

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

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5612/Mum/2018
Assessment Year: 2000-01**

&

**ITA No. 5613/Mum/2018
Assessment Year: 2001-02**

&

**ITA No. 5614/Mum/2018
Assessment Year: 2002-03**

The Dy. CIT(TDS)-2(3),
Mumbai, Smt. K.G. Mittal
Ayarvedic Hospital, Bldg,
Room No. 718 Charni
Road (West), Mumbai-
400002.

M/s Vodafone India Ltd.
Vs. (formerly known as
Vodafone Essar Ltd.),
Peninsula Corporate Park,
Ganpatao Kadam Marg,
Lower Parel, Mumbai-
400021.

PAN:AAACH5332B

Appellant

Respondent

Revenue by : Mr. Sushil Kumar Poddar, DR
Assessee by : Mr. Deepak Chopra, AR

Date of Hearing : 12/09/2019
Date of pronouncement : 18/09/2019

ORDER

PER BENCH

The captioned appeals filed by the Revenue are directed against the order dated 31.07.2018 passed by the Commissioner of Income Tax (Appeals)-60 [hereinafter 'CIT(A)'] and arise out of order u/s

201(1)/201(1A) of the Income Tax Act 1961, (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience. Facts being identical, we begin with the assessment year (AY) 2000-01.

2. One of the grounds raised by the Revenue in this appeal is against the order of the CIT(A) quashing/annulling the order passed by the Income Tax Officer (OSD) (TDS)-3(1), Mumbai (in short the 'AO') u/s 201(1)/(1A) r.w.s. 250 by treating the same as time barred.

3. Briefly stated, the facts are that a survey u/s 133A was conducted in the premises of the assessee on 25.02.2004. Subsequently, on 03.03.2011, the AO requested the assessee to provide an explanation as to why no tax is deductible u/s 194J in respect of payments made towards Inter-Connection Usage Charges (IUC) as being in the nature of fees for technical services. In response to it, the assessee *vide* letter dated 22.03.2011 filed a reply before the AO stating that the notice dated 02.12.2010 was barred by limitation and consequently, the proceedings are ex-jurisdictional and unsustainable in law. Without prejudice to the above, the assessee filed a detailed submission on non-applicability of TDS on IUC u/s 194J and non-recovery of the taxes from the assessee as the payees would have already paid taxes on the income earned from the assessee. Thereafter, the AO passed an order dated 24.03.2011 raising a demand u/s 201(1)/(1A) for non-deduction of taxes on IUC.

Aggrieved by the order of the AO, the assessee filed an appeal before the CIT(A), challenging the legal validity of the order as being

barred by limitation and applicability of the withholding tax provisions u/s 194J to IUC payments.

The said appeal filed by the assessee was disposed off by the CIT(A) vide an order dated 27.04.2012 rejecting its plea on the order passed u/s 201(1) being barred by limitation and remanding the matter to the file of the AO for verifying with the help of a technical expert as to whether human intervention is involved in the provision of inter-connect facility in the light of the decision in *CIT v. Bharati Cellular Ltd.* 193 Taxman 97 (SC).

Aggrieved by the order of the CIT(A), the assessee filed an appeal before the Tribunal on 04.07.2012 primarily challenging the validity of the order passed u/s 201(1)/(1A) of the Act.

In the meantime, the AO passed an order dated 26.03.2013 u/s 201(1)/(1A) r.w.s. 250 of the Act holding that IUC is in the nature of technical services since there exists human intervention and hence liable for TDS u/s 194J of the Act.

The present appeal is concerned with the appeal effect order dated 26.03.2013 passed by the AO.

4. In appeal filed by the assessee, the Ld. CIT(A) followed the order of the Tribunal in assessee's own case for the impugned assessment year and allowed the appeal by observing as under :

"In light of the above order of the Hon'ble Tribunal, considering that the original order passed under section 201(1)/(1A) of the Act is itself invalid, the appeal effect order passed by the TDS officer on 26 March 2013 for the subject

AY has no legs to stand on and hence, the subject appeals preferred against the said appeal effect orders have also become infructuous.

Before parting, I must put in record that, since I have decided the appeal on the issue of limitation, I have consciously restrained myself from touching upon the merits of the issue regarding applicability of sec '194J' which is left open to be decided. If it arises, in case the revenue challenges the order of the Hon'ble Tribunal and/ or the matter be revived by a higher authority in future, the subject appeals would consequently, automatically stand revived and would require to be adjudicated accordingly.”

5. Before us, the Ld. Departmental Representative (DR) submits that some more time may be given to him to verify the details from the concerned AO.

On the other hand, the Ld. counsel for the assessee submits that the above issue has been decided by the order dated 12.03.2018 by ITAT 'F' Bench, Mumbai in favour of the assessee for the impugned assessment year and the same may be followed.

6. We have heard the rival submissions and perused the relevant materials on record. The above issue arose before the ITAT 'F' Bench, Mumbai in assessee's own case (ITA No. 4511, 4512, 4513, 4514 & 4515/Mum/2012 for AYs 2000-01, 2001-02, 2002-03, 2003-04 & 2004-05). The Tribunal *vide* order dated 12.03.2018 held as under :

“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 has 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.”

7. As the above matter has already been decided by the Co-ordinate Bench, we follow it and uphold the order of the Ld. CIT(A).

Facts being identical, our above decision for AY 2000-01 applies *mutatis mutandis* to AYs 2001-02 & 2002-03.

8. In the result, the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 18/09/2019.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai; Dated: 18/09/2019
Rahul Sharma Sr. PS

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai