

**आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक**  
**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK**  
**BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM**

**आयकर अपील सं./ITA No.03, 04, 307 & 308/CTK/2014**

(निर्धारण वर्ष / Assessment Years : 2009-10, 2010-11, 2011-12 & 2012-13)

Vodafone Spacetel Limited, Unit-41, E-52, Infocity, Chandrasekharapur, Chandaka Industrial Estate, Bhubaneswar- 751024	Vs.	ACIT (TDS), Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AABCE 2207 R</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Sparsh Bhargava, AR  
राजस्व की ओर से /Revenue by : Shri A.K.Mohapatra, CIT DR

सुनवाई की तारीख / Date of Hearing : **08/08/2017**

घोषणा की तारीख/Date of Pronouncement **11/08/2017**

**आदेश / O R D E R**

**Per Shri Pavan Kumar Gadale, JM:**

The assessee has filed these appeals against the different orders of CIT(A)-I, Bhubaneswar for the assessment years 2009-10, 2010-11, 2011-12 & 2012-13. Since the issues are common in all the appeals, therefore, they are clubbed together, heard and disposed off by this consolidated order. For the sake of convenience, we take up assessee's appeal i.e. ITA No.307/CTK/2014 for the assessment year 2011-12 and facts narrated therein.

2. Brief facts of the case are that the assessee company is in the business of providing telecommunication services in various parts of India. There was survey operation u/s.133A of the Act in the premises of the assessee on 29.9.2011 and revenue found violation of provisions of TDS

in non-deducting TDS in respect of payments dealt in the financial year and called for the various records to verify the deduction of TDS and charging of interest. The assessee company was called for submitting the reasons for non-deduction of TDS u/s.194J in respect of roaming charges and u/s.194H on account of discount extended to pre-paid cards to distributors. The AO was not satisfied with the explanations. The AO observed that the assessee offers services to its subscribers in both post paid and pre-paid categories, TDS has to be made on discount/commission paid u/s.194 of the Act, whereas in case of prepaid services, SIM cards or recharge vouchers are sold to the customers through network of distributors and agents who remit the sale proceeds back to the telecom companies after retaining a fixed amount which is commonly termed as discount in the common parlance.

3. The assessee company filed explanation in respect of pre-paid SIM cards, services and no commission is paid to the dealers and distributors but the AO was of the opinion that TDS has to be deducted in respect of prepaid SIM cards, therefore, issued show cause notice to the assessee. The assessee filed explanations in detail as referred by the AO in his order at pages 2 & 3, wherein the AO also dealt on the explanations filed on 26.2.2013 and various agreements entered into by the assessee with the distributors and finally the AO after considering the clauses of agreement came to the conclusion that the assessee cannot sale the products at the maximum subscription charges. The SIM cards cannot be sold on the MRP and also the relationship of the assessee with the

distributor is not of principal to principal basis. Ld. AO relied on the decision of Kolkata Bench of ITAT and other judicial decisions and discussed elaborately on the business operations of the assessee and came to the conclusion that the commission is paid for services rendered by the network of distributors and the terminology of discount as claimed by the distributor is nothing but the commission payment services rendered by the distributors, therefore, provisions of section 194H are applicable and considering the submission made by the assessee as on 26.2.2013 in respect of pre-paid SIM card, observed that the assessee has not deducted TDS and, therefore, calculated TDS at 10% under the provisions of Section 194H of the Act.

4. Similarly, the assessee has not deducted TDS on roaming charges, where there is a inter-connectivity charges in respect of roaming from one state to another in country. As per industry norms the inter-connectivity charges are paid and, provisions of Section 194J of the Act are applicable. The AO further observed at page 5 and dealt on the operating activity of the assessee and identified that services are utilised for connecting call. Therefore, the process of relaying STD call for which inter-connectivity charges are paid and roaming call for which roaming charges are paid are essentially the same since they make use of the network of other operator. However, while TDS is deducted by the telecom company on inter-connectivity charges, no TDS is being deducted by the telecom companies on roaming charges. The AO on perusal of the financial statements was of the opinion that the deduction

of TDS at 10% u/s.194J of the Act is mandatory and calculated TDS u/s.194J at Rs.2,27,70,748/- and u/s.194H at Rs.6,42,83,393/- and held the assessee as the assessee in default in respect of non-deduction of TDS u/s.194H&194J of the Act on payment of commission and fee for professional or technical services, and passed the order u/s.201(1)&201(1A) of the Act, dated 21.3.2013.

5. Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A). In the appellate proceedings Id. AR argued that the order passed by the AO is bad in law and TDS is not liable to be deducted on the discounts u/s.194H of the Act and further the provisions u/s.194J of the Act are not applicable on the roaming charges paid to the telecom operators, the AO was aware that the recipients have offered income in their income tax return and paid taxes, therefore no TDS need to be made u/s.201(1) of the Act and further the AO has not considered the CA certificate filed by the assessee which was obtained from the recipient telecom operations. The Id.CIT(A) considered the findings of the Id. AO and the grounds raised by the assessee and the submissions made by the assessee in the course of appellate proceedings, observed at page 2 & 5 of the order and found that the AO has jurisdiction and he has properly exercised his work over the non-deduction of TDS and dismissed the grounds of appeal of the assessee.

6. On the other disputed issue the assessee has filed an explanation on 16.5.2014 in respect of applicability of provisions of Section 194H of the Act. The CIT(A) has dealt elaborately in respect of discounts and

analysed the system of work between the telecom company and distributors at page 6 of his order and considered the submission made by the assessee. But on disputed issue the Id. CIT(A) has dealt at para 5 of the order where in relied on the earlier assessment year 2010-2011 and discussed on this issue and dismissed the ground of assessee and referred the assessee's own case in ITA No.0007/12-13, dated 8.10.2013 at para 5 page 7 to 12 of the order. The Id. CIT(A) observed the application of CBDT Circular in respect of provisions of tax deducted at source u/s.201(1)&201(1A) of the Act and dealt on the judicial decision of Hon'ble Supreme of Hindustan Coca Cola Beverage (P) Ltd. Vs. CIT, 293 ITR 226 and relied on the CBDT Circular and finally concluded that the assessee may not be declared as an assessee-in-default in respect of failure to deduct tax u/s.194H and u/s.194J of the Act. But in the instant case the fact of distributor offering the income is not clear and details of the recipient of commission is not available and Id. CIT(A) observed as under :-

*“However, in the instant case the appellant does not appear to have furnished any particulars or evidences regarding payment of taxes and filing of returns by the prepaid distributors for commission income u/s.194H and other telecom operators to whom roaming charges have been paid u/s.194J. the ACIT(TDS) is accordingly directed not to treat the appellant as assessee-in-default as per CBDT Instruction and decision of the Hon'ble Apex Court as mentioned above after satisfying himself that taxes have been paid by the recipients on the commission/roaming charges received before. The ACIT(TDS) is directed to obtain necessary details from the appellant and cause enquiries as may be necessary to satisfy himself that the said distributors in respect of commission receipts and other telecom operators in respect of roaming charges received have filed returns of income and paid taxes on such commission/roaming charges.”*

In respect of non-deduction of TDS u/s.194J of the Act, Id. CIT(A) relied on the judicial decisions referred at para 6.1 and decision of the coordinate bench of the in the case of Intel Tech India (P) Ltd., (2009) 32 SOT 227 (Bang.) wherein it was held that interest u/s.201(1A) of the Act has to be charged till the date on which the deductee files return of income discharging finally its tax liability, if any, and accordingly, the CIT(A) has directed the ACIT(TDS) to charge interest u/s.201(1A) of the Act till date of payment of taxes or till the date of filing of return by the recipient/payee and partly allowed the appeal of the assessee.

7. Aggrieved by the order of CIT(A), the assessee has filed an appeal before the Tribunal.

8. Ground No.1 is general in nature, therefore, no adjudication is required.

9. In regard to ground No.2, Id. AR submitted that the assessee is not liable for deduction u/s.194H of the Act on the discount paid to the distributors for pre-paid SIM cards and talktime and the CIT(A) has erred in confirming the addition on TDS and also not considering the fact that the relationship between the assessee and distributor of pre-paid SIM cards is on principal to principal basis and discount is allowed to the distributors. Further, Id. AR submitted his arguments relying on the judicial decisions on the provisions applicable to section 194H and distinguished that the Id. CIT(A) has not considered the facts of higher forum that similar issues are pending before the Hon'ble Supreme Court. Contra, Id. DR relied on the orders of CIT(A).

10. We have heard rival submissions, perused the material on record and judicial decisions. The sole substantive ground raised by the assessee that the provisions of Section 194H is not applicable whereas the Id. AR drew our attention to the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd., 372 ITR 33 (Karnataka), wherein similar issue it was held as under :-

*62. In the appeals before us, the assesseees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be an income payable by the assessee to the distributor. In other words the income accrued or belonging to the distributor should be in the hands of the assesseees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a subdistributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependant on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of*

*income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.*

**63.** *It was contended by the revenue that, in the event of the assessee deducting the amount and paying into the department, ultimately if the dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.*

**64.** *In the case of Vodafone Essar Cellular Ltd., (supra) it is necessary to look into the accounts before granting any relief to them as set out above. They have accounted the entire price of the prepaid card at Rs.100/- in their books of accounts and showing the discount of Rs.20/- to the dealer. Only if they are showing Rs.80/- as the sale price and not reflecting in their accounts a credit of Rs.20/- to the distributor, then there is no liability to deduct tax under Section 194H of the Act. This exercise has to be done by the assessing authority before granting any relief. The same exercise can be done even in respect of other assessee also.*

**65.** *In the light of the aforesaid discussions, we are of the view that the order passed by the authorities holding that Section 194H of the Act is attracted to the facts of the case is unsustainable. Therefore, the substantial question of law is answered in favour of the assessee and against the Revenue. Hence, we pass the following order:*

#### ORDER

1. Appeals are allowed.
2. The impugned orders passed by the authorities are hereby set aside.
3. The matter is remitted back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated

and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above, in para 60, Section 194H of the Act is not attracted.

Ordered accordingly.

Ld. DR has submitted that the issue has not attained finality as the decision of the same is pending before the Hon'ble Supreme Court. We considering the ratio of judicial decisions cited above and the provisions of Section 201(1) and applicability of Section 194H of the Act, the disputed issue has to be verified by the AO as the assessee has relied on the decisions and prima facie the AO has not made any findings in respect to the applicability of provisions of Section 194H of the Act. Accordingly, we remit the entire disputed issue to the file of AO for verification and examination of evidence in accordance with law and pass the orders after providing adequate opportunity of hearing to the assessee and ground of appeal of the assessee is allowed for statistical purposes.

11. Similarly, in respect of third ground, Id. AR submitted that the assessee is required to deduct TDS under the provisions of Section 194J of the Act on roaming charges paid to the telecom operators. Ld. AR submitted that the roaming facilities is standard automatic facility, which cannot be considered as a business for technical services and also there is no human intervention is involved and provisions of Section 194J shall not come into picture whereas Id. DR drew our attention to page 306 of the paper book and relied on the decision of Hon'ble Karnataka High Court in the case of Vodafone South Ltd., 72 taxmann.com 347, wherein the Hon'ble High Court held as under :-

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

We, considered the ratio of the decision of the Hon'ble Karnataka High Court and are of the opinion that the facts have to be verified with available evidence where there is human intervention in providing the services. Ld. DR submitted that the matter has not attained finality and prayed for dismissal of the ground. We have considered the apparent facts and material on record and the submissions of the assessee and found that the charges are not in the nature of technical services and also the AO has not given any finding in respect of human intervention is required in roaming services, therefore, in the interest of justice, we remit this issue to the file of AO for examination and verification and the AO shall provide adequate opportunity of hearing to the assessee and the assessee shall cooperate in submitting the information before passing of the order. This ground of assessee is allowed for statistical purposes.

12. The assessee has raised fourth ground relates to recovery of demand under section 201(1) of the Act.

13. Ld. AR of the assessee submitted that the onus to prove that deductees have paid taxes on their income had shifted to the TDS Officer

since the assessee had furnished requisite details in the form of name and Permanent Account Number and address of the distributors/roaming operators and also CA certificates furnished by such roaming operators, on a sample basis, wherein it has been confirmed that the roaming telecom partners have filed their return of income and roaming charges paid by the assessee to such operators have been offered to tax. On the other hand, Id. DR relied on the order of CIT(A).

14. We have heard rival contentions and perused the material on record. On perusal of the facts and submissions of the assessee and the provisions of law, we found that the assessee filed submissions in respect of distributors who have offered their income in their respective return of income and no liability is accrued to the assessee. We are of the considered opinion that the main disputed issue u/s.194H & 194J of the Act are remitted to the file of AO, therefore, we consider it appropriate to remit this issue to the file of AO for verification of evidences and afford adequate opportunity of hearing to the assessee and ground of appeal of the assessee is allowed for statistical purposes.

15. Thus, the appeal of the assessee is allowed for statistical purposes.

16. Similarly, the assessee has filed ITA No.308/CTK/2014 for the assessment year 2012-2013, wherein grounds No.1, 2, 3, 4 & 5 raised by the assessee are similar to the grounds raised in the assessment year 2011-2012, wherein we have dealt and discussed and remitted the disputed issue to the file of AO. Accordingly, these grounds raised by the assessee are remitted to the file of AO for further verification and

examination after providing adequate opportunity of hearing to the assessee and the assessee shall cooperate in submitting the information before passing of the order. These grounds of assessee are allowed for statistical purposes.

17. We take up the assessee's appeal i.e. ITA No.04/CTK/2014 for the assessment year 2010-11. The grounds raised in this appeal are similar to the assessment year 2011-2012 which we have decided and remitted the same to the file of AO for fresh verification. Accordingly, the grounds raised in this appeal, being similar to the appeal for assessment year 2011-2012, are remitted to the file of AO for verification after providing sufficient opportunity of being heard to the assessee and the assessee shall cooperate in submitting the information before passing of the order. We order accordingly. These grounds of the assessee are allowed for statistical purposes.

18. In the assessee appeal in ITA No.03/CTK/2014 for the assessment year 2009-10, the assessee company has raised ground No.1 relates to time barring of passing of the order by the ACIT(TDS) and the remaining grounds i.e. ground Nos.2, 3,4, 5 & 6 are similar grounds raised by the assessee for the assessment year 2011-2012 in ITA No.307/CTK/2014, which we have decided and applying the ratio of decision, we remit these grounds to the file of AO for fresh verification and the AO shall provide sufficient opportunity of being heard to the assessee and the assessee shall cooperate in submitting the information before passing of the order.

We order accordingly. These grounds of the assessee are allowed for statistical purposes.

19. In regard to ground No.1, Id. AR submitted that the AO has passed the order beyond the limitation period specified u/s.201(3) and held the assessee as assessee-in-default for non-deduction of TDS. The Id. AR submitted that the assessee has filed TDS return for financial year 2008-09 as referred at page 3, where the AO considered the written submissions of the assessee and discussed regarding the time limit for passing the order u/s.201(1)/201(1A) of the Act whereas in the appellate proceedings, Id. CIT(A) has considered the submissions of the assessee of the impugned order passed beyond the time limit. The fact that the assessee has been revising TDS returns many time and the last return was filed on 21.07.2011. Therefore, order u/s.201(3) of the Act can be passed when each statement was filed. Since the revised return of TDS was filed in the said financial year and the order was passed by the AO u/s.201(1) of the Act within the time limit the Id. CIT(A) has dismissed this ground.

20. Before us, Id. AR submitted that there are amendments to the provisions of section 201(3) of the Act and various statements and evidences should be considered by the AO before passing the order and prayed for an opportunity to represent the case before the AO on the question of limitation and Ld. DR has objected to the prayer of the Id. AR and relied on the order of CIT(A).

21. We heard the rival submissions on the disputed issue and perused the material available on record. Prima facie, the contention of Id. AR that the order passed by the AO is beyond the limitation and the Id. AO has not considered the submissions and amendments and prayed for an opportunity to represent before the Assessing Authority. Accordingly, since the other grounds are remitted to the file of the AO, we in the interest of justice, remit this disputed matter also to the file of AO and Id. AO shall consider the submission of the assessee and decide the case on merits and assessee shall be provided opportunity of being heard before passing the order and this ground of appeal of the assessee is allowed for statistical purposes.

22. In the result, ITA No.307/CTK/2014, ITA No.308/CTK/2014, ITA No.03/CTK/2014 & ITA No.04/CTK/2014 filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on this 11/08/2017.

**Sd/-**  
**(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(PAVAN KUMAR GADALE)**

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 11/08/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार / BY ORDER,

*ITA Nos.03 &04/14  
And ITA Nos.307 & 308/14*

**(Senior Private Secretary)**

आयकर अपीलुय अधलकरण, कटक / ITAT, Cuttack