

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITANo.513/Ind/2014**

**&**

**ITA NO.65/Ind/2018**

**Assessment Years:2010-11 & 2009-10)**

M/s. Bharti Airtel Limited Metro Tower, 3 <sup>rd</sup> & 4 <sup>th</sup> Floor, Scheme No.54, Near Vijay Nagar Indore	Vs.	ITO-(TDS) Indore
(Appellant / Assessee)		(Respondent/ Revenue)
<b>PAN: AAACB 2894 G</b>		
Assessee by	Shri Sumit Nema, Sr. Adv. And Shri Gagan Tiwari, Adv	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	16.05.2023	
Date of Pronouncement	25.05.2023	

**ORDER**

**Per Bench:**

These two appeals by the assessee are directed against two separate orders of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A)-II, Indore dated 31.03.2014 & 25.10.2017 arising from order passed u/s 201(1)/201(1A) & 154/201(1)/201(1A) for A.Ys. 2010-11 & 2009-10 respectively. For the A.Y. 2010-11 the assessee has raised following grounds of appeals:

1. The learned Income Tax Officer, TDS-II (AO) has erred both on facts and in law in applying the provisions of Section 194H of the Income Tax Act, 1961 to the discount given to distributors on sale of pre-paid products, being, "right to use Airtime for a specified value". The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

1.1. The learned AO has erred both on facts and in law in treating the business relationship between the company and the distributor as principal to agent as against the actual relationship of principal to principal. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

1.2) The learned AO has erred both on facts and in law in passing an order u/s 201(1) and holding the assessee company to be in default in respect of non- deduction of tax amounting to Rs. 52,778,043/- u/s 194H on the difference between the distributor's price and sale price of the prepaid card alleging the difference to be in the nature of commission. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned AO.

1.3) The learned CIT(A) has further erred both on facts and in law in following the decision of his predecessor while passing the order which was passed based upon reliance placed on Delhi High Court ruling in case of Idea Cellular Limited and Kerala High Court ruling in case of Vodafone Essar Cellular and Kolkata High Court ruling in case of Bharti Cellular. The learned CIT(A) has erred in placing reliance over above rulings as all three cases are factually distinguishable.

2. The learned AO has erred both on facts and in law in demanding the tax amounting to Rs. 52,778,043/-, in spite of the fact that the amount has been subject to tax in the hands of distributor. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in ignoring the information filed by the company to substantiate that distributor has already paid tax on the disputed amount.

2.1) The learned CIT(A) has further erred in not allowing the benefit of ratio laid down by Hon'ble Supreme Court in case of Hindustan Coca Cola Beverages.

2.2) The learned CIT(A) has further erred both on facts and in law in ignoring the applicable ratio as laid down by Mumbai Tribunal in Vodafone case (2010- TIOL-789-ITAT-MUM) while dealing with the applicability of the judgment of Hon'ble Supreme Court in the matter of Hindustan Coca-Cola Beverages Ltd. wherein it was held that

*when the Permanent Account Numbers are made available to the Assessing Officer, it would not be unreasonable on the part of the assessee to ask the Assessing Officer to have the payments verified from the records of the Assessing Officers within whose jurisdiction the payees are assessed.*

*3.The learned AO has erred both on facts and in law in charging interest of Rs.15,649,727/- u/s 201(1A) of the Act. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned AO.*

*4.The appellant craves leave to add, alter or amend the ground of appeal at a later stage.*

2. The assessee company is engaged in the business of providing telecom services including the mobile services through prepaid and post-paid connections, recharge vouchers of prepaid connections. In order to provide these services to the subscribers the assessee is having network of distributors/dealers appointed by the assessee through written agreements. The Ld. AO noted that the assessee is allowing certain amounts to the distributors/dealers in respect of prepaid products which is in fact in the nature of commission or brokerage as per explanation (1) to section 194H of the Act. The AO accordingly, issued show cause notice to the assessee to explain as to why the assessee should not treat as assessee in default u/s 201(1) and 201(1A) of the Act due to the default of the assessee in deducting tax at source in respect of the said commission paid/allowed to the distributors/dealers. The assessee contested the said show cause notice issued by the AO and explained that the transactions of allowing the discount by the assessee to the dealers/distributors is between principal to principal and not between principal to agent. The AO did not accept this explanation and contention of the assessee and by following the judgments of *Hon'ble Delhi High Court in case of CIT vs. Idea Cellular Ltd. 325 ITR 148* as well as other decisions of this tribunal held that the assessee was under the liability to deduct tax at source u/s 194H of the Act and accordingly assessee is liable to pay the tax u/s 201(1) as well as interest u/s 201(1A) of the Act being assessee in default. The assessee challenged this order passed by the AO u/s 201(1)/201(1A) of the Act before the ld. CIT(A) and submitted that the payments allowed by

the assessee to the distributors/dealers is discount and not commission. Further the transactions of payment are not between principal and agent but it is between principal to principal and therefore the provisions of section 194H of the Act are not applicable. The assessee relied upon the judgment of Hon'ble Supreme Court in case of *Stamp Vendors Association v. Union of India [2002] 257 ITR 202* as well as other decisions of this Tribunal, Hon'ble Bombay High Court, Hon'ble Karnataka High Court and also relied upon the Hon'ble Supreme Court in the case of *Hindustan Coca Cola vs. CIT, 402 ITR 539*. The Ld. CIT(A) did not accept the contention of the assessee in view of the decisions of jurisdictional Tribunal dated 11.12.2014 in case of *M/s Idea Cellular Ltd. ITANo.267/Ind/2010, ITANo.268/Ind/2010 & ITANo.181/Ind/2012* and upheld the order passed by the AO.

3. Before the tribunal the assessee has relied upon the various decisions of the different benches of the Tribunal in favour of the assessee whereas the department has relied upon the decision of Coordinate Bench of this Tribunal as well as the decisions of Hon'ble Delhi High Court, Hon'ble Kerala High Court and Kolkata High Court. The Ld. Sr. counsel of the assessee has reiterated his contention as raised before the Ld. CIT(A) and submitted that the nature of transaction between the assessee and distributors/dealers is not a commission but the assessee is allowing only discount to the distributors/dealers. He has filed specimen copy of the agreement between the assessee and distributors and submitted that from the terms and conditions of this agreement it cannot be inferred that the relationship between assessee and dealer is that of principal and agent but the relationship is principal to principal and therefore, amount released by the assessee to the distributor in respect of providing services through post-paid and prepaid SIM as well as recharge of vouchers is nothing but only a discount allowed by the assessee. He has further submitted that the assessee is receiving the amount as a sale proceeds from the distributors has not actually paying anything. The discount which is allowed by the assessee is deducted by the dealers/distributors

while making payment to the assessee. Therefore, it is only one way transaction of sale proceed received by the assessee and there is no payment of commission. He has further pointed out that since there are divergent decision on this issue by various High Courts therefore, the SLP's have been filed by the telecom services providers as well as by the department before the Hon'ble Supreme Court which are pending adjudication. He has given details of SLP's now pending before Hon'ble Supreme Court and submitted that the Hon'ble Supreme Court has stayed recovery of demand in respect of those cases where the SLP's are pending before the Hon'ble Supreme Court.

4. The Ld. Counsel for the assessee has also filed ledger copy of the distributors in the books of the assessee and submitted that the transaction is recorded in the books of account of the assessee as discount allowed and not as commission paid to the distributors. He has submitted that though in case of M/s Idea Cellular Ltd. Vs. ITO the coordinate Bench of this Tribunal has decided this issue against the assessee however at that point of time when the said order was passed in the year 2014 only Delhi High Court judgment was available as a precedence whereas subsequently, there are three High Courts judgments in favour of the assessee/telecom service providers were passed wherein the issue has been decided in favour of the assessee by holding that the payment allowed by the assessee to the distributors/dealers is not in the nature of commission and therefore, the provision of section 194H are not applicable. He has also relied upon the decisions of this Tribunal in case of *Vodafone Digilink Ltd. in ITANo.67/JP/2015*, *in case of Idea Cellular Ltd. in ITANo.648 to 651/Bang/2014* and *in case of Vodafone Idea Ltd. in ITANo.1579 to 1582/Kol/2019*.

5. On the other hand, ld. DR has relied upon the decision of the Coordinate Bench of this tribunal in case of *Idea Cellular Ltd. vs. ITO (supra)* as well as decision of Hon'ble Delhi High Court in case of CIT vs. Idea Cellular Ltd. reported 189 taxmann.com 118, decision of Hon'ble Kerala High Court in case of Vodafone Essar Cellular vs. ACIT reported

194 taxman 518 and decision of Hon'ble Kolkata High Court Bharati Cellular Ltd. Vs. ACIT reported 12 taxmann.com 30.

6. He has also relied upon the order of the authorities below and submitted that the Id. CIT(A) has passed impugned order by following order of this Tribunal in case of *Idea Cellular Ltd. vs. ITO* dated 11.12.2014.

7. We have considered the rival submission as well as relevant material on record. There is no quarrel that there are divergent views on the issue involved in this case wherein one set of decisions passed by the Hon'ble Karnataka High Court, Hon'ble Bombay High Court and Hon'ble Rajasthan High Court are in favour of the assessee whereas the another set of decisions of Hon'ble Delhi High Court, Hon'ble Calcutta High Court and Hon'ble Kerala High Court are in favour of the revenue. The details of the decisions given divergent views in favour of the assessee and revenue are as under:

In favour of assessee:

- i. Bharati Airtel Ltd. vs. DCIT, 52 taxmann.com 31 (Kar)
- ii. CIT vs. Vodafone Cellular (ITANo.1152/2017 (Bom)
- iii. Hindustan Coca Cola vs. CIT 402 ITR 539 (SC)

In favour of Revenue :

- i. ACIT vs. Bharati Cellular Ltd. 105 ITD 129
- ii. CIT vs. Idea Cellular Ltd. 189 taxmann.com 118 (Del)
- iii. Vodafone Essar Cellular vs. ACIT 194 taxman 518(Ker)
- iv. Bharati Cellular Ltd. Vs. ACIT reported 12 taxmann.com 30(Cal)

8. Apart from these judgments of the Hon'ble High Courts there are series of decisions of various coordinate Benches of this Tribunal wherein divergent views have been taken by the following respective jurisdictional

of High Courts. The Tribunal is bound by the judgment of jurisdictional High Court being binding precedents and therefore, in view of divergent views of different High Courts it is bound to be divergent view of the different benches of the Tribunal functioning under the different High Courts. In the absence of any judgment of the jurisdictional High Court, (Madhya Pradesh) this Bench has to take an independent view concurring with one of the two divergent views already taken by various Benches of this Tribunal as well as by the Hon'ble High Courts. It is also matter of record that the dispute is finally taken to the Hon'ble Supreme Court and various SLP's are pending for adjudication before the Hon'ble Supreme Court the details which are as under:

- i. VODAFONE ESSAR CELLULAR LTD. VS. ASSISTANT COMMISSIONER OF INCOME TAX, COCHIN Civil Appeal 40677/2010*
- ii. COMMISSIOENR OF INCOME TAX (TDS) VS. M/S BHARTI HEXACOM LTD. Civil Appeal Number 13836/2018.*
- iii. COMMISSIONER OF INCOME TAX (TDS) JAIPUR vs. M/S BHARTI HEXACOM LTD. Civil Appeal Number 15192/2018*
- iv. COMMISSIONER OF INCOME TAX (TDS) JAIPUR vs. M/S IDEA CELLULAR LIMITED Civil Appeal Number 25484/2018*
- v. IDEA CELLULAR LIMITED VS.COMMR OF IT-XVII Civil Appeal Number 7471/2010*
- vi. BHARTI CELLULAR LTD.NOW BHARTI AIRTEL LD V ASSISTANT C.I.T CIRCLE 57. & Others (Civil Appeal No. 7257/11)*

9. Against the conflicting judgment of Hon'ble High Courts the assessee as well as revenue has filed respective SLP's before the Hon'ble Supreme Court which are pending adjudication. The assessee has relied upon various decisions of the Tribunal including the Jaipur Bench of the Tribunal as well as Bangalore Benches of this Tribunal wherein this issue has been decided in favour of the assessee and one of us judicial member

is a party to those decisions. Without going into the divergent views taken by the various Benches of this tribunal as well as by the Hon'ble High Courts, at the outset we note that the Ld. AO passed order u/s 201(1)/201(1A) by following the judgment of Hon'ble Delhi High Court and consequential judgment of the Tribunal following the judgment of Hon'ble Delhi High Court. It is pertinent to note that though the AO has recorded the fact that distributors are appointed by the assessee through written agreements however, the AO has not considered the terms and conditions of the agreement which are crucial for determination of the nature of transaction between the assessee and distributors/dealers whether the payment allowed by the assessee is in the nature of discount or commission attracting the provision of section 194H. Further the another aspect which is also relevant for determining nature of the transaction being payment allowed by the assessee is treatment given by the assessee to the said transaction in its books of account. Both of these aspects are inevitably relevant for determining the nature of the transaction and consequential liability/obligation of the assessee to deduct the tax at source as per provisions of section 194H of the Act.

10. The Ld. Sr. counsel of the assessee has filed before us the specimen copy of the agreement entered into between the assessee and the distributors/dealers as well as ledger copy of the distributors in the books of the assessee. These relevant documents have not been examined and considered by the AO while passing order u/s 201(1)/201(1A). Further the Ld. CIT(A) has also not given a finding of fact regarding nature of transaction but has simply followed the decision of this Tribunal in pursuant to the judgment of Hon'ble Delhi High Court only precedent at that point of time therefore, Ld. CIT(A) has not considered the contrary view taken by other High Courts while the passing the impugned order. In fact the terms and conditions of the agreement between the assessee and distributors/dealers as well as treatment of the transactions in the books of the assessee are essential consideration for determining the nature of transaction have not been taken into account either by the AO or by the

Ld. CIT(A). Hence in the facts and circumstances of the case as discussed above and in the interest of justice, we are of the considered view that matter requires a proper verification/ examined and fresh adjudication at the level of the AO after considering terms and conditions of the agreement between assessee and distributors/dealers as well as the treatment of these transactions in the books of the assessee. Accordingly the impugned order is set aside and the matter is remanded to the record of the AO for fresh adjudication after proper verification and examination of the agreement between the assessee and distributors/dealers as well as entries in the books of account reflecting the treatment by the assessee. Needless to say assessee be given an appropriate opportunity of hearing before passing the fresh order.

**For A.Y. 2009-10 the assessee has raised following grounds:**

*1.The Ld. CIT(A) has erred both on facts and in law in confirming the order passed by the Ld. DCTT (TDS) under section 154/201(1)/201(1A), levying interest under section 220(2).*

*2.The Ld. CIT(A) has erred both on facts and in law in confirming that interest under section 220(2) is levied on a calendar month basis instead of number of days (30 or 31, as the case may be):*

*2.1.Ld. CIT(A) erred in not appreciating the fact that 'month' as mentioned in section 220(2) is not 'calendar month & rather a period of 30/31 days as the case may be.*

*2.2) Ld. CIT(A) failed to appreciate that the relevant section itself worded as under:*

*"If the amount specified in any notice of demand under section 156 is not paid the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid".*

*From the above, it is apparent that the legislation provides that interest should be levied from the day immediately following the end of the period mentioned in 156 notice. Hence the computation of month would be from immediately next day of time provided in notice till the time of payment of tax.*

11. Since the issue arises in this appeal is consequential to the issue of determination of the nature of transaction as involved in A.Y.2010-11. Therefore, in view of our order for A.Y.2010-11 setting aside the issue to the record of the AO, this matter is also set aside to the record of the AO for fresh adjudication as per the outcome of the set aside proceeding for A.Y.2010-11.

11. In the result, appeals of assessee are allowed for statistical purposes.

Order pronounced in the open court on 25.05.2023.

**Sd/-**

**(B.M. BIYANI)**  
Accountant Member

**Indore, 25 .05.2023**

**Patel/Sr. PS**

Copies to: (1) The appellant  
(2) The respondent  
(3) CIT  
(4) CIT(A)  
(5) Departmental Representative  
(6) Guard File

**Sd/-**

**(VIJAY PAL RAO)**  
Judicial Member

*By order*

*Sr. Private Secretary  
Income Tax Appellate Tribunal  
Indore Bench, Indore*