

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

**SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 884/MUM/2016
(Assessment Year: 2011-12)
&
ITA No. 2834/MUM/2017
(Assessment Year: 2012-13)**

Vodafone India Ltd.,
Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parel, Mumbai - 400013
[PAN: AAACH5332B]

..... **Appellant**

**Assistant Commissioner of Income Tax-
8(3)(2), Mumbai,**

Vs

..... **Respondent**

**ITA No. 1916/MUM/2016
(Assessment Year: 2011-12)**

**Deputy Commissioner of Income Tax
5(2)(1), Mumbai,**
5th Floor, Room No. 525, Aayakar Bhavan,
M.K. Road, Mumbai - 400020

..... **Appellant**

**M/s Vodafone Idea Limited,
(Earlier known as Vodafone India
Limited which now stands merged with
Idea Cellular Limited ('ICL') and
consequently known as Vodafone Idea
Limited),**

Vs

10th Floor, Birla Centurion, Pandurang
Budhkar Marg, Worli, Mumbai - 400030
[PAN: AAACH5332B]

..... **Respondent**

Appearance

For the Assessee

: Shri P.J. Pardiwala
Shri Ketan Ved
Shri Abdul Kadir Jamsadwala

For the Department

: Shri T. Sankar

Date

Conclusion of hearing

: 22.02.2024

Pronouncement of order

: 17.05.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. This is a batch of three appeals consisting of cross appeals for the Assessment Year 2011-12 and appeal preferred by the Assessee for the Assessment Year 2012-13. Since the appeals involved common issues the same were heard together and are being disposed by way of a common order.

Assessment Year 2011-12

2. We would first take up take up cross appeals for the Assessment Year 2011-12 which are directed against Final Assessment Order dated, 28/01/2016, passed under Section 144C(13) read with Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2011-12, as per directions issued by Dispute Resolution Panel-2, Mumbai [hereinafter referred to as 'the DRP'] under Section 144C(5) of the Act.
 - 2.1. In ITA No. 884/Mum/2016, the Assessee has raised grounds of appeal in relation to the following issues:
 - (a) Ground No. 1 to 1.2: Disallowance of INR 357,23,70,000/- under section 14A of the Act
 - (b) Ground No. 2 to 2.2: Disallowance of INR 19,35,01,258/- being interest on Capital Work-in-Progress under Section 36(1)(iii) of the Act.
 - (c) Ground No. 3 to 3.7: Disallowance of INR 30,95,03,786/- in respect of roaming charges under Section 40(a)(ia) of the Act
 - (d) Ground No. 4 to 4.5: Disallowance of INR 47,17,99,596/- in respect of discount extended to pre-paid distributors under Section 40(a)(ia) of the

Act

- (e) Ground No. 5 to 5.5: Disallowance of deduction under Section 80IA of the Act
- (f) Ground No. 6 to 6.3: Disallowance of deduction under Section 80-IA of the Act in respect of 'Other Income'
- (g) Ground No. 7 to 7.2: General grounds on Transfer Pricing Adjustment
- (h) Ground No. 7.3 to 7.8: Transfer Pricing Adjustment of INR 22,01,14,350/- pertaining to Advertisement, Marketing and Promotion expenditure
- (i) Ground No. 7.9 to 7.10: Transfer Pricing Adjustment of INR 7,97,68,155/- pertaining to Brand Royalty payment made to Vodafone Ireland Marketing Limited for obtaining the right to use of Vodafone trademark and trade name
- (j) Ground No. 7.11 to 7.13: Transfer Pricing Adjustment of INR 1,31,43,772/- pertaining to payment for technology support charges
- (k) Ground No. 7.14: Transfer Pricing Adjustment of INR 93,12,637/- pertaining to Reimbursement of Expenses of salary and related cost on deputation of personnel in India.
- (l) Ground No. 8: Levy of interest under Section 234D and 244A of the Act
- (m) Ground No. 9: Incorrect computation of Book Profits under Section 115JB of the Act
- (n) Ground No. 10 : Non-Grant of full credit in respect of Tax Deducted at Source (TDS)
- (o) Ground No. 11 : Initiation of penalty proceedings under Section 271(1)(c) of the Act

2.2. In ITA No. 1919/Mum/2016, the Revenue has raised grounds of appeal in relation to the following issues:

- (a) Ground No. (i) & (ii): pertaining to disallowance of

INR 30,95,03,786/- in respect of roaming charges under Section 40(a)(ia) of the Act

- (b) Ground No. (iii): pertaining to disallowance of INR 2,05,35,800/- made under Section 37 of the Act
- (c) Ground No. 2 to 4: general grounds

3. The relevant facts, in brief, are that Assessee is a company engaged, inter alia, in providing cellular services. The Assessee filed its return of income for the Assessment Year 2011-12 on 30/11/2011 declaring total income of INR 2,35,15,11,079/-. The case of the Assessee was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Assessee has entered into international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions. The TPO, vide order, dated 21/01/2015, passed under Section 92CA(3) of the Act proposed, inter alia, the following transfer pricing adjustments:

SNo.	Additions/Disallowances	Amount (INR)
1	Payment of Royalty for brand name and mark	7,97,68,155/-
2	Technology support charges	1,31,43,772/-
3	Payment for GMAC costs, PwC consulting charges and People Survey charges	4,14,86,237/-
4	Under recovery of salary expenses from AE	93,12,637/-
5	Excessive AMP expenditure	22,01,14,350/-
	Total	36,38,25,151/-

3.1. On 31/03/2015, the Assessing Officer passed Draft Assessment Order under Section 143(3) read with Section 144C(1) of the Act incorporating the above transfer pricing adjustment. In addition

the Assessing Officer also proposed other additions/disallowances as per the provisions of the Act.

- 3.2. The Assessee filed objections before the DRP against the Draft Assessment Order, dated 31/03/2015. On 22/12/2015, the DRP disposed off the objections granting partial relief to the Assessee. As per the directions of the DRP, the Assessing Officer passed the Final Assessment Order, dated 28/01/2016, under Section 143(3) read with Section 144C(13) of the Act, assessing total income of the Assessee at INR 478,20,94,710/- computed as under:

Particulars	Amount (INR)	Amount (INR)
Income under the head business or profession (as per revised computation)		(-) 185,73,18,001
Disallowance under Section 14A	357,23,70,000	
Disallowance of Interest on Capital Work-In-Progress	19,35,01,258	
Disallowance under Section 40(a)(ia) for non deduction of TDS on Roaming Charges & on Discount extended to prepaid distributors	244,72,76,991	
Penalty payment DoT disallowed under Section 37(1)	2,05,35,800	
TP Adjustment	36,38,25,151	
Total Disallowances		659,75,09,200
Taxable income under the head business or profession		474,01,91,199
Income from Other Sources (as per revised computation)		
Interest on fixed deposit	4,19,03,514	4,19,03,514
Total income		478,20,94,713/-
Total income (as per Normal Provisions)		478,20,94,713
Rounded off to		478,20,94,710/-

- 3.3. Being aggrieved the Assessee had preferred the present appeal against the Final Assessment Order, dated 28/01/2016, on the grounds reproduced in paragraph 2.1 above.

Ground No. 1

4. Ground No. 1 raised by the Assessee is directed against the order of CIT(A) confirming the disallowance of INR 357,23,70,000/- made by the Assessing Officer under Section 14A of the Act by invoking provisions contained in Rule 8D of the Income Tax Rules [for short '**IT Rules**'].
- 4.1. During the assessment proceedings, the Assessee was asked to explain why disallowance should not be made under Section 14A of the Act read with Rule 8D of the IT Rules. In response, it was submitted by the Assessee that no exempt income was earned by the Assessee during the relevant previous year and therefore no disallowance under Section 14A of the Act was warranted. However, the Assessing Officer rejected the aforesaid contention of the Assessee and proceeded to compute disallowance at INR 357,23,70,000/- as per provisions contained in Rule 8D of the IT Rules and made disallowance of the said amount under Section 14A of the Act.
- 4.2. In the objections filed by the Assessee against the Draft Assessment Order, dated 31/03/2015, the DRP agreed with the Assessing Officer and decline to issue any directions. Accordingly the Assessing Officer passed the Final Assessment Order, dated 28/01/2016, making disallowance of INR 357,23,70,000/- under Section 14A of the Act.
- 4.3. Being aggrieved, the Assessee has carried the issue in appeal before us.

- 4.4. We have heard the rival contentions and perused the material on record. It is admitted position that no exempt income earned by the Assessee during the relevant previous year. It has been contended by the Assesses that in absence of exempt income, disallowance under Section 14A of the Act was not warranted. We find merit in the aforesaid contention of the Assessee. In the absence of any exempt income arising in the relevant previous year, no occasion to make any disallowance under Section 14A of the Act can arise [*Principal Commissioner of Income-tax Vs. Red Chillies Entertainment Pvt. Ltd.: [2020] 116 taxmann.com 770 (Bombay)[20-08-2019]*].
- 4.5. In the case of the Assessee, for the Assessment Year 2008-09 [ITA No. 6718/Mum/2012, dated 08/05/2023] and 2009-2010 [ITA No. 3425/Mum/2014, dated 24/02/2023] the Tribunal had deleted disallowance under Section 14A of the Act as the Assessee did not earn any exempt income during the corresponding previous years.
- 4.6. In view of the above, the disallowance of INR 357,23,70,000/- made by the Assessing Officer under Section 14A of the Act is deleted Ground Number No. 1 raised by the Assessee is allowed.

Ground No. 2

5. Ground No. 2 raised by the Assessee pertains to disallowance of interest expenses of INR 19,35,01,258/-
- 5.1. During the assessment proceedings, the Assessing Officer noted that in the relevant previous year the Assessee had substantially expanded its existing business which was evident from the significant capital work-in-progress. Since the capital work in

progress was not put to use, no deduction could be allowed for the interest on borrowed funds used for capital work in progress. Further, there was substantial addition to the fixed assets base of the Assessee. However, according to the Assessing Officer, as per the provisions of Section 36(1)(iii) of the Act, interest paid on capital borrowed for acquisition of assets for extension of business was not allowed as a deduction. Accordingly, the Assessing Officer proposed disallowance on an ad-hoc basis by applying a notional interest rate of 11% on the month-wise balances in CWIP account. Thus, the Assessing Officer proposed disallowance of INR 19,35,01,258/- under Section 36(1)(iii) of the Act read with proviso thereto in the Draft Assessment Order, dated 31/03/2015.

- 5.2. In the objections filed by the Assessee against the Draft Assessment Order before the DRP it was contended on behalf of the Assessee that during the relevant previous year the Assessee had made certain additions to its fixed assets in order to meet the demand for its services and as part of continuous process to improve the quality and reach of its services. The acquisition of such fixed assets by the Assessee was from, both, interest bearing funds as well as own funds and the purpose of acquisition was to assist the Assessee in carrying on its existing operations and not for the purpose of expansion/extension of business. Further, the Assessee routed all additions to fixed assets through the capital work in progress account and therefore, has month-end balance pending capitalisation. Proviso to Section 36(1)(iii) of the Act applied only where there is 'extension of business'. In the present case, the Assessee continued to operate only in one telecom circle. Therefore, there was no 'extension of business', and hence, proviso to Section

36(1)(iii) of the Act was incorrectly invoked by the Assessing Officer. However, DRP did not find merit in the aforesaid and agreeing with the Assessing Officer, declined to issue any directions. Accordingly the Assessing Officer passed the Final Assessment Order, dated 28/01/2016, making disallowance of 19,35,01,258/- under Section 36(1)(iii) of the Act.

5.3. Being aggrieved the Assessee has carried the issue in appeal before the Tribunal.

5.4. We have considered the rival submissions and perused the material on record. It emerges that in identical facts and circumstances, vide common order dated 16/03/2023 passed in appeals for the Assessment Year 2006-07 [ITA No 216/CHANDI/2011] & 2007-08 [ITA No. 1173/Mum/2011], the Tribunal had decided identical issue in the favour of the Assessee and allowed deduction for interest on borrowed funds use for purchase of assets and capital work in progress. The relevant extract of the aforesaid decision of the Tribunal reads as under:

"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 Id. 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 Id.

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 Id. 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)

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21. Per contra, the Id. 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 Id. Departmental Representative referred to the findings of the Assessing Officer in para 5.4 to 5.6 of the assessment order. The Id. 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 Id. 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 xx xx

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."

- 5.5. Respectfully following the above decision of the Tribunal in the case of the Assessee, the disallowance of interest expenses of INR 19,35,01,258/- made by the Assessing Officer under section 36(1)(iii) of the Act is deleted. Ground No. 2 raised by the Assessee is allowed.

Ground No. 3

6. Ground No. 3 raised by the Assessee is directed against the disallowance of roaming charges made by the Assessing Officer

under section 40(a)(ia) of the Act.

- 6.1. During the relevant previous year, the Assessee incurred domestic roaming charges amounting to INR 1,97,54,77,395/-. The roaming charges were paid by the Assessee to telecom operators towards roaming services provided by such operators to the subscribers of the Assessee. According to the Assessing Officer even though the process of carriage of calls was fully automated and no human intervention was involved, there was an element of human intervention at the time of setup, monitoring, fault identification etc and therefore, the Assessing Officer was of the view that the roaming charges were subject to tax deduction at source in terms of Section 194J of the Act. Since the Assessee had failed to deduct tax at source in compliance with the provisions of Section 194J of the Act, the Assessing Officer made disallowance of INR 1,97,54,77,395/- in respect of roaming charges invoking provisions contained in Section 40(a)(ia) of the Act in the Draft Assessment Order, dated 31/03/2015.
- 6.2. In the objections filed by the Assessee on this issue, the DRP granted partial relief and directed the Assessing Officer to follow the directions of DRP for the Assessment Year 2010-11. Accordingly, in the Final Assessment Order, dated 28/01/2016, the Assessing Officer made disallowance of INR 30,95,03,786/- under Section 40(a)(ia) of the Act (as against the disallowance of INR 1,97,54,77,395/- proposed in the Draft Assessment Order) in respect of roaming charges.
- 6.3. Being aggrieved, the Assessee has carried the issue in appeal before the Tribunal.

- 6.4. We have considered the rival submissions and perused the material on record.
- 6.5. We note that in the identical facts and circumstances, the Tribunal has, vide order dated 08/11/2023 passed in appeals for the Assessment Year 2009-10 [ITA No 1121/Mum/2014,], decided this issue in the favour of the Assessee and deleted the disallowance of roaming charges under Section 40(a)(ia) of the Act. The relevant extract of the aforesaid decision of the Tribunal reads as under:

"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 Id. 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 Id. 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. 18 M/s. Vodafone India Ltd.

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.”

- 6.6. Respectfully following the above decision of the Tribunal in the case of the Assessee for the preceding Assessment Year 2009-10, which in-turn followed the decision of the Tribunal in the case of the Assessee for the Assessment Year 2006-07 and 2007-08, the disallowance of INR 30,95,03,786/- made under Section 40(a)(ia) of the Act in respect of roaming charges is deleted. Ground No. 3 raised by the Assessee is allowed.

Ground No. 4

7. Ground No. 4 raised by the Assessee is directed against the disallowance of discount extended to pre-paid distributors under

Section 40(a)(ia) of the Act.

- 7.1. During the relevant previous year, discount amounting to INR 47,17,99,596/- were extended by the Assessee to its distributors of pre-paid products ('pre-paid distributors'). According to the Assessee. The pre-paid distributors were appointed on Principal to Principal basis. The discount extended represents the difference between the Maximum Retain Price (MRP) of the talk-time and pre-paid connections and the price at which these are transferred to the pre-paid distributors. No payment or credit was made by the Assessee to its pre-paid distributors. In fact, it was the pre-paid distributors who make a payment to the Assessee for transferring pre-paid talk time and connections and accordingly the discount extended was not income earned by the distributors.
- 7.2. In the Draft Assessment Order, dated 31/03/2015, the Assessing Officer proposed disallowance under Section 40(a)(ia) of the Act on the upfront discount extended to the pre-paid distributors by terming the arrangement as 'Principal to Agent instead of 'Principal to Principal' basis certain clauses in the agreement on exclusivity right to inspect and treated upfront discount given to distributor as commission liable for withholding under Section 194H of the Act.
- 7.3. The objections filed by the Assessee on this issue were rejected by the DRP. Accordingly the Assessing Officer passed the Final Assessment Order dated 28/01/2016 making disallowance of INR 47,17,99,596/- under Section 40(a)(ia) of the Act in respect of disallowance of discount extended to pre-paid distributors under section 40(a)(ia) of the Act.

- 7.4. Being aggrieved, the Assessee has carried the issue in appeal before the Tribunal.
- 7.5. We have considered the rival submissions and perused the material on record.
- 7.6. Having considered the rival submissions and on perusal of the record we find that identical issue has been decided by the Mumbai Bench of the Tribunal in the case of the Assessee for the Assessment Year 2009-10 in ITA No. 1121/Mum/2014 and ITA No. 1885/Mum/2014, vide order dated 08/11/2023. The relevant extract of the aforesaid order read as under:

"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 19 M/s. Vodafone India Ltd. 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 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. 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 20 M/s. Vodafone India Ltd. 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 21 M/s. Vodafone India Ltd. 253 (Bom). Hence the reliance placed on the decision of Hon'ble Delhi High Court by the Id. 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 Id. 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 assessees 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 Id. 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 23 M/s. Vodafone India Ltd. 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. (Emphasis Supplied)

11.1 Facts being identical, following the above said decision of the coordinate 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."

- 7.7. Respectfully following the above decision of the Tribunal in the case of the Assessee, the disallowance of INR 47,17,99,596/- under Section 40(a)(ia) of the Act in respect of discount extended to pre-paid distributors under Section 40(a)(ia) of the Act is deleted. Ground No. 4 raised by the Assessee is allowed.

Ground No. 5

8. Ground No. 5 raised by the Assessee is directed against the disallowance of deduction under section 80IA of the Act.
- 8.1. The relevant facts in brief are the Assessee incurred tax loss for the Assessment Year 2011-12 and, therefore, claimed 'Nil' deduction under Section 80IA of the Act. However, during the assessment proceedings it was prayed before the Assessing Officer that in case any additions were made during the course of the assessment proceedings which convert losses into assessed profits, the Assessee should be granted benefit of deduction under Section 80IA of the Act since the Assessee is eligible to claim deduction at the rate of 30% in terms of Section 80IA of the Act for the Assessment Year 2011-12 (being the 7th year of claim of deduction).

8.2. The relevant facts in brief are that the Assessee was incorporated on 21/02/1992 and had bid for licenses for providing Cellular Mobile Telephony Services ('CMTS') and paging services in March, 1992. Thereafter, the Assessee was awarded the license to provide paging services in select cities (Ahmedabad, Bangalore, Pune, Baroda, Chandigarh, Hyderabad and Ludhiana) and CMTS in Mumbai telecom circle on 05/08/1994 and 29/11/1994, respectively. Given the nature of services and also the fact that these are provided in different service areas, the Assessee organized paging and cellular services as two separate undertakings/divisions. The Assessee commenced providing paging services in May, 1995 and cellular services in November, 1995 (i.e. in Financial Year 1995-96) after installation of the required telecom network infrastructure which was essential for provision of services and after obtaining the necessary clearances/permits from the Department of Telecommunication ('DoT'). Besides various government approval/permits/letters on launch of telecommunication services, the Assessee was also granted approval vide letter dated 21/04/2006 under Section 10(23G), by CBDT stating that the Assessee was an eligible undertaking as per Section 80IA(4) of the Act. Further, in assessment and appellate order for Assessment Year 1995-96 & 1996-97, it has been concluded that the Assessee was set up in Financial Year ('FY') 1995-96 i.e. Assessment Year 1996-97 and its plea that it had set-up its business in Financial Year 1994-95 was rejected.

8.3. However, the Assessing Officer was not convinced. The Assessing Officer relied upon assessment order for Assessment Year 2005-06 to conclude that the Assessee had commenced providing telecommunication services prior to 01/04/1995 and

denied deduction claimed under Section 80IA of the Act in the Draft Assessment Order, dated 31/03/2015. The DRP agreeing with the Assessing Officer declined to grant any directions and therefore, in the benefit of Section 80IA of the Act was not granted to the Assessee in the Final Assessment Order, dated 28/01/2016. Being aggrieved, the Assessee has carried the issue in appeal before the Tribunal.

8.4. We have considered the rival submissions and perused the material on record.

8.5. We note that identical issue had come up for consideration before the Mumbai Bench of the Tribunal in the case of the Assessee for the Assessment Year 2005-06 [ITA No. 5598/Mum/2017, dated 28/11/2022]. The Tribunal decided the issue in favour of the Assessee holding that the Assessee had started providing telecommunication services after 01/04/1995 and claimed deduction for the first time in the Assessment Year 2005-06. The relevant extract of the aforesaid decision of the Tribunal read as under:

"7. *We have heard extensive submissions made by rival sides and examined the orders of authorities below. We have also considered various documents and decisions on which the respective sides have placed reliance in support of their arguments.*

8. xx xx

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 200506.

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.-13 xx xx

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:

XX XX

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.

XX XX

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:

<i>Date</i>	<i>Telecom District</i>
<i>31/03/1995</i>	<i>Chandigarh</i>
<i>20/04/1995</i>	<i>Ludhiana</i>
<i>28/04/1995</i>	<i>Pune</i>
<i>01/05/1995</i>	<i>Bangalore</i>
<i>09/05/1995</i>	<i>Secunderabad</i>
<i>22/05/1995</i>	<i>Vadodara</i>
<i>24/05/1995</i>	<i>Ahmadabad/Gandhinagar</i>

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 fulfil 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 an unambiguous terms explains that, "this deduction is inter alia available to an undertaking providing telecommunication services if such undertaking is formed by splitting up 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.” (Emphasis Supplied)*

8.6. Respectfully following the above decision of the Tribunal in the case of the Assessee, we hold that the Assessee is eligible for deduction under Section 80IA of the Act for the Assessment Year 2011-12 and therefore, the Assessing Officer is directed to allow the deduction under Section 80IA of the Act as claimed by the Assessee after verification of the computation as per law. In terms of the aforesaid, Ground No.5 raised by the Assessee is allowed.

Ground No. 6

9. Ground No. 6 raised by the Assessee is directed against the Disallowance of deduction under section 80IA of the Act on 'Other Income'.

9.1. During the relevant previous year, the Assessee had earned 'Other Income' aggregating to INR 8,56,40,90,000/- consisting of the following

- (a) Interest Income amounting to INR 4,52,31,00,000 million
- (b) Management services form subsidiaries amounting to INR 3,52,71,00,000/-
- (c) Cellsite sharing revenue amounting to INR 59,00,000/-

- (d) Export incentives amounting to INR 3,08,400,000/-
- (e) Miscellaneous income amounting to INR 19,42,90,000/-
- (f) Liabilities/provisions written back of INR 53,00,000/-

9.2. The Assessee claimed deduction under Section 80IA(1) read with Section 80IA(2A) of the Act in respect of Other Income contending that the said Other Income had direct nexus with the telecommunication business of the Assessee. However, the Assessing Officer, following the assessment order for Assessment Year 2005-06, concluded that Other Income was not eligible for deduction under Section 80IA of the Act since section 80IA(1) of the Act used the phrase 'derived' and such other income has no direct nexus with eligible business. The objections filed by the Assessee on this issue were rejected by the DRP. The Assessing Officer passed the Final Assessment Order dated 28/01/2016 denying deduction under Section 80IA of the Act.

9.3. Being aggrieved, the Assessee is now in appeal before the Tribunal contending that the deduction under Section 80IA of the Act as claimed by the Assessee should be allowed. It has been contended that the Assessee is entitled to claim deduction under Section 80IA of the Act in respect of Other Income.

9.4. Having heard the rival submission and on perusal of record, we find that in the case of the assessee in appeal for the Assessment Year 2005-06 [ITA No. 5598/Mum/2017] Co-ordinate Bench of the Tribunal has, vide order dated 28/11/2022, decided identical issue in favour of the Assessee. By following the judgment of the Hon'ble Delhi High Court in the case of PCIT vs. Bharat Sanchar Nigam Limited: 388 ITR 371 it

was held by the Tribunal that as per Section 80IA(2A) of the Act what is available for claiming deduction is 'hundred per cent of the profits and gains of the eligible business'. The assessee was, therefore, eligible to claim deduction in respect of interest income and miscellaneous income in terms of Section 80IA(2A) of the Act which was much wider in scope than Section 80IA(1) of the Act. The relevant extract of the aforesaid decision of the Tribunal read as under:

"24. Ground No.2 of the appeal reads as under:

"2.Disallowance of deduction under section 80IA of the Act on 'Other Income'

2.1 On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in upholding that deduction u/s 80IA of the Act can be allowed only on direct income derived from the specified activity, thereby ignoring the non obstante sub-section 2A of section 80IA which provides that to be eligible for deduction u/s 80IA of the Act, income arising should be business income of the eligible undertaking, i.e. telecom undertaking of the Appellant in the present case

2.2 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the order of the learned AO in excluding the following incomes while computing deduction u/s 80IA of the Act:

- (a) Interest income amounting to INR. 6,09,99,174; and*
- (b) Miscellaneous income amounting to INR 4,98,14,610;"*

25. The Id. Counsel for the assessee submits that the assessee had earned interest income of Rs.6.09 crores and miscellaneous income of Rs.4.98 cores. The assessee claimed deduction u/s. 80IA of the Act in respect of the aforesaid income. The same was disallowed by the Assessing Officer and the CIT(A). The Id.Counsel for the assessee submitted that Delhi Bench of the Tribunal in the case of Bharat Sanchar Nigam Ltd.(BSNL) reported as 156 ITD 847 (Del-Trib) has held that deduction for

telecommunication services is allowable in respect of "profits of eligible business and not restricted to profits derived from eligible business as mentioned in section 80IA of the Act."

Thus, the provisions of sub-section (2A) of Section 80IA of the Act are much wider in scope as compared to the provisions of section 80IA(1) of the Act. The deduction in computing total income of an undertaking providing telecommunication services shall be in accordance with the provisions of subsection (2A) of section 80IA of the Act. The Id. Counsel for the assessee further submits that the decision rendered by Tribunal in the case of BSNL (supra) was upheld by the Hon'ble Delhi High Court in the case of PCIT vs. BSNL reported as 388 ITR 371. The Id. Counsel for the assessee further referred to the observations of the DRP for assessment year 2013-14. He referred to the findings of DRP at para 12, wherein the DRP had recorded, "the Hon'ble Delhi High Court has held the deduction u/s. 80IA(2A) of the Act is also allowable in respect of other incomes, which are part of profits and gains of eligible business. The decision of Hon'ble Delhi High Court has been accepted by the Revenue as no SLP has been filed by the Revenue against aforesaid decision."

26. Per contra, the Id. Departmental Representative vehemently defended the findings of CIT(A) on this issue.

27. Both sides heard. The short issue for adjudication in the appeal by assessee is: Whether interest income and miscellaneous income earned by the assessee would be eligible for deduction u/s. 80IA of the Act? We find that similar issue had come up before the Tribunal in the case of BSNL vs. DCIT (Supra). The Tribunal after examining and comparing the provisions of section 80IA(1) and 80IA(2A) held as under:

"13.2. On a reading of sub-section (1) of section 80-IA, we find that the legislature specifically uses the words meaning and import of which is plain and unambiguous in the context it is to be construed. Deduction under section 80- IA in terms of subsection (1) is available to "gross total income" of an assessee where "gross total income" is restricted to "profits and gains derived by..... from any business referred to in sub-section (4)". The deduction is available of an amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years" subject to the provisions of the section. The meaning

and intention of the legislature has been legally settled and well understood to mean that only those profits come under the ambit which can be said to be "derived from" such business. The intention of the legislature on a plain reading of the said sub-section is loud and clear. Reference to the decisions which establish a nexus of the first degree at this stage is refrained from as the position is well-settled legally and at this stage is not an issue for consideration in the present proceedings as both the parties agree that sub-section (1) of section 80-IA envisages only first degree nexus for the purposes of claiming deduction. The fact that deduction is available to hundred percent of the profits for a period of ten consecutive years is also not an issue under debate and even otherwise we find that the above provision in the said extent is clear and unambiguous.

13.3. What we may take note of is that on reading of only this sub-section in isolation what emanates clearly is that the deduction is applicable to any undertaking or an enterprise from any business referred to in sub-section (4) of section 80-IA which the legislature describes as "eligible business". The said sub-section sets out in unequivocal terms that the deduction is available to the gross total income of such undertaking/enterprise which "includes" "profits and gains derived from" such business. The meaning and limits of first degree nexus of the said phrase is well understood by the tax payer, the tax collector and the Legislature. The said subsection also sets out the period and extent of deduction available as hundred percent for ten years."

The Co-ordinate Bench further held that:

"13.10. Thus the dispute of bringing sub-section (1) into play for a tax payer falling in sub-section (2A) of section 80-IA to our minds cannot arise. According to the assessee sub-section (2A) does not put the restriction contemplated in sub-section (1) of section 80-IA in the face of the non-obstante clause coupled with the specific omission to use the well understood term "derived from". This argument is notwithstanding the argument that considering the assessee's nature of business the direct nexus presumed by sub-section (1) of section 80-IA is also

fulfilled. On a careful reading of the above provisions, we find that the legislature has left no ambiguity in the wording of the sub-section (2A). Having started with the non-obstante clause in sub-section (2A) which over-rides the mandate of sub-section (1) and (2), the legislature is well aware that the phrase "derived from" has been used only in subsection (1). The meaning of the said terms is judicially well-accepted and understood and it is not the case of that Revenue that the legislature was not conscious of the said term. It is seen that the import of this term continues to exist for an assessee covered under subsection (2) of section 80-IA. The legislature has consciously retained it for enterprise/undertaking falling in sub-section (2) and the proviso thereto only keeping in mind the nature of the enterprises/undertakings contemplated under sub-section (2) the option of claiming deduction in any ten consecutive years is given to be claimed from the first fifteen years of beginning operation is given.

13.11. Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, wherever it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived

from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play"

The Tribunal finally concluded that in terms of non- obstinate clause used in section 80IA(2A), deduction for telecommunication services is available in respect of "profits of eligible business" and is not restricted to "profits derived from eligible business" as mentioned in section 80IA(1) of the Act. The aforesaid findings of the Tribunal were affirmed by the Hon'ble Delhi High Court. We further observe that the DRP in directions dated 21/09/2017 for assessment year 2013-14 has observed that no SLP has been filed against the decision of Hon'ble Delhi High Court by the Revenue and allowed assessee's claim of deduction u/s. 80IA of the Act in respect of other incomes. Respectfully following the decision of Hon'ble Delhi High Court in the case of BSNL(supra), we direct the Assessing Officer to allow the benefit of deduction u/s. 80IA of the Act in respect of interest Income as well as miscellaneous income. Ground No.2 of the assessee's appeal is thus allowed."

- 9.5. In view of the judgment of the Hon'ble Delhi High Court in the case of Bharat Sanchar Nigam Limited (supra) which was followed by the Tribunal in the case of the Assessee [Assessment Year 2005-06; [ITA No. 5598/Mum/2017; dated 28/11/2022], the contention of the Assessee is allowed. The Assessing Officer is directed to allow the benefit of deduction under Section 80IA of the Act in respect of Other Income aggregating to INR 8,56,40,90,000/- and re-compute deduction under Section 80IA of the Act after including Other Income. Accordingly, Ground No. 6 raised by the Assessee is allowed.

Ground No. 7

10. Ground No. 7 raised by the Assessee pertains to transfer pricing adjustment.

Ground No. 7.1 and 7.2

11. Ground No. 7.1 and 7.2 raised by the Assessee are general

grounds relating to transfer pricing adjustment which do not require separate adjudication. Accordingly, Ground No. 7.1 and 7.2 are dismissed as being general in nature.

Ground No. 7.3 to 7.8

12. Ground No. 7.3 to 7.8 raised by the Assessee pertain to transfer pricing adjustment of INR 22,01,14,350/- relating to Advertisement, Marketing and Promotion Expenditure (for short '**AMP Expenditure**').
 - 12.1. During the assessment proceedings the Transfer Pricing Officer (TPO) noted that the Assessee was incurring very large amount of AMP Expenditure on Vodafone brands in India and thus, creating a valuable marketing intangible. TPO noticed that for the immediately preceding year also transfer pricing adjustment was made for AMP Expenditure. Therefore, a show cause notice, vide order sheet entry dated 22/12/2014, was issued to the Assessee to explain why the excess AMP Expenditure spend should not be treated as the cost incurred towards building the brand of Associated Enterprise (AE) in India; and why the same should not be held to be recoverable alongwith suitable mark-up for the marketing services provided by the Assessee to the AE as brand building exercise. In response, the Assessee filed reply letter dated 09/01/2015. The main contention of the Assessee were that (a) AMP Expenditure does not qualify as an international transaction; (b) AMP Expenditure is incurred for furthering its own business and for its own benefit; and (c) the purpose of AMP Expenditure was to distribute services through a network of dealers and distributors to retain existing customers and attract new customers and to increase the overall market share. However, the TPO was not convinced. The TPO observed

that the bright line concept could be applied in the case of the Assessee to determine the excessive marketing spend over and above the comparables which were not promoting any brand. Following the decision of the Special Bench of the Tribunal in the case of the L.G. Electronics India Private Limited (SB): (2013) 140 ITD 41/29 taxmann.com 300 (Delhi)(SB)/[2013] 140 ITD 41/29 taxmann.com 300 (Delhi), the Assessing Officer concluded that the transfer pricing adjustment could be made for the AMP marketing intangibles. The TPO selected 6 comparable companies and analysed the ratio of AMP/Sales (%) for the Assessment Year 2011-12. Taking the arithmetic mean of AMP/Sales ratios of the aforesaid 6 comparables at 5.44%, the TPO computed excess AMP Expenses over Bright Line at INR 20,16,34,544/- [6.20% less 5.44%]; and proposed transfer pricing adjustment of the INR 22,01,14,350/- after adding a mark-up of 9.17% of the same vide order dated, 21/01/2015 passed under Section 92CA(3) of the Act which was incorporated by the Assessing Officer in the Draft Assessment Order, dated 31/03/2015.

- 12.2. The Assessee filed objection before the DRP against the above transfer pricing adjustment on account of AMP Expenditure. The DRP agreed with the Assessing Officer and declined to give any directions. Therefore, the Assessing Officer passed Final Assessment Order, dated 28/01/2016, making transfer pricing addition of INR 22,01,14,350/- in respect of AMP Expenditure.
- 12.3. Being aggrieved, the Assessee is now in appeal before us on this issue challenging the transfer pricing addition.
- 12.4. We have considered the rival submission and perused the material on record including the chart of issues filed by the

Assessee.

12.5. We note that in the present case the TPO has arrived at a conclusion that there existed international transaction solely on the basis of the fact that the Assessee has incurred high AMP Expenditure at the rate of 6.2% of sales. While AMP Expenses may constitute an international transaction, the existence of an arrangement and consequently, an international transaction cannot be presumed on the basis of bright line test only. In the case of Maruti Suzuki India Limited Vs Commissioner of Income Tax: [2016] 381 ITR 117 (Delhi) it has been held by the Hon'ble Delhi High Court that the existence of AMP Expenditure, being an international transaction, will have to be established *de hors* the bright line test. In absence of any written agreement, whether any arrangement existed or the Assessee along with its AE acted in concert would depend upon the facts and circumstances of each case. Where an assessee denies existence of international transaction in case of AMP Expenditure, as is the case in the present appeal, the onus would be on the Assessing Officer to bring out facts, circumstances, policy or conduct to support existence of an international transaction. In the present case, there is nothing on record to show or infer the existence of international transaction. We also note that in the subsequent assessment years (i.e. Assessment Year 2012-13, 2013-14 & 2014-15) no adverse inference was drawn and no transfer pricing adjustment has been made in relation to advertisement, marketing and promotion expenses incurred during the relevant previous years. In the aforesaid facts and circumstances the transfer pricing addition made by the Assessing Officer in respect AMP Expenditure of INR 22,01,14,350/- cannot be sustained and is, therefore, deleted. Ground No. 7.3 raised by the Assessee is

allowed and Ground No. 7.4 to 7.8 are dismissed as being infructuous.

Ground No. 7.9 and 7.10

13. Ground No. 7.9 to 7.10 raised by the Assessee pertains to transfer pricing adjustment of INR 7,97,68,155/- made in respect of the payment of brand royalty for obtaining the right to use of Vodafone trademark and trade name.
 - 13.1. During the relevant previous year, the Assessee has made the following royalty payments to its AES (a) INR 15,95,36,310/- to Vodafone Ireland Marketing Limited (VIML) [*@0.70% of net revenue*] for grant of right to use "Vodafone" trademark and trade name; and (b) INR 8,61,80,955/- to Rising Groups Limited (RGL) (@0.35% of net revenue) for grant of right to use "Essar" trademark and trade name. The Assessee contended that as per Comparable Uncontrolled Price Method (for short 'CUP Method') the payments of royalties was at arm's length since on analysis of the comparables, the Assessee found that the mean of the royalty payments being made under comparable third-party arrangements was 2.69% which was more than the rate of royalty payments by the Assessee. However, the TPO was not convinced. The TPO rejected the CUP Method used by the Assessee to determine the ALP of royalty payment made for right to use of 'Vodafone' trademark and proposed transfer pricing addition of INR 7,97,68,155/- which was incorporated by the Assessing Officer in the Draft Assessment Order, dated 31/03/2015.
 - 13.2. The objections filed by the Assessee on this issue did not yield favourable results as the DRP declined to give any direction and therefore, in the Final Assessment Order, dated 28/01/2016,

transfer pricing adjustment of INR 7,97,68,155/- was made by the Assessing Officer.

13.3. The Assessee is now before us in appeal challenging the above transfer pricing addition.

13.4. We have considered the rival submissions and perused of material on record (including the chart of issues furnished by the Assessee) and orders passed by the authorities below.

13.5. We find that the TPO has rejected the approach adopted by the Assessee on account of the following reasons:

(a) According to the TPO, the Assessee did not explain as to why the different rates of royalty were paid for 'Essar' and 'Vodafone' trademarks and trade name and failed to submit any qualitative difference to justify higher payment to Vodafone over Essar,

(b) The Assessee had not undertaken any FAR analysis to demonstrate that trademark agreements of the external CUP comparables were similar to the agreement entered into between the Assessee and VIML for the grant of right to use 'Vodafone' trademark/ trade name. Therefore, the economic analysis undertaken by the Assessee suffers from ad-hocism and arbitrariness.

13.6. We do not find any infirmity in the factual findings returned by the TPO and Assessing Officer. However, at the same time we note that TPO has accepted RGL to be an AE of the Assessee. The transaction entered into by the Assessee with its AE (i.e. RGL) is a controlled transaction. Therefore, we find merit in the

contention advanced by the Learned Senior Counsel that RGL cannot be used as comparable under CUP Method to benchmark the royalty paid to VIML. We note that the Assessee has now placed on record note giving reasons for differential payments of royalty to VIML and RGL. Keeping in view the overall facts and circumstances of the present case we remand this issue back to the file of TPO/Assessing Officer with the directions decide the issue of transfer pricing adjustment in relation to international transaction of royalty payments afresh after granting the Assessee reasonable opportunity of being heard. The Assessee is directed to place before TPO/Assessing Officer such agreements/documents on which the Assessee wishes to place reliance in support of its contentions. In terms of aforesaid, Ground No. 7.9 and 7.10 raised by the Assessee are allowed for statistical purposes.

Ground No. 7.11 to 7.13

14. Ground No. 7.11 to 7.13 raised by the Assessee pertains to transfer pricing adjustment of INR 1,31,43,772/- made in respect of the technology support charges.
- 14.1. During the relevant previous year, the Assessee made payments to its AE for technology support services of INR 1,31,43,772/- in relation to the cost incurred for maintenance and up-gradation of IT platform maintained by Vodafone Group on which Vodafone Intranet portal is hosted. The Assessee aggregated the aforesaid services and determined the ALP of the subject transaction using Transaction Net Margin Method (TNMM) as the most appropriate method with Operating Profit (OP)/Operating Revenue (OR) as the Profit Level Indicator (PLI). According to the Assessee, the operating margin of 9.39% earned by the Assessee were higher

than the operating margins of the Indian companies engaged in similar mobile telecommunication services, and therefore, the payment of technology support charges by the Assessee was stated to be at arm's length warranting no transfer pricing adjustment. It was explained by the Assessee that the payments made by the Assessee for technology support services represents costs allocated by Vodafone Group Services Ltd in relation to VISTA support services. VISTA charges were in relation to the IT platform maintained by Vodafone group on which Vodafone Intranet portal was hosted, which had applications like HR, share-point etc. internally used by the employees across the group entities including those of the Assessee for communicating and sharing information.

- 14.2. However, the TPO rejected the aforesaid submission, inter alia, holding that the Assessee failed to satisfy the need-purpose-benefit test. The Assessee could not justify the charge based on cost benefit analysis and whether there was a need to incur such costs. Except for submitting description of services and invoices, which were not self-explanatory, the Assessee did not substantiate the cost incurred in connection with VISTA platform with documentary evidence. The Assessee also did not give the bifurcation of amount and nature of services rendered by the AE under various heads within the allocation of technology support charges paid. Further, the TPO observed that the Assessee did not even produce any primary evidence to show that the services are actually rendered by the AE were at arm's length. Therefore, the ALP of technology Support charges was taken as 'NIL' and transfer pricing addition was made for the entire payment on account of technology support expenses of INR 1,31,43,772/-. The aforesaid proposed transfer pricing addition was

incorporated by the Assessing Officer in the Draft Assessment Order, dated 31/03/2015.

- 14.3. The objections filed by the Assessee on this issue did not yield favourable results as the DRP declined to give any direction and therefore, in the Final Assessment Order, dated 28/01/2016, transfer pricing adjustment of INR 1,31,43,772/- was made by the Assessing Officer.
- 14.4. Now the Assessee is in appeal before us on this issue.
- 14.5. We have considered the rival submissions and perused the material on record (including the chart of issues furnished by the Assessee) and orders passed by the authorities below. It emerges that identical issue had come up for consideration before the Mumbai Bench of the Tribunal in the case of the Assessee in appeal(s) pertaining to Assessment Year 2009-10 [ITA No. 1121 & 1885/MUM/2014, dated 08/11/2023]. The Co-ordinate Bench of the Tribunal set aside the issue back to the file of TPO/Assessing Officer holding as under:

"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-BANGTP, 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.” (Emphasis Supplied)

14.6. Facts and circumstances being identical, we do not find any reason to depart from the view taken by the Tribunal in the above decision. Accordingly, adopting the reasoning given by the Tribunal in the above decision we set aside the transfer pricing addition of INR 1,31,43,772/- made in respect of technology support charges with the directions to the AO/TPO to determine the ALP of the relevant transactions as per law and make transfer pricing adjustment, if any. The Assessee is directed to furnish all the information and explanations in support of the claim that the payments are at arm’s length. The TPO/Assessing Officer would consider the same and adjudicate the issue after

granting the Assessee reasonable opportunity of being heard. Ground No. 7.11 to 7.13 raised by the Assessee are allowed for statistical purposes.

Ground No. 7.14

15. Ground No. 7.14 raised by the Assessee pertains to transfer pricing adjustment pertaining to reimbursement of expenses.
- 15.1. During the relevant previous year, the AEs of the Assessee incurred certain expenses relating to salary and other related costs of the employees who were seconded to the Assessee and who worked under the supervision, management and control of the Assessee. Subsequently the Assessee reimbursed these expenses incurred by its AEs on cost to cost basis. Out of the aforesaid expenses, the TPO determined the payments pertaining to GMAC Costs, PWC Consulting and people survey cost aggregating to INR 4,14,86,237 as 'Nil'. Therefore, the ALP of international transaction pertaining to reimbursement of salary and related cost of the personnel on deputation with the Assessee was determined at INR 20,53,45,896/- as against INR 24,68,32,133/- claimed by the Assessee. Since DRP declined to grant any relief. The Assessee has carried the issue in appeal before the Tribunal challenging the transfer pricing addition of INR 4,14,86,237/-.
- 15.2. Having heard the rival submission and on perusal of the record we find that this is a recurring issue. Both the sides agreed that for the Assessment Year 2008-09 and 2009-10, in identical facts and circumstances, this issue was restored to the file of TPO/Assessing Officer with directions. The relevant extract of the decision of Mumbai Bench of the Tribunal in the case of the

Assessee [ITA No. 1121 & 1885/MUM/2014, dated 08/11/2023]
read as under:

"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 No 6718/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."

- 15.3. In view of the above decision of the Tribunal, the Assessee is granted another opportunity to substantiate its claim that the INR 4,14,86,237/- were incurred in relation to the employees deputed with the Assessee and that the same, having being recovered on cost to cost basis from the Assessee, were at arm's length. The Assessee is directed to furnish relevant documents/details to substantiate its claim. The Assessing Officer/TPO shall grant reasonable opportunity of hearing to the Assessee and shall decide the issue in accordance with law after taking into consideration the details/documents furnished by the Assessee and the directions issued by the Tribunal in the case of the Assessee for the Assessment Year 2008-09 in ITA No 6718/Mum/2012, dated 08/05/2023. In terms of the aforesaid, we restore this issue to the file of AO/TPO with similar directions. Ground No.7.14 raised by the Assessee in appeal is allowed for statistical purposes.

Ground No. 8

16. Ground No. 8 raised by the Assessee pertains to levy of interest under Section 234D and 244A of the Act and the same is disposed off as being consequential in nature with the directions to the Assessing Officer to re-compute the same as per law.

Ground No. 9

17. Ground No. 9 raised by the Assessee pertains incorrect

computation of Book Profits under Section 115JB of the Act. In this regard we note that a rectification application, dated 14/09/2015, filed by the Assessee is pending adjudication. Since substantial time has lapsed since filing of the Application, the Assessing Officer is directed to take up the rectification application at the earliest. Ground No. 9 raised by the Assessee is allowed for statistical purposes.

Ground No. 10

18. Ground No. 10 raised by the Assessee pertains non-grant of full credit of TDS as claimed by the Assessee. In this regard we note that a rectification application, dated 14/09/2015, filed by the Assessee is pending adjudication. Since substantial time has lapsed since filing of the Application, the Assessing Officer is directed to take up the rectification application at the earliest and grant credit of tax deducted at source to the Assessee as per law. Ground No. 10 raised by the Assessee is allowed for statistical purposes.

Ground No. 11

19. Ground No. 11 raised by the Assessee pertains to initiation of penalty proceedings under Section 271(1)(c) of the Act is dismissed as being premature.

Appeal by Revenue : ITA No. 1919/Mum/2016

20. Now we would take up grounds raised in appeal preferred by the Revenue.

Ground No. 1 & 2

21. Both the sides agreed that Ground No. 1 & 2 raised by the

Revenue are connected to Ground No. 3 raised by the Assessee in appeal for the Assessment Year 2011-12. In view of our finding and adjudication in paragraph 6 to 6.6 above, Ground No. 1 and 2 raised by the Revenue in relation to disallowance of roaming charges under Section 40(a)(ia) of the Act are dismissed.

Ground No. 3

22. Ground No. 3 raised by the Revenue pertain to disallowance of penalty paid to Department of Telecommunications ('DoT').
 - 22.1. During the relevant previous year, the Assessee paid INR 2,05,35,800/- to DoT as penalty for non-compliance of the various requirements prescribed by the DoT in connection with verification of subscribers. Since the aforesaid penalty has been levied on account of default committed in compliance with the terms of the license agreement entered into between the Assessee and DoT, it represents a contractual liability arising as a result of breach/non-compliance of the terms of the contract and not a statutory liability imposed under the provisions of any statutory enactment. Accordingly, the aforesaid penalty levied by DoT was not disallowed in the computation of income. In the Draft Assessment Order, dated 31/03/2015, the Assessing Officer proposed disallowance of the aforesaid penalty paid to DoT by invoking provisions of Section 37 of the Act. However, in the objections filed by the Assessee against the proposed disallowance, the DRP accepted the contention of the Assessee and directed the Assessing Officer not to make the disallowance. Accordingly, as per the directions of the DRP no disallowance was made under Section of the Act in the Final Assessment Order, dated 28/01/2016.

22.2. Now Revenue has preferred appeal on this issue challenging the directions issued by the DRP and claiming the penalty paid to DoT was not allowable as deduction under Section 37(1) of the Act read with Explanation thereto.

22.3. We have heard the rival submissions and perused the material on record. We note that while granting relief to the Assessee on this issue the DRP has observed as under:

"6.1 On this issue the assessee company has relied on the judgment of Vodafone East Limited, which is a group concern of the assessee company, in ITA Nos. 1864/Kol/2012, 243/343/Kol/2014), wherein it has been held that the penalty paid to DOT is for the breach of contractual obligation and hence is allowed as a deduction under section 37 of the Act. Respectfully following, the judgment of Vodafone East Limited, referred supra, the AO is directed to delete the addition made on this issue."

22.4. The DRP has placed reliance on the decision of the Tribunal in the case of Vodafone East Limited Vs. ACIT [2016] 156 ITD 337 and DCIT Vs. Vodafone Digilink Ltd. [2018] 193 TTJ 150 (Delhi Trib) wherein in identical facts and circumstances disallowance made under Section of the Act of in respect of penalty paid to DoT was deleted by the Tribunal holding that penalty paid to DOT is for the breach of contractual obligation and hence is allowable as a deduction under section 37 of the Act read with Explanation thereto. Accordingly, we do not find any infirmity in the direction issued by the DRP and the consequent final Assessment Order dated 28/01/2016, passed by the Assessing Officer on this issue. Thus, Ground No. 3 raised by the Revenue is dismissed.

Assessment Year 2012-13

Appeal by Assessee : ITA No. 2834/Mum/2017

23. We would now take up appeal for the Assessment Year 2012-13 preferred by the Assessee arising from the Final Assessment Order dated, 30/01/2017, passed under Section 143(3) read with Section 92CA read with Section 144C(13) of the Act as per directions issued by the DRP under Section 144C(5) of the Act.
- 23.1. During the hearing both the sides agreed that, there being no change in the facts and circumstances, finding and adjudication in grounds of appeal raised by the Assessee in appeal for the Assessment Year 2011-12 shall apply with the corresponding ground of appeal raised by the Assessee in appeal for the Assessment Year 2012-13. Accordingly, we proceed to take up the grounds raised in appeal for the Assessment Year 2012-13 in seriatim.

Ground No. 1 to 1.1

24. Ground No. 1 to 1.1 raised by the Assessee are directed against the disallowance of INR 4,02,94,45,192/- under section 14A of the Act. The Assessee has not earned exempt income during the relevant previous year. The issue raised in grounds under consideration is identical to the issue raised in Ground No. 1 raised by the Assessee in appeal for the Assessment Year 2011-12, in view of our findings and adjudication in paragraph 4 to 4.6 above, disallowance of INR 4,02,94,45,192/- made under Section 14A of the Act is deleted and Ground No. 1 & 1.1 raised by the Assessee is allowed.

Ground No. 2 to 2.2.

25. Ground No. 2 to 2.2 raised by the Assessee are directed against the disallowance of INR 14,78,19,997/- on interest on Capital work- in progress under Section 36(1)(iii) of the Act. Ground No. 2 to 2.2 raised by the Assessee in appeal for the Assessment Year 2012-13 are identical to Ground No. 2 raised by the Assessee in appeal for the Assessment Year 2011-12. Respectfully following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2006-07 [ITA No 216/CHANDI/2011] & 2007-08 [ITA No. 1173/Mum/2011, dated 16/03/2023], and keeping in view of our finding and adjudication in paragraph 5 to 5.5 above, the disallowance of interest of INR 14,78,19,997/- made by the Assessing Officer under Section 36(1)(iii) of the Act is deleted. Ground No. 2 to 2.2 raised by the Assessee are allowed.

Ground No. 3 to 3.4

26. Ground No. 3 to 3.4 raised by the Assessee are directed against the disallowance of INR 48,39,89,911/- under Section 40(a)(ia) of the Act in respect of disallowance of discount extended to pre-paid distributors under section 40(a)(ia) of the Act. Ground No. 3 to 3.4 raised by the Assessee in appeal for the Assessment Year 2012-13 are identical to Ground No. 4 raised by the Assessee in appeal for the Assessment Year 2011-12. Respectfully following the decision of the Tribunal in the case of the Assessee for the Assessment Year 2009-10 [ITA No. 1121 & 1885/Mum/2023, dated 08/11/2023] and keeping in view of our finding and adjudication in paragraph 7 to 7.7 above, the disallowance of INR 48,39,89,911/- under Section 40(a)(ia) of the Act in respect of disallowance of discount extended to pre-paid distributors is deleted. Ground No. 3 to 3.4 raised by the Assessee is allowed.

Ground No. 4 to 4.3

27. Ground No. 4 to 4.3 raised by the Assessee is directed against the disallowance of deduction under section 80IA of the Act in respect of 'Other Income' aggregating to INR 1,082.22- Crores consisting of
- (a) Interest Income amounting to INR 669.65 Crores
 - (b) Management services form subsidiaries amounting to 391.61 Crores
 - (c) Miscellaneous income amounting to INR 20.9 Crores
- 27.1. Ground No. 4 to 4.3 raised by the Assessee in appeal for the Assessment Year 2012-13 are identical to Ground No. 6 raised by the Assessee in appeal for the Assessment Year 2011-12.
- 27.2. In view of the judgment of the Hon'ble Delhi High Court in the case of Bharat Sanchar Nigam Limited (supra) which was followed by the Tribunal in the case of the Assessee [Assessment Year 2005-06; [ITA No. 5598/Mum/2017; dated 28/11/2022], and in view of our findings and adjudication in paragraph 9 to 9.5 above, the contention of the Assessee is allowed, the Assessing Officer is directed to allow the benefit of deduction under Section 80IA of the Act in respect of Other Income aggregating to INR 1,082.22 Crores and re-compute deduction under Section 80IA of the Act after including Other Income. Ground No. 4 to 4.3 raised by the Assessee is allowed.

Ground No. 5

28. Ground No. 5 raised by the Assessee pertains to disallowance of

depreciation on 3G Spectrum.

28.1. During the relevant previous year the Assessee paid charges for allotment of right to commercially utilize the 3G spectrum allotted to it for a period of 20 years in the telecom circle of Mumbai. Since the right to use 3G spectrum did not itself entitle a company to provide telecom services for which a telecom license was required, the Assessee treated such right as an 'Intangible asset' under Section 32 of the Act and accordingly, tax depreciation per the prescribed rate was claimed on such capitalized cost. According to the Assessee the allowability of depreciation of such right was examined by the Assessing Officer in the assessment proceedings for Assessment Year 2011-12, [i.e year of acquisition of right to use spectrum] and after due examination tax depreciation was allowed. However, for the Assessment Year 2012-13, the AO disallowed the depreciation claimed amounting to INR 782,49,24,022/- and amortized the same under section 35ABB of the Act on the basis of concluding as under:

- (a) Right to use the spectrum emanates from the license and is part and parcel of the license;
- (b) Since 2G and 3G spectrum are similar in nature then there is no basis for different tax treatment of the two spectrum;
- (c) In the case of a telecom license the specific provision, i.e. section 35ABB would apply and not the general provision of the commercial rights in the nature of license covered under section 32(1)(ii).

28.2. The DRP concurred with the findings of the Assessing Officer that the right to use spectrum flows from the telecom license and is part and parcel of the license. Further, the 2G and 3G spectrum being similar in nature, there can't be a differential tax treatment

of the two. Since, the Act specific section viz. 35ABB/35ABA for the tax treatment of telecom license & spectrum, the same shall override the general provisions of the section 32(1). The provisions of Section 35ABA introduced w.e.f 1.4.2017 were clarificatory in nature. A plain reading of the provisions of newly introduced section 35ABA, makes it clear that the intention of the legislature is to amortize the expenditure on license in an equal manner over the entire period to which it relates. While enacting Section 35ABA, it was not the intention of the legislature to provide depreciation under Section 32 of the Act till 31/03/2017 and amortize the expenditure after 01/04/2017, as has been suggested by the assessee company. Further, the DRP was of the view that the intangible asset (namely 3G license) was allotted to the Assessee for a fixed period of time and as per the accounting principles, the same should be written off during the said fixed period only. Thus, the AO was correct in disallowing depreciation and allowing amortization over the operational lifetime of the 3G license. As per the directions of the DRP the Assessing Officer passed Final Assessment Order, dated 28/01/2016, denying claim of depreciation and allowing amortization.

28.3. Being aggrieved the Assessee is now in appeal before us.

28.4. We have considered the rival submission and perused the material on record. We find that identical issue came up for consideration before Mumbai Bench of the Tribunal in the case of the Assessee for the Assessment Year 2011-12 [ITA No. 3327/Mum/2018, dated 28/08/2020]. In that case, after considering identical submissions/contentions, the Tribunal arrived at the conclusion that the Assessee was entitled to claim depreciation in respect of 3G spectrum charges. The relevant

extract of the aforesaid decision read as under:

"29. Accordingly, we can safely conclude that on the merits of the issue, the Mumbai Bench of the ITAT in the case of Idea Cellular Ltd. (ITA No. 360/Mum/2016) has already held that the provisions of section 35ABB are not applicable on the cost of acquisition of the 3G Spectrum and no specific arguments have been made on the said decision of the ITAT on the merits of the issue by the Revenue.

30. This decision has also been followed by the ITAT in the case of Tata Teleservices Maharashtra Ltd.(ITA No. 3567/Mum/2016 and 4392/M/2017).

31. With regard to reliance of the Id. DR on the decision of Hon'ble Supreme Court in the case of Britania Industries Ltd.(278 ITR 546), we observe that the question before the Supreme Court in the said case was whether expenses towards rent, repairs, depreciation and maintenance of a building used as a guest house, was to be governed by the provisions of section 30 to 36 of the Act or whether the specific provisions of section 37(4) r.w.s. 37(3) and 37 (5) of the Act would be applicable. The Hon'ble Supreme Court held that the specific provisions would be applicable. In the instant case, the provision of section 35ABB of the Act, which is sought to be applied by the Revenue, do not specifically cover allowability of payments for cost of acquisition of the 3G Spectrum and hence the decision of the Supreme Court cannot be made applicable in the instant case. In fact a specific section viz., 35ABA has been brought on the statute books subsequently, by the Finance Act, 2016 with effect from 01 April 2017 (i.e. AY 2017-2018) on the issue of allowability of cost of acquisition of the 3G Spectrum. This amendment too clearly indicates that the provisions of section 35ABB of the Act cannot be made applicable thereon.

32. We also observe that if the argument of the Revenue that payment for spectrum was covered by Section 35ABB is to be accepted, it would render the provisions of Section 35ABA to be otiose to say the least and this too highlights the fallacy of the said argument. To sum up, we observed that Section 35ABA of the Act is specific to expenditure for obtaining right to use spectrum and not Section 35ABB of the Act. Accordingly, the decision of the Mumbai Bench of the ITAT in the case of Idea Cellular Ltd. (ITA No. 360/Mum/2016) and also the decision of

Tata Teleservices Ltd. (ITA No. 3567/Mum/2016 and 4392/Mum/2017) cannot be faulted with and the same has to be followed.

33. In view of the above, we hold that this issue is squarely covered in favour of the assessee by the decision of the Jurisdictional Bench of the Tribunal in the case of Idea Cellular Limited (ITA No. 360/Mum/2016) dated December 6, 2017. In this context, we highlight that the Tribunal in identical fact pattern for the same assessment year has not only upheld claim of depreciation on the 3G spectrum fees under section 32(1)(ii) of the Act treating the right to use 3G spectrum as an intangible asset, but has also quashed the revisionary proceedings initiated by the Revenue authorities. The key observations of the Hon'ble Tribunal are as under:

a. On maintainability of revisionary proceedings under section 263 of the Act: The Hon'ble Tribunal categorically held that since the assessment order was passed after conducting a detailed enquiry and adopting one of the legally permissible view, the revisionary proceedings initiated on such issue has no legs to stand on and is thus liable to be quashed. Refer paras 13 to 16 of the order (page no 19 to 25 of the order).

b. On merits of allowability of depreciation claimed on 3G spectrum fees: The Hon'ble Tribunal observed that the telecom license and spectrum are independent of each other and 3G spectrum fee merely provides a right to use a particular frequency/spectrum while providing telecommunication services. The assessee has rightly claimed depreciation under section 32 of the Act and the provisions of section 35ABB of the Act are clearly not applicable. Refer paras 17 to 20 of the order (page no 25 to 30 of the order).

It was further highlight that the Jurisdictional Tribunal in the case of Tata Teleservices Maharashtra Limited (ITA 3567/Mum/2016 and 4392/Mum/2017), for AYs 2011-12 and 2012-13, has followed the decision of Idea Cellular (supra) and directed the AO to allow the depreciation claim under section 32(1)(ii) of the Act in respect of the amount paid to DOT for purchase of 3G spectrum and quashed the order passed u/s 263 of the Act by the learned CIT."

- 28.5. Respectfully following the above decision of the Tribunal in the case of the Assessee for the Assessment Year 2011-12 [ITA No. 3327/Mum/2018, dated 28/08/2020], we direct the Assessing Officer to allow depreciation upon the 3G spectrum charges capitalize by the Assessee under Section 32(1)(ii) of the Act. Ground No. 5 raised by the Assessee is allowed.

Ground No. 6

29. Ground No. 6 raised by the Assessee pertains non-grant of full credit of TDS as claimed by the Assessee. The Assessing Officer is directed to grant credit of tax deducted at source as per law. Ground No. 6 raised by the Assessee is allowed for statistical purposes.

Ground No. 7 & 8

30. Ground No. 7 and 8 raised by the Assessee are general grounds relating to transfer pricing adjustment which do not require separate adjudication. Accordingly, Ground No. 7 and 8 are dismissed as being general in nature.

Ground No. 9 & 10

31. Ground No. 9 & 10 raised by the Assessee pertains to transfer pricing adjustment of INR 9,36,75,998/- made in respect of the payment of brand royalty for obtaining the right to use of Vodafone trademark and trade name. Ground No. 9 & 10 raised by the Assessee in appeal for the Assessment Year 2012-13 are identical to Ground No. 7.9 to 7.10 of the Assessee's appeal for Assessment Year 2011-12. Therefore, in view of our findings and adjudication in paragraph 13 to 13.6 above, and keeping in view the overall facts and circumstances of the present case we

remand this issue back to the file of TPO/Assessing Officer with the directions decide the issue of transfer pricing adjustment in relation to international transaction of royalty payments afresh after granting the Assessee reasonable opportunity of being heard. The Assessee is directed to place before TPO/Assessing Officer such agreements/documents on which the Assessee wishes to place reliance in support of its contentions. In terms of aforesaid, Ground No. 9 and 10 raised by the Assessee are allowed for statistical purposes.

Ground No. 11

32. Ground No. 11 raised by the Assessee pertains to transfer pricing adjustment of INR 11,23,53,754/- made in respect of the reimbursement of expenses. Ground No. 11 raised by the Assessee in appeal for the Assessment Year 2012-13 are identical to Ground No. 7.14 of the Assessee's appeal for Assessment Year 2011-12. Therefore, in view of our findings and adjudication in paragraph 15 to 15.3 above, and in view of the above decision of the Tribunal [ITA No. 1121 & 1885/MUM/2014, dated 08/11/2023], the Assessee is granted another opportunity to substantiate its claim that the INR 11,23,53,754/- were incurred in relation to the employees deputed with the Assessee and that the same, having being recovered on cost to cost basis from the Assessee, are at arm's length. The Assessee is directed to furnish relevant documents to substantiate its claim. The Assessing Officer/TPO shall grant reasonable opportunity of hearing to the Assessee and shall decide the issue in accordance with law after taking into consideration the details/documents furnished by the Assessee and the directions issued by the Tribunal in the case of the Assessee for the Assessment Year 2008-09 in ITA No

6718/Mum/2012, dated 08/05/2023. In terms of the aforesaid, we restore this issue to the file of AO/TPO with similar directions. Ground No.11 raised by the Assessee in appeal is allowed for statistical purposes.

Ground No. 12

33. Ground No. 12 raised by the Assessee pertains to initiation of penalty proceedings under Section 271(1)(c) of the Act is dismissed as being premature.
34. In result, for the Assessment Year 2011-12, the appeal preferred by the Assessee is partly allowed while appeal preferred by the Revenue is dismissed and For Assessment Year 2012-13 the appeal preferred by the Assessee is allowed for statistical purposes.

Order pronounced on 17.05.2024.

Sd/-
(S Rifaur Rahman)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 17.05.2024
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai