

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "I" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1121/Mum/2014 (A.Y. 2009-10)

Vodafone India Ltd. Peninsula Corporate Park Ganpatrao Kadam Marg Lower Parel Mumbai-400 013.	Vs.	DCIT-7(3) Mumbai.
(Appellant)		(Respondent)

I.T.A. No. 1885/Mum/2014 (A.Y. 2009-10)

DCIT-5(2)(1) 5 th Floor Room No. 525 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Vodafone India Ltd. 10 th Floor, Birla Centurion, Pandurang Budhkar Marg, Worli Mumbai-400 030. PAN : AAACZ1849D
(Appellant)		(Respondent)

Assessee by	Shri Ninad Patade
Department by	Shri Ashok Kumar Abastha
Date of Hearing	25.08.2023
Date of Pronouncement	08.11.2023

ORDER

Per B.R.Baskaran (AM) :-

These cross appeals are directed against the assessment order dated 21-01-2014 passed by the assessing officer for assessment year 2009-10 u/s 143(3) r.w.s 144C(13) of the Act in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. The assessee is a Cellular Service Provider. The AO passed the draft assessment order by making transfer pricing adjustments made by the

Transfer Pricing Officer (TPO) and also various additions. The assessee filed objections against the draft assessment order before Ld DRP. After receipt of the order passed by Ld DRP, the assessing officer has passed this final assessment order, which the assessee is challenging in the present appeal filed before the Tribunal. The revenue is challenging the decision of Ld DRP with regard to deduction claimed u/s 80IA of the Act.

3. The assessee has raised many grounds, while the revenue assails the decision of Ld DRP with regard to allowing deduction u/s 80IA of the Act. We notice that the first issue raised by the assessee in Ground no.1 & 2 relates to the disallowance made u/s 80IA of the Act. Hence the appeal of the revenue and the above said grounds are adjudicated together. With the adjudication of these grounds, the appeal of the revenue would get disposed of and the ground nos. 1 & 2 of the assessee will also be addressed.

3.1 The case of the revenue is that the assessee had commenced the business of providing telecommunications prior to 01-04-1995, i.e., in AY 1995-96. It is pertinent to note that the benefit of deduction u/s 80IA will be available only if assessee has started providing telecommunication services after 01-04-1995. The contention of the revenue is that the assessee is not eligible for deduction u/s 80IA of the Act, since the telecommunication business has been started by the assessee prior to 1.4.1995. Since the Ld DRP had held that the assessee has started providing telecommunication services after 01-04-1995, the revenue has filed this appeal.

3.2 We notice that the issue relating to the date of commencement of providing of telecommunication services by the assessee has been examined in detail by the co-ordinate bench in the assessee's own case in AY 2005-06 in ITA No.5598/Mum/2017 dated 28-11-2022 and held that the assessee has started providing telecommunication services after 01-04-1995. The Tribunal also observed that the assessee has started claiming deduction u/s

80IA of the Act in respect of profits and gains derived from telecommunication services in AY 2005-06 for the first time. For the sake of convenience, we extract below the decision rendered by co-ordinate bench in AY 2005-06:-

“8.The primary reason for rejecting assessee’s claim by the Assessing Officer is that the assessee started providing telecommunication service in the Financial Year 1994-95 i.e. prior to 01/04/1995. As per the provisions of section 80IA the undertaking is eligible for benefit of deduction u/s. 80IA(4)(ii), if the undertaking started or starts providing telecommunication service on or after 1st day of April 1995. According to the Assessing Officer since, the assessee has started providing telecommunication services prior to 01/04/1995 the assessee is not eligible for claiming deduction u/s. 80IA of the Act. The assessee claimed deduction u/s. 80IA of the Act for the first time in AY 2005-06.

9. Two issues have emerged from the submissions and the grounds of appeal raised by the Department:

(i) Whether the assessee started providing telecommunication services before 01/04/1995 or thereafter; and

(ii) Whether the assessee is eligible to claim deduction u/s. 80IA(4)(ii) of the Act .

10. The primary reason for rejecting assessee’s claim of deduction u/s. 80 IA(4)(ii) of the Act by the Department is that the assessee started providing telecommunication services prior to 01/04/1995. Whereas, the claim of assessee is that the assessee started providing telecommunication services after 01/04/1995.

11. Before proceeding further to decide this issue, it would be imperative to refer to the provisions of section 80 IA(4)(ii) of the Act. The relevant extract of the same are reproduced herein below:

Section 80IA(4)(ii)

*“(ii) any undertaking which has **started or starts providing telecommunication services**, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services **on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.**”*

12. The Department in order to prove that the assessee started providing telecommunication services which includes radio paging services and

cellular telephone services inter-alia placed reliance on following documents:

- (i) Form No.10CCB furnished by the assessee for AYs 2005-06 & 2006-07;
- (ii) Return of income of assessee for A.Y. 1995-96 and 1996-97;
- (iii) Information extracted from Web portal of Max Telecom (predecessor of the assessee);
- (iv) Licence agreement dated 29/11/1994;
- (v) Telecom Commission report;
- (vi) Additional evidences filed by the Department viz. communication between the assessee and Principal General Manager, Department of Telecommunication (in short ' the DoT'), invoices, etc.

13. On the other hand, the assessee in order to substantiate that the assessee started providing telecommunication services after 01/4/1995 inter-alia placed reliance on following documents:

- (i) Assessment order for Assessment Year 1995-96 and 1996-97;
- (ii) Letter of approval and letter of clearance issued by DoT Government of India;
- (iii) Auditors Certificate clarifying date of commencement of services;
- (iv) Interface/Service approval Certificate;
- (v) Radio frequency assignment letter;
- (vi) Approval from CBDT u/s. 10(23G) of the Act, etc.

14. Hutchison Max Telecom Pvt. Ltd. (predecessor of the assessee) was incorporated on 21/02/1992 with the main object of providing radio paging services and cellular telephone services in India. Initially, the assessee claimed that the business of assessee commenced in Financial Year 1994-95 i.e. the period relevant to the Assessment Year 1995-96. The assessee in the return of income for Assessment Year 1995-96 claimed interest expenditure and depreciation, accordingly. The Assessing Officer issued a questionnaire dated 16/12/1997 making specific enquiries regarding the details of commencement of paging and cellular services and details of machinery, equipment and installation required for operating paging and cellular services. The Assessing Officer after making detailed enquiries came to conclusion that cellular services were started by the assessee on 16/11/1995. Even pilot services prior to commencement of commercial services were started on 27/07/1995 and radio paging services commenced during the period May 1995 to June 1995. The Assessing Officer in assessment order dated 09/03/1998 for Assessment Year 1995-96 categorically held that the assessee's business was not set up by 31/03/1995. The relevant extracts from the assessment order for 1995-96 are reproduced herein below:

“6. After taking into account all the facts relevant to the issues and the submissions made by the assessee, it is held that the assessee’s business was not set up in 1992. **It is also held that the business of the assessee has not been set up till the closure of the accounting year relevant to the assessment year under consideration i.e. 31/03/1995.** The reasons for holding so are discussed below:

A. xxxxx

B. xxxxx

C. xxxxx

D. *The nature of the business of the assessee is such that it requires a large scale development of highly sophisticated communication equipment. These equipments could be operationalised only after developing the requisite software for that area. **There is no evidence provided by the assessee company on record to show that necessary equipments and the required software was installed by the assessee on 31/03/1995. It is pertinent to note that even the pilot services for cellular telephone and the paging services were started 2 to 4 months after the closure of the previous year under consideration. This means that the required equipments and software were installed by the assessee only after 2 to 3 months of the closure of the previous year in question.***

[Emphasized by us]

The assessee filed appeal against the aforesaid assessment order before the CIT(A), however, the said appeal was withdrawn by the assessee. No revision proceedings were carried out by the Department for the Assessment Year 1995-96. Thus, the aforesaid assessment order attained finality.

In the assessment order for 1996-97 dated 09/01/1999 passed u/s. 143(3) of the Act, the Assessing Officer in para 3 recorded, **“The assessee’s business has commenced in the financial year pertaining to current asstt. year. The cellular services had started on 16/11/1995 and paging services in 7 cities were also started in May/June 1995.”** The Assessing Officer in assessment order for Assessment Year 1996-97 in para -3.1 of the order further observed, **“The issue regarding setting up of business has already been decided in the case of assessee company in Asst. year 1995-96 by passing a detailed order.”** The Assessing Officer after recording the above facts allowed assessee’s claim of depreciation in Assessment Year 1996-97. The aforesaid findings given in the assessment order for Assessment Year 1996-97 were confirmed by the CIT(A) vide order dated 11/09/2000. No further appeal was filed by either of the sides thereafter, hence, the findings in the assessment order for Assessment Year 1996-97 became final.

15. The assessee in order to substantiate that cellular services commenced after 01/04/1995 referred to the communication dated 31/05/1995 from DoT, Wireless Planning and Co-ordination (WPC) Wing (at page 113 of Assessee’s paper book -1), whereby Radio Frequency

Channels for GSM Cellular Network in Mumbai was assigned to the assessee. Our attention was also drawn to the letter dated 13/10/1995 at page 116 of the Paper Book-1, whereby Ministry of Communications (WPC Wing) accorded permission for launching cellular mobile telephone services at Mumbai subject to final clearance from Director (VAS-I), DoT. The said clearance was accorded to the assessee by Director (VSA-I) vide letter dated 20/10/1995 (at page 117 of Paper Book-1). Although, the licence agreement was executed between the assessee and DoT in November, 1994 the assessee could not have started cellular mobile telephone services till the time radio frequency was assigned and all clearances prior to commencement of cellular mobile telephone services are obtained by the assessee. A perusal of the said agreement (Condition -20) clearly mentioned that a separate licence shall be required from the WPC Wing of Ministry of Communication which will permit utilisation of appropriate radio frequency spectrum for establishment and operation of cellular mobile telephone services. Thus, without allocation of radio frequency the assessee could not have commenced cellular mobile telephone services. As is evident from permits/assignment letters from the DoT referred above it is evident that the said permissions/clearances were granted to the assessee after 01/04/1995.

In so far as radio paging services is concerned the assessee received Interface/Service approval Certificate for the seven cities (Telecom District) in the month of April/May 1995. The date-wise details of the same are tabulated herein below:

Date	Telecom District
31/03/199	Chandigarh
20/04/199	Ludhiana
28/04/199	Pune
01/05/199	Bangalore
09/05/199	Secunderabad
22/05/199	Vadodara
24/05/199	Ahmadabad/Gandhinagar

After Interface/Service approval Certificate, radio frequency for paging services were assigned to the assessee by WPC Wing on 24/04/1995 for Chandigarh Telecom District. Similarly, for other Telecom Districts mentioned above the WPC Wing allotted frequency for radio paging service in the month of April/May 1995. Radio paging services could be provided only after assignment of radio frequency by the DoT, government of India. From the documents on record it is evident that the assessee started providing radio paging service after 01/04/1995.

16. In the case of ACIT vs Vodafone Essar Gujarat Ltd. (supra), the assessee had entered into agreement on 11-1-1996. In the State of Gujarat, the assessee started telecommunication services on 24-01-1997 i.e. in assessment year 1997-98. The assessee claimed deduction u/s. 80IA (4) of

the Act in assessment year 2006-07. The Assessing Officer held that for the purpose of claiming deduction u/s.80IA(4) of the Act, assessment year 1996-97 was the initial year as the agreement was executed in the period relevant to the said assessment year. The matter travelled to the Tribunal. The Tribunal held that the assessee started its commercial operations on 24/01/1997, therefore, initial year for claiming deduction u/s. 80IA(4) was assessment year 1997-98. The Assessing Officer in the assessment for 1997-98 accepted that assessee started providing telecommunication services in AY 1997-98. The Assessing Officer in assessment order dated 29/01/1999 for assessment year 1996-97 had held that no business activities were carried out by the assessee. The dispute in AY 2006-07 was the "initial assessment year". The assessee claimed AY 1997-98 to be the initial AY, whereas, the Revenue held that the AY 1996-97 was the initial AY. The Tribunal while deciding the controversy in assessment year 2006-07 held that, "whether or not" the assessee started providing telecommunication services in any year has to be decided in the assessment proceedings for that year in the light of the relevant facts and circumstances of that assessment year alone. The Tribunal further held that without reopening the assessment proceedings for AY 1996-97, the findings recorded in the assessment year 1996-97 cannot be reconsidered in the subsequent assessment years. To support this view the Tribunal placed reliance on the decision of Hon'ble Apex Court in the case of New Jehangir Vakil Mills Co. Ltd. vs. CIT, 49 ITR 137. The aforesaid decision of the Tribunal was upheld by the Hon'ble Gujarat High Court in Tax Appeal No.1339 of 2010(supra).

Similarly, in the instant case the Revenue is trying to reconsider the concluded findings of the assessment order for assessment year 1995-96 and 1996-97 in assessment year 2005-06. This is impermissible in the scheme of Act. The Revenue by placing reliance on defective certifications and information derived from web portal of the assessee is trying to revisit the facts settled in assessment year 1995-96 and in assessment year 1996-97. The Act does not permit to disturb the findings of closed assessment (except within the mechanism provided under the provisions of the Act) in assessment proceedings for later AYs.

17. Non mentioning of date of commencement or mentioning of wrong date in Form No.10CCB by the Auditors of the assessee can be an error of reporting. We find that in Auditor's Report for the Financial Year ending on 31st March , 1995 (relevant to AY 1995-96), the Auditors have reported:

"No Profit and Loss Account has been prepared for the year ending 31st March, 1995 since the Company has not commenced commercial service."

The subsequent certification by the Auditor's dated 28/11/2013 rectifying the date of commencement in Form 10CCB for AY 2006-07 is in consonance with the Auditor's Report for FY 1994-95.

De-hors the fact that the date of commencement in Form 10CCB for assessment year 2005-06 was not mentioned or wrong date of commencement is mentioned in Form 10CCB for in assessment year

2006-07, the Department cannot turn blind eye to the findings given in the assessment order for assessment year 1995-96 and 1996-97, wherein it was held that the assessee had not commenced the business till 31/03/1995 and it was thereafter only that the assessee started or starts providing telecommunication services. The Department after a decade cannot overlook the findings of the Assessing Officer which were not disturbed by invoking the provisions of section 263 or 148 of the Act or any other provisions of the Act that provide remedy to the Department to correct the alleged wrong findings of the Assessing Officer. Now, the Department cannot disown the assessment order for AY 1995-96 and 1996-97 staring at the face of Revenue.

18. Another reason for Revenue to believe that the assessee had commenced business in the Financial Year 1994-95 is the sale of pagers, as has been reflected in the books of the assessee. The contention of Revenue is that as soon as the assessee purchased pagers for resale the assessee commenced its business of telecommunication. We do not concur with the argument put forth on behalf of the Department. The requirements of section 80IA(4)(ii) is, **“any undertaking which started or stars providing telecommunication services on or after the 1st day of April 1995.”** The requirement of section is not commencement of business but the start of telecommunication services. It is the commencement of telecommunication services which is material for the purpose of section 80IA(4)(ii) of the Act. The business may commence with the purchase of pagers but telecommunication services would only start after assignment of radio frequency and various other technical/interface approvals from the DoT. The Revenue has placed reliance on the decision in the case of CIT vs. ESPN Software India Pvt. Ltd.(supra) and CIT vs. Saurashtra Cement and Chemical Industries Ltd.(supra) in support of the arguments that the business of the assessee commenced on the date of agreement or the date on which the assessee had traded in Pagers. There is no dispute in so far as the law laid down by the Hon'ble Court in the aforesaid decisions. However, the ratio laid down in the aforesaid decisions would not apply in the facts and circumstances of the present case.

19. One of the objection raised by the Department is that the assessee has not maintained separate books of account. The assessee had ventured into two different telecommunication services i.e. radio paging services and cellular mobile telephone services. The Id. Counsel for the assessee stated at Bar that the assessee has claimed deduction u/s. 80IA of the Act in respect of cellular mobile telephone services only.

It is evident from the documents on record that radio paging services were started in May /June 1995 and the cellular telephone services were started in November 1995. Thus, both telecommunication services started after 01/04/1995. Undisputedly, the assessee was not maintaining separate books of account for two different segment of telecommunication services. Separate books of account for the two segments is not a mandatory condition for claiming deduction u/s. 80IA of the Act. Our aforesaid view is supported by the decision rendered by the Hon'ble

Punjab and Haryana High Court in the case of CIT vs. Micro Instruments Co.(supra). Therefore, the claim of the assessee u/s. 80IA of the Act cannot be declined on the ground that the assessee was not maintaining separate books of account for two different segment of telecommunication services.

The Revenue in support of its submissions has placed reliance on the decision in the case of Arisudana Spinning Mills vs. CIT (supra). We find that the ratio laid down in the aforesaid decision would not apply in the instant case. The need to maintain separate books of account in the said case was necessitated because of the nature of business of the assessee therein. The assessee therein had claimed the benefit of deduction u/s. 80IA of the Act in respect of manufacturing activity and trading activity. In the instant case, the assessee is providing telecommunication services. No manufacturing or trading activity was carried out by the assessee except for sale of Pagers. Be that as it may, as pointed earlier there is no statutory requirement for maintaining separate books for two different segments.

20. The Department raised an objection that the assessee is ineligible to claim the benefit of deduction u/s 80IA of the Act as it fails to fulfill the conditions of section 80IA(3) of the Act. The undertaking has been allegedly formed after merger/reconstruction of two divisions i.e. cellular telephone service division and radio paging service division.

The above argument advanced by the Revenue is contrary to the CBDT Circular No.5 of 2005 (supra). The aforesaid circular in unambiguous terms explains that, "*this deduction is inter alia available to an undertaking providing telecommunication services if such undertaking is formed by splitting up or reconstruction of a business already in existence or by the transfer to a new business of old plant and machinery.*"

The Circular (supra) further clarifies that the condition introduced by the Finance (No.2) Act, 2004 will not apply to undertakings which have started providing telecommunication services prior to 01-4-2004. Documents on record clearly show that the assessee started providing telecommunication services after 01/4/1995 but before 01/4/2004. Thus, even if the assessee's undertaking is formed after merger/reconstruction, still the assessee would be eligible for deduction u/s.80IA of the Act in the light of CBDT circular (supra).

21. In the light of our findings above, we see no infirmity in the order of CIT(A) in coming to the conclusion that the assessee had started telecommunication services after 01/04/1995 and the assessee is eligible for deduction u/s. 80IA(4) of the Act. The findings of the CIT(A) on this issue are confirmed and the appeal of Revenue is dismissed. Thus, both the issues emerging from the appeal of the Revenue are decided in favour of the assessee."

3.3 It can be noticed that the co-ordinate bench, by the above said detailed order, has held that the telecommunication services have been started by the assessee after 01/04/1995. Following the same we reject the appeal filed by the revenue.

4. The Ld DRP, after giving a finding that the assessee has started providing telecommunication services after 1.4.1995, has denied the deduction on various reasons. Hence the assessee has raised ground no.1 and 2 before us. The main claim of the assessee is that it has started claiming deduction u/s 80IA of the Act from AY 2005-06 onwards. Hence it is eligible for 100% deduction for AYs 2005-06 to 2009-10 and 30% deduction thereafter. We noticed earlier that the co-ordinate bench has accepted that the assessee has started claiming deduction u/s 80IA from 2005-06 onwards, meaning thereby, the assessee should be eligible for deduction @ 100%, since the year under consideration would fall within the eligible period for making claim. Further, the AO had rejected the claim for deduction u/s 80IA of the Act on other miscellaneous income. We notice that both the issues are covered by the decision rendered by co-ordinate bench in assessee's own case in AY 2008-09 in ITA No.6718/mum/2012 dated 08th May, 2023. The relevant observations made by the Tribunal are extracted below:-

“Para 7. Ground No.2 & 3 – Disallowance of deduction u/s 80IA of the Act and disallowance of deduction u/s 80IA of the Act on ‘Other incomes’:

The co-ordinate Bench while deciding the appeal of assessee for assessment year 2005-06 in ITA No. 5598/Mum/2017 vide order dated 28/11/2022 has held that the assessee started telecommunication services after 01/04/1995 and hence, the assessee is eligible to claim deduction u/s 80IA(4) of the Act. Following the order of Tribunal in assessee's own case for assessment year 2005-06, the assessee's claim of deduction u/s 80IA of the Act was allowed in assessment year 2006-07 and 2007-08. In the impugned assessment year the assessee's claim of deduction u/s 80IA of the Act was rejected for the reason similar to assessment year 2006-07. Following the decision rendered in assessee's own case for assessment year 2006-07 (supra), ground no.2 of the appeal is allowed.

7.1 The assessee's claim of deduction u/s 80IA in respect of interest income, miscellaneous income, cell site sharing revenue and net foreign exchange gain was rejected. We find that in assessee's appeal for assessment year 2005-06 in ITA No.5078/Mum/2017 dated 28/12/2022, the Tribunal has accepted assessee's claim of deduction u/s 80IA of the Act on other incomes, viz., interest income and miscellaneous income. Following the order of Co-ordinate Bench, ground no.3 of the appeal is allowed, protanto."

4.1 The facts, being identical in this year also, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow deduction u/s 80IA of the Act.

5. The next issue raised in Ground No.3 relates to the disallowance of depreciation claimed on "Asset restoration cost" obligation. In the earlier years, this issue has been restored back to the file of AO by the Tribunal for examining the assessee's method of determining provision, since it was not examined by the AO. Following the order so passed by co-ordinate bench in the earlier years, we restore this issue to the file of AO with similar directions.

6. The next issue urged in Ground no.4 relates to the disallowance made u/s 14A of the Act. The Ld A.R submitted that the assessee did not earn any exempt income during this year and also in earlier years. Hence the Tribunal, in the earlier years, has deleted the disallowance made by the AO u/s 14A of the Act. Since the assessee did not earn any exempt income, the question of making disallowance u/s 14A of the Act will not arise as per the decision rendered by co-ordinate benches in the earlier years. The decision of Tribunal also gets support from the decision rendered by Hon'ble Delhi High Court in the case of IL & FS Energy Development Company Ltd (2017 SCC online Del 9893). Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance made u/s 14A of the Act.

7. The next issue urged in Ground no.5 relates to disallowance of interest relatable to interest free loans given to subsidiaries. We notice that an identical disallowance made in AY 2006-07 (ITA No.216/Chandi/2011 dated 16-03-2023 dated 16-03-2023) has been deleted by the Tribunal. Following the said order, another co-ordinate bench deleted identical disallowance made in AY 2008-09. The decision rendered in AY 2006-07 is extracted below:-

“ITA NO.216/CHANDI/2011(A.Y.2006-07)
ITA NO.1173/CHANDI/2011(A.Y.2007-08)

19. Both sides heard, orders of authorities below examined. The Assessing Officer has disallowed interest free loans advanced to the sister concerns. **The primary contention of the assessee is that loans have been advanced to sister concerns out of commercial expediency. It is an undisputed fact that the loans has been advanced by the assessee to the group concerns who were in the same business and are providing cellular services in different telecom circles in India.** The stand of the assessee before the authorities below for providing interest free loans to subsidiaries is that the subsidiaries are in the initial years of business and require huge initial outlay of funds and the telecommunication business has long gestation period. It may not be possible for new entities to obtain entire requirement of funds from banks/financial institutions. Therefore, the assessee extended loans/advances to its subsidiaries in the initial years of business. We find merit in the explanation furnished by the assessee. **The Hon'ble Supreme Court of India in [S.A Builders Ltd. vs. CIT\(Supra\)](#) has held that once it is established that interest free loans has been advanced to sister concerns on account of commercial expediency, the interest paid on such loans by assessee cannot be disallowed.** In so far as the objection of Revenue regarding advancement of loans to a loss making group concern, we hold that it is the assessee who has the exclusive right to take a call regarding advancing of loans to the group concern, the Assessing Officer cannot sit in the arm chair of the assessee and decide to whom loan is to be extended or at what rate of interest loan is to be extended. Once the assessee has been able to establish commercial expediency for extending the loan, which in our considered view the assessee has been successful in the present case, the interest expenditure cannot be disallowed.

19.1 The assessee has further shown that to cover the interest free loans advanced to Vodafone South Limited and Vodafone Digilink Limited aggregating to Rs.830 crores, the assessee has sufficient own funds to cover the investment. The Hon'ble Bombay High Court in the case of Reliance Utilities and Power Limited (supra) has held that, where the assessee is having mixed bag of interest free funds and interest bearing funds and the assessee has made investment out of such common pool of

funds, the presumption would be that the investments are made out of interest free funds available with the company provided the said funds are sufficient to meet the investments. Thus, in the facts of the case and the decisions discussed above, we find merit in ground No.5 of the appeal. The disallowance of interest expenditure on loans given to subsidiaries is directed to be deleted. The assessee succeeds on ground No.5 of the appeal.”

7.1 The Ld A.R submitted that all the subsidiaries are in same line of business, i.e., they are providing cellular services in different circles in India. Further the loans have been given out of commercial expediency. The Ld D.R did not object to this factual aspect. We notice that the co-ordinate bench has followed the decision rendered by Hon’ble Supreme Court in the case of S A Builders Ltd (288 ITR 1), wherein it is held that once it is established that interest free loans has been advanced to a sister concern on account of commercial expediency, the interest paid on loans taken by the assessee cannot be disallowed. Since the facts are being identical, following the decision rendered by the co-ordinate benches, we set aside the order passed by Ld CIT(A) and direct the AO to delete this disallowance.

7.2 We notice that the co-ordinate bench has also considered the fact of own funds available with the assessee in the earlier years. However, in the year under consideration, the funds position was not brought to our notice and hence we are not considering the same.

8. The next issue urged in Ground no.6 relates to disallowance of interest on Capital Work in Progress. The assessing officer disallowed a part of interest expenditure relatable to Capital work in progress on the reasoning that the proviso to sec.36(1)(iii) requires disallowance of interest expenses incurred on borrowed capital used to acquire fixed assets. We notice that an identical disallowance was made in AY 2006-07 and 2007-08 (ITA No.216/Chandi/2011 & ITA No.1173/Chandi/2011 respectively) and the said disallowance was deleted with the following observations:-

“20. In ground No.6 & 7 of appeal the assessee has assailed disallowance of interest Rs.1,63,96,415/- on Capital Work-in-Progress and disallowance of interest Rs.38,70,010/- on ECB. The ld. Counsel for the assessee submits that the assessee has acquired fixed assets from the borrowed capital during the year relevant to the assessment year under appeal. The assets were acquired not for the purpose of extension of its existing business but to provide better quality of services to the customers. The Assessing Officer while disallowing interest on capital work-in-progress and interest on ECB has erred in holding that the assessee has extended its existing business, by making substantial addition to the fixed asset base of the company. The Assessing Officer on wrong appreciation of facts has erred in coming to the conclusion that interest paid on capital borrowed is for acquisition of assets for extension of business, hence, not allowable as deduction u/s. 36(1)(iii) of the Act. The ld. Counsel for the assessee asserted that the assessee has utilized borrowed funds for the purpose of carrying out its existing operations more efficiently. The expenditure on capital work-in-progress was for facilitating its existing operations and not in connection with extension of its existing operations. The investments in network assets is a continuous process to improve quality of services for its subscribers, hence, the assets acquired cannot be construed for extension of existing business operations. In telecommunication business the extension of business mean expansion beyond geographical area, where telecommunication services are rendered. The assessee is providing telecommunication services in Mumbai Telecom Circle and even after acquiring new assets the geographical area of operation remain confined to Mumbai Telecom Circle. The ld. Counsel for the assessee in support of his submissions placed reliance on the following decisions:

- (i) [DCIT vs. Core Healthcare Ltd.](#), 252 ITR 61 (Guj).
- (ii) [ITW Signode India Ltd. vs. DCIT](#), 110 TTJ 170 (Hyd-Trb)

In respect of ECBs the ld. Counsel for the assessee submits that ECB was raised by the assessee for the purpose of acquiring fixed assets for supporting and smooth running of existing business. The ECB loan was received on 10/03/2006 and the same was not utilized up to end of the Financial Year 2006 i.e. 31/03/2006. The interest cost on the ECB has not been capitalized during the impugned assessment year, nor depreciation has been claimed thereon. The ld. Counsel for the assessee finally submitted that as long as borrowings are for the purpose of business, it is not relevant as to whether they are in the nature of capital or revenue. The proviso to [section 36\(1\)\(iii\)](#) is not attracted as it is not a case of extension of existing business.

21. Per contra, the ld. Departmental Representative vehemently defending the assessment order submitted that the assessee had acquired loans and raised ECBs for expansion of business. With the acquisition of new assets, the subscriber base of the assessee has increased, the increase in subscriber base is also an extension of business. Therefore, proviso to [section 36\(1\)\(iii\)](#) of the Act is attracted. The ld. Departmental Representative referred to the findings of the Assessing Officer in para 5.4

to 5.6 of the assessment order. The ld. Departmental Representative pointed that there has been substantial addition in the fixed assets of the assessee under the head 'Plant and Machinery'. This shows that there has been substantial expansion of the existing business by the assessee. The ld. Departmental Representative further pointed to the observations of the Assessing Officer in para 5.6 of the impugned order that capital work-in-progress has not been utilized for the purpose of business during the year under consideration, hence, interest expenses on capital work- in-progress is not allowable as deduction.

21.1 In respect of ECB loans, the ld. Departmental Representative pointed that the Assessing Officer has categorically mentioned that ECB loans were not utilized by the assessee till 31/03/2006, hence, interest paid on such loans is not allowable u/s. 36(1)(iii) of the Act. The said loans have been diverted to subsidiaries for non-business consideration. Hence, the interest amounting to Rs.38.70 lacs cannot be allowed as deduction to the assessee.

22. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee has raised loans during the period relevant to the assessment year under appeal and has paid interest on said loans. The assessee has admittedly used borrowed funds for acquiring assets. The contention of the Revenue is that the assets acquired by the assessee are for expansion of the existing business, hence, proviso to [section 36\(1\)\(iii\)](#) of the Act gets attracted, consequently, interest paid on such borrowed capital is not allowable u/s. 36(1)(iii) of the Act.

23. Au Contraire, stand of the assessee is that purchase of asset in assessee's case does not lead to extension of business but has merely improved quality of service. In terms of telecommunication business, expression extension is used where the business of the assessee has grown in geographical terms. It is an undisputed fact that even after having acquired new assets, the area of operation of the assessee has not extended. The assessee was providing telecommunication services in Mumbai Telecom Circle and even after substantial investment in new assets, the area of operation remain confined to Mumbai Telecom Circle. The investment in assets/Plant & Machinery/Network equipment by the assessee have improved the quality of services, this may have resulted in increase of the subscriber base to some extent. Increase in volume of subscriber base within the same territory of operation cannot be termed as extension of business. Therefore, we do not find merit in the observations of the Assessing Officer that the interest u/s. 36(1)(iii) of the Act has to be disallowed.”

We notice that the co-ordinate bench has recognized the fact that the new assets have only improved the quality of service and there is no expansion of area of operation. Accordingly, it has accepted the contentions of the assessee that the proviso to sec.36(1)(iii) will not apply to the facts of the

present case. It was submitted that there is no change in facts in the current year. We also notice that the above said decision was followed in the assessee's own case in AY 2008-09 also. Accordingly, following the decision rendered in the earlier years, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

9. The next issue urged in ground no.7 relates to disallowance of expenses incurred in connection with raising loans. We notice that an identical expenses incurred on raising loans were disallowed in AY 2006-07 and 2007-08 and the co-ordinate bench has deleted the disallowance by following the decision rendered by Hon'ble Supreme Court in the case of India Cements Ltd (60 ITR 52)(SC). The relevant observations made by the co-ordinate bench in AY 2006-07 and 2007-08 (supra) are extracted below:-

"24. The ld. Counsel for the assessee submits that during the period relevant to the assessment year under appeal, the assessee incurred following expenditure in relation to raising of loans:

1	Loan arrangement fee	Rs. 47.69 million
2	Bank Guarantee	Rs. 6.79 million
3	Total	Rs. 54.48 million

The secured and unsecured loans were raised purely for business exigencies. The assessee has largely utilized borrowed funds for the strategic business requirement for conducting telecommunication operations in different Telecom Circles. The observations of the Assessing Officer that the loan funds have been utilized for non-business consideration are contrary to the facts on record. The assessee has utilized borrowed funds for conducting cellular phone operations in different Telecom Circles.

24.1 Without prejudice to the primary contention, the ld. Counsel for the assessee submits that it is a well settled principle of law that expenditure incurred for raising loan is revenue expenditure irrespective of the purpose or motive for which such loan is obtained. To support his contention, the ld. Counsel for the assessee placed reliance on the decision in the case of [India Cements Ltd. vs. CIT](#), 60 ITR 52(SC).

25. The ld. Departmental Representative submits that the secured and unsecured loans raised have been utilized for non-business consideration. Hence, the expenses incurred to raise the loans have been rightly disallowed u/s. 37(1) of the Act.

26. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee during the period relevant to assessment year under appeal has raised secured and unsecured loans. The Assessing Officer has disallowed expenditure on raising of loan for the reason that loan has been disbursed for capital expenditure and not for augmentation of the working capital and loan funds have been utilized for non-business considerations. While deciding the preceding grounds we have held that the loans have been utilized by the assessee for the purpose of business. The loans that have been advanced to the group concern are on account of business exigencies

26.1 The Hon'ble Apex Court in the case of [India Cements Ltd. vs. CIT](#) (supra) has held that expenditure on raising of loan is revenue in nature, hence, allowable. The nature of expenditure on raising of loan does not depend upon nature and purpose of loan. Hence, we have no hesitation in holding that the expenditure incurred for raising of the loan is allowable u/s.37(1) of the Act. The ground No.8 of the appeal is thus, allowed.”

The above said decision has been followed in the assessee's own case in AY 2008-09 also. Accordingly, following the decision rendered in the earlier years, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

10. The next issue urged in Ground no.8 relates to disallowance of roaming charges u/s 40(a)(ia) of the Act for non-deduction of tax at source. We notice that an identical disallowance made in AY 2006-07 and 2007-08 u/s 40(a)(ia) of the Act. The co-ordinate bench has deleted the disallowance with the following observations:-

“27. In ground No.9 of appeal, the assessee has assailed disallowance of roaming cost u/s. 40(a)(ia). The ld. Counsel for the assessee submits that during the year under consideration the assessee incurred expenses on roaming charges. Payments are made to other telecom operators to enable subscribers of the assessee to make or receive calls originating/terminating on other telephone networks. Roaming service is in the nature of automated services and no human intervention for switch over to the network of other telecom operators while in roaming is warranted. The Assessing Officer made disallowance u/s. 40(a)(ia) of the Act on the pretext that the provisions of [section 194C](#) and/ or [section 194J](#) of the Act are attracted on payments made to other telecom operators. The ld. Counsel for the assessee submitted that the issue is squarely covered by the decision of Kolkata Bench of the Tribunal in the case of [Vodafone East Ltd. vs. Addl. CIT](#), 156 ITD 337.

28. The Id. Departmental Representative vehemently placed reliance on the assessment order and the observations of DRP on the issue and prays for dismissing ground No.9 of the appeal.

29. We have heard the submissions made by rival sides and have examined the orders of authorities below. One of the issue before Kolkata Bench of Tribunal in the case of [Vodafone East Ltd. vs. ACIT](#) (supra) was with respect to deduction of tax at source in respect of roaming charges paid by the assessee to other telecom operators. The Co-ordinate Bench after analyzing the facts of the case and various decisions held that the payment of roaming charges does not fall under the ambit of TDS provision either u/s. 194C or 194J of the Act, hence, addition made u/s. 40(a)(ia) of the Act was deleted. We find that the facts and the reason for making disallowance u/s.40(a)(ia) of the Act in the impugned order are similar to the case of Vodafone East Ltd.(supra). No distinction has been pointed by the Revenue in the present case. Thus, for parity of reasons, disallowance u/s. 40(a) (ia) of the Act is directed to be deleted. The assessee succeeds on ground No.9 of appeal.”

The above said decision has been followed in the assessee’s own case in AY 2008-09 also. Accordingly, following the decision rendered in the earlier years, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

11. The next issue urged in Ground no.9 relates to disallowance of discount extended on pre-paid cards/recharge vouchers u/s 40(a)(ia) for non-deduction of tax at source. It was brought to our notice that an identical issue was examined by the co-ordinate bench in ITA No.3425/Mum/2014 relating to AY 2009-10 in the case of M/s Vodafone Idea Ltd (As successor to Spice Communications Ltd) and the Tribunal, vide its order dated 24-02-2023, has held that the TDS is not deductible from the discount paid on prepaid cards. The relevant observations are extracted below:-

“3.30. In view of the above observations, we hold that the decision rendered by us in assessee’s own case for A.Y.2008-09 in ITA No.2285/Mum/2014 dated 12/10/2022 would be squarely applicable to the facts of the assessee’s case before us for the year under consideration also. The relevant operative portion of the said order of this Tribunal is reproduced hereunder:-

“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. In fact 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 ld. DR hereinabove. Effectively Pune Tribunal adopted the decision of Hon'ble Karnataka High Court. The ld. 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. For the sake of convenience, the entire order is reproduced hereunder:-

Heard learned counsel for the parties.

2. The Appellant-Revenue challenges the order dated 4 January 2017 passed by the Income Tax Appellate Tribunal in Income Tax Appeal No.1041, 1042 and 1953 to 1955/PUN/2013.

3. This Appeal pertains to the Assessment Year is 2010-11.

4. The Appellant-Revenue has raised the following questions as a substantial questions of law :-

"(a) Whether on the facts and circumstances of the case and in law, the Hon'ble [194H](#) of the Income Tax Act ?

(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in setting aside the case to the Assessing Officer ?"

5. The Tribunal noted the observations of the Assessing Officer that the discount allowed to the distributors by the Respondent - assessee company is on account of principal to principal relationship and not that of principal to agent. The Tribunal followed the decision of the Karnataka High Court in the

case of [Bharati Airtel Ltd. vs. DCIT](#) [372 ITR 33] and held that the sale of SIM cards/recharge coupons at discounted rate to the distributors was not commission and therefore not liable to deduct the TDS under [Section 194H](#). The Tribunal noted that there was no decision of this Court on this issue on that date.

6. Learned counsel for the parties have tendered the copy of the order passed in Income Tax Appeal No. 702 of 2017 subsequently in the case of [Pr. Commissioner of Income Tax-8 vs. M/s. Reliance Communications Infrastructure Ltd.](#), where same issue arose for the consideration of this Court. The Division Bench of this Court while holding against the Appellant - Revenue observed thus :-

"3. Having heard the learned Counsel for the parties and having perused the documents on record, we do not find any error in the view of the Tribunal. The Tribunal, as noted, besides holding that the Commissioner's order setting aside the order passed under [Section 201](#) was not carried in appeal, had also independently examined the nature of the transaction and come to the conclusion that when the transaction was between two persons on principal to principal basis, deduction of tax at source as per [section 194H](#) of the Act, would not be made since the payment was not for commission or brokerage."

7. In view of the finding of fact rendered by the Tribunal which we have noted above, the same principle would apply in the present case. Therefore, the questions of law as proposed do not give any rise to substantial question of law. The Appeal is disposed of.

(emphasis supplied by us)

2.8.2.1. It is also pertinent to note that the Distribution Agreement of Maharashtra Circle was subject matter of examination and adjudication by the Pune Tribunal wherein the Pune Tribunal had recorded a finding of fact that the relationship between assessee and distributor is that of Principal to Principal. This Order has been approved by the Hon'ble Jurisdictional High Court. We find that the Hon'ble Jurisdictional High Court held that once Principal to Principal relationship is established, there could be no commission or discount and consequently no deduction of tax at source in terms of section 194 H of the Act is warranted.

2.8.3. With regard to reliance placed by the Id. DR vehemently on the decision of Hon'ble Delhi High Court in assessee's own case reported in 325 ITR 148 (Del) is concerned, we find that the Hon'ble Karnataka High Court in the case of [Bharti Airtel Ltd \(372 ITR 33\)](#) referred supra had after considering the decision of Hon'ble Delhi High Court referred supra and decided the issue in favour of the assessee. We find that the Hon'ble Karnataka High Court had also followed the decision of Hon'ble Jurisdictional High Court in the case of [Qatar Airways](#) reported in 332 ITR

253 (Bom). Hence the reliance placed on the decision of Hon'ble Delhi High Court by the ld. DR does not advance the case of the revenue. In any case, the decisions of Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Calcutta High Court referred supra had been considered and distinguished by the Hon'ble Karnataka High Court referred supra.

2.8.4. We further find that the Hon'ble Rajasthan High Court in the case of [Hindustan Coca Cola Beverages \(P\) Ltd vs CIT III Jaipur](#) reported in 402 ITR 539 (Raj) which had rendered a comprehensive judgement on the impugned issue together with various other assesses including Idea Cellular Ltd (assessee herein). The relevant Income Tax Appeal Nos. 168/2015 , 169/2015 . 170/2015 and 171/2015 which were admitted by the Hon'ble Rajasthan High Court on 18/10/2016 relates to assessee herein for Rajasthan Circle in respect of the identical issue. The question no.1 raised before the Hon'ble Rajasthan High Court is as under:-

1. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that whether the assessee is liable to deduct TDS u/s. 194-H of IT Act, as the relation between assessee and distributor is that of Principal to Agent?

2.8.4.1. We find that the Hon'ble Rajasthan High Court after considering the plethora of judgements on the impugned issue of various High Courts (which includes the three High Court decisions of Kerala, Delhi and Calcutta relied upon by the ld. DR before us herein) had rendered its decision as under:-

Idea Cellular

58. As the agreement is produced, issues are answered in favour of assessee in the departmental appeals.

59. Even the contention which has been raised by the counsel for the assessee that the final tax is paid by the Distributor and not by the agent, the revenue is not at loss in any form.

.....

61. In view of the above discussion, all the appeals of assesseees are allowed and those of Department are dismissed.

2.8.5. We further find that the Hon'ble Rajasthan High Court in the case of [CIT \(TDS\) Jaipur vs Idea Cellular Ltd](#) in Income Tax Appeal No. 90/2018 dated 12/04/2018 had taken an identical view on the identical set of facts. Further we find that the Hon'ble Jurisdictional High Court in the case of [CIT\(TDS\) Pune vs Vodafone Cellular Ltd](#) (assessee's own case) in Income Tax Appeal Nos. 1152 , 1274, 1995, of 2017 & Income Tax Appeal Nos. 571, 1266 of 2018 dated 27/01/2020 had also taken an identical view in respect of identical issue.

2.8.6. The ld. DR before us placed heavy reliance on the decision of Hon'ble Supreme Court in the case of [Union of India vs Association of](#)

[Unified Telecom Service Providers of India and Others](#) reported in (2020) 3 SCC 525 dated 24/10/2019 to drive home the point that the assessee had erred in accounting the discounted price of sales as its revenue when sim cards are sold to distributors. We have gone through the said decision and we find that the said decision was rendered in the context of determination of Annual Gross Revenue for the purpose of fixing the licence fee payable to Government by the telecom service providers. It further held that while reckoning the Gross Revenues, no deduction would be available such as discount, commission etc. First of all, we have already held that the assessee had not made any payment of discount to the distributors. In any case, we have already held that the entries in the books of accounts are not determinative of tax liability of an assessee by placing reliance on various decisions of Hon'ble Apex Court. Those decisions still rule the field as they were not overruled by the latest Supreme Court decision relied upon supra by the Id. DR. It is trite law that though the decision of Hon'ble Apex Court would be binding as per [Article 141](#) of the Constitution of India, still the judgement of the Hon'ble Supreme Court should be understood from the issue raised before it. In our considered opinion, this decision has got absolutely nothing to do with the applicability of provisions of [section 194H](#) of the Act. Hence we hold that the reliance placed by the Id. DR on the said decision is grossly misplaced.

2.8.7. The Id. DR before us vehemently submitted that the orders of Hon'ble Rajasthan High Courts and Hon'ble Jurisdictional High Courts and Hon'ble Karnataka High Court had not attained finality as they had been appealed by the revenue before the Hon'ble Supreme Court. This argument of the revenue, in our considered opinion, cannot be a deterrent for this Tribunal to follow those High Court orders. We find that the similarly worded distribution agreement had been subject matter of adjudication and examination by the Hon'ble Rajasthan High Court and Hon'ble Jurisdictional High Court wherein the Hon'ble High Courts had taken a categorical view that the relationship between assessee and distributor is only that of Principal to Principal. Hence this finding cannot be disturbed by this tribunal by respectfully following the judicial hierarchy. Infact no contrary materials on facts were even brought on record by the revenue before us to disturb the findings of Hon'ble High Courts. Hence we have no hesitation in holding that the relationship between assessee and distributor is only that of Principal to Principal and not that of Principal to Agent and accordingly there is no obligation for the assessee to deduct tax at source in terms of [section 194H](#) of the Act.

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.”

3.31. 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.”

11.1 Facts being identical, following the above said decision of the co-ordinate bench in the case of M/s Vodafone Idea Ltd (As successor to Spice Communications Ltd), we hold that the assessee is not liable to deduct tax at source from the discount paid on prepaid sim card/recharge vouchers. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance made u/s 40(a)(ia) of the Act.

12. The next issue urged by the assessee in ground no.10.1 and 10.2 relates to the transfer pricing adjustment on the payment made for technology support services.

12.1 The Ld A.R submitted that the assessee has paid a sum of Rs.7.84 crores to its Associated Enterprises as technology support charges for using VISTA system, which is an IT intranet portal used by its employees. The Ld A.R submitted that the AO took the view that the assessee did not furnish any evidence to justify that the services have been rendered and also did not furnish the details of allocation keys. Accordingly, the Transfer Pricing Officer (TPO) determined the Arms Length Price as NIL without applying any of the methods prescribed u/s 92C(1) of the Act. The Ld A.R submitted that the Ld DRP confirmed the order of TPO without giving any reason.

12.2 The Ld A.R submitted that the assessee, vide its submissions dated 8th January, 2013 filed with TPO, has provided the detailed nature of services rendered (IT intranet portal used by employees), benefits derived along with evidences of snap shots of VISTA IT platform used by its employees, the allocation key used for the said charges which is based on number of

employees. The Ld A.R submitted that the TPO has not examined these details. He submitted that the TPO can make adjustment by applying any of the methods prescribed u/s 92C(1) of the Act and in support of the said proposition, he placed reliance on certain case laws, which inter alia, includes the decision rendered by Hon'ble Bombay High Court in the case of CIT vs. Lever India Exports Ltd (2017)(292 CTR 393) and CIT vs. Kodak India Pvt Ltd (2017)(288 CTR 46)(Bom).

12.3 We heard rival contentions and perused the record. We noticed earlier that the TPO has determined the ALP of both the international transactions as NIL, i.e., the TPO did not determine the ALP under any of the prescribed methods. The question as to whether the TPO can determine the ALP of international transactions as NIL was examined by Hon'ble Delhi High Court in the case of CIT vs. M/S. CUSHMAN AND WAKEFIELD (INDIA) PVT. LTD (367 ITR 730)(Delhi), wherein it was held as under:-

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine ITA 475/2012 Page 25 whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422:

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to

engage services of outside experts for auditing and management consultancy;

it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

35. The TPO's Report is, subsequent to the [Finance Act, 2007](#), binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under [Section 37](#) in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO. This aspect was made clear by the ITAT in [Delloite Consulting India Pvt. Ltd. v. Deputy Commissioner of Income Tax](#), [2012] 137 ITD 21 (Mum):

"37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in Gemplus India P. Ltd. 2010-TII-55-ITAT-BANG-TP, held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price.

38. In the case on hand, the Transfer Pricing Officer has determined the arm's length price at "nil" keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in terms of the agreements. This is a case where the assessee has not determined the arm's length price. The burden is initially on the assessee to determine the arm's length price. Thus, the argument of the assessee that the Transfer Pricing Officer has exceeded his jurisdiction by disallowing certain expenditure, is against the facts. The Transfer Pricing Officer has not disallowed any expenditure. Only the arm's length price was determined. It was the Assessing Officer who computed the income by adopting the arm's length price decided by the Transfer Pricing Officer at "nil".

This is a slender yet crucial distinction that restricts the authority of the TPO. Whilst the report of the TPO in this case ultimately noted that the ALP was 'nil', since a comparable entity would pay 'nil' amount for these services, this Court noted that remarks concerning, and the final decision relating to, benefit arising from these services are properly reserved for the AO.

36. In this case, the issue is whether an independent entity would have paid for such services. Importantly, in reaching this conclusion, neither the Revenue, nor this Court, must question the commercial wisdom of the assessee, or replace its own assessment of the commercial viability of the transaction. The services rendered by CWS and CWHK in this case concern liaising and client interaction with IBM on behalf of the assessee - activities for which, according to the assessee's claim - interaction with IBM's regional offices in Singapore and the United States was necessary. These services cannot - as the ITAT correctly surmised - be duplicated in India insofar as they require interaction abroad. Whether it is commercially prudent or not to employ outsiders to conduct this activity is a matter that lies within the assessee's exclusive domain, and cannot be second-guessed by the Revenue.

37. At this point, it is noteworthy that the circumstance that the assessee had market research facilities in India does not correspond to the performance of services abroad, especially in relation to client interaction services located outside India - albeit for ultimately sourcing them into the Indian market. The e-mails considered by the ITAT from Mr. Braganza and Mr. Choudhary so far as they deal with specific interaction with IBM by

those persons, and relate it to benefits obtained by the assessee, provide a sufficient basis to hold that benefit accrued to the assessee. However, this determination remains unclear and inchoate. The devil here lies in the details. The details of the specific activities for which cost was incurred by both CWS and CWHK (for the activities of Mr. Braganza and Mr. Choudhary), and the attendant benefit to the assessee, have not been considered till date. This must be provided, in addition to a consideration of the ALP vis-à-vis the total cost claimed by these AEs. **To this extent, for the consideration of ALP in respect of these transactions, the matter is remanded back to the file of the concerned AO, for an ALP assessment by the TPO, followed by the AO's assessment order in accordance with law."**

12.4 A careful perusal of the above said decision rendered by Hon'ble Delhi High Court would show that the TPO is required to determine the ALP of international transactions under any of the methods prescribed under the Income tax Rules, i.e., the TPO is not correct in determining the ALP at Nil without establishing that a third party would not have paid any money under similar circumstances. The TPO is not empowered to disallow the expenses.

12.5 Admittedly, in the instant case, the TPO did not examine the ALP of the impugned international transactions under any one of the methods prescribed under the Income tax Rules. Hence, he was not justified in determining the ALP of the impugned international transactions as NIL. We notice that the Ld DRP confirmed the same without proper reasoning. We notice that the Hon'ble Delhi High Court in the above said case has restored the matter of determination of ALP of transactions to the file of AO/TPO. Accordingly, following the decision rendered by Hon'ble Delhi High Court, we set aside the order passed by Ld CIT(A) with regard to the determination of ALP of technology support charges to the file of AO/TPO with the direction to determine the ALP of both the transactions under any one of the methods prescribed under the Rules. The assessee is also directed to furnish all the information and explanations in support of the claim that the payments are at arms length.

13. The next issue urged by the assessee in ground no.10.3 relates to the transfer pricing adjustment made in respect of reimbursement of salary and related costs on deputation of personnel to India.

13.1 The assessee had claimed reimbursement of salary and other related costs incurred on employees seconded by Associated Enterprises. The TPO determined ALP of the same at NIL. The Ld DRP allowed in part. We notice that an identical issue was examined by the co-ordinate bench in the assessee's own case in 2008-09 in ITA No16718/Mum/2012 dated 08-05-2023 and the matter was restored to the file of AO/TPO with the following observations:-

“18. In the instant case, the DRP in principle has accepted the fact that the payments were made towards reimbursement of salary and related cost of seconded employees on cost to cost basis and thus allowed substantial part of assessee's claim. However, Rs.3,63,31,007/- has been disallowed for the reason that the assessee has not been able to substantiate back to back payment of the said amount. Once it has been accepted that the five employees were seconded to India by overseas AEs, the relocation of those employees to India is a consequential step. There would be cost attached to relocation of such employees. The said cost has either to be borne by the AE or the assessee. This fact can be determined from the terms and conditions of secondment of employees. In case relocation costs/travel costs are borne by the assessee, the same deserves to be allowed if they are reimbursed on cost to cost or are paid directly to the seconded employees. Taking into consideration entire facts, we deem it appropriate to restore this issue back to the file of Assessing officer for re-examination. The assessee is directed to furnish relevant documents to substantiate that the costs disallowed by the DRP were in fact cost paid by the assessee towards relocation/travel of the seconded employees. The assessing officer shall decide this issue after affording reasonable opportunity of hearing/to make submissions to the assessee, in accordance with law. Ergo, ground no.13 of the appeal is allowed for statistical purpose.”

13.2 The facts available in this year, being identical, following the decision rendered by the co-ordinate bench in the assessee's own case in AY 2008-09, we restore this issue to the file of AO/TPO with similar directions.

14. The remaining grounds urged by the assessee are either consequential in nature or premature one.

15. In the result, the appeal of the assessee is treated as allowed and the appeal of the revenue is dismissed.

Order pronounced in on 8.11.2023.

Sd/-
(Pavan Kumar Gadale)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 08/11/2023

Copy of the Order forwarded to :

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

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai