

## IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'B' KOLKATA

[Before Hon'ble Shri S.S.Godara, JM &amp; Dr.A.L.Saini, AM ]

**ITA Nos.1202& 1203/Kol/2016**

Assessment Years : 2010-11 &amp; 2011-12

M/s Idea Cellular Ltd.  
Kolkata  
(PAN: AAACB2100P)  
(Appellant)

-versus-

A.C.I.T. (TDS)-58  
Kolkata

(Respondent)

**ITA Nos.1300& 1301/Kol/2016**

Assessment Years : 2010-11 &amp; 2011-12

A.C.I.T., Circle-2 (TDS)  
Kolkata

-versus-

M/s Idea Cellular Ltd.  
Kolkata  
(PAN: AAACB2100P)

For the Assessee : Shri R.S.Desai, FCA

For the Department : Shri G.Hangshing, CIT, DR

Date of Hearing : 31.07.2018.

Date of Pronouncement : 24.08.2018.

**ORDER****PER S.S.GODARA, JM:**

The assessee and Revenue have filed their instant two cross appeals each ITA No.1202& 1300/Kol/2016 for A.Y.2010-11 and ITA NO.1203 & 1301/KKOl/2016 for A.Y.2011-12 against the CIT(A)-24, Kolkata's common order dated 17.03.20-16 passed in Appeal No.1534,882 & 1275/CIT(A)-24/Kol/2012-13 & 2013-14; respectively involving proceedings u/s 201(1)/201(1A) of the Income Tax Act, 1961 (the 'Act').

Heard both the parties. Case file perused.

2. We advert to the assessee's appeals first. Its main substantive ground raised in two assessment years pleads that both the lower authorities have erred in law as well as on facts in treating its discount offered to its distributors as commission thereby terming it as an assessee in default u/s 201(1) r.w.s. 194H of the Act. The CIT(A)'s findings to this effect read as under :-

“4. The grounds No. I, II, III & IV in respect of Appeal Nos. 1534 & 882 and Grounds Nos. II, III, V & VI in respect of Appeal No.1275 are common in nature in all the three appeals. They are , therefore, decided together as under.

5. The appellant is a Cellular/Mobile Telephone Service Provider and has engaged distributors for collection of various charges from its ultimate customers, who are the users of its various services. Instead of directly paying these distributors, there is a system of collection in which margins are left for the distributors. These margins being the difference in the price paid to the appellant and that collected from the customers are the gross revenue in the hands of the distributors. The A.O.'s case is that the appellant service provider is a principal having engaged distributors as. its agents and in return for the said service the above said difference is being allowed by the appellant to the distributors. The A.O., therefore, has held the appellant liable for deduction of tax at source on commissions/discounts allowed to the said distributors in the above said manner. As the A.O. held it liable for TDS and the appellant did not deduct TDS, the liability u/s.201(1) , in respect of tax ought to have been deducted but not deducted by the appellant ,was raised by the A.O. The grounds of appeal raised in effect challenges the A.O.'S above said case. The plea taken by the appellant is that the distributors are not its agents, that the distributors are not being paid commissions by the appellant and that tile distributors are acting as independent business partners. The appellant has relied on various judicial decisions on the point of above said liability determined by the A.O.

5.1. The issue is covered in favour of Revenue by the following decisions of the High Courts:-

- a) Vodafone Essar Cellular V. ACIT (2010) 7 Taxman (Ker).
- b) Bharati Cellular Ltd. V. ACIT(2013) 354 ITR507 (CaL)(HC)

5.2 Though conflicting decisions are there on the issue I am following the above decisions of the Hon'ble High Court of Calcutta and of Kerala as these two decisions according to me correctly define the relations between the appellant and its distributors and the payments involved. According to the above decision of the Kerala High Court, the discounts given to the distributors at the time of sale of SIM Card or Recharge coupons is nothing but commission on which tax is deductible -. The test to be applied has been held as one to see whether or not assessee appellant has made any payment and whether it was for services rendered by the payee to the assessee deductor. The jurisdictional High Court of Calcutta has held the views to the following effect :-

- 1)the property in the scilfer pack and pre-paid coupons even after transfer and delivery to the franchises remained with the assessee;
- 2) the franchises really acted as a facilitator or instrumentality of providing services by the assessee to the ultimate subscriber;

3) the franchises had no free choice to sell it and everything was being . regulated and guided by the assessee, and

4)the rate at which the franchises sold to retailers and that's at which the assessee sold to the franchises, was also regulated and fixed by the assessee.

It was thus held that there was indirect payment to the franchisees of the commission and the commission would be liable to tax deduction at source.

Whatever the effect of the terms of agreement, the appellant is a principal exercising overall control on the business, various schemes and products and services, reducing the distributors or franchisees to agents. In effect the distributors or the franchises have thus been held liable as agent and there is indirect payment. I, therefore, agree with the A.O.'s view that the discount or commission is hit by. section 194H and thus the appellant is liable to the provision of TDS. This ground, therefore, is not allowed.

6. The second issue is that. the A,O. should have ascertained whether the recipient assessee or distributors failed to pay tax directly and in case the recipient thus paid, the appellant's plea is that the deductor cannot be treated as assessee in default. The appellant has relied on the case of DCIT vis Jagaran Prakashan Ltd. (2012) Allahabad High Court [345 ITR 288]. This plea was also taken before the A.D. in the course of determination of the liability u/s.201, who rejected it on the ground that the appellant did not comply with all the provisions of TDS and did not furnish any evidence that the tax was already paid by the deductees. The' appellant has also relied on the decision of Hon'ble Lucknow Tribunal in the case of ICICI Bank [36 taxmann.com 433]. The extract of the submission on the point as in para-4 dated 24.12.2015 is reproduced as under:-

*"4. . The decision of Hon 'ble Lucknow Tribunal in the case of ICICI Bank Ltd. Vs. Deputy CIT (36 taxmann.com 433) (Refer page no.51 to 55 of LPB which has after following the decision of Jagran Prakashan Ltd. (supra), categorically held as under :*

*» The onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, ands it is only when the primary liability is snot discharged that vicarious recovery liability can be invoked*

*> Once all the details of the person to whom payments have been made are on record, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income-tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld.*

*> As a result of the judgment of Hon 'ble Allahabad High Court in Jagran Prakashan Ltd. case, there is a paradigm shift in the manner in which recovery provisions u/s.201 (1) can be invoked.*

» *As observed by Their Lordships, the provisions of section 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly".*

» *Once this finding about the non-payment of taxes by the recipient is held to a condition precedent to invoking section 201 (1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all the information about the recipient as he is obliged to maintain under the law, once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income"*

6.1 In my view, in view of various judicial decisions on the point, it is not correct to collect the tax twice - ones from the deductee and then from the deductor. The A.O should have examined whether the distributors included the commission in its income chargeable to tax and offered it in the return. Only in cases of failure to pay taxes on the part of the deductees the A.O. can resort to the collection mechanism of section 201 of the I.T. Act. 1, therefore, direct the A.O. to verify the payment of taxes by the distributors of the appellant and restrict the liability u/s.201(1) of the I.T. Act only to the amount of tax not deducted by the appellant and not paid by the deductee distributors. The ground relating to this issue is accordingly treated as allowed, for statistical purposes but subject to the finding of the above direction.”

3. It transpires during the course of hearing that we have already upheld the CIT(A)'s identical findings in A.Y.2012-13 involving assessee's appeal itself ITA No.1204/Kol/2016 decided on 31.05.2018 confirming the demand in question raised u/s 201(1) of the Act. Learned Authorised Representative seeks to carve out a distinction in the impugned assessment year. He places reliance upon the assessee's agreements clauses with its distributors concerned. It is submitted that the relevant discount coupons had been issued on principal to principal basis without involving any agency relationship. We find no merit in the instant argument since the above coordinate bench has declined the very plea in A.Y.2012-13. Suffice to say, hon'ble jurisdictional high court's decision in Bharati Cellular Ltd (supra) has already adjudicated the very substantial question of law in Revenue's favour. We therefore see no justification to adopt a different approach in the impugned assessment years. The assessee's instant substantive grievance as well as its main appeals ITA No.1202&1203/Kol/2016 are declined.

4. Next come the Revenue's cross appeals ITA Nos.1300 & 1301/Kol/2016. Its grievance raised in the instant appeals is that the CIT(A) has erred in law and on facts in deleting the corresponding addition of Rs.1,21,81,991/- and Rs.2,85,89,546/- in the nature of TDS deductible u/s 194H of the Act @ 10.3% of the discount price of Rs.11,82,71,758/- and Rs.2,85,89,546/- (assessment yearwise), coming to Rs.1,21,81,991/- in former and Rs.2,85,89,546/- in latter assessment year; respectively. The Revenue's grievance therefore appears to be directed against the CIT(A)'s action in restoring the issue back to the Assessing Officer for factual verification as to whether the recipients concerned have included the corresponding commission income in their respective returns or not. The said directions are evident from para 6.1 of the lower appellate findings extracted in the preceding paragraphs. Suffice to say, various judicial precedents including hon'ble Allahabad high court decision in Jagran Pvt. Ltd. (supra) have made it clear that section 201(1) proceedings are in the nature of TDS recovery mechanism which do not come into operation in case the recipients concerned already stand assessed to tax. The assessee has already sought to place on record its distributors' income tax returns having included the corresponding commission income in paper book. The CIT(A) has therefore restored the issue back to the Assessing Officer for necessary factual verification to this effect. We conclude that the Revenue's instant identical grievance has no substance in the given facts and circumstances as well as per our earlier order (supra). These two Revenue's appeals ITA No.1300&1301/Kol/2016 fail accordingly.

5. All these four appeals are dismissed.

**Order pronounced in the Court on 24/08/2018.**

Sd/-  
[Dr.A.L.Saini ]  
Accountant Member

Sd/-  
[ S.S.Godara ]  
Judicial Member

Dated : 24/08/2018.

[RG Sr.PS]

Copy of the order forwarded to:

1.M/s Idea Cellular Limited, Srijan Tech Pak, 7<sup>th</sup> Floor, DN-52, Sector-V, Salt Lake City, Kolkata-700091.

2. A.C.I.T. (TDS)-58, Kolkata.

3. C.I.T.(A)-24, Kolkata      4. C.I.T-(TDS), Kolkata

5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary  
Head of Office/D.D.O, ITAT Kolkata Benches