

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

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.4318/Mum/2017
(Assessment Year : 2010-11)**

Vodafone Idea Limited (Formerly Idea Cellular Limited) 10 th Floor, Birla Centurion, Century Mills Compound Pandurang Budhkar Marg, Worli Mumbai- 400 030	Vs.	The Deputy Commissioner of Income Tax-3(2) Mumbai
PAN/GIR No.AAACB2100P		
(Appellant)	..	(Respondent)

**ITA No.4513/Mum/2017
(Assessment Year : 2010-11)**

The Deputy Commissioner of Income Tax-3(2) Mumbai	Vs.	Vodafone Idea Limited (Formerly Idea Cellular Limited) 10 th Floor, Birla Centurion, Century Mills Compound Pandurang Budhkar Marg, Worli Mumbai- 400 030
PAN/GIR No.AAACB2100P		
(Appellant)	..	(Respondent)

Assessee by	Shri J.D. Mistri, Sr. Adv. a/w. Shri Ronak Doshi
Revenue by	Shri T Shankar, CIT DR
Date of Hearing	07/03/2024 & 19/07/2024
Date of Pronouncement	14/10/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against order dated 08/03/2017 passed by CIT(A)-22, Mumbai for the quantum of assessment passed u/s.143(3) for the A.Y.2010-11.

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

1. Ground No. I: Addition u/s. 28(iv) of the Act amounting to Rs. 3,34,00,98,756/-
2. Ground No. II: Treating capital receipt as a benefit taxable u/s 28(iv) of the Act:
3. Ground No. III: Disallowance u/s. 36(1)(iii) of the Act of interest expenditure of Rs.30,24,65,753/- paid for acquisition of the shares of erstwhile Spice Communications Limited (Spice):
4. Ground No. IV: Disallowance of certain expenses amounting to Rs.47.66.22.574/- u/s 40(a)(in) of the Act for non-deduction of taxes
5. Ground No. V: Disallowance of interconnect charges amounting to Rs. 1,42,00,000/-
6. Ground No. VI: Disallowance of switching and cell sites rent amounting to Rs. 1,24,18,386/- u/s. 40(a)(ia) of the Act for non-deduction of taxes u/s. 194-1 of the Act:
7. Ground No. VII: Deduction u/s 35DD of the Act:

3. Whereas the Revenue in their grounds of appeal has raised following grounds:-

1. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in and circumstances of 35,44,41,244/- as benefit taxable u/s 28(iv) of the Act, being the Net value (NV) of the Telecom Undertaking ("the Demerged Undertaking) demerged from Aditya Birla Telecom (ABTL)("the Demerged Undertaking") into the Appellant under a court approved scheme u/s 391 read with section 394 of the Companies Act, 1966"*
 2. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in disallowing a sum of Rs.80,89,24,560/- u/s 14A of the Act r.w.r 8D of the Rules towards expenses incurred for making tax-free investment"*
 3. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in disallowing the discount of Rs.3,47,80,25,095/- allowed to be Distributors u/s 40(a)(ia) of the Act on the alleged ground that such discount was, in reality, "commission" from which the appellant has failed to deduct tax at source u/s 194H of the Act".*
 4. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in disallowance of Rs. 28,29,08,135/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESOP")".*
 5. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in disallowance of revenue share license fees ("RSLF") amounting to Rs.8,68,29,06,892/- paid Telecommunications ("the DOT)". to the Department of Telecommunications ("the DOT)".*
4. We will take up first issue in the assessee's appeal, i.e., addition u/s.28(iv) of the Act amounting to Rs. 334,00,98,756/-.

5. The brief facts qua the issue involved are that Aditya Birla Telecom Limited ("ABTL") was a wholly owned subsidiary of Idea Cellular Limited ("ICL" or "Assessee") w.e.f. February 28, 2007. On 05/12/2008, a foreign entity, P5 Asia Holdings Investments (Mauritius) Limited ("P5 Asia") was allotted 19,25,000 compulsorily convertible preference shares (CCPS) of Rs. 10/- each of ABTL. ABTL had obtained a Unified Access Services License in November 2006 for providing telecom services in Bihar (including Jharkhand) service area. The shareholding pattern of ABTL as on March 31, 2009 is as under:

Company	No. of shares	Amount (Rs.)	% of holding
ICL (equity shares)	1,00,00,000	10,00,00,000/-	100%
P5 Asia (preference shares)	19,25,000	1,92,50,000/-	100%
<u>As a % of total share capital</u>			
ICL (equity shares)	1,00,00,000	10,00,00,000/-	83.86%
P5 Asia (preference shares)	19,25,000	1,92,50,000/-	16.14%
Total	1,19,25,000	11,92,50,000	100%

6. Apart from the telecom operations, ABTL had, inter- alia, invested in 16% of the equity share capital of Indus Towers Limited ("Indus"), another company which provides passive infrastructure to telecom operators. The net book value of assets of ABTL as on March 31, 2009 was as follows:

- Telecom circles in Bihar & Jharkhand area: Rs. 2,069 crores
- Investment in Indus: Rs. 0.019 crores
- Other Investments: Rs. 0.05 crores.

7. ICL wanted to consolidate all the telecom operations under itself rather than having them carried out through separate entities. Accordingly, during the year under consideration, i.e., AY 2010-11, under a scheme of arrangement under section 391 to 394 of the Companies Act, 1956 which was approved by the Hon'ble High Courts of Gujarat and Bombay, ABTL's telecom operations (the Undertaking) was demerged into ICL with the appointed date being April 1, 2009.

8. Under the relevant clauses of the scheme, following term were provided;

- i) all the assets, rights and liabilities of the Undertaking were transferred (Clause no. 4.1.) at their book values (Clause no.11.1);
- ii); In terms of the scheme, ABTL revalued its investment in Indus (Clause no. 11.3), an asset separate from the Undertaking,

and business restructuring reserve was created by crediting a sum of Rs. 7,330 crores;

iii) Further, the net book value of the Undertaking being demerged was Rs. 2,069 crores;

iv) As per the accounting treatment under the scheme, ICL credited this net book value of assets, being the differential book value of assets and liabilities of the demerged Undertaking, in the General Reserve account (Clause no 11.2); v) As per the said scheme, no shares were issued to Assessee, i.e., ICL being the holding company (Clause 10.1); and

vi) Further, the scheme also provided for modification of the terms of conversion of Preference shares. (Part A of Preamble).

9. The Id. Assessing Officer held that the net book value of undertaking being assets of Rs.2,069 Crores is taxable u/s.28(iv) for which he has given his detailed reasoning which can be summarized in the following manner:-

i) Under the scheme, all properties and all the liabilities related to the undertaking are not transferred and no shares allotted by ICL to shareholders of ABTL. Thus, as conditions of section 2(19AA) of the Act not satisfied, it is a non-qualifying demerger. (Para 4.3.3 & 4.3.4 of the assessment order)

ii) There is direct business nexus between ABTL & ICL as both the companies are under same corporate management, engaged in similar line of business, headed by same conglomerate,

providing services under the same brand 'Idea', etc. Thus, the demerger is purely a business transaction. (Para 4.5.9)

iii) ICL has received the benefit of difference in net assets of the demerged telecom undertaking transferred under the scheme, without any consideration. Therefore, the same has to be mandatorily taxed as a benefit/perquisite u/s. 28(iv) of the Act. (Para 4.5.9)

iv) P5 Asia, who earlier had stake in ABTL's entire telecom and investment business has been reduced to a stake holder only in investment business of ABTL and it has not been compensated by allotting shares of ICL. (Para 4.5.12).

v) Assessee has changed stands inter alia that the receipt of Rs. 2,069 crores is a gift, therefore not taxable as per provisions of section 47(iii) of the Act, which as per the AO is not correct in absence of any natural love and affection between the two companies.

10. Before the ld. CIT (A) assessee's explanation in sum and substance was as under:-

- the demerger was in accordance with section 2(19AA) of the Act;
- the aforesaid arrangement is tax neutral and there is no loss to the Revenue;
- there is no benefit at all arising from the demerger, much less any benefit from business of the assessee, hence section 28(iv) of the Act does not apply:

- the ratio of the Hon'ble Kolkata Tribunal's decisions in the case of 31 Taxman.com 11 and M/s. Kyal Developers (supra) would squarely apply in the assessee case;
- similarly, the question whether the demerger is as per section 2(19AA) of the Act or not, is also not relevant since a capital receipt cannot be regarded as a revenue receipt even if the demerger is not as per section 2(19AA) of the Act.
- the telecom undertaking is a capital asset separate from its component assets and therefore, the difference between current assets and current liabilities cannot taxable under the Act.

11. However, Ld. CIT (A) partly gave relief after giving following observations and the findings which reads as under:-

“5.3 I find that the appellant’s contention that sub-clauses (iv) & (v) of section 2(19AA) are not applicable to it in view of provisions of section 77 of the Companies Act, rests on the plank that the requirement to issue shares on pro rata basis applies to equity shareholders only and not to preference shareholders. It has contended that in a demerger, there was no need to issue shares to the preference shareholders of ABTL. That the term 'shares' in Section 2(19AA) of the Act will have to be read only as "equity shares" and not "preference shares". I find that this is sweeping contention which is untenable. Sub-clauses (iv) & (v) of section 2(19AA) as they stood during the relevant period read as under:

(iv) the resulting company Issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis;

(v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become

share-holders of the resulting company or companies by virtue of the demerger.

From a plain reading of the above sub-clauses, it is evident that it is nowhere specified that the shares on proportionate basis are to be issued to only the equity shareholders of the demerged company. It is a settled principle of interpretation of statutes that one cannot impute words which are not expressly mentioned in the statute. Preference shareholders are also part of the total shareholders of a company. They own part of the company to the extent of the shares held by them. The main difference vis-a-vis the equity shareholders is that they do not have voting power and that they get dividend at fixed rate before paying dividend to equity shareholders; and their capital gets returned first at the time of winding up of the company, before the payment to the equity shareholders. Apart from these, there is no difference in their interest/rights in the company. Perusal of the share holding of M/s Aditya Birla Telecom Ltd. as on 31.03.2009 just before the demerger shows the following:

<i>Shareholders</i>	<i>Type of shares</i>	<i>No. of shares</i>	<i>Amount (Rs.)</i>
<i>Idea Cellular Ltd</i>	<i>Equity</i>	<i>10,00,00,000</i>	<i>10,00,00,000/-</i>
<i>P5 Asia Holding Investment (Mauritius) Ltd.</i>	<i>Preference</i>	<i>19,25,000</i>	<i>1,92,50,000/- plus premium of 2096,32,50,000/-</i>

At para 1.13 of its submission above, the appellant has stated that "In the present case, the Appellant is holding 100% shares in ABTL and hence, there is no requirement to issue shares to the shareholder of ABTL as the shareholder of ABTL is itself the Appellant." This is factually incorrect as can be seen from the

above shareholding details of ABTL. Even if the appellant could not have issued shares to itself due to the constraint placed by section 77 of the Companies Act, proportionate shares should have been issued to P5 Asia Holding Investment (Mauritius) Ltd. on demerger as per requirements of sub-clauses (iv) & (v) of section 2(19AA). The appellant having failed to do so, I endorse the conclusion of the Assessing Officer that the demerger of the Telecom Undertaking was not a qualifying demerger u/s 2(19AA) of the Act since no shares were allotted to the shareholders of ABTL

5.4 The appellant has also contended that there was no benefit arising to it, as upon the demerger, against vesting of the Telecom Undertaking into the Appellant, there was a natural corresponding decrease in the intrinsic value of investment (i.e. shareholding in ABTL) of the appellant. That, therefore, in reality, there was no "benefit/perquisite" arising to the appellant, as alleged by the AO. That it is an axiomatic truth that when the undertaking belonging to WOS rolls back into its parent, the value of the shares held by the parent in the WOS correspondingly falls. That the gain of the parent is exactly equal to the sacrifice by the parent. Consequently, there is no "benefit" at all to the parent. The appellant submitted that in order to invoke section 28(iv) of the Act, it must be shown that some "benefit" or "perquisite" had arisen to the appellant. The appellant's submissions have been considered. While the same may be true to the extent of the shares held by it in ABTL, it cannot be said to be equally true for its preference shareholder. The basic principle of any demerger is that the shareholders are compensated for by being allotted shares on proportionate basis on vesting of the undertaking into the resulting company. In the instant case, no shares have been issued to the shareholders of ABTL and hence, no consideration had passed. However, the Net Value being the excess of book value of assets over book value of liabilities of the Telecom Undertaking amounting to Rs 2,069.45 crores has been credited to the appellant's Reserve Account. The view taken by the AO that benefit had arisen to the appellant on this account is, therefore, upheld in principle. However, regarding the quantum of such benefit, I find merit in the appellant's submission that when the undertaking belonging to WOS rolls back into its parent, the value

of the shares held by the parent in the WOS correspondingly falls. That the gain of the parent is exactly equal to the sacrifice by the parent. No benefit would arise on account of non issue of shares to the appellant. Moreover, the appellant also could not have issued shares to itself as per the provisions of section 77 of the Companies Act. I am, therefore, of the considered view that the benefit arising to the appellant would be in the ratio of so much of the shares held by P5 Asia Holding Investment (Mauritius) Ltd. to the total shares of ABTL just before demerger. It is seen that the total number of shares of ABTL was 1,19,25,000 out of which 19,25,000 shares were held by P5 Asia Holding Investment (Mauritius) Ltd. which comes to 16.14%. The addition of Rs. 2069,45,40,000/- u/s 28(iv) of the Act is, therefore, confirmed to the extent of 16.14% of the same which comes to Rs. 334,00,98,756/-

5.5 The appellant has further submitted that it is in the business of providing "cellular mobile services and trading in accessories" and not engaged in the business of sale and purchase of undertakings. That the Demerger of the undertaking was an exceptional event and not in the course of the business of the appellant. Hence, the AO's observation that the benefit arose from the business of the appellant was without any merits and therefore, the question of applying section 28(iv) of the Act did not arise. On this issue, I find that there is no dispute that both the appellant as well as the Telecom Undertaking of ABTL are in the same line of business, that is, providing cellular mobile services. The demerger was entered into to consolidate and further the business interests of the appellant. The benefit which accrued to the appellant on account of such demerger, therefore, arose from business. The benefit may not have arisen from "the" business of sale and purchase of undertakings, but it certainly arose from business. The specific wording of section 28(iv) is as below:

"(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession"

It is pertinent to note that the words used are "arising from business" and not "arising from the business". The Hon'ble Madras

High Court in the case of CIT vs Ramaniyam Homes(P.) Ltd.[2016] 68 taxmann.com 289(Madras) has held that the absence of the prefix 'the' to the word 'business' makes a world of difference. The benefit arising to the appellant on account of the demerger is, therefore, held to be from business,

5.6 The various case laws relied upon by the appellant are also not applicable to the appellant's case as in those cases the requisite conditions for amalgamation stood fulfilled.

In the instant case, benefit has been held to have arisen not simply because of excess of assets over liabilities but because no consideration had passed as no proportionate shares had been issued to the shareholders of the demerged company

5.7 In view of the discussions at paras 5.2 to 5.6 above, the addition of Rs. 2069,45,40,000/- u/s 28(iv) of the Act is confirmed to the extent of Rs. 334,00,98,756/-. The appellant's ground of appeal is partly allowed.

12. We have heard both the parties at length, perused the relevant material placed on record and the findings given by the ld. AO and ld. CIT (A). It is seen that the ld. CIT(A) after considering the entire facts and submissions of the assessee had decided the issue partly in favour which can be summarized in the following manner:-

i) CIT (A) partially agreed to the assessee's submission that, due to the terms of the scheme as approved by the High Court and the constraints placed by section 77 of the Companies Act, 1956, ICL could not issue shares to equity shareholders of ABTL in consideration of the transfer. However, he endorsed the conclusion of the AO that the demerger is not a qualifying one since no shares were allotted to P5 Asia.

ii) The CIT(A) agreed that in principle since Assessee held 100% shares in ABTL, any transfer of assets from WOS to Holding Co, would result in corresponding decrease in intrinsic value of investment of Assessee in ABTL. He further observed that "when the undertaking belonging to WOS rolls back into its parent, the value of shares held by parent in the WOS correspondingly falls". However, by considering that Preference Shareholders were not compensated, the benefit arising to ICL were held to be in the ratio of so much of the shares held by P5 Asia to the total shares of ABTL just before demerger, which comes to 16.14%. Thus, out of the addition of Rs. 2,069 crores, he confirmed the addition to the extent of Rs. 334 crores (i.e., 16.14%) and granted relief for the balance 1,735 crores.

in) The CIT(A) upheld the observation of the AO on the transaction amounting to a benefit arising from business, stating that the demerged was entered to consolidate and further the business interest of ICL.

iv) The benefit has not only arisen because of excess of assets over liabilities but also because no consideration had passed to the shareholders of the demerged company. Thus, the case laws relied by the Assessee which were in cases of amalgamation are not applicable here.

13. Before us Id. Sr. Counsel for the assessee Mr. J.D. Mistry submitted that only "income" can fall within the purview of Section 28 and therefore, capital receipts fall outside the ambit of Section 28. Here in this case, there is no income of Revenue in

nature arising in the course of business. Thus, the first proposition was that Section 28(iv) cannot be invoked for taxing the capital receipts for which he placed reliance on the following judgments:-

- *CIT vs. Mahindra and Mahindra Ltd [2003] 261 ITR 501 (Bom HC) as affirmed by the Supreme Court in 93 taxmann.com 32 (SC)*
- *CIT vs. Xylon Holdings Pvt. Ltd. (26 Taxmann.com 333) (Bom)*
- *CIT vs. STADS Ltd. (2015) (373 ITR 313/61 taxmann.com 33) (Madras)*
- *ITO vs. Shreyans Investment (P) Ltd. (31 Taxmann.com 11) (Kol-Trib)*
- *ITO vs. M/s. Richvik Enterprises Private Limited (ITA no. 389/KOL/2012 order dated 24/06/2013)*
- *ITO vs. M/s. Kyal Developers Pvt. Ltd. (ITA No. 627/Kol/2012)*
- *Aamby Valley Ltd. vs. ACIT [2019] 102 taxmann.com 385 (Delhi - Trib.)*
- *Sundaram Finance Ltd. vs. ACIT [2017] 165 ITD 563 (Chennai - Trib.)*
- *CIT vs. Areva T&D India Ltd. [2021] 434 ITR 604 (Madras HC)*

14. He submitted that in the aforesaid judgments it has been held that any reserve created under a scheme of amalgamation is a capital receipt and thus not covered u/s. 28(iv) of the Act. This principle clearly applies to any scheme including scheme of demerger and further, whether a merger/demerger is qualifying or not will not alter the position in law that amalgamation/merger and demerger cannot be considered to be anything but a capital transaction and therefore, provisions of section 28 (iv) cannot apply to it.

15. Mr. J.D. Mistry further submitted that even for the sake of argument that a benefit arises, then such benefit should be arising from business or exercise of a profession and benefit accruing to a person must necessarily be an offshoot of business. By way of example, he submitted that when an advocate agrees to appear for a client and for that purpose the client offers a car for travelling to the advocate. The benefit to the advocate because of the car is a direct offshoot of the exercise of his profession/business, is thus chargeable to tax u/s. 28(iv) of the Act. In this regard, he placed on the decision of the Hon'ble Apex Court in case of Universal Radiators vs. CIT [1993] 201 ITR 800.

16. Without prejudice he submitted that if at all there is a benefit, the said transaction at worst could be considered to be a gift being a transfer of property without consideration. In this connection, it is further submitted that corporate can also give and accept gifts and the Ld. AO made an erroneous presumption that only natural persons can give and accept gifts out of natural love and affection. Reliance in this regard was placed by him on the decision of DP World (P.) Ltd. v. DCIT [2013] 140 ITD 694 (Mumbai) and the decision of Hon'ble Madras High Court in PCTT v Redington (India) Ltd [2021] 430 ITR 298 (Madras) affirming the Hon'ble Chennai Tribunal decision in [2014] 49 taxmann.com 146 (Chennai - Trib.) Thus, in law, if stand of Department that Assessee received undertaking worth Rs.2069 crores without consideration is accepted, it would be a gift. A gift is a capital receipt and hence again cannot be taxed u/s. 28(iv).

In any event, the Legislature to tax such gifts introduced section 56(2)(vii) by Finance (No.2) Act, w.e.f. October 1, 2009. However, until amendment made by Finance Act 2017 w.e.f. April 1, 2017 when clause (x) to section 56(2) was introduced, any sum of money or property received without consideration or less than fair market value was taxable under clause (vii) to section 56(2) and which applied only to individual and HUF and not to companies.

17. Further, looking from point of view of ABTL, the Department itself treated this very transaction as being on capital account and sought to tax capital gain on transfer of telecom undertaking by treating demerger as slump sale adopting revaluation of investment in Indus as consideration, the Tribunal [ITA No. 341/Mum/2014] held that though there is transfer of telecom undertaking which may be liable to capital gains, in absence of consideration, computation mechanism for capital gain fails and AO was not justified in computing capital gain. This decision is also affirmed by Hon'ble Bombay High Court [ITA No. 1866 of 2017] He thus, submitted in this respect that the revenue cannot take a contrary view on the nature of the transaction in the hands of ICL.

18. On the other hand, ld. CIT DR after referring to the various points raised by the ld. CIT (A) submitted that the benefits certainly constitute income of the assessee and is Revenue in nature because benefit here is accruing to the assessee is equivalent to the share premium paid by P5 Asia Holding

Investment (Mauritius) Ltd. Assessee is also in the same line of business. Id. CIT(A) in para 5.5. has clearly held that the demerger was entered into to consolidate and further the business interests of the assessee. The benefit which accrued to the assessee on account of such demerger, therefore, arose from business.

18.1. Here in this case, following businesses were merged with the assessee during the year

- Telecom operations of Spice Communication Ltd with assessee
- Telecom operations of ABTL with assessee

18.2 Thus, there was a conscious effort for consolidation and furtherance of business. Assessee before the Id. CIT(A) has clearly stated that investment in telecommunication business is the business of the assessee and it continues to remain "wholly engaged" in the telecommunication business. This being so, it is clearly evident that benefits accruing to the assessee are in the nature of revenue and have been rightly taxed by the Id. AO.

18.3. Further, in the cases of Vodafone Idea Ltd. in ITA NO. 216/CHANDI/2011 (AY 2006-07) & ITA NO 1173/CHANDI/2011 (A.Y 2007-08), the Tribunal has accepted the argument of the assessee that the primary contention of the assessee is that loans have been advanced to sister concerns out of commercial expediency. It is an undisputed fact that the loans has been advanced by the assessee to the group concerns who were in the

same business and are providing cellular services in different telecom circles in India.

18.4. In so far as reliance placed by the ld. Counsel for the assessee in the case of Vodafone Idea Ltd. in ITA No.1121/Mum/2014, does not support the case of the assessee because here the issue was the loans given out of commercial expediency because all the subsidiaries are in the same line of business i.e. they are providing similar services in different circles in India. Once the loans are claimed to be given for commercial expediency it would not be appropriate to claim the benefits arising out of such business are capital and not taxable in nature. Similarly, in the case of the assessee in A.Y.2008-09, the Tribunal in ITA No.2285/Mum/2014 & ITA No.2273/Mum/2014 all are dated 12/10/2022 after noting down the advances given to subsidiary companies held that these were all due to commercial expediency and as they were engaged in same telecom business. Thus, it could be held that the income arising on account of such business and benefits which have accrued to the assessee are in the same business and are in the nature of revenue receipts and arising in ordinary course of business.

18.5. He further submitted that even if the adventure in the nature of trade is solitary in nature, it is assessable as income from business as held by the Hon'ble Bombay High Court in the case of Ramesh Babulal Shah vs. CIT reported in (2015) 53 taxmann.com 277. He also quoted the Tribunal judgment in the

case of *Young Indian vs. ACIT* Exemptions reported in (2022) 137 taxmann.com 12 wherein following principles were laid down therein.

- An adventure in the nature of trade need not be business itself Any activity akin to business may be taken to be adventure in the nature of trade
- A single transaction may also constitute adventure in the nature of trade There need not be regularity or repetitiveness in the activity
- No hard and fast rule can be laid down in this regard as it has to be understood on the facts and circumstances of each case
- The activity alleged/claimed adventure in the nature of trade need not be allied to the already existing activity of the assessee
- In the circumstances and the facts as in the present case, it is the duty of the court to see where ingenuity is expended to avoid taxing and get behind the smoke screen of welfare legislation and discover the true state of affairs.

18.6. Thus, the word 'benefit' as occurring in section 28(iv) means some kind of adventure or gain or had same value or acquires any interest in any land, chattel, etc. Thus, the benefit is nothing but any form of adventure and here the adventure is clearly getting the underlying huge properties situated all over the country by stroke of one transaction and to enjoy the benefits of all those properties in future.

18.7. Thus, it is clear that gains and benefits arising out of even a solitary transaction are taxable in nature in the instant case, the assessee is in the business of telecommunication. It has claimed the benefits of loan interest as allowable expenses on the grounds of commercial expediency. It has continued itself in the same line of business.

18.8 On the issue of whether the transaction is gift or not, he submitted that the Tribunal in the case of Aditya Birla Telecom Ltd vs DCIT, ITA 341/Mum2014 for AY 2010-11 dated 19.10.2016, the very same issue of gift in the hands of ABTL came up before the Tribunal. In para 52 of its order, the Tribunal held the transaction as capital gain in the hands of ABTL but ruled that the same could not be taxed due to non-receipt of consideration and no benefit to ABTL. In fact, the assessee had argued also that the transaction was one of gift but the same was not accepted by the Tribunal. Hence, this contention of the assessee is not correct. Lastly, on the issue of proposition: Taxability is open to adjudication even in case of amalgamation approved by the Hon'ble High Court, he referred and relied upon the decisions of this Tribunal in the case of Grasim Industries Ltd vs DCIT in ITA no.1935/Mum/2020 & 41/Mum/2021 dated 30.11 2022 for AY 2018-19, the very same issue came to be decided by the Hon'ble ITAT. The assessee contended that the scheme of arrangement could not be gone into. The Tribunal in 145 taxmann.com 289 negated this and held as under:-

72. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as the several judicial precedents relied upon before us. We have also carefully considered the direction of the learned Dispute Resolution Panel wherein as per direction dated 30 June 2022 in paragraph number 25.9 this issue has been dealt with. The learned dispute addition panel agreed with the learned assessing officer that the approval of NCLT does not preclude revenue from examining the scheme for tax compliances. We do not have any hesitation in upholding the finding of the learned dispute resolution panel that it is the duty of the learned assessing officer to examine the impact of the scheme for tax purposes. It is not the case of the learned assessing officer and as confirmed by the learned Additional Solicitor General, that there is any attempt by revenue to rewriting the scheme of merger and demerger, but it merely doing an exercise of determining the true and correct tax liability of the assessee under the income tax act. It is also the fact that the order of the learned National Company Law Tribunal has not examined the tax liability of the assessee pursuant to the above scheme but has merely approved the scheme. The determination of the tax liability on the basis of the scheme of composite merger and demerger approved by the learned national company law tribunal, looking at all the terms and conditions laid down therein, is the statutory duty of the assessing officer. The order of the National Company Law Tribunal does not says that if any tax liability arises in the hands of the assessee that cannot be examined by the assessing officer. The dispute between assessee and revenue is the claim of the assessee that the learned assessing officer is rewriting the scheme which is already approved by Page | 175 Grasim Industries Ltd. 2018-19 national company law tribunal. We do not agree with the contention of the assessee. We have not been shown that there is any attempt by the learned AO to tinker with the scheme approved by NCLT. He is merely examining that according to the terms and condition of the scheme, the assessee fulfils the conditions of demerger for tax neutrality [u/s 2](#) (19 AA) of the act as well as the chargeability of deemed dividend in the hands of the shareholders of the assessee company. According to us, he is duty-bound to do so. None of the decisions cited by the learned senior advocate held that the revenue does not have an authority to compute the tax liability of

the assessee in pursuance to the scheme of corporate reorganization approved by the National Company Law Tribunal. Further, the object of the representation before the National Company Law Tribunal is only with respect to the scheme, if it is to defraud the revenue. Naturally, any scheme which is framed for with the object of defrauding the revenue cannot be approved by the NCLT. The circular of Ministry of corporate affairs as well as the instructions of central board of direct taxes are also conveying the same intent that if revenue has any objections to the scheme, it should make available its view before the NCLT. However, both these above instructions and circular does not prevent the assessing officer in applying the provisions of the income tax act to the return of income of the assessee filed in compliance with the scheme approved by National Company Law Tribunal. The ld. Special Counsel has also placed before us decision of NCLT in Panasonic India Pvt Ltd V Panasonic Life Solutions India P Ltd in CP (CAA) no.8/ CHD/HRY/2021 dated 19/5/2022 where in para no 7.15 even NCLT has agreed that even if a proposal of a scheme of amalgamation is approved by the Adjudicating Authority, it is clarified that no provision of such a scheme can override the existing provision of the Act. In any case, the issues may come up before the ld. AO at time of the assessment of those companies, and the department can analyze the scheme and is entitled to take any decision as per the provisions of the [Income Tax Act](#) on issues including issues in NCLT order. That Page | 176 Grasim Industries Ltd. 2018-19 decision also noted that Transferee Company has deposited anundertaking before court/NCLT also to that effect.

73. In commentary of Kanga, Palkhivala and Vyas in —the Law and practice of income tax —it has been observed that provisions relating to the taxation of the companies involved in the demerger and their shareholders are applicable only if the demerger fulfils the conditions provided [u/s 2](#) (19 AA) of the act, 1961. Mere sanction of scheme is by High Court of demerger under the companies act 1956 is by itself not sufficient.

74. Hon Bombay High court in Casby CFS P Ltd in re [2015] 56 taxmann.com 263 (Bombay)/[2015] 231 Taxman 89 (Bom.) has also held asunder: -

39. According to the Petitioners, since the Regional Director has stated that the tax issues arising out of the Scheme shall be subject to the final decision of the Income Tax Authority and the approval of the scheme will not deter the Income Tax Authority from scrutinizing the Income Tax Returns filed by the Petitioners and the decision of the Income Tax Authority is binding on the Petitioners and since the Petitioners have accepted this position in their Affidavits in Reply, nothing survives in the objections of the Regional Director. In other words, according to the Petitioners, the objections of the Regional Director do not survive once the Petitioners accept that it will be open to the Income Tax Authorities to deal with the tax issues arising out of the scheme regardless of the approval of the scheme by this Court XXXXXX 42. In my view the contentions of the Regional Director in this regard deserve to be accepted. The distinction between para 6(c) and 6(e) of the first affidavit of the Regional Director is apparent. As rightly pointed out by the Regional Director para 6(e) deals with the situation that arises in the event of the Court sanctioning the scheme. According to the Regional Director if the Court sanctioned the scheme, then the tax issues that may arise from the amalgamation must be left open for the Income Tax Authorities to decide in other words according to the Regional Director, the sanction of the scheme should not prevent the Income Tax Authorities from scrutinizing tax returns filed by the Petitioners after giving effect to the amalgamation. In other words the Petitioners should not escape the liability, if any, to taxation upon giving effect to the amalgamation. This is very different from the contention raised by the Regional Director in para 6(c) of his first affidavit as elaborated in his third affidavit to the effect that the scheme itself should not be sanctioned in view of the retrospective appointed date being contrary to the provisions of the Income Tax Act. As such it is not possible to accept the contention of the Petitioners that para 6(e) of the first affidavit of the Regional Director read with para 6 of the Affidavit in Reply of the Petitioners is a complete answer to the

objection of the Regional Director. This judgment also supports the case of revenue instead of Assessee."

4.2. Hence, this claim of the assessee has no merit.

18.9. Lastly, on the proposition of the assessee that Section 2(19AA) has not been violated, he referred to the following judgments:-

-Hon'ble SC in Kartikeya Sarabhai vs CIT [1997] 94 Taxman 164 (SC) held that preference shares are part of share capital It held in para 11: "11. When as a result of the reducing of the face value of the share, the share capital is reduced, the right of the preference shareholder to the dividend or his share capital and the right to share in the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital"

-Reliance Industries Limited vs. ACIT, Large taxpayer unit, Mumbai [2022] ITA No 7299/Mum/2017 (Mum-Trib.), the Hon'ble Tribunal held as under

"029. Thus, though Reliance Industries Ltd. Assessee holds 100% equity share capital of Reliance Industrial Investment and Holdings Ltd but it does not hold preference share capital of the Reliance Industrial Investment and Holdings Ltd. Thus, it does not hold the "whole of the share capital" of the subsidiary company...."

"031. Share capital includes 'equity and preference share capital' both. There is no reference of holding of only equity share capital in that section. Therefore, the capital loss arising to the assessee on sale of shares by assessee to its subsidiary company are eligible capital loss of the assessee. Wherever the statute wanted to include each clause of the capital or type of the capital, or any condition attached such shareholding it has provided accordingly. Provisions of Section 86 of the Companies Act 2013 provides that share capital of the company limited by shares shall be of two kinds only i.e. Equity share capital and

preference share capital and the 'whole of the share capital' should include holding of equity share capital and preference share capital both."

- In Northern Projects Limited vs Blue Coast Hotels And Resorts Ltd on 3 May, 2007, (2007) 5 Comp LJ 170 CLB, the Hon'ble Company Law Board held as under

"9. I have considered the pleadings and arguments of the counsel Section 399 prescribes certain qualifications for filing a petition under Sections 397/398. One of the qualifications is that the petitioner should hold not less than 1/10th of the issued capital. It has been urged by the learned Counsel for the petitioner that the term "issued capital" should be construed to mean only equity share capital. In a recent case, the Supreme Court has laid down the principle of construction of a statute in the following terms "The first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc, can only be resorted to when the plain words of statute are ambiguous and lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule". Raghurath Bareja v Punjab National Bank 2007 19 CLA-BL Supp 108 (SC). The term "issued share capital" as used in Section 399 is neither ambiguous nor would lead to any unintelligible result, as, this term is well known, well understood and also in a way defined in the Companies Act itself. The Act recognizes two types of share capital-equity and preference. Shri Choudhary, referring to Schedule VI to the Companies Act, rightly pointed out that issued capital would include not only equity share capital but also the preference share capital. This being the position, there is no scope, contrary to the contention of the learned Counsel for the petitioner, to interpret "issued capital" as "equity capital" or "voting rights". Considering the fact that the Act itself has, in various provisions, as pointed out by Shri Chaudhary, provides for various types of qualifications to invoke those provisions, to

initiate action under Sections 397/398, one has to hold not less than 1/10th of the issued capital, which would include not only equity shares but also preference shares. It appears to me that legislature has consciously used the term "issued capital" in Section 399 instead of "equity capital" or "voting rights" to ensure that the person invoking the provisions of Section 397/398 has some minimum financial stake in the company in the form of share capital-be it equity or preference or both. Thus, I am unable to accept the contention of the petitioner that the petition is maintainable as it holds 14.8% of the equity capital, which is only capital) about 2% of the issued share capital.

19. Thus, the finding of the ld. AO in para 4.5.12 regarding the non- compensation of P5 Asia Holding Investment (Mauritius) Ltd assumes significance. The order of the ld.CIT(A) is also to this effect. In fact, the assessee has been unable to bring any material fact that it had brought these specific facts to the ld. AO or the ld. CIT(A) at any point of time. The ld. AO's order is dated 28.03.2013 while the order of CIT-A is dated 08.03.2017. The special resolution of ABTL held on 30.09.2016 etc. has not been brought before the lower authorities at any point of time. Moreover, no valuation or specifics of how P5 Asia Holding Investment (Mauritius) Ltd was compensated was never demonstrated before the ld. AO.

20. After considering the aforesaid submissions and the facts brought on record qua the issue whether on account of demerger of ABTL's telecom operations (the Undertaking) into Idea Cellular Ltd. (assessee); the net book value of assets of Telecom circles in Bihar & Jharkhand area of Rs. 2,069 crores can be taxed u/s 28(iv). As noted above ABTL, was a wholly own subsidiary of Idea

Cellular Ltd. (assessee); a foreign entity, P5 Asia Holdings Investments (Mauritius) Limited was allotted 19,25,000 compulsorily convertible preference shares of Rs. 10/- each of ABTL; ABTL had obtained a Unified Access Services License in November 2006 for providing telecom services in Bihar (including Jharkhand) service area and P5 Asia Holdings Investments (Mauritius) Limited had total share capital of 16.14% in ABTL. Further ABTL had invested 16% of equity share capital in Indus Towers Limited, another company which provides passive infrastructure to telecom operators. Accordingly, as noted above, the net book value of assets of ABTL as on 31/03/2019 was:

- Telecom circles in Bihar & Jharkhand area: Rs. 2,069 crores
- Investment in Indus: Rs. 0.019 crores
- Other Investments: Rs. 0.05 crores.

Since, Idea Cellular Ltd., wanted to consolidate all the telecom operations itself, therefore during the year under consideration under a scheme of arrangement under section 391 to 394 of the Companies Act, 1956 which was approved by the Hon'ble High Courts of Gujarat and Bombay, the entire ABTL's telecom operations were demerged into ICL with the appointed date being April 1, 2009. Under the scheme, all the assets, rights and liabilities of the Undertaking were transferred at the book values. Accordingly, ABTL revalued its investment in Indus, an asset separate from the Undertaking, and business restructuring reserve was created by crediting a sum of Rs. 7,330 crores and the net book value of the Undertaking being demerged was Rs. 2,069 crores. Now, as per the accounting treatment under the

scheme, assessee credited this net book value of assets, being the differential book value of assets and liabilities of the demerged Undertaking, in the General Reserve account. As per the said scheme, no shares were issued to assessee, i.e., ICL being the holding company. The case of the department is that; *firstly*, the conditions of Section 2(19AA) of the Act is not satisfied as it is a non-qualifying demerger; *secondly*, there is direct business nexus between ABTL and ICL, being under the same corporate management, engaged in similar line of business, therefore, the demerger is purely a business transaction; *thirdly*, the assessee has received benefit in the form of difference in net assets of the demerged telecom undertaking without any consideration, therefore, it is the benefit which is taxable u/s. 28(iv) of the Act. *Lastly*, P5 Asia, who earlier had stake in ABTL's entire telecom and investment business has been reduced to a stake holder only in investment business of ABTL and it has not been compensated by allotting shares of ICL. Any receipt of income following u/s.28, has to be income chargeable to tax under the head 'profits and gains of business or profession'. Thus, income should be in the nature of revenue arising in the course of business.

21. If the aforesaid contention of the revenue is to be upheld that demerger is a revenue transaction and is taxable u/s.28(iv) of the Act, then consequence thereof would be that every purchase of an undertaking by any assessee at a value lesser than the market value would be deemed to be a revenue

transaction and taxable u/s.28(iv). It is important to note here that, prior to the amendment made by the Finance Act, 2017, w.e.f. 01/04/2017 when Clause (x) to Section 56(2) was introduced, section 56(2)(vii) provided that any sum of money or property received without consideration or less than fair market value was taxable in the hands of an individual but not with the companies. Thus in the A.Y. 2010-11 the said provision of section 56(2)(vii) has no application to a Company. One very important fact which is borne out from the term of scheme approved by the Hon'ble High Court upon the demerger is that, no shares were allotted by ICL against share capital of ABTL as ICL itself being holding company, held the whole of equity share in ABTL and thus one cannot allot share to itself. There is no benefit as such arising to ICL upon the demerger against vesting of the Telecom Undertaking into the ICL, because there was a natural corresponding decrease in the intrinsic value of investment which is in the form of decrease of shareholding of ICL in ABTL. Even the ld. CIT(A) agreed in principle that since Assessee held 100% shares in ABTL, any transfer of assets from wholly owned subsidiary to holding company, would result in corresponding decrease in intrinsic value of investment of ICL in ABTL. Ld. CIT (A) further observed that "when the undertaking belonging to WOS rolls back into its parent, the value of shares held by parent in the WOS correspondingly falls". However, on facts it is noticed that he erroneously held that Preference Shareholders were not compensated, because the benefit arising to ICL were held to be in the ratio of so much of the shares held

by P5 Asia to the total shares of ABTL just before demerger, comes to 16.14%. Thus, on this logic he held that, out of the addition of Rs. 2,069 crores, the addition to the extent of Rs. 334 crores (i.e., 16.14%) should be confirmed and granted relief for the balance Rs. 1,735 crores.

22. It appears that Id. CIT (A) was under a mistaken belief that no compensation accrued to P5 Asia. We have perused the facts and material placed on record before us and as per the terms of Hon'ble High Court, the approved scheme, no shares were issued to P5 Asia, being the preference share holding of 19,25,000 compulsorily convertible preference shares of ABTL. The reason for non-issuance of shares to P5 Asia was that the terms of conversion of CCPS in terms of ABTL have been increased to 16.14% to 23.2456% after the demerger. Before us, the assessee had submitted a letter that P5 Asia has approved the scheme of arrangement vide its letter dated 02/11/2009 which, *inter alia* mentioned that there would be no discharge of consideration to any shareholder. The shareholder's agreement between ABTL, ICL and P5 Asia was again amended vide 3rd and 4th amendment agreement dated 28/04/2010 wherein the terms of conversion of CCPS into equity shares of ABTL have been further increased to 30.31% and this has been stated to be approved by the Board of Directors of ABTL. It has been stated that shareholding pattern of ABTL as on 30/09/2016 were as under:-

*ITA No.4318/Mum/2017 & 4513/Mum/2017
Vodafone Idea Limited (Formerly Idea Cellular Limited)*

Name of equity shareholder	No. of shares	Amount (Rs.)	% of holding
ICL	99,97,500	9,99,75,000	69.67%
P5 Asia	43,49,776	4,34,97,760	30.31%
Other 6 nominees	2,500	25,000	1.74%
Total	1,43,49,776	14,34,97,760	100%

23. Thus, as per the resolution passed on 30/09/2016, Board approved that the issue and subscribed equity share capital of ABTL shall stand reduced from Rs. 14,34,97,760/- divided into 1,43,49,776 fully paid-up equity shares of Rs. 10 each to Rs. 10,00,00,000 fully paid-up equity shares of Rs. 10 each; and such reduction shall be affected by cancelling 43,49,776 equity shares held by P5 Asia representing 30.3125% of the fully paid-up equity share capital of ABTL; and distributing to P5 the following:

- a) 57,794 equity shares of Re. 1 each (ie. 4.85% holding) presently held by ABTL in Indus Towers Limited, and
- b) An aggregate sum of Rs. 455,00,00,000/- in cash.

24. This shows that P5 Asia was well compensated at a higher value than as decided before the demerger. Thus, Id. CIT (A) to that extent was incorrect while deciding the issue against assessee solely on this reason.

25. Further, any excess fair value of assets taken over under the amalgamation scheme over the shares issued, and transfer to General Reserve account cannot be treated as trading receipt and at the threshold, it cannot be treated as 'arising from business' so as to be taxed u/s.28(iv). The phrase 'arising from business' in the context of Section 28(iv) contemplates not only

some connection with the business undertaking of the assessee which envisages that benefit of perquisite must arise out of actual conduct of the business of the assessee, and it should have live connection with the business carried out by the assessee and the benefit must accrue or arise in the course of carrying of such business. The benefit of perquisite has to be in the nature of trade receipts. Assessee in the course of carrying on his business, there can be benefit on two accounts, either capital or revenue. But both are separate and distinct and benefit in capital account cannot be taxed u/s. 28(iv), albeit the benefit on revenue account can be taxed u/s.28(iv). Even if the claim of deduction u/s.36(1)(iii) is allowed in respect of funds borrowed for the purpose of business, it cannot be inferred that receipt of the entire undertaking under the scheme of demerger is assessable u/s.28(iv). To this extent, we disagree with the contention raised by the ld. CIT DR before us while referring to the decision of the Tribunal in the case of Vodafone. If the contention raised by the ld. CIT DR is to be accepted, then in all cases of purchase or acquiring of capital asset in the form of business or undertaking under the scheme of amalgamation for price lesser than fair value, then the difference should be taxed u/s. 28(iv). This is not purport or the scope of Section 28(iv). To fall within the ambit of Section 28(iv), the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession, should arise from carrying on the business. Here the benefit is not arising from business, albeit the benefit is on account of discount on

purchase of a capital asset, which can never be treated as benefit or perquisite arising from the business. In the present case when telecom undertaking of ABTL got merged into the assessee without shares being issued because under the Companies Act, the holding company cannot issue shares to subsidiary and therefore, it cannot be envisaged that it is a trading receipt of revenue in nature so as to make addition u/s.28(iv).

26. here in this case the ld. AO has made addition u/s.28(iv) by assessing the entire net worth of telecom undertaking as revenue receipt assessable under the head 'income from business and profession' and the basis is that no consideration was paid by the assessee as assessee did not issue shares to itself and to preference share holder of ABTL. We have already held as to why Section 28(iv) cannot apply in case of assessee. In addition, on facts of the present case, a property is transferred without consideration which can be at best be treated as a gift and such a gift even under the then existing provision of Section 56(2)(vii) cannot be taxed in the hands of the assessee being a company and provision which probably might cover such situation is under section 56(2)(x) brought in the statute w.e.f. A.Y.2017-18 at the most.

27. In so far as the contention that the Section 2(19AA) has been violated by the assessee having failed to compensate preference share holders, we have already noted that assessee had not compensated preference share holders by issuing share of the assessee. However, the preference shareholders were

compensated as per the terms of the scheme which we have already discussed in detail in the foregoing paragraphs wherein specific reference was made to the manner of compensating the preference shareholder. The reason for non-issuance of any shares to the preference shareholders as such accrued scheme is that the terms of conversion of CCPS into equity shares of ABTL have been increased from 16.14% to 23.456% after the demerger which is inclined in part A of the preamble of the scheme. Thus, the scheme itself contained terms of compensate of preference shareholder which was there before both the authorities. Preference shareholders have approved the scheme of arrangement vide their letter dated 02/11/2009 which *interalia* mentions that there would be no discharge of consideration to any shareholder. Accordingly, we hold that the entire basis and the premise for taxing Rs. 2,069 Crores u/s.28(iv) had no basis and the same is directed to be deleted.

28. Now coming to the second issue of disallowance u/s 36(1)(iii) of the act of interest expenditure incurred for acquisition of shares of the erstwhile spice communications limited ("SPICE").

29. The brief facts are that during the financial year ("FY") 2008-09, the assessee had borrowed Rs.30,000 million for acquiring 41.09% of the paid-up share capital of Spice, another cellular service provider operating in the telecom circles of Punjab and Karnataka. Out of the said borrowing, the assessee repaid Rs. 15,000 million in the financial year 2008-09 and balance sum of Rs. 15,000 million in June 2009. During the year

under consideration, the assessee incurred interest expense of Rs.30,24,65,753/- on the foregoing loan. Spice was amalgamated with the Assessee under the scheme approved by the Hon'ble Gujarat and Bombay High Courts u/s. 391 to 394 of the Companies Act, 1956 w.e.f. March 1, 2010 i.e. in the current financial year.

30. The ld. AO has disallowed the interest expenditure u/s.36(1)(iii) on the ground that similar addition was made in A.Y.2009-10. Ld. CIT (A) held that the interest expense was incurred for acquisition of shares of Spice with the ultimate purpose of acquiring ownership of Spice. Subsequently, Spice merged with the assessee and by virtue of this merger, the assessee acquired the telecom license earlier held by Spice and a new asset and advantage of enduring benefit was brought into existence. Thus, the interest expense incurred for acquisition of such capital asset is capital in nature and cannot be allowed as deduction. Thus, CIT (A) upheld the disallowance made by the AO.

31. Admittedly this issue is covered by assessee's own case in A.Y.2009-10 in Idea Cellular Limited v. DCIT Circle 3(2) & vice versa (ITA No. 3424/Mum/2014 & others) order dated 27/07/2023. The Tribunal by following the decision of SA Builders reported in 288 ITR 1(SC) and Hon'ble Bombay High Court in the case of PCIT vs. Concentrix Services (I) Pvt. Ltd (2019) 111 taxmann.com 269. Thus, in view of the above, we find that this issue is covered by the decision of the Tribunal in

assessee's own case. Accordingly, this ground is decided in favour of the assessee.

32. Disallowance of year end provisions u/s. 40(a)(ia) of the Act of the non-deduction of taxes.

33. The brief facts are that the assessee is engaged in the business of telecommunications and for providing such services to the end subscribers, the assessee supplies the SIM cards via its Distributors. The assessee provides for commission based on target activation based on valid KYC which distributor is expected to achieve till the last day of March month. However, the process of verification of such KYC and activation documents takes time and the actual amount payable to Distributor's is determined after the closure of the year in so far as amount payable for March is concerned. While there is a legal liability of company to pay the provisions, the provision for March is made considering the target what distributors have actually achieved in preceding month. Thus, though the distributors have activated new customer, the verification is pending, and hence while the liability to pay such activation commission is also on the Company, however, until the verification is complete, the distributor who is to be paid and how much post verification exactly is unknown. Thus, the liability is accrued but not due as on 31/03/2010 also the identity of recipient individually is not known.

34. During the year under consideration, the Assessee has debited commission, in relation to the said services, amounting to Rs. 3,64,10,80,872/- to the Profit & Loss Account. Out of Rs. 3,64,10,80,872/-, the assessee debited commission of Rs. 47,66,22,574/- for the month of March 2010.

35. Ld. AO has disallowed the provision of commission on the ground that the said expense cannot be claimed as a deduction as it is contingent in nature and said provision is disallowable u/s. 40(a)(ia) of the Act, since the assessee has not deducted tax thereon. The ld. CIT (A) directed the AO to verify and allow the expenses in the subsequent year in which the provision is reversed and tax is deducted and deposited.

36. Mr. Mistry informed that in view of the direction of the ld. CIT(A), the ld. AO in the order giving effect noted that assessee has submitted the details of subsequent tax deduction on commission paid to the distributors and after final verification of subscribers, he has granted relief to the extent of Rs.36,54,85,562/-. Before us, ld. Counsel submitted that the said provision is made on the scientific basis based on best estimates i.e. some percentage of last month commission amounts. The assessee has paid commission to the Distributors for activation of SIM cards after final verification of the subscribers. Thus, the liability for commission is accrued but not due. The expense of commission which is an otherwise allowable expense is incorrectly disallowed on the ground of non-deduction

of TDS, as TDS provisions do not apply if the payee is not identified at the time of making provision of expense.

37. In this regard, Ld. Counsel placed reliance on the decisions of UCO Bank vs. UOI [2014] 369 ITR 335 (Delhi HC) and Industrial Development Bank of India v. ITO [2007] 107 ITD 45 (Mum. Trib.) wherein it has been held that the whole scheme of TDS proceeds on the assumption that the person whose liability is to pay an income knows the identity of the beneficiary or the recipient of the income. He further relied upon other decisions as cited in the legal compilation filed at bar during the course of hearing and submitted that the whole addition of commission expense be allowed as deduction during the year under consideration.

38. After considering the submissions and on perusal of the record, it is seen that out of disallowance of provision of commission of Rs.47,66,22,574/-, already ld. AO has allowed in the order giving effect to the ld. CIT(A) order, the claim of expenses of Rs.36,54,85,560/-. The assessee makes the provision based on some percentage of last month commission amounts. The assessee has paid commission to the Distributors for activation of SIM cards after final verification of the subscribers. Thus, the liability for commission has accrued. We are unable to agree with the contention of the ld. Counsel that even if the expenses are related to business of the assessee, however, wherever TDS provisions are attracted for deducting TDS on any expenses, the same has to be discharged. It has

been informed that there are further details of subsequent deductions of tax or assessee has written back of provisions in the subsequent years. However, this aspect needs to be examined by the AO. Accordingly, assessee will furnish the details deductions of tax or write back of provisions in the subsequent years and AO will examine and thus, this issue is partly allowed for statistical purposes.

39. Disallowance of interconnect charges u/s.37 of the Act. During the year under consideration, the Assessee had debited expenses related to fraud amounting to Rs. 5.1 crores to the Profit & Loss Account. The said factum of fraud is also reported in the Statutory Auditor's report. Out of Rs. 5.1 crores, Rs. 1.42 crores were incurred towards additional inter-connect costs incurred due to fraudulent usage of call conference facility by a subscriber of the assessee. The assessee had made the payment of aforesaid expenses to other operators for using their network after deduction of TDS as per the provisions of the Act. The assessee has claimed deduction of the aforesaid expenses as business expenditure under the Act while computing the total income.

40. Ld. AO has disallowed the said expenses on the ground that the Assessee is incorrect in claiming the said expenses without showing any corresponding income receivable and the unilateral debit of expense which is actually recoverable from subscribers /customers is not accordance with the law and accounting practices. The ld. CIT (A) has upheld the action of the ld. AO.

41. Before us, ld. Counsel submitted that it is an undisputed fact that the assessee has paid the interconnect charges to other operators for using their network. As submitted during the assessment proceedings, these charges are payable irrespective of the recovery of the same from the subscribers. Thus, the said expenditure being incurred wholly and exclusively for the purpose of the business is allowable as revenue expense u/s. 37(1) of the Act irrespective of the fact that there is no recovery of said charges from the customers. He further submitted that presence of a receipt on the credit side is not mandatory to justify the deduction of an expense.

42. After hearing both the parties and on perusal of the material on record, it is seen that assessee has to pay the interconnect charges to other operators by using their network and these parties are payable irrespective of recovery from the subscribers. Thus, it cannot be denied that it is purely business expenditure wholly and exclusively incurred during the course of business and accordingly, we agree with the contention of the ld. Counsel that same is to be allowed. Accordingly, disallowance of interconnect charges is deleted.

43. Ground No.VI relating to disallowance of switching and cell sites rent u/s.40(a)(ia) for non-deduction of tax u/s.194I of the Act, the same has not been pressed and therefore, dismissed as not pressed.

44. As regards ground No.VII relating to deduction u/s.35DD of the Act, the brief facts are that during FY 2003-04, the assessee had paid legal fee amounting to Rs. 29,37,435/- to M/s. Amarchand Mangaldas and Suresh A. Shroff, Advocates and Solicitors for legal services such as drafting of loan agreements, due diligence, etc. in respect of Escotel Mobile Communication Limited ("Escotel"). Escotel was the cellular service provider in the telecom circles of Kerala, Haryana and Uttar Pradesh (West). The Assessee acquired shares of Escotel in the Financial Year 2004-05 and Escotel was amalgamated into the Assessee with effect from April 1, 2006. In this regard, the Assessee claimed the proportionate deduction of Rs. 5,87,487/- (i.e. 1/5th of Rs. 29,37,435/-) of the total aforesaid legal fees u/s. 35DD of the Act during AY 2004-05. The AO disallowed the deduction claimed by the assessee in AY 2004-05 on the ground that no merger had taken place in the said assessment year. This disallowance made by the AO was upheld by the CIT(A).

45. The aforesaid issue in AY 2004-05 had travelled to the Tribunal for adjudication. Therefore, without prejudice to the outcome of the said appeal, a ground was taken by the Assessee before the Ld. CIT (A) in the year under consideration. The ld. CIT(A) held that since this issue is pending before the Tribunal, the ld. CIT(A) directed the ld. AO to follow the decision of the Tribunal as and when received.

46. Before us, it has been pointed that this issue has been decided by the Hon'ble Tribunal that the deduction u/s. 35DD

would be available for 5 years starting from AY 2007-08 on the ground that the amalgamation had taken place in FY 2006-07.

The Tribunal orders passed for this issue are as under:

- Vodafone Idea Ltd. v. DCIT (ITA No. 2285/Mum/2014) (Mumbai Tribunal) for AY 2008-09
- Idea Cellular Limited Vs. ACIT & vice versa [(ITA No. 4445/Mum/2013 & others) order dated May 27, 2016 (Mum. Trib.)] for AY 2007-08
- Idea Cellular Limited Vs. ACIT & vice versa [(ITA No. 6736/Mum/2012 & others) order dated February 24, 2016 (Mum. Trib.)] for AY 2004-05.

47. Pursuant to the Tribunal order in AY 2004-05, the order giving effect to the CIT(A) order passed by the AO allowing the deduction u/s. 35DD for the relevant years are as under:

- Order Giving Effect to CIT(A) order for AY 2009-10 dated 19.06.2017
- Order Giving Effect to CIT(A) order for AY 2008-09 dated 19.06.2017
- Order Giving Effect to CIT(A) order for AY 2007-08 dated 12.04.2017.

48. Thus, in view of the aforesaid fact, ld. AO is directed to give consequential relief and allow the deduction u/s.35DD accordingly.

Department's appeal

49. Now coming to the Revenue's appeal wherein the first issue relates to disallowance u/s.14A r.w.r.8D which has been taken by ground No.ii.

50. The brief facts are that during the year under consideration, Spice was merged with the Assessee. Carlos Towers Limited

("Carlos") was a wholly owned subsidiary of the erstwhile Spice and pursuant to the said merger it stood transferred to the assessee. Accordingly, an investment of Rs. 0.50 million made in Carlos by Spice was reflected in the Balance Sheet of the assessee. No fresh investment was made by the assessee in Carlos or in any other companies during the year under consideration. The assessee continued to hold investments in its other subsidiaries during the year under consideration. During the year under consideration, the assessee did not receive any dividend income from the shares held as investments in the subsidiaries. Further, during the year under consideration, the assessee had made investments in the units of Growth Schemes of Mutual Funds amounting to Rs. 11,184 million. These investments are not capable of generating any tax-free income.

51. The ld. AO disallowed Rs. 80,89,24,560/- u/s. 14A of the Act read with rule 8D by applying 0.5% of the average value of tax-free investments and interest expenses proportionate to average total investment to average total assets.

52. The ld. CIT(A) after perusing the Profit & Loss account of the assessee which shows that no dividend income has been earned during the year and that no exempt income is claimed in the Computation of Income, allowed this ground and deleted the disallowance u/s 14A relying on various decisions of Hon'ble High Courts.

53. We find that this issue is covered by the decision of the Tribunal in assessee's own case for A.Y.2009-10 wherein the Tribunal has referred and relied upon identical issue decided in A.Y.2008-09. Since this issue is covered in favour of the assessee by the Tribunal in A.Yrs. 2008-09 and 2009-10 and since similar finding and facts are permeating in this year, therefore, following the same, this issue is decided against the department. Accordingly, ground raised by the Revenue is dismissed.

54. In ground No.3 Revenue has challenged the deletion of disallowance of discount amounting to Rs. 3,47,80,25,095/- allowed to the pre-paid card distributors ("the distributors") u/s. 40(a)(ia) of the act for non-deduction of tax u/s. 194H of the act.

55. Before us Id. Counsel submitted that in the course of its business, the assessee appoints the Prepaid Distributors ("Distributors") to whom the assessee supplies Prepaid SIM Cards and Recharge Vouchers at a discounted price. The Distributors are free to resupply them to the Retailers at any price subject to the Maximum Retail Price ("MRP"). It is the distributor who makes payment of the discounted price in advance to the assessee and there is no payment of any kind made by the assessee to the distributors. Accordingly, this transaction does not attract any TDS provisions. However, the Id. AO relying upon the decision of Hon'ble Delhi High Court in assessee's own case reported in 189 taxman 118, has disallowed the foregoing discount under section 40(a)(ia) of the Act on the alleged ground that the assessee has not deducted tax at source

under section 194H of the Act on the difference between the MRP and the price paid by the Distributor to the assessee.

56. After considering the identical factual matrix involved and considered by Hon'ble Tribunals at Jaipur and Karnataka in Assessee's own case and relying on the decision of Hon'ble Karnataka High Court judgement in the case of Bharti Airtel limited and others vs. DCIT and others reported in 372 ITR 33, which has discussed the legal position in detail and has also considered the previous Delhi High Court and Kerela High Court judgements which are against the Assessee, the CIT(A) had allowed this ground of appeal and deleted the disallowance of Rs. 347,80,25,095/-. Though this issue has been stated to be covered in assessee's own case in following cases:-

- *Idea Cellular Limited v. DCIT Cir. 3(2) & vice versa (ITA No. 3424/Mum/2014 & ITA No. 3674/Mum/2014)*
- *Vodafone Idea Ltd. Vs. DCIT (ITA No. 2285/Mum/2014) in own case for AY 2008-09.*
- *M/s. Vodafone Idea Ltd. (As successor to Spice Communications Ltd.) vs. DCIT (ITA No.3425/Mum/2014)*

57. However, recently the Hon'ble Supreme Court in the case of Bharti Cellular Ltd (Now Bharti Airtel Ltd.) vs. ACIT [Civil Appeal No. 7257 of 2011] had decided the same issue in favour of the Assessee by holding that no TDS u/s. 194H is required on such transactions. Accordingly, the department appeal is dismissed.

58. Disallowance of amount debited to the profit & loss account towards amortization of the intrinsic value of shares under the

Employee Stock Option Scheme ("ESOS"). The facts in brief are that during the year under consideration, the assessee had debited Rs. 28,29,08,135/- towards ESOS amortization cost to the Profit & Loss Account as part of its "Employee Compensation Cost" under "Schedule 15-Personnel Expenditure". The amount of compensation cost of ESOSs was computed as per the Intrinsic Value Method as specified in the Securities and Exchange Board of India ("SEBI") 'Employee Stock Option Scheme and Employee Stock Purchase Scheme Guidelines, 1999 ("SEBI Guidelines"). The term "intrinsic value" under the SEBI Guidelines means the excess of the market price of the shares under the ESOS over the exercise price of the option.

59. Ld. AO has disallowed the amount of employee compensation cost on the following grounds:

- The expense is contingent in nature;
- Assessee has not incurred any expenditure on account of ESOP. It has merely received lesser amount of share premium.

He further made disallowance following a similar disallowance made by the AO in the assessment order for AY 2009-10.

60. The ld. CIT (A) has deleted the disallowance after following various judgments. Admittedly, this issue is covered in favour of the assessee in assessee's own case in A.Y.2009-10 and A.Y.2008-09 by following the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd. reported in 438 ITR 151, accordingly, this ground is dismissed.

61. Lastly, with regard to disallowance of Revenue share license fees paid to the DOT, the brief facts are that during the year under consideration, the assessee had debited a sum of Rs. 8,68,29,06,892/- towards RSLF paid to the DoT under Schedule - 17 "License and WPC Charges" in the Audited Financial Statements. In the computation of income for the captioned Assessment Year, the Assessee had claimed the aforesaid amount as a revenue expenditure u/s. 37(1) of the Act. Annexure 3A of clause 15 in the Form No. 3CD of the Tax Audit Report gives the details of deduction claimed by the Assessee u/s, 35ABB of the Act in respect of the Fixed License Fees amounting to Rs. 2,10,11,87,070/-. However, while computing the deduction u/s. 35ABB of the Act, the assessee had not considered the RSLF paid during the captioned Assessment Year as it relates to payment of periodic share license fees required to be made for the purpose of keeping alive the license to operate on year-to-year basis thereby enabling telecommunication operator to carry out the business.

62. The ld. AO disallowed the foregoing RSLF of Rs. 8,68,29,06,892/- on the ground that the Assessee had already claimed deduction u/s. 35ABB of the Act on the same amount and, hence, allowance of expenses u/s. 37(1) of the Act would result into double deduction.

63. The ld. CIT(A) following the order of the Hon'ble Tribunal in Assessee's own case for AY 2001-02 [ITA No. 3260/Mum/2008, order dated May 13, 2014] and AY 2003-04 [ITA No.

3261/Mum/2008, order dated March 11, 2015), wherein the identical issue has been decided in favour of the assessee, has allowed this ground and directed the AO to delete the disallowance of RSLF of Rs. 8,68,29,06,892/- and treat the same as allowable u/s 37(1) of the Act.

64. We find that the Hon'ble Supreme Court in the case of **CIT vs. Bharti Hexacom Ltd. in Civil Appeal No.11128 of 2016 vide order dated 16/10/2023** has held that the variable annual licence fee paid by the Telecom Companies to the DoT under the Policy of 1999 are capital in nature and may be amortised in accordance with Section 35ABB of the Act. Accordingly, we restore this issue to the file of the ld. AO to determine the amount of deduction u/s.35ABB applying the principle laid down by the Hon'ble Supreme Court. Accordingly, this ground is allowed for statistical purposes.

65. In the result, appeal of the assessee is partly allowed and appeal of the Revenue is allowed for statistical purposes.

Order pronounced on 14th October, 2024.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai; Dated 14/10/2024
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

*ITA No.4318/Mum/2017 & 4513/Mum/2017
Vodafone Idea Limited (Formerly Idea Cellular Limited)*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai