniently applied to the facts of the present case. We have earlier held that the various letters issued by the ITO from 08-03-2004 were only letters calling for various details. We have also held that the ITO has issued show cause notice for the first time on 02-12-2010. The Hon'ble Delhi

High Court is held in the case of *Vodafone Essar Mobile Services Ltd (supra)*, by following its own decision rendered in the case of *CJ International Hotels P Ltd (supra)* has held that the time limit of four years prescribed for initiating the proceedings u/s 201(1) of the Act by its decision rendered in the case of *NHK Japan Broadcasting Corporation (supra)* does not require reconsideration, in view of the amendment brought in sec. 201 by insertion of sub-section 3. Accordingly it was held that the ITO could not initiate proceedings u/s 201(1) for periods earlier than four years prior to 31st March 2011. In the instant cases, the time limit of four years from the end of financial year (or three years from the end of assessment year) has expired by 31.3.2004 to 31.3.2008 respectively for assessment years 2000-01 to 2004-05. Hence, the show cause notice issued for the first time on 02-12-2010 for these years is clearly beyond the period of limitation fixed by Hon'ble Delhi High Court in the case of *NHK Japan Broadcasting Corporation (supra)*.

27. The Ld. D.R placed reliance on the Circular issued by CBDT. However we notice that the Hon'ble Gujarat High Court has also considered the above said circular as well as the memorandum explaining the provisions of Finance Bill no.2 of 2009, through which the provisions of sec.201(3) was inserted.

28. The Ld D.R also placed reliance on the decision rendered by Lucknow bench of ITAT in the case of *Uttar Pradesh Financial Corporation (supra)*. The facts prevailing in that case was that the AO issued notices u/s 201(1) of the Act on 09-02-2007 for assessment year 2005-06. The Tribunal noted that the notice has been issued within 3 years from the end of the assessment year, which was the time limit prescribed by Hon'ble Delhi High Court in the case of *NHK Japan Broadcasting Corporation (supra)*. Since, the proceedings were pending as on 1.4.2007, the Tribunal held that the provisions of sec. 201(3)

including the proviso as inserted by Finance Act No.2 of 2009 would apply and hence the proceedings could be completed by 31.3.2011. Thus, we notice that the Tribunal has decided the above said case on the basis of facts available therein. As noticed earlier, the time limit for initiation of proceedings u/s 201(1) in the hands of the present assessee for the assessment years under consideration has expired long back prior to insertion of sec. 201(3) by Finance Act No.2 of 2009.

29. The Hon'ble Gujarat, in the case of Tata Teleservices (supra) has considered the Memorandum of Finance Bill No.2 of 2009 explaining the provisions of sec. 201(3). The following explanation was considered by Hon'ble Gujarat High Court:-

“..... To provide sufficient time for pending cases, it is proposed to provide that such proceedings for a financial year beginning from 1st April, 2007 and earlier years can be completed by the 31st March, 2011.”

30. Accordingly, the Hon'ble Gujarat High Court has held that, in respect of F.Y 2007-08 and earlier years only proceedings that were pending could be completed by 31.3.2011 and as such no fresh proceedings could be commenced for the said period. (Paragraph 12.07 of the order). In the instant cases, we have held that the proceedings have become time barred prior to 01-04-2007 and hence no fresh proceedings could be commenced for the impugned years by virtue of the proviso to sec. 201(3) of the Act.

31. Accordingly we hold that the initiation of proceedings u/s 201(1) of the Act for the assessment years 2000-01 to 2004-05 is barred by limitation. Accordingly we quash the orders passed by the tax authorities for the above said years.

**ITA Nos. 4637/MUM/2013, 4638, 4639, 4633 & 4640/MUM/2012
(Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04 & 2004-05)**

32. The aforesaid cross appeals have been filed by the revenue against the appellate orders passed by the Ld. CIT(A) in assessee's appeals against the orders passed u/s 201(1) of the Act for the assessment years 2000-01 to 2004-05 by raising the following common grounds:-

1. (i) *"The Ld. CIT (A) has erred on facts and in law in not appreciating the correct nature of the expense incurred in respect of interconnect Usage Charge (IUC Charges) in substance and effect, are nature of fees for technical and professional services within the meaning of section 194J of the Income Tax Act, 1961.*
2. (ii) *The Ld. CIT (A) has erred on facts and in law in deleting the demand of Rs. 3,43,82,778/- without properly appreciating the factual and legal matrix of the case as clearly brought out by the Ld. A.O. in order u/s 201 (1) of the Income Tax Act, 1961.*
3. (iii) *The Ld. CIT (A) has erred on facts and in law in directing the A.O. to examine the issue pertaining to the payment of national roaming charges and inter connection charges in the light of Supreme Court decision in the case of CIT vs. Bharti Cellular Ltd as reported in 319 ITR 139, setting aside this issue in substance and in effect. As CIT (A) has no power to set aside an assessment, his decision in respect of settling aside of roaming charges and inter connection charges are erroneous in law and on facts and may be deleted and A.Os fining be upheld."*

33. Since we have held in the preceding paragraphs that the proceedings initiated by the ITO for assessment years 2000-01 to 2004-05 are barred by

limitation and accordingly quashed the orders, the above said appeals filed by the revenue are liable to be dismissed.

**ITA Nos. 5293, 5294, 5295, 5296 & 5297/MUM/2012
(Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04 & 2004-05)**

34. The aforesaid appeals have been filed by the revenue against the five separate orders all dated 11.05.2012 passed by the Ld. CIT(A) whereby the Ld. CIT(A) has directed the AO to re-compute the interest if any u/s 201(A) of the Act in terms of his order.

35. The revenue has raised the following effective grounds of appeal against the impugned orders passed by the Ld. CIT (A):-

1. *“The Ld. CIT (A) has erred on facts and in law in deleting the demand of Rs. 4,95,11,200/- without properly appreciating the factual and legal matrix of the case as clearly brought out by the A.O. in orders u/s 201 (1A) of the Income Tax Act, 1961.*
2. *The Ld. CIT (A) has erred on facts and in law and on the facts and circumstances of the case in issuing directions for recalculation of interest u/s 201 (1A) on the basis of order to give effect to his order in appeal no. CIT (A)/14/I.T. 719/TDS Rg. 3/11-12 dt. 27.4.2012 and thereby in substance and in effect in setting aside this issue pertaining to interest u/s 201 (1A) despite the fact that he is not competent in law to set aside an issue.*
3. *It is prayed that the matter may be restored back to the file of CIT (A) and he may be directed to specifically decide the issue afresh.*

36. Since we have held in the preceding paragraphs that the proceedings initiated by the ITO for assessment years 2000-01 to 2004-05 are barred by

limitation and accordingly quashed the orders, the above said appeals filed by the revenue are liable to be dismissed.

ITA No. 4808/MUM/2013 (Assessment Year: 2007-08)

37. The revenue has preferred this appeal against the order dated 30.03.2013 passed by the Ld. CIT(A) whereby the Ld. CIT(A) has quashed the order passed by the AO u/s 201(1)/201(1A) by holding the same as time barred. The revenue has raised following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

- (i) *“On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO u/s 201(1) (1A) by treating the same as time-barred on the grounds that the notice has been issued /proceedings initiated vide notice dated 18th March 2011 as the time limit for processings an order u/s 201 (1) of the Act is two years from the end of the F.Y. in which the TDS return was filed has already lapsed on 31-03-2010,, without appreciating the fact that that as per the provisions of section 201(3) of the Act, the order u/s 201 (1)/201 (1A) for a F.Y. commencing on or before the 1st day of April 2007 may be passed at any time on or before 31st day of March 2011.*
- (ii) *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO u/s 201 (1)/201 (1A) by treating the same as time-barred without appreciating the fact that as per Circular No. 5 of 2010 issued by the CBDT, it was clarified that the AO can complete the TDS proceedings for F.Y. beginning from A.Y. of 1st April 2007 and earlier years in which TDS proceedings are validly pending before the tax authorities.*

- (iii) *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO u/s 201 (1)/201 (1A) by treating the same as time-barred without appreciating the fact that in the instant case, the default is pending before the A.O. for the A.Y. 2007-08 which was filed on 15th June 2007, i.e. Proceedings are pending on or before 1st April 2009. The date of issue of notice for completing the TDS proceedings u/s 201 (1) shall not be taken into account for the reason that there is no time limit prescribed in the Act for issue of notice for TDS proceedings.*
- (iv) *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO u/s 201 (1)/201 (1A) by treating the same as time-barred without appreciating the fact that in the assessee's case, the default statement is pending before the AO for the A.Y. 2007-08 which was filed on 15-06-2007 i.e. proceedings are pending on or before 1st April 2009. The date of issue of notice for completing the TDS proceedings u/s 201 (1) shall not be taken into for the reason that there is no time limit prescribed in the Act for issue of notice for TDS proceedings.*
- (v) *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO and also erred in accepting the submission of the assessee that the payments were already made without appreciating the fact that the TDS payments claimed to have been made by the assessee are not reflecting in the system due to which the short payment and consequential interest are worked out in the system.*
- (vi) *On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in quashing/annulling the order passed by the AO without properly appreciating the factual and legal matrix brought out by the AO in the order u/s 201/201 (1A) of the IT Act.”*

38. The revenue has challenged the order passed by the Ld. CIT (A) on the ground that the Ld. CIT (A) has wrongly quashed the order passed by AO u/s 201 (1) /201 (1A) of the Act by treating the same as time barred. The Ld. DR submitted that as per the proviso to section 201 (3) of the Act, the AO was competent to pass order u/s 201 (1)/201 (1A) of the Act before 31st day of March, 2011 pertaining to financial year commencing on or before the first day of April 2007. Accordingly it was contended that the Ld. CIT(A) has wrongly quashed the order holding the proceedings as barred by limitation.

39. On the other hand, the Ld. counsel for the assessee relying on the order passed by the Ld. CIT (A) submitted that the Ld. CIT (A) has passed the said order in accordance with the provisions of law, therefore, there is no merit in the appeal of the revenue and the same is liable to be set aside.

40. We have perused the record in the light of the rival contentions. The sole issue raised by the revenue is that the Ld. CIT(A) has wrongly declared the order passed by the AO as void being barred by the limitation period. The Ld. CIT (A) has quashed the order passed by the AO holding as under:-

“4.2 I have considered the above submissions of the appellant as well as the facts of the case. I agree with the appellant that the impugned order passed by the AO is time-barred. In the Appellant’s case, the 201(1) proceeding with respect to short-deduction of taxes/non-deposit of taxes was initiated by the AO vide notice dated 18 March 2011. Hence, at the time of insertion of the provisions of section 201 (3) of the Act by Finance Act, 2009, no such proceedings were pending against the appellant. The proviso to section 201 (3) would therefore not apply.”

4.3 Section 201(3) prescribes that the limitation period for passing of orders under section 201 (1) shall be two years from the end of the Financial Year in which the statement of TDS is filed. In the case of the appellant, the impugned TDS statement was filed on 15.06.2007, i.e. in the Financial Year 2007-08, and hence the limitation expired on 31.03.2010. Since the impugned order has been passed on 26.03.2011, it is clearly time-barred and deserves to be annulled. I order accordingly.”

41. We notice that the Ld CIT(A) has interpreted the provisions of sec.201(3) and accordingly held that the proceedings are barred by limitation. However a careful perusal of the provisions of sec. 201(3) would show that the same would cover to an assessee who is considered to be in default on account of failure to deduct the whole or any part of tax. For the sake of convenience, we extract below the relevant provision at the cost of repetition:-

“No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of-

- (iii) Two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed.*
- (iv) Six years from the end of the financial year in which payment is made or credit is given, in any other case:*

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011”.

42. So the time limit prescribed in sec. 201(3) of the Act would apply to the cases, where there was failure to deduct the whole or any part of the tax, meaning thereby, the time limit prescribed in sec. 201(3) of the Act would not

apply to the cases of non-payment or failure to pay the whole or any part of the tax. The provisions of sec. 201(1) cover the case of non-deduction, non-payment or non-payment after deduction. The provisions of sec. 201(1) read as under:-

“201(1) Where any person, including the principal officer of a company,--

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer’

does not deduct or does not pay, or after so deducting fails to pay, the whole or any part of tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax;”

43. A perusal of the order passed u/s 201(1)/(1A) would show that the AO has raised demand for short deduction of tax as well as for non-payment of tax after its deduction. We notice that the ld CIT(A) has wrongly applied the provisions of sec. 201(3) for the case of non-payment of tax after its deduction. We notice that there is no discussion about the same. Hence, we are of the view that the issue relating to non-payment of tax after its deduction should be adjudicated afresh by Ld CIT(A) as the provisions of sec. 201(3) shall not apply to the same. Accordingly, while upholding the order of Ld CIT(A) for the issue relating to short deduction of tax at source, we restore the issue relating to non-payment of tax after its deduction to his file for adjudicating the same afresh after hearing the assessee.

44. In the result,

(a) appeals filed by the assessee for assessment years 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05 in respect of orders passed u/s 201(1) of the Act in ITA Nos.4511, 4512, 4513, 4514 & 4515/MUM/2012 are treated as allowed.

(b) The cross appeals filed by the revenue against appellate order passed in respect of orders passed u/s 201(1) in ITA Nos. 4637/MUM/2013, 4638, 4639, 4633, 4640/MUM/2012 are dismissed.

(c) The appeals filed by the revenue against the orders passed u/s 201 (1A) for the assessment years 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05 in ITA No. 5293, 5294, 5295, 5296 & 5297/MUM/2012 are dismissed.

(d) The appeal of the revenue for the assessment year 2007-08 is treated as partly allowed.

Order pronounced in the open court on 12th March, 2018.

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 12/03/2018

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-

ITA Nos. 4511, 4512, 4513, 4514, 4515, 5293, 5294, 5295, 5296, 5297/Mum/2012, 4637/Mum/2013, 4638, 4639, 4633, 4640/Mum/2012 & 4808/Mum/2013
Assessment Years: 2000-01, 2001-02, 2002-03, 2003-04, 2004-05 & 2007-08

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai