

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I-2' BENCH  
MUMBAI**

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER  
&  
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.2350/Mum/2018  
(Assessment Year :2009-10)**

M/s. Vodafone Idea Ltd (formerly known as Idea Cellular Limited) 10 <sup>th</sup> Floor, Birla Centurian Century Mills Compound Pandurang Budhkar Marg Worli, Mumbai-400 030	Vs.	Assistant Commissioner of Income Tax HQ(Judl) to CIT-14, Mumbai Room No.461/432, 4 <sup>th</sup> Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020
<b>PAN/GIR No.AAACB2100P</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

**ITA No.3147/Mum/2018  
(Assessment Year :2009-10)**

DCIT-14(2)(1) Mumbai Room No.432, 4 <sup>th</sup> Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Vodafone Idea Ltd (formerly known as Idea Cellular Limited) 5 <sup>th</sup> Floor, Windsor, Off. C.S.T Road, Kalina, Santacruz Mumbai-400 098
<b>PAN/GIR No.AAACB2100P</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri J.D. Mistry & Ms. Manshi Padhiar
Revenue by	Shri T. Sankar
<b>Date of Hearing</b>	<b>09/02/2023</b>
<b>Date of Pronouncement</b>	<b>31/03/2023</b>

## **आदेश / ORDER**

### **PER M. BALAGANESH (A.M.):**

These cross appeals in ITA No. 2350/Mum/2018 & 3147/Mum/2018 for A.Y.2009-10 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal No.CIT(A)22/IT/242/Mum/2015-16 dated 08/02/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 'Nil' by the Id. Asst. Commissioner of Income Tax (HQ) (Judl) to the CIT-14, Mumbai (hereinafter referred to as Id. AO).

2. The ground No.I raised by the assessee is challenging the validity of re-assessment proceedings u/s.147 of the Act. The other grounds raised by the assessee are challenging the various additions/ disallowances made by the Id. AO.

3. We have heard rival submissions and perused the materials available on record. The return of income for the A.Y.2009-10 was filed by the assessee company on 26/09/2009 declaring Rs.'Nil' as total income after set off of unabsorbed depreciation of Rs.33,06,29,157/-. The assessee filed revised return on 01/04/2010 declaring total income of Rs.'Nil' wherein the figure of brought forwarding unabsorbed depreciation was changed to Rs.125,51,17,160/- on account of demerged of the tower business during the year. This return was again revised on 30/03/2011 by challenging the figure of brought forward unabsorbed depreciation of Rs.234,59,26,810/- the assessment was completed u/s.143(3) of the Act on 29/12/2011 determining total income of Rs.261,27,32,035/- under the

normal provisions of the Act and book profit of Rs.1114,86,97,454/- u/s.115JB of the Act.

3.1. The original assessment completed u/s.143(3) was sought to be reopened u/s.147 of the Act after recording reasons to believe that income of the assessee had escaped assessment. Accordingly, notice u/s.148 of the Act was issued on 28/03/2014 and served on the assessee.

3.2. This is a case of reopening of assessment made within four years from the end of the relevant assessment year in which the assessment was framed. The reasons recorded by the Id. AO for reopening the assessment are as under:-

*(1) From a perusal of records, it is noticed that the assessee has paid non-compete fees of Rs.5439.75 million to Mcorpglobal Communications Pvt. Ltd. (MCPL) and has claimed the same as a deduction in the computation of income. This capital expenditure remained to be disallowed in the assessment u/s.143(3) completed on 29.12.2011 Non-compete fee, being a capital expenditure, is not allowable as a deduction. The Hon'ble Delhi High Court in the case of Sharp Business System Vs. CTT-III (2012) 27 Taxmann.com 50 (Delhi) held that a company cannot use non-compete fee to lower its tax outgo. Therefore, I have reason to believe that on account of wrong claim of deduction on account of non-compete fee of Rs.5439.75 million paid by the assessee, income chargeable to tax amounting to Rs.5439.75 million has escaped assessment as envisaged in Section 147 of the I.T. Act, 1961.*

*(ii) From a perusal of para 4 of the assessment order dated 29.12.2011, it is found that an amount of Rs.14,47,37,034/- debited in the P&L Account as Employees Stock Scheme has been disallowed as being a contingent liability. But the same has not been added to the book profit u/s.115JB. Thus, I have reason to believe that as the amount of Rs.14,47,37,034/- remained to be added to the book profit, though disallowed as a contingent liability, the Income of Rs.14,47,37,034/- has escaped assessment.*

*(iii) Due to demerger, assets relating to passive infrastructure, were transferred to ICTIL which formed 13.98% of total assets. Thus, only 86.02% assets remained balance with the assessee. However, the assessee has claimed set off of 100% of the unabsorbed depreciation instead of 86.02% only. Therefore, I have reason to believe that due to excess claim of depreciation on assets transferred, income amounting to 13.98% of the value of the has escaped assessment.*

*(iv) The assessee has claimed deduction u/s 35ABB in respect of fixed license fees which included amortized cost in respect of fixed license fees North East of 684.59 crores paid for circles viz, West Bengal, J&K, Orissa, Assam, Kolkata, Karnataka, Punjab and Tamilnadu, which admittedly had yet not commenced operations. The deduction on the license fees of these circles is not allowable. The assessee had itself not claimed deduction on these in AY 2008-09 on the ground that the operations had not commenced. Therefore, I have reason to believe that due to claim of deduction on these license fees, income amounting to the deduction claimed, has escaped assessment*

*(v) The assessee transferred the Passive Infrastructure Assets (PIAs) amounting to Rs.1622,77,60,000/- to Idea Cellular Tower Infrastructure Ltd. ITCIL, a 100% subsidiary of M/s. Aditya Birla Telecom Ltd. (ABTL) who in turn is 100% subsidiary of the assessee Idea Cellular Ltd) through Demerger at Nil consideration with an appointed date of 01.01.2009. Subsequently, ICTIL amalgamated in Indus Towers Ltd. (Indus), resulting into transfer of PIAs amounting to Rs.1622,77,60,000/- to Indus. Thus, the PIAs of the assessee, having a book value of Rs. 1622,77,60,000/- as on 31.12.2008, stood transferred to Indus without payment of any taxes. This business arrangement is a colourable device through which PIA having book value of Rs.1622,77,60,000/- have been transferred out of the block of assets of the assessee at Nil consideration and without payment of due taxes. In view of this there is reason to believe that the colourable device created through a scheme of De-merger and Amalgamation is only for tax evasion and no taxes on these transactions have been paid. The Balance Sheet of ABTL indicates that the investment in Indus, have increased from Rs.1,90,000/- as on 31.03.2009 to Rs.7330,75,56,000/- as on 31.03.2010 as ABTL fair valued its investment in Indus. Since the assessee is a holding company of ABTL, therefore, this increase in fair valuation of Indus is due to the transfer of PIAs from Idea Cellular Ltd. to Indus. The fair valuation of ABTL's investments in Indus has increased by Rs.7330,75,56,000/- as a result of receipt of PIAs of Idea Cellular Ltd. by Indus Therefore, this increase in fair valuation of investment in Indus of Rs.7330,75,56,000/- is, effectively the fair market value of PIAs of Idea Cellular Ltd. which were transferred at book value at Rs. 1622,77,60,000/- through a scheme of De-merger and subsequent Amalgamation. Therefore, I have reason to believe that the difference of Rs.5707,97,96,000/- (Rs.7330,75,56,000 - Rs.1622,77,60,000) is the value of benefit received by Idea Cellular Ltd. from business which has escaped assessment due to failure on the part of the assessee to disclose all material facts at the time assessment u/s 143(3) and is required to be taxed u/s 28(iv) of the I.T. Act.*

*In view of the above I have reason to believe that income chargeable to tax for the AY 2009-10 has escaped income due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.*

3.3. From the perusal of the aforesaid reasons in point (i) to (iv) supra, it was submitted by the Id. DR that these were pursuant to audit objections

raised by the Revenue audit party which was accepted by the Id. AO. Hence, the reopening of assessment was made. The Id. DR in support of this contention also placed reliance on the decision of the *Hon'ble Supreme Court in the case of PVS Beedies Pvt Ltd reported in 237 ITR 13(SC)*.

4. The Id. AR before us stated that in respect of issue in point No.(iii) mentioned in the reasons above, the Id. CIT(A) had granted relief to the assessee ultimately, against which the Revenue has not preferred any appeal before this Tribunal. Hence, the matter had attained finality in favour of the assessee. The Id. AR vehemently argued that once an issue for which reopening was made by the Id. AO stated subsequently decided in favour of the assessee, the formation of belief of the Id. AO that income of the assessee had escaped assessment fails. In the instant case we find that admittedly, the addition made by the Id. AO with respect to issue in point No. (iii) above had been deleted by the Id. CIT(A). It is admitted that there is no appeal preferred by the Revenue on this issue before the Tribunal. This goes to prove that the Id. AO could not have validly formed a belief that income of the assessee had escaped assessment. Hence, reopening proceedings initiated u/s.147 of the Act on this issue becomes bad in law.

5. With regard to issue in respect of point No. (i) recorded in the reasons above, the same represents non-compete fee paid in the sum of Rs.5439.75 million to MCorp Global Communications Pvt. Ltd. (MCPL) by the assessee which was claimed as deduction in the computation of income. This was allowed by the Id. AO as revenue expenses while completing the original assessment u/s.143(3) of the Act. In fact, the assessee had shown this as a separate line item in the main profit and

loss account which is enclosed in page 17 of the paper book and had also disclosed that the same is withdrawn from Securities Premium Account. Though this expenditure was debited to Securities Premium account in the books of accounts of the assessee, the same was claimed as deduction by the assessee in the return of income. We also find that assessee had given a detailed note in this regard in Note No.5 forming part of financial statements explaining the entire modus operandi adopted by it and also stating that the non-compete fee debited to Securities Premium account in the books is part of the Scheme of Arrangement which has been approved by the Hon'ble High Court of Gujarat.

5.1. Further, we find that the Id. AO during the course of original scrutiny assessment proceedings had issued a letter dated 12/07/2011 to the assessee specifically asking about the accounting treatment given for non-compete fee together with the copy of the order of the Hon'ble Gujarat High Court approving the merger vide Question No.9 thereon. We find that the assessee had duly replied to the same vide letter dated 03/11/2011 before the Id. AO. Further, the assessee had also given detailed explanation before the Id. AO vide letter dated 15/12/2011 about the claim of deduction made u/s.37(1) of the Act in respect of non-compete fee paid to MCorp Global Communications Pvt. Ltd in the sum of Rs.5439.75 million together with supporting decisions of the Hon'ble Delhi High Court and Mumbai Tribunal. The assessee on, without prejudice basis, also submitted that in any case, the said non-compete fee would either be eligible for grant of depreciation or would be eligible for amortization over a period of three years. The assessee had also submitted the non-compete fee agreement before the Id. AO in the original scrutiny assessment proceedings.

5.2. The Id. AO on considering the aforesaid submissions together with the necessary documents submitted by the assessee along with various evidences had framed the assessment u/s.143(3) of the Act 29/12/2011 by accepting the plea of the assessee that the said non-compete fee would be eligible for deduction u/s. 37(1) of the Act. Even though no discussions had been made by the Id. AO in the assessment order framed u/s.143(3) of the Act, it is a fact that all the details that are relevant for adjudication on the allowability of non-compete fees were duly placed on record by the assessee before the Id. AO in the original scrutiny assessment proceedings itself. In the instant case, the reasons recorded by the Id. AO in respect of this issue is only on the aspect that the said sum of non-compete fee would be a capital expenditure, not allowable as deduction, by placing reliance on the decision of the *Hon'ble Delhi High Court in the case of Sharp Business System vs. CIT reported in 27 taxmann.com 50 (Del HC)*. This fact is very much evident from the reasons recorded by the Id. AO supra. It is pertinent to note that the decision of the Hon'ble Delhi High Court in the case of Sharp Business Systems referred to supra was rendered on 05/11/2012. The assessment was framed u/s.143(3) of the Act on 29/12/2011. Hence, as on the date of framing of assessment u/s.143(3) of the Act, the decision relied upon by the Id. AO in the case of Sharp Business Systems supra was not available with the Id. AO.

5.3. In any case , it is evident from the reasons recorded, the Id. AO had merely stated "from perusal of records". This goes to prove that the Id. AO while recording the reasons had looked into the very same materials that were available with him in the assessment records and absolutely had no tangible material with him which would enable him to form a reasonable belief that income of the assessee had escaped

assessment, warranting reopening u/s.147 of the Act. This is a clear case of change of opinion of the Id. AO based on the decision of the Hon'ble Delhi High Court in the case of Sharp Business System vs. CIT. The law is very well settled that even if the reopening is within four years from the end of the relevant assessment year in which the original assessment was framed, still the assessment cannot be reopened based on change of opinion of the Id. AO. Reliance in this regard is placed on the decision of the *Hon'ble Supreme Court in the case of Kelvinator of India Ltd reported in 320 ITR 561 (SC)*. Moreover, similar issue on merits of reopening was also subject matter of adjudication by the *Hon'ble Jurisdictional High Court in the case of Marico Ltd vs ACIT reported in 111 taxmann.com 253 (Bom)*. The Special Leave Petition (SLP) preferred by the Revenue against this decision, was dismissed by the *Hon'ble Supreme Court which is reported in 117 taxmann.com 244*.

5.4. In any event, the law is also settled by the decision of the *Hon'ble Jurisdictional High Court in the case of Sesa Goa Ltd vs JCIT reported in 294 ITR 101 (Bom)* that subsequent decision of the Hon'ble High Court cannot be a ground of reopening the assessment. The Hon'ble Jurisdictional High Court in this case had held that the deduction u/s.80HHC of the Act had been allowed to that assessee after due scrutiny of return, annexures, documents and evidences filed during the course of assessment and the same cannot be reopened on the ground that the said deduction was not computed in accordance with the principles laid down by another decision of the Hon'ble Bombay High Court. It had also held that in that event, the notice issued u/s.148 of the Act would have to be construed based on change of opinion. In our considered opinion, the ratio decidendi laid down by the Hon'ble Jurisdictional High Court that reopening could not be made based on

subsequent decision of the High Court is very crucial and the same cannot be ignored, merely because the reopening in that case was made beyond four years. Hence, the distinction brought out by the Id. DR that the decision rendered by the Hon'ble Jurisdictional High Court in 294 ITR 101 supra is not applicable on facts, deserves to be dismissed.

5.5. In the case of Sharp Business System relied upon by the Id. AO and the Id. DR, we find that nowhere in the said decision, even whisper is made that assessee had used the non-compete fees to lower its tax outgo, whereas strangely the Id. AO in the reasons recorded in respect of this issue had mentioned this expression that the Hon'ble Delhi High Court had held that a company cannot use non-compete fee to lower its tax outgo. This itself goes to prove that the reasons recorded by the Id. AO in respect of this issue of non-compete fees is based on incorrect understanding of the decision of the Hon'ble Delhi High Court and incorrect presentation of facts. In any event, this issue on merits, is covered by the decision of the *Hon'ble Jurisdictional High Court in the case of CIT vs. Everest Advertising Pvt. Ltd in Income Tax Appeal No.6539 of 2010 dated 04/12/2012* wherein it was dealing with the issue of non-compete fee for a period of three years. In the instant case before us also, the non-compete fee agreement is for a period of three years. The Hon'ble Jurisdictional High Court had held non-compete fee as revenue expenditure.

5.6. In view of the aforesaid observations and respectfully following the decisions of Hon'ble Jurisdictional High Court supra, we hold that the reopening made by the Id. AO on the issue of non-compete fee fails on law as well as on merits. Hence, the reopening made on the issue of non-compete fee is hereby dismissed.

6. With regard to another issue of disallowing expenditure incurred on Employee Stock Option Scheme (ESOP) while computing the book profit u/s.115JB of the Act for which assessment is sought to be reopened vide point No. (ii) recorded in the reasons is concerned, we find that an amount of Rs.14,47,37,034/- debited in the profit and loss account towards ESOP expenditure was disallowed by the Id. AO in the normal assessment proceedings u/s.143(3) of the Act. However, the same was not disallowed by the Id. AO while computing the book profits u/s.115JB of the Act. We find that the Id. AO had mainly relied upon the decision taken by his predecessor in A.Y.2008-09 as far as this issue is concerned. But we find the disallowance made in A.Y.2008-09 had been subsequently deleted by this Tribunal on merits. In any case, we find that the Id. AO had devoted exclusive paragraphs vide paragraph Nos. 4.1 to 4.3 in the original assessment order dated 29/12/2011 for disallowing this ESOP expenditure under normal provisions of the Act. Ultimately, despite these disallowances, the income was finally determined only u/s.115JB of the Act by the Id AO in the said assessment. Hence, in our considered opinion, it was a conscious decision taken by the Id. AO on due application of mind that the said ESOP expenditure would not be eligible to be added back to book profits u/s.115JB of the Act. This also goes to prove that a clear and conscious opinion has been framed by the Id. AO while framing assessment u/s.143(3) of the Act that the said expenditure is not eligible to be added back u/s. 115JB of the Act. Moreover on perusal of the reasons on this issue, the Id. AO does not bring any tangible material on record. He only re-visits para 4 of the original scrutiny assessment order and tries to change his opinion in the reasons recorded by stating that this sum has not been added back u/s.115JB of

the Act and hence, there is reason to believe that income has escaped assessment in the hands of the assessee.

6.1. In any event, on merits, the provision made on account of ESOP expenditure would become an allowable expenditure in view of the following decisions:-

- (a) Decision of the *Hon'ble Madras High Court in the case of CIT vs. PVP Ventures Ltd. reported in 23 taxmann.com 286 dated 19/06/2012*
- (b) Decision of the *Hon'ble Delhi High Court in the case of PCIT vs. New Delhi Television Ltd reported in 398 ITR 57 (Del)*
- (c) Decision of the *Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd. reported in 121 taxmann.com 351* approving the decision of the *Hon'ble Special Bench of Bangalore Tribunal in 35 taxmann.com 335.*

6.2. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that provision made on account of ESOP expenditure would be an ascertained liability and not a contingent liability warranting any disallowance either under normal provisions of the Act or while computing book profits u/s.115JB of the Act. Hence, the reopening made on this ground by the Id. AO fails both on law as well as on merits.

7. With regard to issue raised in point No. (iv) reasons recorded on the allowability of deduction u/s.35ABB of the Act in respect of fixed licence fee is concerned, this is nothing but a fixed licence fee payable by the

assessee for operating telecom services in the new circle obtained by the assessee during the year. The case of the revenue is that since new circle has been obtained by the assessee, the services would be rolled out only in future. Hence, fixed licence fee paid would not be allowed as a revenue expenditure in the year in which it is paid. The actual deduction on account of fixed license fees claimed by the assessee is Rs. 32,59,95,238/-. Even though in the re-assessment, the Id. AO disallows a higher sum of Rs.684,59,00,000/-, however, this has been rectified by the Id. AO himself, subsequently by disallowing the actual deduction claimed by the assessee in the sum of Rs.32,59,95,238/-. This sum of Rs.32.59 Crores claimed by the assessee was attributable to new circles obtained by the assessee for rendering telecom services during the year. This fact is not in dispute. The assessee vide letter dated 16/06/2011 filed before the Id. AO in the original scrutiny assessment proceedings had given explanation for claiming the deduction u/s.35ABB of the Act in respect of fixed license fees. The assessee also drew the attention of the Id. AO to Annexure 4A of clause 15 in the Form 3CD (tax audit report) wherein the detailed workings for claim of deduction u/s.35ABB of the Act in respect of licence fee paid for acquiring right to operate the telecommunication services in various circles were given by the assessee.

7.1. The provisions of Section 35ABB of the Act contained the explanation which defines the expression "relevant previous year". For the sake of convenience, the provisions of Section 35ABB together with the explanation which defines that expression "relevant previous year" are reproduced hereunder:-

**35ABB.** (1) *In respect of any expenditure, being in the nature of capital expenditure, incurred for acquiring any right to operate telecommunication services either before the commencement of the business to operate telecommunication services or thereafter at any time during any previous year and for which payment*

*has actually been made to obtain a licence, there shall, subject to and in accordance with the provisions of this section, be allowed for each of the relevant previous years, a deduction equal to the appropriate fraction of the amount of such expenditure.*

*Explanation.—For the purposes of this section,—*

*(i) "relevant previous years" means,—*

*(A) in a case where the licence fee is actually paid before the commencement of the business to operate telecommunication services, the previous years beginning with the previous year in which such business commenced;*

*(B) in any other case, the previous years beginning with the previous year in which the licence fee is actually paid,*

*and the subsequent previous year or years during which the licence, for which the fee is paid, shall be in force;*

7.2. The assessee's case herein squarely falls in Clause (B) of the definition of "relevant previous years" given in Explanation above. Though the actual licence fee paid in January 2008 by the assessee is Rs.684,59,00,000/-, the actual deduction claimed by the assessee is only Rs.32,59,95,235/-. We find that the assessee in its tax audit report enclosed in page 67 of the factual paper book had given detailed workings of deduction u/s.35ABB of the Act for each circle. In fact, the Id. AO in the scrutiny assessment proceedings u/s. 143(3) of the Act dated 29/12/2011 had indeed disallowed the deduction u/s.35ABB of the Act vide para 7 thereon by placing reliance on the decision of his predecessor in earlier years for assessee.

7.3. On perusal of the reasons recorded by the Id. AO in point No.(iv) of the reasons reproduced supra, the only grievance of the Id. AO is that assessee had not claimed deduction on this in A.Y.2008-09 and hence, it is not eligible for deduction for the year under consideration. We have already dealt with definition of relevant previous year provided in Section 35ABB of the Act which clearly stipulates that the license fee paid in the year in which the licence is obtained would be allowable as deduction u/s.35ABB of the Act. Hence, there is no reason to place reliance in

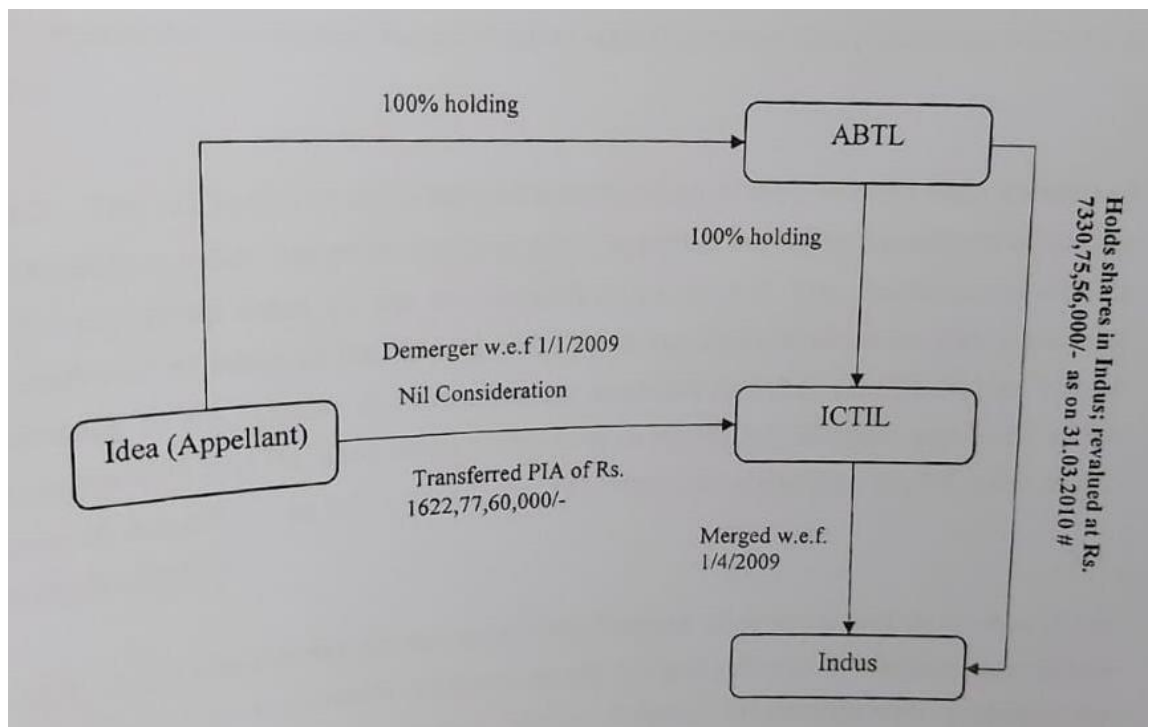
A.Y.2008-09 for this purpose, when the provisions of the Act specifically provides for grant of deduction in this regard. Hence, this deduction u/s.35ABB of the Act is statutorily available to the assessee, especially in view of the fact that deduction claimed thereon by the assessee in respect of Rs.32,59,95,238/- was attributable to new circle operated by the assessee which fact is not in dispute before us.

7.4. In any event, we find that there is absolutely no tangible material available with the Id. AO in respect of this issue which would enable him to form a reasonable belief that income of the assessee had escaped assessment within the meaning of Section 147 of the Act, warranting reopening. At the cost of repetition, we state that this issue had been duly examined by the Id. AO in the original scrutiny assessment proceedings and huge addition was also made in this regard. The Id. AO in the reopened proceedings is only trying to change his opinion already framed in the scrutiny assessment proceedings. The law is very well settled that no reopening could be made based on change of opinion or in the absence of the tangible material. The case laws discussed hereinabove already in respect of this legal proposition would apply to this issue also. Hence we hold that the reopening made by the Id. AO on the issue of Point No. (iv) of the reasons recorded, is bad in law and is hereby quashed.

8. With regard to issue mentioned in point (v) of the reasons recorded, the facts of the case pertaining to the issue and the treatment given by the Id. AO are explained below:-

- a) The assessee under a court approved Scheme of Arrangement transferred its Passive Infrastructure Assets (PIAs) having book value of Rs. 1622,77,60,000/- to Idea Cellular Tower Infrastructure Ltd. (ICTIL) at nil

consideration with the appointed date of 01.01.2009. ICTIL was a 100% subsidiary of M/s. Aditya Birla Telecom Ltd. (ABTL) which in turn was a 100% subsidiary of the assessee. Subsequently, ICTIL amalgamated into Indus Towers Ltd. (Indus) resulting in transfer of PIAS having book value of Rs. 1622,77,60,000/- to Indus: By a separate Scheme of Arrangement u/s. 391 r.w.s. 394 of the Companies Act, 1956, the telecom undertaking of ABTL (comprising Bihar and Jharkhand telecom circles and related assets and liabilities) was demerged into the assessee with the Appointed Date of April 01, 2009. Pursuant to this separate Scheme, ABTL revalued its investment in shares of Indus from Rs.1,90,000/- as on 31.03.2009 to Rs.7330,75,56,000/- as on 31.3.2010. These facts have been pictorially explained by the assessee as under:-



# This was done as part of a separate scheme u/s. 391 r.w.s. 394 of the Companies Act, 1956 under which the telecom undertaking of ABTL (comprising Bihar and Jharkhand telecom circles and related assets and liabilities) was demerged into Idea with the Appointed Date of April 01, 2009.

b) From the above facts, the Id. AO held that the Scheme of Arrangement through which the PIAs of the assessee having book value of Rs 1622,77,60,000/- was transferred to ICTIL for Nil consideration and then from ICTIL to Indus on the subsequent amalgamation of ICTIL with Indus was a colorable device to evade taxes. That this was a transfer of assets of the assessee to an entity outside the Group, and that ICTIL was only an intermediary through which the assets were being routed to avoid taxes and duties that would otherwise be attracted. The Id. AO also

observed that not only the assessee but two other shareholders of Indus namely, Vodafone and Bharti Airtel had also resorted to such subterfuge. The Id. AO noted that in the related case of M/s Vodafone Essar Gujarat Limited, by an Order dated 9th December 2010, the Hon'ble Gujarat High Court had accepted the submissions of the Income Tax Department upholding the locus of the Income Tax Department and rejected similar Scheme of Arrangement proposed by Vodafone Essar Gujarat Limited under Sections 391 to 394 of the Companies Act, 1956 vide Company Petition No. 183 of 2009. That the present Scheme of Arrangement in the assessee's case also had been challenged by the Department before the Hon'ble Gujarat High Court vide Civil Application No.2933 of 2013.

- c) The Id. AO held that since the entire undertaking of the PIAs had been transferred ultimately to Indus, the gains accruing to the assessee had to be considered as flowing from the slump sale as per section 50B of the Act. The revaluation of ABTL's investment in Indus at Rs.7330,75,56,000/- as on 31.03.2010 which was apparently because of the transfer of PIAs from the assessee to Indus was treated as the full consideration and the book value of the PIAs of Rs.1622,77,60,000/- was taken as the cost of acquisition. In this manner, the Id. AO computed short term capital gains of Rs. 5707,97,96,000/-.
- d) The Id. AO did not accept the Scheme of Arrangement as he was of the view that it was a colorable device to evade tax and since in the related case of M/s Vodafone Essar Gujarat Limited, similar Scheme of Arrangement proposed by Vodafone was rejected by the Hon'ble Gujarat High Court and the Department had challenged the Scheme of Arrangement in the assessee's case also.
- e) On the issue of colorable device to evade tax, the assessee has submitted that Indus is a separate independent entity assessable to tax and it is paying taxes. That it is a joint venture company between Bharti Airtel Group, Vodafone Group and the assessee, formed to provide Passive Infrastructure (PI) services on commercial basis to telecom operators including the foregoing parties. Indus is registered with DOT as IP-1 to provide PI and related maintenance services to various telecommunications operators in India on a shared basis. Indus was formed as part of joint efforts of telecom operators to economise on cost of maintenance of PI Assets by pooling in towers in a jointly owned company. Presently, Indus is the largest telecom tower company in India. Govt. of India had also issued directions to promote sharing of infrastructure by telecom operators to achieve economies of scale and focus on active telecom services by the operators. Pursuant to the Govt. directive, the cellular operators in India initiated Project MOST (Mobile Operators Shared Towers). Thus, formation of Indus met with the regulatory directions as well as commercial advantage to the promoters of

Indus. This rationale was stated in all the Schemes of Arrangement entered into to meet this purpose which has been approved by various High Courts. That similar arrangements were entered into by the other Promoters of Indus namely Vodafone and Bharti Airtel.

- f) The Department in the case of Vodafone had challenged the demerger of the PI Undertaking of Vodafone Essar Gujarat Ltd into Vodafone Infrastructure Ltd. before the single judge of the Hon'ble Gujarat High Court on the ground that the said demerger scheme was formulated with the purpose of evading taxes/stamp duties etc. The single judge did not approve the said demerger of Vodafone Essar Infrastructure Ltd. This is the decision referred to by the ld. AO in the assessment order.
- g) The assessee submitted that the decision of the Single Judge in case of Vodafone referred to by the ld. AO was reversed by the decision of the Division Bench of the Hon'ble Gujarat High Court which approved the demerger scheme in the case of Vodafone Essar Gujarat Ltd. Vs. Department of Income-tax (2013) 353 ITR 222 dated August 27, 2012. In this case, the Hon'ble Division Bench of the Gujarat High Court, while appreciating that the ultimate effect of the Scheme of Demerger without consideration may result into some tax benefit or tax avoidance, nevertheless, approved the Scheme of Demerger considering the commercial rationale advocated by the applicant which was also backed by the Government directive. The objective was to separate non-telecom assets of the telecom operator and achieve economies of scale by housing these assets in a separate entity which was approved by the DOT to provide passive infrastructure services on competitive basis.
- h) The Department had further filed SLP before the Hon'ble Supreme Court against the order of the division bench. The Hon'ble Supreme Court vide its order dated 15 April 2015 dismissed the SLP filed by the Department and confirmed the division bench decision of the Hon'ble Gujarat High Court. In the assessee's case, the petition filed by the Department [C.A. (OJ) No. 693 of 2013] before the Hon'ble Gujarat High Court for recalling the demerger order in the case of ICTIL has been dismissed vide order dated 22 July 2015 following the order of the Hon'ble Supreme Court in the case of the SLP filed by Vodafone. Similarly, Hon'ble High Court of Delhi has dismissed the application of the Department [CO. APP 25/2016] vide order dated March 22, 2017 following the order of the Hon'ble Supreme Court in the SLP filed by Vodafone. In view of the dismissal of the Department's appeals for recalling the order approving the Scheme of Arrangement, the question of treating the Scheme as a colorable device to evade tax does not arise anymore. The Scheme as approved by the court will have to be accepted. The Scheme of Arrangement provides for transfer of the assessee's PIAs to ICTIL at Nil consideration. This cannot be substituted by any other notional

consideration. Once the consideration is taken as Nil, there is no basis for the addition made by the Id. AO.

8.1. The main crux of the reopening made by the Id. AO in respect of this issue based on demerger of Passive Infrastructure Assets (PIA) from assessee to Idea Cellular Tower infrastructure Ltd (ICTIL) worth Rs.162,77,60,000/- w.e.f. 01/01/2009 for 'Nil' consideration. ICTIL later merged with Indus Tower Ltd on 01/04/2009. ICTIL is a 100% subsidiary of M/s. Aditya Birla Telecom Ltd. (ABTL) who in turn is 100% subsidiary of the assessee. Pursuant to the merger of ICTIL with Indus Tower Ltd, ABTL was issued shares of Indus Towers Ltd. On 31/03/2010 ABTL revalued its shares held in Indus Towers Ltd. for Rs.7330,75,56,000/-. Based on this revaluation of shares in Indus Towers Ltd made by ABTL on 31/03/2010, the Id. AO treated the entire transaction of demerger and merger as a colourable device. We have already held hereinabove based on the facts that there is no colourable device involved at all in the instant case. It is a fact that the scheme of demerger and the merger had been duly addressed by the Hon'ble High Courts.

8.2. Moreover, the revaluation of shares has been made by ABTL on 31/03/2010 which falls in A.Y.2010-11. Hence, the event which had occurred in A.Y.2010-11 in the hands of ABTL can never be a ground for reopening in the case of assessee for A.Y.2009-10. Hence, reopening on this issue fails directly for A.Y.2009-10.

8.3. Further the Id. AO had stated that this entire device would result in benefit u/s.28(iv) of the Act to the assessee in the sum of Rs.5707,97,96,000/- (7330,75,56,000-1622,77,60,000). Even if the entire contentions of the revenue and the Id. DR are to be accepted it is ABTL who had revalued its shares for Rs.7330,75,56,000/- in Indus Towers Ltd.

It is ABTL pursuant to the merger of ICTIL with Indus Towers were issued shares in Indus Towers Ltd. Hence, by way of a scheme of demerger and merger if the Passive Infrastructure Assets worth Rs.1622,77,60,000 has been transferred to ICTIL (by way of demerger) and subsequently by way of merger with Indus Towers, for Nil consideration, the benefit, if any, on this entire transaction, would only arise for ABTL and certainly not the assessee herein. Hence, the applicability of the provisions of Section 28(iv) of the Act in the hands of the assessee absolutely fails in the instant case. We are making it very clear that we are not even suggesting that the said sum of Rs.5707,97,96,000/- would become benefit u/s.28(iv) of the Act in the hands of the ABTL. The above observations are made only for the limited purpose of addressing the issue that provisions of Section 28(iv) of the Act can never be applied in the hands of the assessee herein for A.Y.2009-10 in the facts and circumstances of the assessee herein. .

8.4. In any case, we find that the revaluation of shares in Indus Tower to the extent of Rs.7330 Crores duly captures the value of Passive Infrastructure Assets transferred by other telecom operators like Bharti Airtel, Vodafone and also assessee herein. As stated earlier, the transfer of these towers to a separate company was made as per the policy decision taken by the Government of India. Because of the fact that Indus Towers was holding the huge towers pursuant to the transfers made by Vodafone, Airtel and assessee, the value of shares of Indus Towers Ltd had increased substantially. This increased value of shares had been captured in the revaluation of shares made by ABTL as on 31/03/2010 to the extent of its shareholding in Indus. Hence, there cannot be any benefit in the sum of Rs.5707.9796 Crores u/s.28(iv) of the Act in the hands of the assessee for A.Y.2009-10.

8.5. Moreover, we find that the Id. AO had relied on the decision of the single Bench of Hon'ble Gujarat High Court dated 09/12/2010 which rejected the merger scheme in the case of Vodafone Essar Gujarat Ltd. In this decision, the Scheme of Arrangement proposed by Vodafone Essar Gujarat Ltd u/s.391-394 of the Companies Act, 1956 vide company petition No.183 of 2009 was rejected by the Hon'ble Gujarat High Court by accepting the stand of the Income Tax department that this has been made against public interest and with a view to evade payment of taxes. Accordingly, the case of the Revenue is that this is a transfer of assets of the assessee to an entity outside the group, and ICTIL is only an intermediary through which the assets are being routed, to avoid taxes and duties that would otherwise be attracted and therefore the Scheme of Amalgamation was neither a scheme nor arrangement nor a compromise contemplated u/s.391 of the Companies Act, 1956. The scheme of arrangement as envisaged was not really a scheme of arrangement or a scheme of demerger, so as to be eligible for a sanction by the Hon'ble Company Judge u/s.391-394 of the Companies Act 1956. The Revenue's case is that the scheme of demerger was to transfer the PIAs to Indus Towers through the intermediary ICTIL. Hence, the transfer of assets by way of demerger tantamount to gift. The case of the Revenue is also that the company cannot gift its assets. The Revenue also says that the demerger is not Section 2(19AA) compliant and that ICTIL is merely a paper company prior to amalgamation with Indus.

8.6. We are unable to comprehend ourselves to accept to the aforesaid averments made by the Id. AO in his assessment order which were also heavily relied upon by the Id. DR before us. It is pertinent to note that the single Bench decision of the Hon'ble Gujarat High Court which has been

heavily relied upon by the Id. AO and the Id. DR before us has been reversed by the Division Bench order of the Hon'ble Gujarat High Court itself. The date of decision of the single Bench of the Hon'ble Gujarat High Court order is 09/12/2010. The date of the Division Bench order of Hon'ble Gujarat High Court is 27/08/2012. It is also further pertinent to note that this Division Bench order of the Hon'ble Gujarat High Court has been approved by the Hon'ble Supreme Court vide its order dated 15/04/2015. Hence, the decision of the Division Bench of the Hon'ble Gujarat High Court arising out of the decision of the Single Bench of Gujarat High Court had attained finality by the decision of the Hon'ble Supreme Court.

8.7. In view of the above, the entire contentions made by the Id. AO and the Id. DR before us on merits of the issue and also challenging the claim of demerger and claim of merger with the respective parties stated supra, deserves to be dismissed.

8.8. We find with regard to the entire scheme of demerger, a query was raised by the Id. AO during the course of original assessment proceedings itself vide letter dated 12/07/2011 more specifically with regard to transfer of Passive Infrastructure Assets vide point No. 7 thereon. The assessee had filed a reply dated 25/07/2011 before the Id. AO. The assessee had duly stated all the facts with regard to this issue together with the accounting treatment given by the assessee in its books in accordance with the scheme of demerger and scheme of merger approved by the Hon'ble High Courts. The assessee had also specifically provide the purpose of demerger before the Id. AO himself.

8.9. It is also further pertinent to note that though in the reasons recorded, the Id. AO is only trying to treat the alleged benefit of Rs.5707

Crores in the hands of the assessee to be taxed u/s.28(iv) of the Act, but ultimately in the re-assessment order, the Id. AO is only taxing it as short term capital gain u/s.50B of the Act treating it as slump sale.

9. With regard to the arguments advanced by the Id. DR by placing reliance heavily on the decision of the Hon'ble Supreme Court in the case of PVS Beedies reported in 237 ITR 13 (SC), we find that the said decision was rendered in the context of erstwhile provision of Section 147(b) of the Act. This fact is very much evident in paras 1-3 of the said order of the Hon'ble Supreme Court. Moreover, the Hon'ble Supreme Court was concerned with the fact that a donation was given by that assessee to a charitable institution which had already lost its recognition and exemption u/s.80G of the Act was denied to that charitable organisation (Donee institution). Despite that denial of exemption u/s.80G of the Act, the assessee had claimed deduction u/s.80G of the Act and was allowed by the Id. AO. Hence, this factual information together with the error was pointed out by the audit party and this information became information gathered u/s.147(b) of the Act. In these peculiar facts and circumstances, the Hon'ble Supreme Court held that any mistake on factual errors committed by the Id. AO could be subject matter of reopening u/s.147 of the Act even if it is based on audit objection. This decision of the Hon'ble Supreme Court does not give a complete leeway to the Revenue to reopen the assessment based on audit objection. It is not in dispute that the issues raised in the reasons recorded vide point No. (i) – (iv) have been admittedly based on audit objection, which fact has also been confirmed by the Id. DR before us. The law is very well settled that no assessment could be reopened based on audit objection. It is the mandate of provisions of Section 147 of the Act that the Id. AO should have reason to believe that income of the assessee had escaped

assessment. Hence, it is an independent application of mind of the Id. AO that is mandated in the law for reopening the assessment after recording due reasons thereon. Moreover, on reading of the provisions of Section 147 of the Act, there is no mention of the word "information". On this point itself, the decision of the Hon'ble Supreme Court in the case of PVS Beedies Ltd cannot be made applicable to the facts of the assessee herein.

9.1. The Id. DR before us also relied on the decision of the *Hon'ble Supreme Court in the case of A.L.A Firm vs. CIT reported in 189 ITR 285*. On perusal of the said decision, the facts involved thereon was that there was a firm in Malaya which got dissolved. That firm had revalued its assets. That firm had distributed the assets to its partners. The question was whether revaluation was chargeable to tax or not? The entire decision of the Hon'ble Supreme Court rendered on the pretext that the decision of Hon'ble Madras High Court in the case of G.R.Ramachari & Co. vs. CIT reported in 41 ITR 142, was not considered by the Id. AO in the case of A.L.A. Firm assessments. The Hon'ble Supreme Court had upheld the validity of reopening u/s.147(b) of the Act on the ground that existing decision was overlooked by the Id. AO. Hence, the Hon'ble Supreme Court held that when this decision was brought to the notice of the Id. AO, that constituted information u/s.147(b) of the Act. In the case of the assessee herein, we are absolutely not concerned with the information u/s.147(b) of the Act at all. Hence, the reliance placed by the Id. DR on the decision of the Hon'ble Supreme Court in the case of M/s. A.L.A. Firm supra would not advance the case of the Revenue in any manner.

9.2. With regard to the issue of deduction u/s.35ABB of the Act is concerned, the Id. DR relied on the decision of the *Hon'ble Jurisdictional*

*High Court in the case of Belazio Constructions Pvt. Ltd vs. ITO reported in 268 Taxman 170 (Bom)* wherein it was held that an assessment can be reopened on the basis of information obtained during the course of assessment of earlier assessment year u/s.143(3) of the Act. We have gone through the said decision and on perusal of the same, we find that that was the case of assessment framed u/s.143(1) of the Act. It was subjected to reopening since there was a fraudulent claim made for cost of land. This is an extraneous situation distinguishable on facts. This decision, in our considered opinion, is factually distinguishable as there is absolutely no averment in the entire assessment order that there has been some fraud committed by the assessee for claiming any deduction. All the transactions carried out by the assessee were duly reflected in its financial statements, notes on accounts to financial statements and also in the notes accompanying the return of income together with the relevant annexures. Further, all the details were already explained before the Id. AO in the original scrutiny assessment proceedings and the Id. AO had also not agreed to the certain contentions of the assessee and made substantial addition in the original scrutiny assessment proceedings with regard to this issue. Hence, it is a clear case of change of opinion only. Further, the Id. DR argued that the very same deduction u/s.35ABB of the Act was not claimed by the assessee in A.Y.2008-09. It is trite law that there is no estoppel against the statute. Once an expenditure is allowable u/s.35ABB of the Act, how could there be income escaping the assessment in assessee's hands merely because it was not claimed in A.Y.2008-09.

10. In view of the aforesaid detailed observations and respectfully following the various judicial precedents relied upon hereinabove, we have absolutely no hesitation to hold that there is invalid assumption of

jurisdiction for reopening the assessment on the part of the Id. AO u/s.147 of the Act in the facts and circumstances of the instant case. Apart from this, we have already dealt all the issues independently on merits hereinabove and even on merits, there is no scope for making any addition in respect of this issue in the hands of the assessee for the year under consideration. Hence, the reopening made by the Id. AO is hereby quashed and additions suggested thereon are also deleted on merits. Accordingly, the grounds raised by the assessee are allowed.

**11. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.**

Order pronounced on 31/03/2023 by way of proper mentioning in the notice board.

**Sd/-**  
**(VIKAS AWASTHY)**  
JUDICIAL MEMBER

Mumbai; Dated 31/03/2023  
KARUNA, *sr.ps*

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai