

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

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

**ITA No.758/Ind/2013**  
**(Assessment Year:2010-11)**

M/s. Vodafone Idea Ltd. (formerly known as M/s. Idea Cellular Ltd.) 139-140 Electronics Complex Pardeshipura, Indore	Vs.	ITO (TDS)-II Indore
(Appellant / Assessee)		(Respondent/ Revenue)
<b>PAN: AAACB 2100P</b>		
Assessee by	Shri Sumit Nema, Sr. Adv. And Shri Gagan Tiwari, Adv	
Revenue by	Ms. Simran Bhullar, CIT-DR	
Date of Hearing	21.11.2023	
Date of Pronouncement	22.11.2023	

**ORDER**

**Per Vijay Pal Rao, JM:**

This appeal of the assessee is directed against the order dated 31.10.2013 of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A)-II, Indore arising from order passed u/s 201(1)/201(1A) of the Act for A.Y.2010-11. The assessee has raised following grounds of appeal:

*“The Appellant objects to the order dated 31 October 2013 passed by the Commissioner of Income Tax (Appeals) - II, Indore [the CIT (A) + ] in connection with the order under section 201(1)/201(1A) of the*

*Income tax Act, 1961 (the Act) passed by the Income Tax Officer (TDS) II, Indore ('AO') on the following grounds:*

**GROUND I: NON-DEDUCTION OF TAX AT SOURCE ("TDS") UNDER SECTION 194H OF THE ACT ON THE DISCOUNT GIVEN TO PREPAID DISTRIBUTORS:**

*1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the order passed by the AO under section 201(1) / 201 (1A) of the Act, by treating the "discount" offered by the Appellant to the distributors as "commission" and thereby treating the Appellant as "assessee in default" under section 201(1) read with section 194H of the Act.*

*2. The CIT(A) further erred in confirming the A.O.'s finding that there exists a relationship of principal and agent between the Appellant and its prepaid distributors and that the discounts given to the distributors result in the payment of commission, which is subject to deduction of tax under section 194H of the Act.*

*3. The CIT(A) erred in not appreciating that the relationship between the Appellant and the prepaid distributors is that of 'Principal to Principal' and not 'Principal to Agent'.*

*4. He also erred in not appreciating that the distributors do not have any right to create any obligation on behalf of the Appellant or to incur any liabilities on behalf of the Appellant unlike a 'principal-agent' relationship.*

*5. He also erred in not appreciating that the income earned by the distributors is in the nature of discount and not commission as envisaged under section 194H of the Act.*

*6. The Appellant prays that the discount allowed to the distributors be held as not liable to TDS under section 194H of the Act as the relationship between the Appellant and consequently the demand raised in the impugned order in respect of the alleged failure to deduct tax under section 194H of the Act be deleted.*

**WITHOUT PREJUDICE TO GROUND NO. I - GROUND II:**

*1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the observations of the AO by treating the Appellant as 'assessee in default under section 201 of the Act, without appreciating that it is a settled legal position that if TDS machinery fails, the assessee cannot be treated as 'assessee in default under section 201 of the Act.*

*2. The CIT(A) erred in not appreciating that in order to apply the provisions of section 194H of the Act, the amount of commission paid*

*and the time when the TDS should be crystallized should be clearly determinable, which is not possible in the present case.*

*3. The CIT(A) failed to appreciate that the provisions of section 194H of the Act would be applicable only if the payer (i.e. the Appellant) is responsible for the income earned by the payee (i.e. the distributors), which is not the fact in the present case.*

*4. The CIT(A) further failed to appreciate that in the present case it is impossible for the Appellant to determine the amount of income of the distributor on which tax ought to have been deducted and therefore the provisions of section 194H of the Act fail.*

*5. The CIT(A) also failed to appreciate that section 194H of the Act was never intended to apply to cases where a person is neither making any payment to another person nor crediting any sum to the account of another person nor can it imply that there is payment or credit.*

*6. The Appellant thus prays that in the absence of any payment or credit to the distributors, the Appellant should not be treated as 'assessee in default' under section 194H r.w.s. 201 of the Act.*

*WITHOUT PREJUDICE TO GROUND I AND II-GROUND III:*

*1. The CIT(A) erred in not appreciating that the distributors would have already paid the entire taxes on the income received from the sale of SIM cards/recharge coupons. Hence recovering the amount of TDS from the Appellant would amount to recovering the same taxes twice.*

*2. The CIT(A) failed to appreciate that TDS provisions are not charging provisions but are merely a mechanism of collection of tax.*

*3. The CIT(A) further erred in not appreciating that having regard to the taxes paid by the distributors on their income, the Appellant is resolved of its liability to pay the demand under section 201(1) of the Act.*

*4. The Appellant therefore prays that the A.O. be directed to grant credit to the extent of taxes paid by the distributors against the total taxes determined to be payable by the Appellant.*

*WITHOUT PREJUDICE TO GROUND I TO III - GROUND IV:*

*1. The CIT(A) failed to appreciate that in the distribution channel, the distributors provide to retailers and they provide to ultimate customer and hence, the action of the CIT(A) in treating the Appellant as 'assessee-in-default' under section 194H of the Act r.w.s. 201 of the*

*Act on the entire difference between the MRP and the discounted price is completely baseless.*

*2. The Appellant prays that the AO be directed to re-compute the demand considering the difference between the prices at which the distributors have sold it to the retailers as reduced by the price paid by them to the Appellant as also reduced by the other expenses incurred by the distributor.*

**GROUND V: LEVY OF INTEREST UNDER SECTION 201(1A) OF THE ACT:**

*1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the order of the AO in holding the Appellant as 'assessee in default' under section 201 of the Act and thereby levying the interest under section 201(1A) of the Act.*

*2. The CIT(A) erred in not appreciating that interest under section 201(1A) of the Act is compensatory in nature and can be levied only when there is default in the payment of taxes.*

*3. The CIT(A) erred in not appreciating that where the Appellant had no liability to deduct taxes under section 194H of the Act, the question of delay in deposit of taxes and consequential levy of interest under section 201(1A) of the Act does not arise.*

*4. The Appellant prays that the interest levied under section 201(1A) of the Act be deleted or be appropriately reduced.”*

2. The Sr. counsel of the assessee has submitted that the issue involved in this appeal of the assessee is identical to the issue for A.Y.2007-08 to 2019-10 & 2014-15 to 2017-18 which were considered and decided by this tribunal vide order dated 25.05.2023 in IT(SS)ANo.166 & 167/Ind/2018 & others. Hence, the Ld. Sr. counsel has submitted that the issue is now covered by the order of this Tribunal in assessee's own case. He has pointed out that the Tribunal has set aside the matter to the record of the AO for fresh adjudication after verification and examination of the relevant terms and conditions of the agreement between the assessee and distributors/dealers as well as entries in the books of account. Thus, Ld. Sr. counsel has pleaded that in view of the earlier order of this tribunal the matter may be remanded to the record of

the AO for fresh adjudication as per law/various judgment referred by the Tribunal in para no.7 of the earlier order.

3. On the other hand, Ld. DR has not disputed that an identical issue has been already considered and decided of this tribunal in assessee's own case.

4. Having considered the rival submissions as well as relevant record. At the outset we note that this tribunal in assessee's own case for assessment years 2007-08 to 2009-10 & 2014-15 to 2017-18 has considered and decided this issue in para 7 as under:

"7. We have considered the rival submission as well as relevant material on record. The solitary issue raised in these appeal is common and identical to the issue involved in case of Bharti Airtel Ltd. vs. ITO(TDS) in ITANo.513/Ind/2014 for A.Y.2010-11 wherein vide even dated order we have considered and decided this issue as under:

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

In favour of assessee:

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

In favour of Revenue :

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

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

i. VODAFONE ESSAR CELLULAR LTD. VS. ASSISTANT COMMISSIONER OF INCOME TAX, COCHIN Civil Appeal 40677/2010

ii. COMMISSIONER OF INCOME TAX (TDS) VS. M/S BHARTI HEXACOM LTD. Civil Appeal Number 13836/2018.

iii. COMMISSIONER OF INCOME TAX (TDS) JAIPUR vs. M/S BHARTI HEXACOM LTD. Civil Appeal Number 15192/2018

iv. COMMISSIONER OF INCOME TAX (TDS) JAIPUR vs. M/S IDEA CELLULAR LIMITED Civil Appeal Number 25484/2018

v. IDEA CELLULAR LIMITED VS.COMMR OF IT-XVII Civil Appeal Number 7471/2010

vi. BHARTI CELLULAR LTD.NOW BHARTI AIRTEL LD V ASSISTANT C.I.T CIRCLE 57. & Others (Civil Appeal No. 7257/11)

9. Against the conflicting judgment of Hon'ble High Courts the assessee as well as revenue has filed respective SLP's before the Hon'ble Supreme Court which are pending adjudication. The assessee has relied upon various decisions of the Tribunal including the Jaipur Bench of the Tribunal as well as Bangalore Benches of this Tribunal wherein this issue has been decided in favour of the assessee and one of us judicial member is a party to those decisions. Without going into the divergent views taken by the various Benches of this tribunal as well as by the Hon'ble High Courts, at the outset we note that the Ld. AO passed order u/s 201(1)/201(1A) by following the judgment of Hon'ble Delhi High Court and consequential judgment of the Tribunal following the judgment of Hon'ble Delhi High Court. It is pertinent to note that though the AO has recorded the fact that distributors are appointed by the assessee through written

agreements however, the AO has not considered the terms and conditions of the agreement which are crucial for determination of the nature of transaction between the assessee and distributors/dealers whether the payment allowed by the assessee is in the nature of discount or commission attracting the provision of section 194H. Further the another aspect which is also relevant for determining nature of the transaction being payment allowed by the assessee is treatment given by the assessee to the said transaction in its books of account. Both of these aspects are inevitably relevant for determining the nature of the transaction and consequential liability/obligation of the assessee to deduct the tax at source as per provisions of section 194H of the Act.

10. The Ld. Sr. counsel of the assessee has filed before us the specimen copy of the agreement entered into between the assessee and the distributors/dealers as well as ledger copy of the distributors in the books of the assessee. These relevant documents have not been examined and considered by the AO while passing order u/s 201(1)/201(1A). Further the Ld. CIT(A) has also not given a finding of fact regarding nature of transaction but has simply followed the decision of this Tribunal in pursuant to the judgment of Hon'ble Delhi High Court only precedent at that point of time therefore, Ld. CIT(A) has not considered the contrary view taken by other High Courts while the passing the impugned order. In fact the terms and conditions of the agreement between the assessee and distributors/dealers as well as treatment of the transactions in the books of the assessee are essential consideration for determining the nature of transaction have not been taken into account either by the AO or by the Ld. CIT(A). Hence in the facts and circumstances of the case as discussed above and in the interest of justice, we are of the considered view that matter requires a proper verification/ examined and fresh adjudication at the level of the AO after considering terms and conditions of the agreement between assessee and distributors/dealers as well as the treatment of these transactions in the books of the assessee. Accordingly the impugned order is set aside and the matter is remanded to the record of the AO for fresh adjudication after proper verification and examination of the agreement between the assessee and distributors/dealers as well as entries in the books of account reflecting the treatment by the assessee. Needless to say assessee be given an appropriate opportunity of hearing before passing the fresh order.

Accordingly in view of our finding as reproduced above the impugned orders are set aside and the matters are remanded to the record of the AO for fresh adjudication after verification and examination of terms and conditions of the agreements between the assessee and distributors/dealers as well as the entries in the books of account reflecting the treatment by the assessee. Needless to say assessee be

*given an appropriate opportunity of hearing before passing the fresh order.”*

Accordingly to maintain rule of consistency we set aside the impugned order of CIT(A) and remand the matter to the record of the AO for fresh adjudication as per law after proper verification and examination of the agreements between the assessee and distributors/dealers as well as entries in the books of account for ascertaining the nature of payments. The AO shall also consider the judgments relied upon by both the parties as referred in para 7 of the earlier order of this Tribunal.

5. In the result, the appeal of assessee is allowed for statistical purposes.

Order pronounced in the open court on 22.11.2023.

**Sd/-**

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

**Indore, 22.11.2023**

**Patel/Sr. PS**

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

**Sd/-**

**(VIJAY PAL RAO)**  
Judicial Member

*By order*

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