

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

1. ITA No. 3424/Mum/2014 (A.Y.2009-10)

Vodafone Idea Limited
(formerly known as Idea Cellular Limited)

10th Floor, Birla Centurion,
Century Mills Compound,
Pandurang Budhkar Marg,
Worli, Mumbai-400 030

PAN: AAACB2199P

..... Appellant

Vs.

DCIT Cir. 3(2),
R. No. 608, 6th floor,
Aayakar Bhavan,
M. K. Road,
Mumbai-400 020

..... Respondent

&

2. ITA No. 3674/Mum/2014 (A.Y. 2009-10)

DCIT Cir. 3(2),
R. No. 608, 6th floor,
Aayakar Bhavan,
M. K. Road,
Mumbai-400 020

..... Appellant

Vs.

Vodafone Idea Limited
(formerly known as Idea Cellular Limited)

10th Floor, Birla Centurion,
Century Mills Compound,
Pandurang Budhkar Marg,
Worli, Mumbai-400 030

PAN: AAACB2199P

..... Respondent

Appellant by : Shri J. D. Mistry /Manish Padhiar
Respondent by : Shri T. Shankar, CIT-DR
Date of hearing : 31/05/2023
Date of pronouncement : 27/07/2023

ORDER

PER GAGAN GOYAL, A.M:

These appeals by assessee and cross appeal by revenue are directed against the order of Ld. CIT (A)-4, Mumbai, dated 14.03.2014 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2009-10 respectively.

2. The assessee has raised the following grounds of appeal:-

Ground No. I:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in non- admitting the additional evidences filed under rule 46A of the Rules by the Appellant during the course of appellate proceeding which go to the root of the issue.

Without Prejudice Ground No. 1:

Ground No. II:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing a sum of Rs. 4, 21, 70, 0 / (- u) / s 40(a)(ia) pertaining to the discount to the distributors of prepaid SIM cards on the alleged ground that the discount allowed by the Appellant is in the nature of commission' and holding that the Appellant is liable to deduct tax at source u / s 194H irrespective of whether the relationship between the Appellant and their distributors is that of principal and agent or not.

Without Prejudice Ground No. 1:

Ground No. III:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing a sum of Rs. 54, 47, 48,738/-u/s. 40(a)(ia) pertaining to the domestic roaming charges paid / payable to the other telecom operators on the alleged ground that the domestic roaming charges is in the nature of 'fee for technical services' and holding that the Appellant is liable to deduct tax at source u/s 1943.

Ground No. IV:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO in disallowing the compensation cost of Employee Stock Scheme (ESOS") amounting to Rs. 14,47,37,034/-.

Ground No. V:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the interest expense of Rs. 2,46,78,07,777 /- on borrowed funds utilised for the acquisition of shares of Spice Communications Limited.

Ground No. VI:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the expenditure of Rs. 4,14,65,950/-u/s . 14A of the Act r.w.r. 8D of the Rules on the alleged ground that dividend from the subsidiaries is exempt.

Ground No. VII:

On the facts and circumstances of the case and in law, Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the Revenue Sharing License Fees amounting to Rs.7,24,57,14,772/- claimed by the Appellant w/s. 37(1) of the Act by mechanically following its own order of earlier year, i.e., AY 2008-09.

Ground No. VIII:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in non- adjudicating the additional ground of appeal filed before the Hon'ble CIT(A).

Without Prejudice to Ground No. VIII:

Without Prejudice to allowability of ground filed before the Hon'ble Income Tax Appellate Tribunal on Legal Fees amounting to Rs. 29,37,435/- for Assessment Year 2004-05: Ground No. IX:

On the facts and circumstances of the case and in law, Hon'ble CIT(A) erred in disallowing the proportionate deduction of Rs. 5,87,487/- (i.e. 1/5 of Rs. 29,37,435/-) u / s 35DD in respect of the total legal fees of Rs. 29,37,435/- even though the amalgamation of the erstwhile Escotel Mobile Communication Limited had taken place during AY 2007-08.

Ground No. X:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of adding the amount of compensation cost of ESOS amounting to Rs.14,47,37,034/- to the 'book profit' computed w / s 115JB of the Act.

Ground No. XI:

On the facts and in the circumstances of the case and in law, Hon'ble CIT(A) erred in upholding the action of the AO of adding the amount of Rs. 4, 14 ,65,950/- calculated u/s. 14A of the Act r.w.r. 8D of the Rules to the 'book profit' computed w/s 115JB of the Act.

Ground No. XII:

The Appellant craves leave to add, to alter and / or amend all or any of the foregoing grounds of

3. The brief facts of the case are that assessee is in the business of providing cellular services in the telecom circles of Maharashtra, Gujarat, Andhra Pradesh, Delhi, UP (W), UP (E), Haryana, Kerala, Rajasthan, Himachal Pradesh and Madhya Pradesh. The company also trades in handsets and accessories which are integral part of the nature of business in which the assessee is operating. During the year, the assessee has claimed deduction u/s 801A of the IT Act on profits of circles.

4. E-Return of income was filed on 26.09.2009 declaring total income of Rs Nil after loss of set off of brought forward unabsorbed depreciation of Rs 330,629,157/-. Tax of Rs 124, 22, 95,483/- was paid on book profits. The assessee filed a revised return of income on 01.04.2010 declaring a total income of Rs Nil after set off of brought forward unabsorbed depreciation of Rs 2,297,410,373/-. Tax payable on book profits was revised to Rs 125,51,17,160/-. The return was revised on account of demerger of the tower business during the year. As a result the income increased and the claim of depreciation was also revised. Subsequently, the return was again revised on 30.03.2011 after set off of brought forward unabsorbed depreciation of Rs 2,345,926,810/-. Tax payable on book profits was revised to Rs 125,84,49,329/-. The second revised return was filed on account of reducing the claim of expenses paid to IBM under finance lease.

5. Case of the assessee was selected for scrutiny after issuing relevant statutory notices. During the assessment proceedings, AO made additions of Rs. 1700, 74, 01,081/- under the normal provisions of the Act and Rs. 4, 14, 65,950/-

for the purposes of section 115JB of the Act. Assessee being aggrieved with this order of AO, preferred an appeal before the Ld. CIT (A)-4, Mumbai. In his order, Ld. CIT(A) partly allowed the appeal of the assessee by way of allowing depreciation on revenue sharing license fee amounting to Rs. 724,57,14,772/-. Rest of the grounds raised by the assessee before the Ld. CIT (A) were dismissed. Assessee being further aggrieved with the order of Ld. CIT (A) preferred this present appeal before us.

6. We have gone through the relevant assessment order, order of the Ld. CIT(A) and submissions of the assessee alongwith the case laws relied upon. Ground no. 2 pertains to disallowance of Rs. 421,70,00,000/- u/s. 40(a)(ia). This issue is identical to what discussed and decided in AY 2008-09 also by the Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

2.1. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of providing cellular services in the telecom circles of Maharashtra, Gujarat, Andhra Pradesh, Delhi, Uttar Pradesh (West), Uttar Pradesh East, Haryana, Kerala, Rajasthan, Himachal Pradesh and Madhya Pradesh. The company also trades in handsets and accessories which are integral part of the nature of business in which the assessee is operating. During the course of assessment proceedings, the assessee was asked to submit details of commission and discount given to dealers and tax deducted on the same. On perusal of the details furnished by the assessee, the Id. AO observed that assessee had deducted tax at source for the commission payments made but had not deducted tax for the discount allowed to the distributors. Accordingly, the assessee was asked to make its submissions as to why tax was not deducted on the discount allowed to the distributors. The assessee furnished a copy of agreement entered into with the distributors and filed a detailed reply before the Id. AO. It was submitted by

the assessee that it appoints distributors who purchase prepaid Starter Packs and recharge vouchers in bulk and then sell them to sub-dealers or retailers. It was submitted that there is a principal to principal relationship between the assessee company and the distributors and the prepaid Starter Packs and Recharge Vouchers are given to them at a discounted price. It was submitted that the assessee company receives the sale proceeds from the distributors in advance and thereafter, deliver the products to the distributors irrespective of whether they inturn are sold or unsold by the distributors. The distributors are free to sell the prepaid cards / recharge vouchers to any retailers who shall be appointed by them on their own account (i.e. the distributors) and no control is being exercised by the assessee company thereon, at any price which the distributor decides subject to maximum retail price (MRP). The assessee company does not have any risk of any bad debts as payment is received by it in advance from the distributors. It was submitted that any loss which the distributor may suffer on account of any unsold / damaged / obsolete stock is not compensated by the assessee company. Thus, what the distributor earns is the difference between price paid to the assessee company and the price at which they decide to sell the products to retailers. The assessee company is not concerned with the profit and loss which the distributors incurs, earns / as the case may be. The assessee company enclosed the copy of agreement entered with the distributor for a territory in Madhya Pradesh, Chhattisgarh circle and also explained that it is a standard agreement for all the distributors entered across India. Accordingly, it was pleaded that the relationship between assessee company and the distributor is on principal to principal basis and therefore, the discount given to prepaid distributors would not be subjected to TDS. It was also pointed out by the assessee, on without prejudice basis, that the assessee receives the entire sale price from the distributors in advance and that no payment is made to the distributors or credit given in favour of the distributor and accordingly, the entire provisions of Chapter XVIIIB of the Act warranting deduction of tax at source fails. The assessee stated that for deducting tax in terms of Section 194H of the Act – `

(a)Income should be in the nature of commission or brokerage

(b) Payment should be received by a person acting on behalf of other, in the course of rendering services to third parties.

(c) Such income should be paid or credited by the payer in favour of payee.

(d) The payer should be a person responsible for paying such income to payee.

(e) The amount of commission should be actually ascertainable.

(f) The time of credit or payment should also be known.

2.4. We find that assessee in the course of its business appoints prepaid distributors (i.e. distributors). The assessee supplies prepaid sim cards and recharge vouchers to its distributors at a discounted price. The assessee supplies prepaid sim cards containing the talk time worth at a higher figure than the discounted price to the distributors. The distributors supply them to the retailers and retailers sell the same to the ultimate customer / user. The distributors make payment of the discounted price in advance to the assessee and there is no payment of any kind made by the assessee to its distributors. The distributors would sell to the retailers after adding its margin and the retailers would sell to the customer after adding his margin. The ultimate price to the customer / user is subjected to the Maximum Retail Price (MRP) fixed by the assessee. It is pertinent to note that the distributor does not earn any income just by obtaining the prepaid sim cards and recharge vouchers from the assessee. The distributor earns income only if the said sim cards and recharge vouchers were sold further. Hence, there is no fixed amount of commission that could be determined from the agreement entered into by the assessee with the distributors. Once the amount of commission income that could be determined in the hands of the distributor is not permissible, there cannot be any obligation of deduction of tax at source that could be casted on the assessee.

2.8.2. We find that in the case before the Co-ordinate Bench of Pune Tribunal in the case of Idea Cellular Limited vs DCIT (TDS) in ITA Nos. 1041, 1042, 1953 -1955/Pun/2013 and ITA Nos. 1867 -1870 /Pun/2014 dated 04/01/2017, the lower authorities had held that relationship between assessee and its distributors was Principal and Agent. It was only the Pune Tribunal which after examining the distributors agreement came to the conclusion

that the relationship is that of Principal to Principal. Infact Pune Tribunal also examined the very same agreement which is the subject matter of agreement before us in the instant case before us, as it is not in dispute that all the distributors agreements are standard agreements across India. We also find that the Pune Tribunal relied on para 62 of the decision of Hon`ble Karnataka High Court in the case of Bharti Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar). We find that the Pune Tribunal had taken note of the fact that Hon`ble Karnataka High Court in 372 ITR 33 had distinguished all the three High Court judgements (i.e. Kerala, Calcutta and Delhi) relied upon by the Id. DR hereinabove. Effectively Pune Tribunal adopted the decision of Hon`ble Karnataka High Court. The Id. DR relied on para 64 of decision of Hon`ble Karnataka High Court and argued that it is against assessee for the first 7 months since discount is separately shown in the books of the assessee as an expenditure. In our considered opinion, what is to be seen is the broader question raised before the Hon`ble Jurisdictional High Court in Income Tax Appeal No. 1129 of 2017 dated 13/01/2020 in assessee`s own case against the order of Pune Tribunal.

2.8.8. In view of the aforesaid observations and findings given thereon, we do not deem it fit to adjudicate other arguments advanced by the Id. AR on the applicability of second proviso to section 40(a)(ia) read with section 201 of the Act, as it would become academic in nature. This aspect of the issue is left open.

2.9. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the sale of prepaid sim cards / recharge vouchers by the assessee to distributors cannot be treated as commission / discount to attract the provisions of section 194H of the Act and hence there cannot be any obligation on the part of the assessee to deduct tax at source thereon and consequentially there cannot be any disallowance u/s 40(a)(ia) of the Act. Accordingly, the Ground No. II raised by the assessee is allowed. The Ground No. I raised by the assessee is only supporting the Ground No. II for furnishing of additional evidences, the adjudication of which becomes academic in nature. Hence Ground No. I is also allowed.

7. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 2 raised by the assessee is allowed. As ground no. 1 is also to support ground no. 2 in terms of substantiating the same by filing additional evidences, although became academic now, but the same is also allowed based on outcome of ground no. 2.**

8. Ground no. 3 pertains to disallowance of Rs. 54,47,48,738/- on account of domestic roaming charges paid to other telecom operators u/s. 40(a)(ia) of the Act. This issue is identical to what discussed and decided in AY 2009-10 also by the Coordinate Bench vide ITA No. 3425/Mum/2014. Relevant findings of Coordinate Bench are as under:-

4.1. We have heard rival submissions and perused the materials available on record. During the year, the assessee has debited Rs.15,39,23,749/- on account of roaming charges in its profit and loss account which was claimed as deduction. The Id. AO observed that this expenditure was incurred without deduction of tax at source. The Id. AO show-caused the assessee as to why the same should not be disallowed u/s. 40(a)(ia) of the Act as the said payment would tantamount to rendering „fee for technical services“ in terms of Section 194J of the Act. The assessee gave a detailed written submissions explaining the entire modus operandi as under:-

1. *Roaming facility is a standard facility provided by the OTOs to the assessee and vice versa. When a subscriber is roaming in circles (states) where the assessee's network is not available, he is all able to make and receive calls by using network of OTOS. In such a scenario, since the subscriber is using the network of OTO, ideally such service provider should directly recover charges from that subscriber. But since it is impossible practically to do so, there is a mutual agreement entered between the network operators to allow use of each other's network by each other subscriber and then recover roaming charges from each other, which ultimately would be recovered from the end user subscriber. Thus, in substance, it is in nature of revenue sharing*

2. *To illustrate, suppose Home Operator (HO) is licensed to provide telecom services only in the Telecom Circle of Karnataka and Visiting Operator (VO) is licensed to provide services only in the Telecom Circle of Mumbai. Further, HO and VO have entered into a roaming arrangement whereby a subscriber of HO, travelling to Mumbai would be able to use the network of VO to avail telecom services and vice versa.*

3. *Given the above roaming arrangements, when a subscriber of HO travels to Mumbai, he will be able to seamlessly latch on to the network of VO and continue to use telecom services in Mumbai. Depending upon the usage of the subscriber and the arrangement between HO and VO, VO shall raise an invoice on HO for such usage by the subscriber, and HO shall subsequently recover such charges from the subscriber*

4. *Thus, each telecom operator would enter into a national roaming agreement with OTO (Refer a specimen national roaming agreement entered with BPL Cellular Limited on page no. 79 to 111 of the FPB-II).*

5. *Roaming Agreement Process: In order that a subscriber is able to "latch" on to a visited network, a roaming agreement needs to be in place between the visited network and the home network.*

Agreement is established after completing of following processes.

Business Agreement – Network and Billing configuration – IREG & TADIG Testing – Launch of commercial service.

Aforesaid process is enumerated in be as under:

- *Business Agreement - A business agreement is signed between two networks as per GSMA guidelines to setup roaming service.*
- *Network& Billing configuration - Post business agreement, necessary configures required to be done in visited and home network and billing system.*
- *IREG & TADIG Testing - Once configuration is done, series of testing is done as per GSMA specified guidelines defined in IREG & TADIO testing document.*
- *(i) IREG (International Roaming Expert Group)-IREG testing is to test the proper functioning of the established communication links.*
- *(1) TADIG (Transferred Account Data Interchange Group) - The TADIG testing is to check the billability of the calls*
- *Commercial Service Launch - After success testing of all scenarios defined in IREG document and TADIG verification, visited network is opened for commercial subscriber to roam in visited network.*

After commercial launch subscriber will automatically latch in visited network and will be able to use the services when they are in visited network coverage area.

6. Effort required for providing roaming service - GSM Service provider has to deploy and maintain a GSM network infrastructure to provide service to its own subscriber. Same infrastructure is used to provide service to roaming subscriber as well, hence service provider does not make any extra effort to provide service to roaming subscribers.

7. On commercial launch of any network, the entire telecommunication services (locally or roaming) is done automatically with negligible human intervention. Factually, it is impossible for the employee of a telecom company to connect lakhs of subscriber to the desired networks.

8. Thus, at the cost of repetition, may the assessee submit that even under the roaming, the entire set up/network infrastructure is the same as would be for the subscriber when using telecom services in his home circle. Only, difference being, due to the roaming agreement, the Home Operator would allow the subscriber of the visited Operator to use his network and make and receive call. The actual process of roaming is completely automated.

9. The assessee's contention that no tax is deductible under section 1943 of the Act on roaming charges paid to the OTOS is based on two separate and distinct propositions:

I. Any payment for the use of standard facility does not amount to FTS; and

II. Without prejudice, in absence of any human intervention during the actual roaming process, payment would not be FTS.

4.8. As in the present appeal before us, the Id. CIT(A) had relied on the decision of the Id. CIT(A) Chandigarh in the case of Idea Cellular Ltd by stating that the facts and circumstances are identical in both the cases when the said order of Id. CIT(A) Chandigarh had been reversed by the decision of the Chandigarh Tribunal referred to supra vide order dated 28/06/2018, we do not find any case in the argument advanced by the Id. DR before us in support of the orders of the lower authorities. Hence, respectfully following the aforesaid decision of the Chandigarh Tribunal which has dealt the decision on the impugned issue, the ground No.III raised by the assessee is hereby allowed.

9. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2009-10 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 3 raised by the assessee is allowed.**

10. Ground no. 4 pertains to disallowance of amortisation of the intrinsic value of ESOP charged to P & L account of Rs. 14,47,37,034/-. This issue is identical to what discussed and decided in AY 2008-09 also by the Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

3.9. We further find that the aforesaid decision on Special Bench of Bangalore Tribunal has been approved by the Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd., reported 430 ITR 151 / 121 taxmann.com 351. The relevant operative portion of the judgement of the Hon'ble Karnataka High Court are reproduced hereunder:-

“10. From perusal of section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfilment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.”

3.10. In view of the aforesaid observation and respectfully following the judicial precedents relied upon hereinabove, the ground No.III raised by the assessee is hereby allowed.

11. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 4 raised by the assessee is allowed.**

12. Ground no. 5 pertains to disallowance of interest expenses of Rs. 2,46,78,07,777/- for acquisition of the shares for erstwhile Spice Communication Ltd. This issue is identical to the facts and circumstances of the case decided by the Hon'ble Supreme Court in the case of **CIT vs. S. A. Builders (288 ITR 1) (SC)** and by the Hon'ble Bombay High Court in the case of **PCIT vs. Concentrix Serives (I) Pvt. Ltd. (2019) 111 taxmann.com 269 (Bom)**. Therefore, after following these decisions which are applicable mutatis mutandis, we allow ground no. 5 raised by the assessee.

13. Ground no. 6 pertains to disallowance of Rs. 4,14,65,950/- u/s 14A. This issue is identical to what discussed and decided in AY 2008-09 also by the

Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

5. *The ground No. V raised by the assessee is challenging the disallowance made u/s.14A of the Act.*

5.1 *We have heard rival submissions and perused the materials available on record. At the outset, we find that assessee had not earned any exempt income during the year. The Id. AO however, disregarded the same and observed that since assessee had made huge investments in various companies, disallowance u/s.14A of the Act need to be made and accordingly, he applied the third limb of Rule 8D(2) of the Rules and worked out the disallowance at Rs.6,94,050/-, which was upheld by the Id. CIT(A).*

5.2 *We hold that in the absence of any exempt income there cannot be any disallowance u/s.14A of the Act. The Id. DR vehemently argued and also filed written submissions on the ground that as per the amendment made in Finance Act 2022 on the provisions of Section 14A of the Act, disallowance u/s.14A of the Act would apply even when there is no exempt income derived by the assessee. He also argued that the said amendment need to be construed as retrospective in operation. Reliance in this regard was placed on the decision of Guwahati Tribunal in the case of Williamson Financial Services Ltd in ITA No.154-156/Gau/2019 for A.Y.2012-13 to 2014-15 and ITA No.159/Gau/2019 for A.Y.2009-10 dated 06/07/2022 in support of his contentions. But we find that the Co-ordinate Bench of this Tribunal in a very elaborate order rendered in the case of K. Raheja Corporate Services Pvt. Ltd., in ITA Nos. 2521- 2527/Mum/2021 for A.Yrs.2012-13 to 2017-18 respectively dated 17/06/2022 had elaborately considered the meaning of*

expression “for the removal of doubts” incorporated in the explanation in the amendment brought in Section 14A of the Act by Finance Act 2022 and had held that the said amendment need to be construed only prospectively. It is also pertinent to note that the said decision of Mumbai Tribunal relied upon supra has considered various Hon`ble Supreme Court decisions and had arrived at the conclusion in favour of the assessee. In any case, we further find that recent decision of the Hon`ble Delhi High Court in the case of PCIT vs. M/s. Era Infrastructure (India) Ltd., in ITA No.204 of 2022 dated 20/07/2022 had categorically held that the amendment brought in Finance Act 2022 is prospective in operation. For the sake of convenience, the relevant order is hereby reproduced:-

“Present Income-tax Appeal has been filed challenging the Order passed by the Income-tax Appellate Tribunal ('ITAT') in ACIT v. Era Infrastructure (India)

Ltd. [ITA No. 798/Del/2018, dated 10th March, 2021] for the Assessment Year 2013-14.

2. Learned Counsel for the Appellant states that ITAT has erred in law in deleting the disallowance of Rs. 3,61,53,268/- made by the Assessing Officer under Rule 8D of Income-tax Rules, 1962 read with section 14A of the Income- tax Act, 1961 ('the Act').

3. He submits that the ITAT erred in relying on the decision of this Court in Pr. CIT v. IL&FS Energy Development Company Ltd. [\[2017\] 84 taxmann.com 186/250 Taxman 174/399 ITR 483](#) (wherein it has been held that no disallowance under section 14A of the Act can be made if the assessee had not earned any exempt income), as the revenue has not been accepted the said decision and has preferred an SLP against the said decision.

4. Learned counsel for the petitioner also submits that in view of the amendment made by the Finance Act, 2022 to section 14A of the Act by inserting a non obstante clause and an explanation after the proviso, a change in law has been brought about and consequently, the judgments relied upon by the authorities below including IL&FS Energy Development Co. Ltd. (supra) are no

longer good law. The amendment to Section 14A of the Act is reproduced hereinbelow:—

'Amendment of section 14A.

In section 14A of the Income-tax Act,—

- (a) in sub-section (1), for the words "For the purposes of, the words "Notwithstanding anything to the contrary contained in this Act, for the purposes of shall be substituted;*
- (b) After the proviso, the following Explanation shall be inserted, namely:—*

"[Explanation.—For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]"

5. However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:

"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous

year in relation to such exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income- tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years." (emphasis supplied)

6. Furthermore, the Supreme Court in Sedco Forex International Drill. Inc. v. CIT [\[2005\] 149 Taxman 352/279 ITR 310](#) has held that a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced hereinbelow:

'9. The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.

10. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [[\(2000\) 241 ITR 314 \(Gau.\)](#)]. It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)

"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4- 1979, cannot

be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand. "

11. The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : [\(2000\) 241 ITR 312](#)] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.

12. In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:

"Explanation.-For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."

The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any change.

13. The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker.)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj.)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate

in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.

14. In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. SR Patton [(1998)8 SCC 608] .)

15. Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165]. It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the

Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3.

"5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years".

16. The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under section 119 of the Act,

nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165

: (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585, 598 : AIR 1981 SC1274, 1282 para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".'

(emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in M.M. Aqua Technologies Ltd. v. CIT [\[2021\] 129 taxmann.com 145/282 Taxman 281/436 ITR 582](#). The relevant portion of the said judgment is reproduced hereinbelow:—

"22. Second, a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill Inc. v. CIT, (2005) 12 SCC 717 as follows :

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the

relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of UP., (1981) 2 SCC 585]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24; Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352; CIT v. Podar Cement (P.) Ltd., (1997) 5 SCC 482]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in SG. Pgnatale [(1980) 124 ITR 391 (Guj.)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

*19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."
(emphasis supplied)*

8. Consequently, this Court is of the view that the amendment of section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

9. Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in Kunhayammed v. State of Kerala [\[2000\] 113 Taxman 470/245 ITR 360](#) and Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association [1992] 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in IL & FS Energy Development Co. Ltd. (supra) and Cheminvest Ltd. v. CIT [\[2015\] 61 taxmann.com 118/234 Taxman 761/378 ITR 33 \(Delhi\)](#).

10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of IL & FS Energy Development Co. Ltd. (supra)."

5.3 *Respectfully following the same, we direct the Id. AO to delete the disallowance made u/s.14A of the Act. Accordingly, the ground No.V raised by the assessee is allowed.*

14. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 6 raised by the assessee is allowed.**

15. Ground no. 7 pertains to disallowance of revenue share license fees of Rs. 7,24,57,14,772/-. This issue is identical to what discussed and decided in AY 2008-

09 also by the Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

6. The ground No.VI raised by the assessee is challenging the disallowance of Revenue sharing license fees amounting to Rs.415,08,45,362/-.

6.1 We have heard rival submissions and perused the materials available on record. The Id. AO observed that assessee had debited license fee amounting to Rs.4150.84 million in its profit and loss account. The Id. AO observed that assessee was claiming depreciation on license fee and deduction u/s.35ABB of the Act. This payment is made by the assessee to Government authorities to carry on the business of telecom service provider. The Id. AO observed that assessee had claimed license fees as deduction u/s.35ABB of the Act by amortising the expenditure over the period of license. He also observed that the assessee had to pay license fees on revenue sharing basis from A.Y.2000-01 onwards. This amount of Revenue sharing license fee was initially capitalised and depreciation was claimed on the same. However, subsequently the assessee started claiming this expenditure u/s.37(1) of the Act as deduction. The Id. AO observed that for the same category of expenditure, the assessee is claiming deduction u/s.35ABB of the Act on amortisation basis and also deduction u/s.37(1) of the Act thereby leading to double deduction. Accordingly, he disallowed the claim of Rs.415.08 Crores in addition to disallowing the claim of depreciation u/s.32 of the Act amounting to Rs.4,99,08,190/-. The Id CIT(A) followed the order passed by his predecessor for A.Y.2007-08 and partly allowed the claim of the assessee by allowing depreciation on the revenue sharing license fee paid.

6.2 We find that revenue sharing license fee is a fixed fee payable by the assessee to department of telecommunications, Government of India. Now, the short question is whether the said payment would be revenue expenditure eligible for

deduction or alternatively eligible for amortisation u/s.35ABB of the Act or eligible for depreciation when it is capitalised.

6.3 *We find that this is a recurring issue in the case of the assessee. We find that this Tribunal in A.Y.2007-08 in ITA Nos. 4445 and 4418/ Mum/2013 for A.Y.2007-08 and 1977 and 1853/Mum/2013 for A.Y.2006- 07 dated 27/05/2016 had allowed deduction as Revenue expenditure in respect of revenue sharing license fee paid by the assessee. We further find that for the A.Y.2007-08 and 2006-07 in assessee's own case, the very same issue was agitated by the revenue before the Hon`ble Jurisdictional High Court which was disposed of in Income Tax Appeal No.741 of 2017 dated 13/01/2020 by the Hon`ble High Court in favour of the assessee. Similarly, the very same issue in the case of the assessee for A.Y.2003-04 in Income Tax Appeal No.1551/2013 dated 11/04/2016 was decided in favour of the assessee by the Hon`ble High Court by allowing it as Revenue expenditure u/s.37(1) of the Act.*

6.4 *With regard to allegation levelled by the Id. DR that assessee had made double deduction, the Id. AR duly clarified that assessee had claimed this deduction on hybrid model, because for one circle which was taken over by the assessee from another company, that company was claiming deduction on amortisation basis u/s.35ABB of the Act. This was continued by the assessee even after takeover of the said company in respect of that one circle alone. In respect of other circles operated by the assessee, the assessee had been consistently claiming deduction as revenue expenditure u/s.37(1) of the Act. Accordingly, he submitted that there is absolutely no double deduction claimed by the assessee at all. This fact was submitted before the Id. CIT(A) by the assessee but no finding has been given by the Id. CIT(A) in this regard. Hence, in the interest of justice and fair play, we remand this issue to the file of the Id. AO for limited purpose on verification of the fact as to whether the*

assessee has claimed double deduction in respect of this expenditure for the same circle where the assessee is operating its telecom services. If it is found that there is no double deduction claimed by the assessee, the assessee would be eligible for deduction as revenue expenditure u/s.37(1) of the Act which would be in tune with the decisions rendered by the Hon'ble Jurisdictional High Court in assessee's own case for A.Yrs. 2003- 04, 2006-07 and 2007-08 referred to supra. With these observations, the ground No.VI raised by the assessee is allowed for statistical purposes.

16. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 7 raised by the assessee is allowed for statistical purposes.**

17. Ground no. 8 and 9 has not been pressed, therefore these grounds raised by the assessee are dismissed.

18. Ground no. 10 pertains to addition to compensation cost of Rs. 14,47,37,034 of ESOPs to book profit u/s 115JB of the Act. This issue is identical to what discussed and decided in AY 2008-09 also by the Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

9. *The ground No.IX is challenging the disallowance of compensation cost of ESOP amounting to Rs.3,75,90,000/- while computing book profit u/s.115JB of the Act.*

9.1 *We have heard rival submissions and perused the materials available on record. We have already held vide ground No.III hereinabove that the compensation cost of ESOP would be allowable as revenue expenditure for the assessee company on merits. Hence, the said expenditure is not be eligible to be added back for computing the book profit u/s.115JB of the Act, as we have already held that the said expenditure is not contingent or notional in nature. Accordingly, the ground IX raised by the assessee is allowed.*

19. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 10 raised by the assessee is allowed.**

20. Ground no. 11 pertains to addition of Rs. 4,14,65,950/- calculated u/s 14A to the book profit u/s 115JB of the Act. This issue is identical to what discussed and decided in AY 2008-09 also by the Coordinate Bench vide ITA No. 2285/Mum/2014. Relevant findings of Coordinate Bench are as under:-

10. *The ground No.X raised by the assessee is challenging the disallowance u/s.14A of the Act while computing book profits u/s.115JB of the Act.*

10.1 *We have heard rival submissions and perused the materials available on record. We have already held vide ground No.V above that no disallowance u/s.14A of the Act could be made in the instant case as there was no exempt income claimed by the assessee. The said decision would hold good for this ground also as admittedly Clause „f“ of Explanation 1 to Section 115JB(2) of the Act would come into operation only if there is exempt income credited in the profit and loss account. Accordingly, the ground No.X raised by the assessee is allowed.*

21. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon’ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 11 raised by the assessee is allowed.**

22. In the result, the appeal filed by the assessee is **partly allowed for statistical purposes.**

ITA No. 3674/Mum/2014

22. This cross appeal filed by the revenue on the following grounds of appeal:-

1. *"On the facts and in circumstances of the case and in law, the Ld. CIT (A) was justified in allowing depreciation on the license fees of Rs.7, 24, 57, 14,772/- without*

appreciating the fact that the assessee had claimed deduction u/s.35ABB and allowing of depreciation on such amount is barred by the provisions of sub section 8 of 35ABB of the I.T. Act, 1961."

2. "The appellant prays that the order of CIT (A) on the above ground be set aside and that of the Assessing Officer be restored."

3. "The appellant craves leave to amend or alter any round or add a new ground which may be necessary."

23. The sole issue raised by the revenue is identical to what discussed and decided in AY 2008-09 by the Coordinate Bench vide ITA No. 2273/Mum/2014. Relevant findings of Coordinate Bench are as under:-

12. The ground No.1 raised by the Revenue is common with ground No.VI raised by the assessee. The decision rendered hereinabove for ground No.VI of assessee"s appeal would hold good for ground No.1 of the Revenue appeal. Hence, the ground No.1 raised by the Revenue is dismissed.

24. As we seen with reference to relevant extract of the order of Coordinate Bench on identical issue for AY 2008-09 has been discussed and deliberated with all relevant facts, agreements and findings of various Hon'ble High Courts and Apex Court and revenue in their arguments in not in a position to differentiate neither in terms of facts nor law, without any hesitation, we accept the preposition laid down by the Coordinate Bench. In view of above, **ground no. 1 raised by the revenue is dismissed.**

25. In the result, the appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 27th day of July, 2023.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 27/07/2023

Sr. PS (Dhananjay)

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
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BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai