

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA Nos.807 & 808/PUN/2016
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

M/s. Idea Cellular Limited,
11/1, Sharda Centre,
Erandwane,
Pune – 411004

.... अपीलार्थी/Appellant

PAN: AAACB2100P

Vs.

The Dy. Commissioner of Income Tax (TDS)-1,
Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Ronak G. Doshi

Revenue by : Shri Rajeev Kumar

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| सुनवाई की तारीख / Date of Hearing : 07.05.2018 | घोषणा की तारीख / Date of Pronouncement: 14.05.2018 |
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by the assessee are against separate orders of CIT(A), Pune-10, both dated 29.01.2016 relating to assessment years 2012-13 and 2013-14 against respective orders passed under section 201(1)/201(1A) of the Income-tax Act, 1961 (in short 'the Act').

2. Both the appeals of assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.807/PUN/2016, relating to assessment year 2012-13 has raised the following grounds of appeal:-

GROUND NO.1: NON-DEDUCTION OF TAX AT SOURCE ("TDS") UNDER SECTION 194H OF THE ACT ON DISCOUNT ALLOWED TO THE PRE-PAID DISTRIBUTORS ("the Distributors"):

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order passed by the TDS Officer under section 201(1)/201(1A) of the Act by treating "discount" offered by the Appellant to the Distributors as "commission" and thereby treating the Appellant as an "assessee in default" under section 201(1) r w s 194H of the Act.*
2. *The Appellant most humbly prays that the discount allowed to the Distributors be held as not liable to TDS under section 194H of the Act as the relationship between the Appellant and its Distributors is on Principal-to-Principal basis and, thus, the demand raised in the impugned order in respect of the alleged failure to deduct tax under section 194H of the Act be deleted.*

WITHOUT PREJUDICE TO GROUND NO.I:
GROUND NO. II:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the observations of the TDS Officer by treating the Appellant as an "assessee in default" under section 201(1) of the Act, without appreciating that it is a settled legal position that, if TDS machinery fails, the Appellant cannot be treated as an "assessee in default" under section 201(1) of the Act.*
2. *The Ld. CIT(A) erred in not appreciating that -*
 - a. *Section 194H of the Act was never intended to apply to cases where a person is neither making any payment to another person nor crediting any sum to the account of another person nor can it imply that there is payment or credit.*
 - b. *It is impossible for the Appellant to determine the amount of income of the distributor on which tax ought to have been deducted and therefore the provisions of section 194H of the Act fail.*
3. *The Appellant thus prays that in the absence of any "payment or credit" to the distributors, the Appellant should not be treated as an "assessee in default" under section 201 r.w.s. 194H of the Act and consequently order passed by TDS Officer treating the Appellant as an "assessee-in-default" be held as bad-in-law and be set aside.*

WITHOUT PREJUDICE TO GROUND NO. I AND II:
GROUND NO. III:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that in the absence of any decision of the jurisdictional Tribunal and Hon'ble High Court it is imperative to follow the decision of the Hon'ble Delhi High Court rendered in appellant's own case for Delhi/ North Circles.*
2. *The Ld. CIT(A), while following the decision of 'non-jurisdictional' High Court, failed to appreciate and ought to have held that it is a settled legal position that in the absence of any decision of the jurisdictional Tribunal and High Court, where two view are possible on a particular issue and that High Courts of different jurisdictions have rendered divergent views, then it is imperative to follow the view which is favourable to the Appellant.*
3. *The Appellant thus prays that where two views are possible in respect of the issue of TDS applicability to discount to prepaid distributors, the view which is favorable to the Appellant should be adopted and accordingly the issue should be decided in favour of the Appellant.*

WITHOUT PREJUDICE TO ABOVE GROUNDS:
GROUND NO. IV: LEVY OF INTEREST UNDER SECTION 200(1A) OF THE ACT:

4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order of the TDS Officer in holding the Appellant as "assessee in default" under section 201(1) of the Act and thereby levying the interest under section 201(1A) of the Act.*
5. *The Appellant prays that the interest levied under section 201(1A) of the Act be deleted or be appropriately reduced.*

4. The learned Authorized Representative for the assessee at the outset pointed out that the issue raised in both the appeals is squarely covered by the order of Tribunal in assessee's own case in ITA Nos.1041, 1042 & 1953 to 1955/PUN/2013, relating to assessment years 2007-08 to 2011-12 and ITA Nos.1867 to 1870/PUN/2014, relating to assessment years 2007-08 to 2010-11, order dated 04.01.2017. He further pointed out that the Assessing Officer giving effect to the order of Tribunal has determined the demand under section 201(1) and interest payable under section 201(1A) of the Act at Nil. The learned Authorized Representative for the assessee further pointed out that the issue stands covered in assessee's favour by the Hon'ble High Court of Karnataka in Bharti Airtel Vs. DCIT reported in 372 ITR 33 (Kar) and by the Hon'ble High Court of Rajasthan in

assessee's own case in ITA Nos.90/2018 and 92/2018 vide judgment dated 12.04.2018. He also placed on record list of decisions of various Benches of Tribunal in which the issue has been decided in favour of assessee.

5. The learned Departmental Representative for the Revenue on the other hand, relied on the orders of authorities below. He further placed reliance on the ratio laid down by the Hon'ble High Court of Delhi in the case of Idea Cellular Ltd. vide decision dated 19.02.2010.

6. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the assessee was engaged in the business of providing GSM based mobile telephony services in Maharashtra and Goa circles. Survey under section 133A of the Act was conducted on 23.04.2008 for verification of compliance of TDS provisions for financial years 2006-07 and 2007-08. Subsequently, order under section 201(1)/201(1A) of the Act was passed for assessment years 2007-08 and 2008-09 on 24.03.2011 on the issue of non deduction of tax at source under section 194H of the Act on discount to pre-paid distributors. Later on, the proceedings for assessment years 2009-10 to 2012-13 were picked up for verification and orders were passed for non deduction of tax under section 194H of the Act. The Assessing Officer further notes that even for assessment year 2013-14, details were called for. For both the years under appeal i.e. assessment years 2012-13 and 2013-14, the Assessing Officer held the assessee to have defaulted in non deduction of tax at source under section 194H of the Act on discount to pre-paid distributors. The Assessing Officer relying on the ratio laid down by the Hon'ble High Court of Delhi in the case of Idea Cellular Ltd. (supra), held the assessee to be in default and raised the demand under section 201(1) and 201(1A)

of the Act at ₹ 10,06,05,528/- in assessment year 2012-13 and ₹ 10,76,02,180/- for assessment year 2013-14.

7. The CIT(A) confirmed the order of Assessing Officer, against which the assessee is in appeal.

8. We find that the Tribunal in assessee's own case relating to assessment years 2007-08 to 2011-12 (supra) vide order dated 04.01.2017 had decided the issue and had applied the ratio laid down by the Hon'ble High Court of Karnataka in the case of Bharti Airtel Vs. DCIT (supra) and held as under:-

"21. No decision of the jurisdictional High Court on this issue brought to our notice. Since the facts of the instant case are identical to the case before the Hon'ble Karnataka High Court, therefore, respectfully following the decision of Hon'ble Karnataka High Court, we hold that sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s.194H of the I.T. Act. However, the Hon'ble High Court while holding so has remitted the matter back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above in para 60 of the order, section 194H is not attracted. Therefore, in line of the above observation of the Hon'ble High Court we restore the matter to the file of the Assessing Officer for necessary verification. The grounds raised by the assessee are accordingly allowed for statistical purposes."

9. The Tribunal had remitted the matter back to the file of Assessing Officer to verify how the books were maintained and how sale price and the sale discount was treated and whether sale discount was reflected in the books of account. The Tribunal thus, held that if the accounts were not reflected as set out in para 60 of the Hon'ble High Court of Karnataka, the provisions of section 194H of the Act were not attracted.

10. The Assessing Officer giving effect to the order passed by the Tribunal dated 04.01.2017 has reduced the demand raised under section 201(1) of the Act and interest charged under section 201(1A) of the Act at Nil vide separate orders

passed for assessment years 2007-08 to 2011-12, separate orders dated 18.09.2017. The learned Authorized Representative for the assessee has filed copies of said orders on record. It may also be pointed out that the Hon'ble High Court of Rajasthan in CIT Vs. Idea Cellular Ltd. (supra) vide judgment dated 12.04.2018 has relied on earlier decision of the said Hon'ble High Court in assessee's own case in Income Tax Appeal No.96/2016 in CIT (TDS), Jaipur Vs. M/s. Idea Cellular Ltd. and held that no substantial question of law arises. The question of law which was framed in the appeal was whether the Tribunal was justified in holding that the assessee was liable to deduct TDS under section 194H of the Act as the relation between the assessee and distributor was that of Principal and Agent and whether the Tribunal had erred in law in deleting demand under section 201(1) of the Act for non deduction of tax under section 194H of the Act on commission payments to various distributors.

11. The issue arising before us is similar to the issue before the Pune Bench of Tribunal in assessee's own case in earlier years. Even the Assessing Officer while raising demand in the hands of assessee had relied on earlier orders passed in the case of assessee starting from assessment year 2006-07, which is consequent to survey operation carried out at the premises of assessee to check evasion of payment of TDS under section 194H of the Act. Since the issue is squarely covered by the order of Tribunal in assessee's own case and also by the Hon'ble High Court of Rajasthan again in assessee's own case and the Hon'ble High Court of Karnataka (supra), we find merit in the plea of assessee in this regard. Accordingly, we direct the Assessing Officer to follow the directions of Tribunal in earlier years and carry out verification exercise as mentioned in para 60 of the order of the Hon'ble High Court of Karnataka and applied by the Pune Bench of Tribunal in para 21. Accordingly, the issue is remitted back to the file of Assessing

Officer for carrying out the necessary verification. The grounds of appeal raised by the assessee are thus, allowed as indicated above.

12. In the result, both the appeals of assessee are allowed as indicated above.

Order pronounced on this 14th day of May, 2018.

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| Sd/- (D.KARUNAKARA RAO) | Sd/- (SUSHMA CHOWLA) |
| लेखा सदस्य / ACCOUNTANT MEMBER | न्यायिक सदस्य / JUDICIAL MEMBER |

पुणे / Pune; दिनांक Dated : 14th May, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A), Pune-10;
4. The CIT(TDS), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए"
/ DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune