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

BEFORE MS. KAVITHA RAJAGOPAL, JM
AND
SMT. RENU JAUHRI, AM

ITA No. 1775/Mum/2018
(Assessment Year: 2011-12)

M/s. Vodafone Idea Limited (formerly Idea Cellular Ltd.) 10th Floor, Birla Centurion, Century Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai – 400030.	Vs.	**DCIT-3(2), Mumbai** Room No. 608 6th Floor, Aayakar Bhavan, M. K. Road, Churchgate, Mumbai – 400 020.
PAN/GIR No. AAACB2100P		
(**Assessee**)	:	(**Respondent**)

ITA No. 2178/Mum/2018 (Assessment Year: 2011-12)
ITA No. 2180/Mum/2018 (Assessment Year: 2014-15)
ITA No. 2179/Mum/2018 (Assessment Year: 2013-14)
ITA No. 5945/Mum/2017 (Assessment Year: 2012-13)

DCIT-5(2)(1), Mumbai 571, Aayakar Bhavan, 5th Floor, M. K. Marg, Mumbai – 400 020.	Vs.	**M/s. Vodafone Idea Limited (Earlier known as M/s. Idea Cellular Ltd.)** Birla Centurion, 10th to 12th Floor, Century Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai – 400030.
PAN/GIR No. AAACB2100P		
(**Assessee**)	:	(**Respondent**)

ITA No. 2150/Mum/2019 (Assessment Year: 2015-16)
ITA No. 1777/Mum/2018 (Assessment Year: 2014-15)
ITA No. 1776/Mum/2018 (Assessment Year: 2013-14)
ITA No. 5765/Mum/2017 (Assessment Year: 2012-13)

M/s. Vodafone Idea Limited (formerly Idea Cellular Ltd.) 10th Floor, Birla Centurion, Century Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai – 400030.	Vs.	**DCIT-14(2)(1), Mumbai** Room No. 432, 4th Floor, Aayakar Bhavan, M. K. Road, Churchgate, Mumbai – 400 020.
PAN/GIR No. AAACB2100P		
(**Assessee**)	:	(**Respondent**)

ITA No. 2987/Mum/2019;
(Assessment Year: 2015-16)

DCIT-5(2)(2), Mumbai 525, Aayakar Bhavan, 5th Floor, M. K. Road, Mumbai – 400 020.	Vs.	**M/s. Vodafone Idea Limited (Formerly known as M/s. Idea Cellular Ltd.)** 10th Floor, Birla Centurion Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai – 400030.
PAN/GIR No. AAACB2100P		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	Shri. Ronak Doshi & Ms. Sukanya Jayaram
Respondent by	:	Shri. T. Shankar, CIT DR

Date of Hearing	:	25.04.2025
Date of Pronouncement	:	24.07.2025

O R D E R

Per Bench:

These captioned appeals are filed by the assessee and the revenue challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2011-12 to 2015-16.

2. As the facts are identical in these appeals, we hereby pass a consolidated order by taking A.Y. 2011-12 as a lead year relevant to ITA No. 2178/Mum/2018 and 1775/Mum/2018.

3. The assessee has raised the following grounds of appeal:

ITA No. 1775/Mum/2018 (A.Y. 2011-12)

Ground No. I: Directing the Assessing Officer (the AO') to verify the claim of deduction of discount pertaining to earlier years on payment basis:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in directing the AO to verify the claim of deduction of discount disallowed in earlier years u/s. 40(a)(ia) of the Act which ought to be allowed in the year under appeal on payment basis...

Ground No. II: Disallowance of domestic roaming charges paid/payable to the Other Telecom Operators (the OTO's') amounting to Rs. 31,57,60,673/-u/s. 40(a)(ia) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in holding the disallowance of roaming charges amounting to Rs. 31,57,60,673/-on the alleged ground that the said payment is in the nature of Royalty for the purpose of section 1941 r.w.s. 9(1)(vi) of the Act.

2. He further erred in not following his own order of the other years in absence of any change in facts.

3. He further erred in holding that the amendment in section 40(a)(ia) of the Act is prospective in nature and does not apply to the year under consideration.

Ground No. III: Disallowance of roaming charges paid/payable to the Foreign Telecom Operators (the FTO's') amounting to Rs. 29,05,84,025/- u/s. 40(a)(i) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of roaming charges amounting to Rs. 29,05,84,025/- on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in not following his own order of the other years in absence of any change in facts.

3. He further erred in holding that the international roaming charges fall within the ambit of royalty as per the Double Tax Avoidance Agreements ('DTAAs') without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAS.

Ground No. IV: Disallowance of interconnection charges paid to the FTOs amounting to Rs. 170,60,00,000/- u/s. 40(a)(i) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in enhancing the assessment made by the AO and additionally disallowing the international interconnection charges paid to the FTOs amounting to Rs. 170,60,00,000/- u/s 40(a)(i) of the Act on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in holding that the international interconnection charges fall within the ambit of royalty as per the DTAAs without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAS.

Ground No. V: Disallowance of year end provision of commission amounting to Rs.15,10,72,022/-u/s. 40(a)(ia) of the Act for non-deduction of taxes:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the year-end provision for commission of Rs.15,10,72,022/-u/s. 40(a)(ia) of the Act on the alleged ground that the Appellant has not deducted tax at source disregarding the fact that the payees were not identifiable at the time of making the provision.

Ground No. VI: Directing the AO to verify the claim of deduction of provision of commission disallowed in AY 2010-11 on payment basis:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in directing the AO to verify the claim of deduction of provision of commission disallowed in AY 2010- 11 u/s. 40(a)(ia) of the Act which ought to be allowed in the year under appeal on payment basis.

Ground No. VII: Deduction u/s. 35DD of the Act:

On facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in not allowing the deduction u/s, 35DD of the Act of Rs. 5,87,487/- (being 1/5th of Rs. 29,37,435/- incurred towards amalgamation of Escotel Mobile Communication Limited with the Appellant w.e.f. April 1, 2006).

4. Brief facts of the case are that the assessee company is engaged in the business of providing cellular mobile service and trading of handsets and accessories. The assessee filed its return of income dated 29.09.2011, declaring total income at Rs. Nil., after setting off of brought forward losses of earlier years amounting to Rs. 127,32,60,976/- under the normal provisions and book profit u/s. 115JB at Rs. 794,64,25,489/-. Subsequently, the assessee filed its revised return of income declaring total income at Rs. Nil, after claiming deduction u/s. 80IA(4) of the Act under Chapter VI-A of the Act amounting to Rs. 1060,74,15,182/- and book profit u/s. 115JB of the Act at Rs. 127,32,60,973/- dated 29.03.2013. The assessee had also claimed TDS credit of Rs. 173,76,67,734/- in the revised return as against the claim of Rs. 156,89,92,736/- in its

original return. Further, the assessee had also claimed deduction u/s. 80IA in the revised return which was not claimed in the original return of income and the same was processed u/s. 143(1) of the Act. The assessee's case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. The learned Assessing Officer ('ld. A.O.' for short) had passed the assessment order u/s. 143(3) of the Act dated 27.03.2014, determining total income at Rs. 1078,68,58,040/- under the normal provisions and Rs. 851,75,07,903/- u/s. 115JB on the book profit after making the following addition/disallowance which are tabulated herein under:

		In Rs.
Total taxable income as per computation of income filed with original return		*127,32,60,974/-*
Add: Disallowance as discussed in body of order		
(i) Disallowance u/s. 14A -as discussed in para 4	*57,10,82,414/-*	
(ii) Disallowance of non-deduction of TDS u/s. 194H as directed in para 5	*625,62,21,192/-*	
(iii) Disallowance of non-deduction of TDS		
u/s.194J-Roaming charges-as discussed in para-6	*62,41,66,807/-*	
(iv) Disallowance of Employee Stock Option Scheme (STOS)- as discussed in para-7	*15,03,41,540/-*	
(v) Disallowance of Revenue Share License fees as discussed in para- 8 1107,64,42,826/- *Less-Depreciation @25% 276,91,10,706/-*	*830,73,32,120/-*	
vi) Disallowance of Abandoned project/site expenses-as discussed in para-9	*85,70,422/-*	

(vii) Disallowance of club entrance fees--as discussed in para-10	*69,06,940/-*	
(viii) Disallowance of free advance to subsidiary company-as discussed in para-11	*34,34,00,000/-*	
ix) Disallowance u/s.40(a)(ia) of the I.T. Act- as discussed in para-12	*15,10,72,022/-*	
(x) Disallowance of lesser rate of TDS u/s.40(a)(ia) of the Act as discussed in para-13	*86,59,127/-*	
xi) Lease rent to Quippo Telecom Infrastructure Ltd (QTIL)-as discussed in para-14	*52,52,59,662/-*	
(xii) Lease rent to ICTIL-as discussed in para-15	*316,80,00,000*	*2012,10,12,246/-*
Gross Total Income		*2139,42,73,220/-*
Less: Deduction u/s.80IA-as claimed		*1060,74,15,182/-*
Total Income		*1078,68,58,038/-*
Less-Set off of b/f losses		*Nil*
Total Taxable Income		*1078,68,58,038/-*
R/off		*1078,68,58,040/-*

Calculation of Book Profits u/s.115JB of the I.T. Act, 1961
Book Profit u/s115JB (as per revised) Rs.794,64,25,489/-
Add: Disallowance u/s. 14A as discussed above Rs. 57,10,82,414/-

5. Aggrieved by the said order, the assessee was in appeal before the first appellate authority, challenging the assessment order.
6. The ld. CIT(A) vide order dated 22.01.2018 had partly allowed the appeal of the assessee by upholding certain additions/disallowance and deleting the remaining additions/disallowance made by the ld. AO.
7. Both the assessee as well as revenue are in cross appeals before us, challenging the impugned order on various grounds.
8. We would take up the assessee's appeal first pertaining to the relevant assessment year.
9. Ground no. 1 pertains to claim of deduction of discount disallowed u/s. 40A(ia) of the Act for earlier years which according to the assessee is to be allowed during the year

under consideration on payment basis. It is observed that the assessee has paid tax on discount allowed to the distributors relevant to earlier years aggregating to Rs. 138,44,28,532/- and the same was disallowed during the earlier assessment year u/s. 40A(ia) of the Act for which the assessee claims deduction of discount which was disallowed in earlier years on payment basis vide its letter dated 26.02.2014 substantiated with challans as proof of payment made. The ld. AO disallowed the claim of discount made u/s. 40A(ia) of the Act on payment basis during the impugned year. The assessee contends that a sum of Rs. 15,10,72,248/- has been paid under protest for F.Y. 2006-07 to 2010-11 and the expenditure pertaining to the same amounting to Rs. 138,44,28,532/- out of which Rs. 15,27,54,280/- pertains to A.Y. 2010-11, where the ld. AO deleted the impugned disallowance for A.Y. 2010-11. The assessee claims that a sum of Rs. 123,16,74,252/- (138,44,28,532 – 15,27,54,280) ought to be allowed during the year under consideration on payment basis. The ld. AO disallowed the deduction claimed by the assessee, where it is observed that the TDS u/s. 194H was paid by the assessee during the year under consideration. The ld. CIT(A) in the appeal filed by the assessee directed the ld. AO to verify the assessee's claim and allow deduction on payment basis after duly considering the TDS paid by the assessee corresponding to the said disallowances.

10. Aggrieved the assessee was in appeal before us.

11. The ld. Representatives for both sides fairly agreed that the said ground requires verification by the ld. AO with regard to the payment made during the year under consideration as the said disallowance pertains to the earlier years and further the ld. AO has also deleted the impugned disallowance pertaining to payments made in A.Y.

2010-11. Pertinently, the first proviso to Section 40(a)(ia) of the Act states that when tax has been deducted in any subsequent year or has been deducted during the previous year but has been paid after the due date specified in Sub Section (1) of Section 139 of the Act, then the same shall be allowed as deduction in computing the income of the previous years in which such tax has been paid. As the ld. AO has disallowed the claim of the discount on the ground that the assessee has not deducted tax at source or has deducted but has not paid before the due date specified in Section 139(1) of the Act, the same is allowable as and when the assessee has paid the tax on payment basis. As the assessee claims that it had paid TDS u/s. 194H during the impugned year, we deem it fit to hold that this factual aspect has to be verified by the ld. AO and to allow the corresponding deduction as per the provisions and in accordance with law. We do not find any infirmity in the order of the ld. CIT(A) directing the ld. AO to verify this factual aspect. We therefore are inclined to remand this issue to the file of ld. AO for further verification.

12. **In the result, the ground no. 1 raised by the assessee is hereby allowed for statistical purpose.**

13. Ground no. 2 pertains to the disallowance of domestic roaming charges paid/payable to Other Telecom Operators ('OTO' for short) amounting to Rs.31,57,60,673/- u/s. 40(a)(ia) of the Act for non-deduction of tax and ground no. 3 and 4 pertains to disallowance of roaming charges paid/payable to foreign telecom operators (FTO) amounting to Rs. 29,05,84,025/- and disallowance of interconnection charges paid to FTOs u/s. 40(a)(ia) of the Act for non-deduction of taxes, respectively. It is observed that the assessee has debited Rs. 62,41,66,807/- towards international roaming charges

and national roaming charges for which the assessee is said to have not deducted TDS on the said payment u/s. 194J of the Act. The assessee contends that the said payment towards roaming charges pertain to services which are automated and requires no human intervention or skill and that these are not paid for rendering any managerial, technical or consultancy services and therefore does not fall under the category of 'fee for technical service' ('FTS') which inter alia does not require deduction of tax on such roaming charges. The assessee's argument is twofold where any payment for use of standard facility does not categories to FTS and that without prejudice in the absence of any human intervention during the actual roaming process such payment would not amount to FTS. The ld. AO held that whether the service in respect of roaming charges requires human intervention or not is *sub judice* before the Hon'ble Apex Court and that the FTS as per Section 194J has the same meaning as defined in Explanation 2 to Clause (vii) of Sub Section (1) of Section 9 which states that any consideration received for rendering any managerial, technical or consultancy services but does not include consideration for any construction, assembly, mining or similar project which would tantamount to income of the recipient chargeable under the head salaries and therefore fee for technical services would include the same. The ld. AO held that as the revenue has filed appeal before the Hon'ble Apex Court in the case of ***CIT vs. Bharti Cellular Ltd. [2011] 330 ITR 239 (SC)*** pending adjudication and the Hon'ble Madras High Court decision in the case of ***Skycell Communication Ltd. vs. Dy. CIT [2001] 251 ITR 53 (Madras HC)*** which has not been reversed by the Hon'ble Apex Court, it is to be held that the roaming charges is in the nature of fee for technical service u/s. 194J of the Act for which the assessee is liable to deduct TDS amounting to Rs. 62,41,66,807/- towards

international roaming charges and national roaming charges and in the failure to deduct the same, the claim of the assessee are to be disallowed u/s. 40(a)(ia) of the Act. The ld. CIT(A) upheld the disallowance made by the ld. AO by holding that the interconnect/roaming service undertaken by one telecom operator allowing the other telecom operator to use its network is termed as 'process' and the payment made for the use/right of the same would be 'royalty' within the meaning of Section 9(1)(vi) of the Act and also as per DTAA, thereby holding such payment to be liable for deducting tax at source and in the failure of which the assessee is held to be an 'assessee in default' u/s. 201(1) of the Act. The ld. CIT(A) further held that the proviso to Section 201 and Section 40(a)(ia) was inserted only w.e.f. 01.07.2012 and 01.04.2013 respectively which are not applicable for the relevant assessment year, thereby upholding the disallowance of Rs. 60,63,44,698/- made vide order u/s. 154 of the Act, dated 26.08.2015. The ld. CIT(A) further observed that as no tax has been deducted at source on the payments made to foreign telecom operators for international interconnection charges on amount of Rs. 170,60,00,000/- paid for the international access charges was disallowed u/s. 40(a)(ia) of the Act.

14. The ld. AR for the assessee contended that the assessee uses the same infrastructure which is deployed for GSM service for providing roaming services and for interconnect usage services and hence, the assessee used only the standard facility which is not subjected to TDS as per Section 194J of the Act which has also been reiterated by the Hon'ble Madara Court in the case of ***Skycell Communications Ltd. (supra)***. The ld. AR further contended that referring to various decisions which has held that payment of roaming and interconnect usage charges are only for use of standard facility and the

payment made towards the same are not fees for technical services and the same does not require deduction of tax at source. The ld. AR relied on the following decisions:

a. *Skycell Communication Ltd. vs. Dy. CIT [2001] 251 ITR 53 (Madras HC)*
b. *CIT vs. Bharti Cellular Ltd. [2009] 319 ITR 139 (Delhi HC)*
c. *CIT vs. Bharti Cellular Ltd. [2011] 330 ITR 239 (SC)*
d. *CIT vs. Vodafone South Limited (now Vodafone Idea Ltd.) [2016] (241 Taxmann 497) (Karnataka)*
e. *CIT vs. Tata Teleservices Ltd. [2023] 456 ITR 691 (Del. HC)*
f. *Bharat Sanchar Nigam Ltd. vs. ACIT [2017] 87 taxmann.com 152 (Delhi ITAT)*

15. The ld. DR for the revenue on the other hand controverted the said fact and stated that the roaming services involves highly technical compliance, where the agreement between OTO's and the assessee shares technical information which enable the subscribers to access the network and further it also involves technical staffs to monitor the same. The ld. DR also contended that the same requires transfer of rights to the assessee or for use or right to use 'process', thereby, making the payment made by the assessee fall under the category of 'royalty' as per Clause (iii) of Explanation 2 r.w. explanation 6 to Section 9(1)(vi) of the Act. The ld. DR also pointed out that the Hon'ble Madras High Court in the case of ***CIT vs. M/s. Dishnet Wireless Ltd. Tax Case Appeal No. 831, 832, 833, 836 and 838 of 2016, order dated 17.05.2024,*** has remanded this issue back to the Tribunal for deciding this issue in hand to the extent of examining human intervention required for rendering the services along with the terms of agreement between the parties, in which case the Hon'ble High Court has also distinguished the decision of the Hon'ble Apex Court in the case of ***Bharti Cellular Ltd. (supra)***. The ld. DR also relied on the order of the lower authorities.

16. We have heard the rival submissions and perused the materials available on record. The moot issue that requires adjudication in this ground is whether the roaming charges paid to OTOs and the interconnect charges paid are in the nature of fee for technical services for which the assessee is required to deduct TDS on such payment u/s. 194J of the Act. The nature of service is that when the assessee's subscribers use roaming facilities in foreign countries, the non-resident operators/foreign telecom operators (FTO) provide telecom services, where the assessee does not have its own network, certain charges are incurred which are to be paid by the assessee which the assessee recovers from its subscribers. The OTOs charges the assessee what is called as 'Interconnect Usage Charges' (IUC), when the assessee's subscribers uses the facility of the OTOs for making calls on its network. The revenue contends that such payments are liable for deducting TDS u/s. 194J of the Act on domestic roaming charges and interconnect usage charges to FTO's as they are alleged to be in the nature of 'fees for technical services' which uses the 'process' of OTOs for connectivity and carriage of calls. The ld. AO held the same to be in the nature of FTS and the ld. CIT(A) held the same to be 'royalty' u/s. 9(1)(vi) of the Act. The assessee's contention that it merely uses the standard facility or standard automated services, where no human intervention is required, did not find favour with the lower authorities. The ld. AR for the assessee extensively relied on the decision of the Hon'ble Apex Court in the case of ***Bharti Cellular Ltd. (supra)*** which held that there is no manual or human intervention involved in the process of transportation of calls which is automated between the two networks. The ld. AR relied on the decision of the Tribunal in the assessee's own case for earlier years, where it was held that the assessee has availed only standard facility

without any customization and the payment made does not have any of the characterization of 'royalty'. The Tribunal further held that the roaming services provided by other telecom operators does not involve any incremental investment but are by availing the existing telecom network without incurring any additional network or infrastructure, reiterating that the same are out of standard automated services holding that the roaming services are akin to the telecom services provided by the telecom operators to its own subscribers which are identical to the normal telecommunication charges paid by subscribers to its service providers. The Tribunal further held that the interconnect charges are not fee for technical services (FTS) as the entire process of making a call and switching a call from one network to another is automated, involving no human interphase as held in the case of ***Bharti Cellular Ltd. (supra)*** and the same would not fall under the ambit of Section 194J of the Act. It is also evident that the Hon'ble Apex Court in the case of ***Bharti Cellular Ltd. (supra)*** had directed the TDS Officer to carry out factual verification to examine the existence of human interphase for roaming services by obtaining technical evidence from experts in the telecom field.

17. It is observed that the Hon'ble Delhi High Court in the case of ***Bharti Cellular Ltd. [2008] 175 taxmann.com 573 (Delhi)***, held that there was there was no human interphase involved in such services and that the expression 'technical services' are those which are rendered by human intervention and held that the interconnect charges/port access charges are not to be considered as 'fees for technical services'. In an appeal preferred by the revenue against the said order, the Hon'ble Apex Court had remanded this issue back to the ld. AO directing for examination by technical experts,

where such facility requires manual intervention resulting in the same to be fee for technical services/professional services. Further, it is observed that the Hon'ble Karnataka High Court in the case of ***Vodafone Idea Ltd. (formerly Vodafone Essar South Ltd.) vs. DCIT (IT) [457 ITR 189 (Karnataka HC)]***, has categorically held the same to be without human intervention and not to be termed as technical service as the same is fully automatic requiring no human intervention. Notably, the SLP filed against the said order was dismissed by the Hon'ble Apex Court relying on the decision of the ***CIT vs. G. India Technological Pvt. Ltd. [2024] 161 taxmann.com 707 (SC)***.

18. The ld. AR has relied on a catena of decisions including the assessee's case for A.Y. 2010-11, where it is observed that the ld. CIT(A) has decided this issue in favour of the assessee and the revenue has not preferred an appeal against the said order. Further, this issue has also been reiterated by the Hon'ble Delhi High Court in the case of ***CIT vs. Tata Teleservices Limited [2023] 456 ITR 691 (Del. HC)***, wherein it was held that no TDS was required to be deducted by the assessee on payment of interconnect user charge as it was not 'fee in technical service'.

19. It is also observed that the assessee has availed interconnection services and roaming services from various foreign telecom operators (FTOs) which are residents of various countries. The revenue held that as per the respective DTAA, the payment made by the assessee to various FTOs would fall under the definition of 'royalty' which includes payment for use or right to use a process whether industrial, commercial or scientific (ICS equipment). The ld. AR relied on the decision of the coordinate bench in the case of ***Bharti Airtel Ltd. vs. ITO, [2016] 178 TTJ 708***, wherein it was held that payments made to foreign telecom operators for interconnect usage charges does not fall within

the ambit of the definition of 'royalty' u/s. 9(1)(vi) of the Act or as per the treaties. Further, the ld. AR contended that the amendment to Section 9(1)(vi) to Explanation 5 and 6 apply retrospectively and not in assessee's case, where the DTAA's are applicable. The ld. AR relied on the following decisions in favour of the assessee:

a. *Vodafone Idea Limited vs. DCIT (ITA Nos. 84 & 85/Hyd/2020) (Hyderabad Tribunal)*
b. *Vodafone Idea Limited vs. DCIT (ITA Nos. 1913, 1914, 1915, 1916, 1917, 1918 & 1919/Hyd/2019) (Hyderabad Tribunal)*
c. *ACIT vs. Viacom18 Media (P.) Ltd. [2022] 193 ITD 716 (Mumbai – Trib.)*
d. *M/s. Telefonica De Espana SA Bangalore vs. ACIT (ITA No. 2657/BANG/2019, order dated 25.07.2023).*
e. *Telefonica UK Ltd. vs. DCIT [2023] 154 taxmann.com 475 (Mumbai – Trib.)*
f. *AI Telekom Austria Aktiengesellschart vs. DCIT [2023] 156 taxamann.com 155 (Banglore Trib.)*
g. *DDIT v. Reliance Infocomm Ltd. (ITA Nos. 5374/Mum/2007 & 6093/Mum/2008)*
h. *DCIT v. Reliance Jio Infocomm Ltd. [2019] 108 taxamann.com 325 (Mumbai)*
i. *Telecom Italia Sparkle Sngapore Ptd. Ltd. Vs. DCIT [2023] 155 taxamann.com 404 (Bangalore ITAT)*
j. *DCIT vs. Orange (formerly known as France Telecom) [2024] 158 taxmann.com 186 (Banglore Trib.)*
k. *HCC Global Communications Ltd. V. DCIT [2024] 158 taxamann.com 633 (Bangalore ITAT)*

20. The ld. DR on the other hand controverted the same and stated that the Hon'ble Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd. vs. DCIT [2014] 361 ITR 575***, had distinguished the case of the Hon'ble Delhi High Court in the case of ***Asia Satellite Telecommunications Co. Ltd. v. DIT [2011] 332 ITR 340/197 Taxman 263/9 taxmann.com 168*** which again was relied upon by the coordinate bench in the case of ***Bharti Airtel Ltd. (Supra).*** The ld. DR further contended that the expression 'process' used in the definition of 'royalty' u/s. 9(1)(vi) of the Act has been discussed at length in the decision of the Hon'ble Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd.*** **(supra)**, wherein it was held the use and right to use of the 'process' is a 'royalty' within the meaning of clause (iii) of Explanation 2 to Section 9(1)(vi) of the Act and further held that the payment was for the use or right to use the equipment, even otherwise, if the payment was not for use the equipment, it would be for the use of process which was provided by the assessee through assured bandwidth which is shared with customers and the technology involved in the same would fall under the ambit of 'royalty'. Further, the ld. DR stated that the Hon'ble Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd. (supra)*** held that the amendment introduced in 2012 w.e.f. 01.06.1976 holds that irrespective of possession, control of payer or use by the payer or the location in India in consideration paid would fall under the ambit of 'royalty'.

21. Having heard the rival submissions and perused the material available on record. It is observed that the issue of whether the payment made by the assessee to FTOs for international carriage and connectivity would be qualified as 'royalty' as per Section 9(1)(vi) of the Act and if so whether the assessee was entitled to deduct tax at source

on such payment made to FTOs u/s. 194J of the Act. The arguments of the ld. AR are twofold, where it was contended that interconnect usage charges and roaming charges are incurred only for the use of standard facility which is not in the nature of FTS. The same is supported by the decision of the Hon'ble Delhi High Court in the case of ***DCIT vs. Pan Amsat International Systems Inc [2006] 9 SOT 100 (Delhi)*** and also the Delhi Tribunal Bench decision in the case of ***Bharti Airtel Ltd. (supra).*** The ld. AR without prejudice have also argued that the IUC and roaming charges are not in the nature of FTS where there is no human intervention in providing the said services. The ld. AR had relied on the decision of the CIT vs. Vodafone South Ltd. and the decision in the case of ***Bharti Cellular Ltd. (supra),*** where it has been held that roaming process is fully automated requiring no human intervention. The ld. AR has also relied on the various other decisions which has reiterated the said proposition. With regard to whether the same is 'royalty' under the provisions of the Act and DTAA, the ld. AR had placed reliance on the decision of the Hon'ble Karnataka High Court in the case of ***Vodafone Idea Ltd. (formerly Vodafone Essar South Ltd.) vs. DCIT (IT) [457 ITR 189 (Karnataka HC)]***, which had also attained the finality where the revenue's SLP was dismissed by the Hon'ble Apex Court. It had reiterated that payment made to non-resident telecom operators for providing interconnect services and transfer of capacity in foreign countries was not chargeable to tax as 'royalty'. Further, the ld. DR's reliance placed on the Mumbai Tribunal in the case of ***ACIT vs. Viacom 18 Media Pvt. Ltd., [2022] 193 ITD 716 (Mumbai – Trib.)***, which had followed jurisdictional High Court decision in the case of ***PCIT vs. Neo Sports Broadcast (P.) Ltd. [2019] 107 taxmann.com 17 (Bombay)***, has been dissented order from the earlier decisions and

held that the transponder services fee was not in the nature of 'royalty' as per Section 9(1)(vi) of the Act and also the decision of the Hon'ble Madras High Court in the case of ***Verizon Communications Singapore Pte Ltd. (supra)*** has also been descended by the Hon'ble Delhi High Court in the case of ***DIT vs. New Skies Satellite BV (382 ITR 114) (Delhi HC)***. The ld. AR extensively relied on the decision of the Delhi Tribunal in the case of ***Bharti Airtel Ltd. (Supra)***, where this issue has been extensively dealt upon. The relevant extract of the said decision is cited herein under for ease of reference:

> *52. The term "process" used under Explanation 2 to section 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available. The term "process" occurring under clauses (i), (ii) and (iii) of Expl 2 to section 9(1)(vi) means a "process" which is an item of intellectual property. Clause (iii) of the said Explanation reads as follows:*
>
> > *"(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property"*
>
> *Clauses (i) & (ii) of the said explanation also use the same coinage of terms. The words which surround the word 'process' in clauses (i) to (iii) of Explanation 2 to section 9(1)(vi) refer to various species of intellectual properties such as patent, invention, model, design, formula, trade mark etc. Thus the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis as held in the case of Bharti Cellular Ltd. (supra). The expression 'similar property' used at the end of the list further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. intellectual property.*
>
> *'Intellectual property' as understood in common parlance means: Knowledge, creative ideas, or expressions of human mind that have commercial value and are protectable under copyright, patent, service mark, trademark, or trade secret laws from imitation, infringement, and dilution. Intellectual property includes brand names, discoveries, formulas, inventions, knowledge, registered designs, software, and works of artistic, literary, or musical nature. It is one of the most readily tradable properties in the digital marketplace." [as per definition provided in BusinessDictionary.com]*
>
> *53. The term "process" is therefore to be understood as an item of intellectual property resulting from the discovery, specialized knowledge, creative ideas, or expressions of human mind having a commercial value and not widely available in public domain. It is therefore an intangible asset, the exclusive right over which normally rests with its developer / creator or with the person to whom such asset has been exclusively transferred.*
>
> *In order to receive a 'royalty' in respect of allowing the usage or right to use any property including an intellectual property, the owner thereof must have an exclusive right over such property. As far as intellectual properties (IPs) are concerned, these have significance*

for the purpose of 'royalty' only till the time the ownership (as differentiated from the right to use) of such property vests exclusively with a single person and such person by virtue of its exclusive ownership allows the usage or right to use such IP to another person/ persons for a consideration in the form of 'royalty'. Payment made for anything which is widely available in the open market to all those willing to pay, cannot constitute 'royalty' and is essentially in the nature of business income.

The Hon'ble High Court of Madras in the case of CIT v. Nayveli Lignite Corporation Ltd. [2000] 243 ITR 0459 held that "the term (royalty' normally connotes the payment made to a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty".

The Hon'ble High Court of Calcutta in the case of M.V. Philips v. CIT [1988] 172 ITR 521/[1987] 34 Taxman 274 held as under:

> *"From the dictionary meaning of the term 'royalty', it appears that the said term connotes payments periodic or at a time for user by one person of certain exclusive rights belonging to another person. The examples of such exclusive rights are rights in the nature of a patent, mineral rights or right in respect of publications. It is possible that a person who invests may not take out a patent for his invention but unless some there inventor independently and by his own efforts come to duplicate the invention the original invention remains exclusive to the investor and it is conceivable that such an inventor might exploit his invention permitting some other person to have the user thereof against payment. Similarly, it is possible for a person carrying out operations of manufacture and production of a particular product to acquire specialised knowledge in respect of such manufacture and production which is not generally available. A person having such specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. It is also conceivable that such a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited user of such specialised knowledge to others in confidence against payment. There is no reason why payment for the user of such specialised knowledge, though not protected by a patent, should not be treated as royalty or in the nature of royalty.-Handley Page us. Butterioorth. 19 Tax Cases 322 relied on. "*

Thus, the term 'royalty' connotes exclusivity and the exclusive right in relation to the thing (be it physical or intellectual property) for which royalty is paid should be with the grantor of that right. In case an intellectual property, it is generally associated with some discovery, invention, creation, specialized knowledge etc. emanating from human mind and is payable to the inventor / creator for allowing the usage of his invention or creation and having an exclusive right over it. The Hon'ble Calcutta High Court in the case of MV Philips (supra) held that a person having some specialised knowledge can claim exclusive right to the same as long as he chooses not to make such specialised knowledge public. Such a person can exploit and utilise such specialised knowledge in the same way as a person holding a patent or owning a mineral right or having the copyright of a publication to allow a limited use of such specialised knowledge to others in confidence against

payment in which case it is termed as royalty. However, once such specialized knowledge becomes public; such person loses the exclusivity in respect of such special knowledge and hence, loses the right to receive any royalty in respect of the same. Thus, for a payment to be classified assessee royalty, 'exclusivity' of the subject matter is of crucial relevance.

54. …….

54.1. …….

***54.2** In the case of telecom industry, all the telecom operators have similar infrastructure and telecom networks in place, for rendition of telecommunication services. The process embedded in the networks of all telecom operators is the same. The equipments, resources etc. employed in the execution of the process may be different in physical terms i.e. in terms of ownership and physical presence, but the process embedded in the execution of a telecom infrastructure is the same and commonly available with all the telecom operators. The 'royalty' in respect of use of a 'process' would imply that the grantor of the right has an exclusive right over such 'process' and allows the 'use' thereof to the grantee in return for a 'royalty'. It is necessary that guarantee must 'use' the 'process' on its own and bear the risk of exploitation. The 'process' of running the networks in the case of all the telecom operators is essentially the same and they do not have any exclusive right over such 'process' so as to be in a position to charge a 'royalty'. For allowing the use of such process, the term 'use' in context of royalty connotes use by the grantee and not by the grantor. A 'process' which has been in public domain for some time and is widely used by everyone in the field cannot constitute an item of intellectual property for the purpose of charge of 'royalty'. Any compensation or consideration, if at all received for allowing the use of any such 'process' which is publically available and not exclusively owned by the grantor constitutes business income and not royalty.*

22. This is also supported by the decision of the Tribunal in the case of ***Bharat Sanchar Nigam Ltd.,Vs. ACIT (2017) 87 taxmann.com 152*** and ***M/s. Telefonica De Espana SA Bangalore vs. ACIT (ITA No. 2657/BANG/2019, order dated 25.07.2023***. The amendment brought about to Explanation 5 and 6 of Section 9(1)(vi) of the Act vide Finance Act, 2012 also cannot be taken in support of revenue for the reason that there has been no amendment brought about in the corresponding DTAA.

23. Upon perusal of the same, it is observed that this issue has been recurring in nature, where the majority view taken by the coordinate benches and the Hon'ble High Courts and the Hon'ble Apex Court stands in favour of the assessee. From the above observation, we are inclined to hold that the interconnect usage charges and roaming

charges are not in the nature of 'royalty' which are taxable in India and resultantly, the assessee is held to be not liable to deduct TDS on such receipt. We therefore deem it fit to allow this grounds of appeal no. 2, 3 and 4 raised by the assessee by taking a consistent view on the identical issues decided by the various forums.

24. In the result, the ground nos. 2, 3 and 4 raised by the assessee is hereby allowed.

25. Ground no. 5 pertains to the disallowance of year-end provision u/s. 40(a)(ia) of the Act for non-deduction of tax. It is observed that the assessee has made year-end provision on account of commission to distributors, where distributors were not identifiable and the ld. AO disallowed commission of Rs. 15,10,72,072/- u/s. 40(a)(ia) of the Act for the reason that the assessee has failed to deduct taxes u/s. 194A, 194C, 194H, 194I and 194J of the Act.

26. The ld. AR contended that the assessee is provided with SIM card after submission of ID proof, address proof, etc. along with Customer Acquisition Form (CAF) and these documents are sent for verification and validation and only on subject to verification and other conditions, the commission was paid to the distributors. As the same was time consuming, the year end provision for commission was made by taking average percentage based on earlier months trend of confirmed activation and hence TDS was not deducted for the reason that the distributors were not identifiable. It was further contended that the commission was paid to distributors only on fulfilling the conditions specified above. The assessee had made provision of Rs. 32,51,06,691/- on account of commission to distributors where distributors were not identifiable and TDS of Rs. 17,38,56,600/- was deducted and paid before filing of returns for the year under consideration and the remaining Rs. 15,10,72,022/- TDS was not deducted as the

distributors were not identifiable. The ld. AO rejected the assessee's contentions stating that the parties are not identifiable which according to the ld. AO was unacceptable as expenses cannot be claimed u/s. 37 which was contingent and once the assessee has claimed the same in its books of accounts, the assessee ought to have deducted TDS on such expenses u/s. 40(a)(ia) of the Act before filing of the returns. The ld. AO disallowed the same u/s. 40(a)(ia) of the Act.

27. The ld. CIT(A) relied on A.Y. 2010-11 and 2012-13 where on similar disallowance made by the ld. AO, the same was allowed in the subsequent years in which taxes were duly deducted and paid by the assessee after the same being duly verified by the ld. AO. It is observed that the Tribunal for A.Y. 2010-11 had remanded this issue to the ld. AO directing the assessee to furnish the details of the deduction of tax or write back of provision in the subsequent years to be examined by the learned Assessing Officer (ld. A.O. for short) As the issue in hand is identical with the issue in A.Y. 2010-11, we hereby remand this issue back to the file of ld. AO for identical verification, where the assessee is directed to submit details of subsequent deduction of tax if any, towards commission expenditure claimed by the assessee or if any write back of provisions in the subsequent year are to be examined. We therefore allow this ground of appeal for statistical purpose.

28. In the result, the ground no. 5 raised by the assessee is allowed for statistical purpose.

29. Ground no. 6 pertains to claim of deduction of provisions of commission disallowed in A.Y. 2010-11 on payment basis. The assessee has raised this ground where the ld. AO disallowed the claim of deduction on provision of commission of Rs. 3,70,22,239/- on

the ground that the assessee has failed to deduct tax at source as per Section 40(a)(ia) of the Act.

30. The ld. CIT(A) had remanded this issue to the file of ld. AO to allow the claim of deduction on payment basis. Both the ld. Representatives fairly agreed with this issue has to be remanded back to the ld. AO for verification as to whether the assessee has deducted and paid tax on payment basis towards the commission expenses claimed by the assessee amounting to Rs. 3,70,22,239/-. We do not find any infirmity in the order of the ld. CIT(A) and hereby uphold the same. Ground no. 6 raised by the assessee is hereby allowed for statistical purpose.

31. In the result, the ground no. 6 raised by the assessee is hereby allowed for statistical purpose.

32. Ground no. 7 pertains to deduction u/s. 36DD of the Act. The ld. AR during the appellate proceeding submitted that as relief was already granted by the ld. AO in the order giving effect to the ld. CIT(A)'s order dated 28.02.2018 and hence this ground of appeal was not pressed by the assessee. We therefore dismiss this ground as not being pressed.

33. In the result, the ground no. 7 raised by the assessee is dismissed as not pressed.

34. In the result, the appeal filed by the assessee for A.Y. 2011-12 is partly allowed.

ITA No. 2178/Mum/2018 (A.Y. 2011-12)

35. The revenue has raised the following grounds of appeal:

> *1. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance made by the AD of Rs.30,37,49,629/- u/s 14A of the Act r.w.r SD of the Rules towards expenses incurred for making tax-free investment".*

2. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in disallowing the discount of Rs.625,62,21,192/- allowed to be the 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".

3. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of Rs.15,03,41,540/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ('ESOP")".

4. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of revenue share license fees ("RSLF) amounting to Rs.1107,64,42,826/ paid to the Department of Telecommunications ("the DOT")".

5. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in holding that section 40(a)(ia) was not applicable in cases of short deduction of tax, ignoring Hon'ble Kerala High Court decision in the case of CIT vs P.V.S. Memorial Hospital Ltd. (60 Taxmann.com 69] which ruled to the contrary and in favour of revenue".

6. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Leave Charge of Rs.52,52,59,662/- paid to Quipo Telecom Infrastructure Ltd.".

7. "The appellant prays that the order of CIT(A) on the above ground be set- 7 aside and that of the assessing be restored".

36. This appeal filed by the revenue challenges the order of the ld. CIT(A) on various grounds. Ground no. 1 pertains to the disallowance u/s. 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962. It is observed that the assessee has made investment of Rs. 2572,80,70,000/- but had claimed that no expenses were incurred for earning the exempt income. The ld. AO not satisfied with the correctness of claim of the assessee pertaining to such expenditure, invoked Rule 8D and made a disallowance of Rs. 57,10,82,414/- to the total income of the assessee.

37. Aggrieved the assessee was in appeal before the first appellate authority, who then deleted the impugned disallowance on the ground that as the assessee has earned no exempt income during the year under consideration and hence no disallowance could

be made in lieu of the proposition laid down by the Hon'ble Delhi High Court in the case of ***Chem Invest Ltd. vs. CIT-VI in ITA No. 749/2014, order dated 02.09.2015***

38. Aggrieved the revenue is in appeal before us challenging the order of the ld. CIT(A).

39. We have heard the rival submissions and perused the material available on record. It is observed that as per the P & L account of the assessee, the assessee has not earned any dividend income during the year under consideration and even otherwise, has not claimed any exempt income in its computation of income. The ld. CIT(A) had followed the order of his predecessor for A.Y. 2010-11 and 2012-13, where on identical facts disallowance was deleted in the absence of the no exempt income earned during the year under consideration.

40. From the above observation, it is observed that there is no dispute in the fact that the assessee has not earned any exempt income during the year under consideration. In the absence of exempt income, it is now a settled proposition of law that no disallowance shall be made u/s. 14A r.w.r. 8D in the absence of the exempt income. This view has been reiterated by various decisions of the Hon'ble High Courts and more extensively by the Hon'ble Delhi High Court in the case of ***Chem Invest Ltd. (supra)*** which held that Section 14A could be invoked only when exempt income has been earned during the year under consideration for the purpose of making disallowance on any expenditure claimed by the assessee. As it is settled law by the decisions of the various Hon'ble High Courts, we do not find any justification in deviating from the same and we therefore are inclined to dismiss the ground no. 1 raised by the revenue.

41. In the result, the ground no. 1 raised by the revenue is hereby dismissed.

42. Ground no. 2 pertains to the disallowance of net discount provided to prepaid card distributors u/s. 40(a)(ia) of the Act for non-deduction of tax u/s. 194H of the Act. The assessee contended that TDS was deducted on commission expenses but not on discount given to dealers amounting to Rs. 625,62,21,192/-. The ld. AO by relying on the decision of the Hon'ble Delhi High Court in assessee's own case held that the assessee is liable to deduct TDS u/s. 194H of the Act on discount to prepaid card holders. The assessee contended that it was a transaction between the Principal to Principal and not Principal to Agent and there was no scope of commission or brokerage paid in such case. Further, the assessee contended that the distributors would have paid the tax on the income and therefore the assessee was not entitled to pay any tax on the same and relied on the decision of the Hon'ble Apex Court in the case of ***Hindustan Coca Cola Pvt. Ltd. vs. CIT (293 ITR 226)***. The ld. AO made a disallowance of the impugned amount for failing to deduct TDS on payments made as discount which were given to prepaid distributors u/s. 40(a)(ia) of the Act.

43. The ld. CIT(A) on the other hand allowed this ground of appeal in favour of the assessee by relying on his own order for A.Y. 2010-11 and 2012-13 and also decision of the Hon'ble Rajasthan High Court in ITA No. 168/2015, vide order dated 11.07.2017, where it has been held that the relationship between the assessee and distributors would be Principal to Principal and not Principal to Agent, where the assessee did not have liability to deduct TDS on selling prepaid cards to the distributors.

44. The ld. CIT(A) had extensively relied on the decision of the Hon'ble Karnataka High Court in the case of ***Bharti Airtel Ltd. 372 ITR 33,*** where on identical facts this issue had been decided in faovur of the assessee.

45. We have heard the rival submissions and perused the materials available on record. Though, it is observed that there are contrary decisions of various High Courts which are in favour of the assessee as well as against and in the absence of any jurisdictional High Court's decision, the ld. CIT(A) had held that the assessee had no obligation to deduct TDS on selling of prepaid cards to the distributors. The Hon'ble High Court of Karnataka in the case of ***Bharti Airtel Ltd. (supra)*** which has been followed by the Jaipur Tribunal in assessee's own case. The Bangalore Tribunal which has reiterated that as per Section 194H of the Act, the assessee ought to have deduct TDS on income payable to the distributors @10%, where the assessee sells SIM cards to distributors, at certain percentage of discount which has been considered as income in the hands of the distributors by the revenue. The Hon'ble High Court held that in such cases, there is no relationship of Principal and Agent between the assessee and distributors, where the distributors in turn sells the SIM cards to various other sub distributors who sell the same to retailers and retailers to customers. Further, it held that the profit earned by such distributors, sub distributors and retailers depends upon the agreement between all of them to share the discount given by the assessee as there is no direct relationship between the assessee and the sub distributors, it is merely a sale of right to service which is akin to relationship of Principal to Principal and there is no commission/income accrued in the hands of the distributor and therefore the assessee was not liable to deduct TDS on such transaction. Pertinently, the ld. AR has also relied on the decision of the Hon'ble Apex Court in the case of ***Bharti Cellular Ltd. [2024] 462 ITR 247 (SC)***. The Hon'ble Apex Court examined this issue at length and has decided this issue in faovur

of the assessee. The relevant extract of the said decision is cited herein under for ease of reference:

> *"39. Coming back to the legal position of a distributor, it is to be generally regarded as different form that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as sui generis, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services. There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement. Franchise agreements are extremely detailed and complex. They may relate to distribution franchises, service franchises and production franchises. Notwithstanding the strict restrictions placed on the franchisees - which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices - the relationship may in a given case be that of an independent contractor. Facts of each case and the authority given by 'principal' to the franchisees matter and are determinative.*
>
> *40. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons. An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer.*
>
> *41. Thus, the term 'agent' denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term 'agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, incidentally, also affect the legal position of his principal in other ways. This can be ascertained by referring to and examining the indicia mentioned*

in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to Section 194-H of the Act.

42. In view of the aforesaid discussion, we hold that the assessees would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors. Section 194-H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeals filed by the assessee - cellular mobile service providers, challenging the judgments of the High Courts of Delhi and Calcutta are allowed and these judgments are set aside. The appeals filed by the Revenue challenging the judgments of High Courts of Rajasthan, Karnataka and Bombay are dismissed. There would be no orders as to cost. Pending applications, if any, shall stand disposed of."

46. By respectfully following the above decision, we decide this issue in favour of the assessee, thereby dismissing ground no. 2 of the revenue's appeal.

47. In the result, ground no. 2 raised by the revenue is hereby dismissed.

48. Ground no. 3 pertains to the disallowance of Rs. 15,03,41,540/- debited in the P & L account towards amortization and intrinsic value of shares under the Employee Stock Option Plan ("ESOP"). It is observed that the assessee had debited an amount of Rs. 15,03,41,450/- towards ESOP amortization cost to its P & L account as part of 'Employee Compensation Cost' as per intrinsic value method specified in Securities and Exchange Board of India (SEBI), Employees Stock Option Scheme and Employee Stock Purchase Scheme Guidelines, 1999 (SEBI Guidelines) which is the excess of the market price of the shares under ESOS over the exercise price of the option. The ld. AO during the assessment proceeding disallowed the said amount and added the same to the total income of the assessee u/s. 37 of the Act on the ground that the liability towards difference in the market price and ESOP price is contingent and has not crystalized during the year under consideration and that the loss incurred by the assessee was towards capital gain and not allowable as deduction as the same is the difference

in the market price of the share and mere allotment of the shares to the employee would not be allowable as business expenditure u/s. 37 of the Act. The ld. AO relied on the various decisions in support of his contentions.

49. The ld. CIT(A) on the other hand allowed the assessee's claim by relying on his own order for A.Y. 2010-11 which has infact placed reliance on the Special Bench decision of the Bangalore Tribunal in the case of ***Biocon Ltd. vs. Dy. CIT (LTU) Bangalore, (2013) 25 ITR (T) 602 (Bangalore Tribunal)***.

50. The revenue is in appeal before us and challenging the impugned order of ld. CIT(A) on this ground.

51. We have heard the rival submissions and perused the materials available on record. The issue of whether the discount on issue of shares to be Employee Stock Option is allowable as deduction while computing the income in the profit and loss account has been now a settled preposition of law by the decision of the Special Bench in the case of ***Biocon Ltd. (supra)***, wherein it was held that the same was allowable deduction u/s. 37(1) of the Act. It further held that the term 'expenditure' would also include loss and the difference arising out of the discount given to the employees in issuance of the shares as compared to the price of the market value of the shares would tantamount to an expenditure allowable u/s. 37(1) of the Act and the same is entitled to deduction subject to fulfillment of the condition. We do not find any infirmity in the order of the ld. CIT(A) in respectfully following the judicial precedents along with various other decisions which has reiterated the said proposition. In view of the same, ground no. 3 raised by the revenue is hereby dismissed.

52. In the result, the ground no. 3 raised by the revenue is hereby dismissed.

53. Ground no. 4 pertains to the disallowance of Revenue Share License Fee (RSLF) amounting to Rs. 1107,62,42,826/- paid to the Department of Telecommunication (DOT). The assessee is said to have debited an amount of Rs. 1107,64,42,826/- as license fee and claimed deduction u/s. 35ABB of the Act. It is observed that the assessee has obtained a license to carry on business of telecom service provider from the Government of India in A.Y. 1996-97 and commenced its business in A.Y. 1997-98 and had claimed the amount which was paid towards the license fee as deduction u/s. 35ABB of the Act which was amortized over the period of the license. The assessee had also paid license fee on revenue sharing basis from A.Y. 2000-01 onwards which was initially capitalized and depreciation was claimed on the same. The ld. AO observed that the assessee subsequently claimed expenditure u/s. 37(1) of the Act towards the same expenditure. The ld. AO disallowed the said claim u/s. 37(1) of the Act but had allowed depreciation on the same.

54. Aggrieved the assessee was in appeal before the first appellate authority, who had allowed assessee's claim by relying on his own order for A.Y. 2010-12 and 2012-13 which had inturn relied on the assessee's own case for A.Y. 2001-02 and 2003-04, where the revenue share license fee has been allowed as deduction u/s. 37(1) of the Act. Further, the ld. CIT(A) had also relied on the decision of the Hon'ble Jurisdictional High Court in ITA No. 516 of 2015, where the Hon'ble High Court had dismissed the appeal filed by the department vide order dated 30.09.2016.

55. The revenue is in appeal before us, challenging the impugned order of the ld. CIT(A).

56. We have heard the rival submission and perused the material available on record. It is observed that the assessee company has migrated from National Telecom Policy 1994

to National Telecom Policy 1999, where post migration, license period was extended from 10 years to 20 years for which the assessee was required to pay one time entry fees and also pay RSLF to DOT on percentage basis towards revenue earned. The assessee had claimed Rs. 1107,64,42,826/- towards RSLF as determined on the gross revenue as per the license agreement and claimed the same u/s. 37(1) of the Act as an allowable expenditure. The assessee contends that RSLF is paid annually based on the revenue share for the year under consideration which is purely based on the revenue earned by the assessee company. The assessee also contended that the RSLF paid is not a fixed license fee having enduring benefit but depends on the multiple regime, where there would be multiple cellular operators as per the license given by the government under the amended license agreement. The assessee reiterated that RSLF is a revenue expenditure u/s. 37(1) of the Act and relied on the decision of the Hon'ble Delhi High Court in the case of ***CIT vs. Bharti Cellular Ltd and Ors., in ITA No. 1336/Del./2010 and Ors.*** Vide order dated 19.12.2013, wherein it was held that the annual license fee paid to DOT before National Telecom Policy, 1999 is to be amortized as per Section 34ABB of the Act and that paid after National Telecom Policy, 1999 on migration to revenue share is allowable u/s. 37(1) of the Act. The revenue on the other hand disallowed the same as being double deduction claimed by the assessee u/s. 35ABB of the Act and Section 37(1) of the Act. It is further observed that the Tribunal in assessee's case has consistently held the same to be an allowable deduction u/s. 37(1) of the Act as revenue expenditure. Pertinently, the Hon'ble Apex Court in the Review Petition filed by the assessee in case of ***Commissioner of Income-tax vs. Bharti Hexacom Ltd. [2023] 155 taxmann.com 322 (SC)/[2023] 458 ITR 593 (SC)[16-10-***

2023], held that license fee paid to DOT under National Telecom Policy would be capital in nature and was to be amortized in accordance with Section 35ABB of the Act as the same was non-transferable and non-assignable and the payment was intrinsic to existence of license as well as trade, holding the entry fee and the variable annual fee to be capital in nature. This review petition was filed by the assessee against the order dated 16.10.2023 in ***Bharti Hexacom Ltd. (supra),*** wherein the Hon'ble Apex Court held that the payment of entry fee as well as variable annual license fee paid by the assessee to the DOT under the New Telecom Policy, 1999 are capital in nature and are to be amortized as per Section 35ABB of the Act, thereby setting aside the decision of the Hon'ble High Court of Delhi, Bombay and Karnataka. Further, the Hon'ble Apex Court also held that there cannot be two different characterizations on the same nature of payment made for the same purpose, for the reason of change in the nature of payment, where the Hon'ble High Courts have held the same to be partly revenue and partly capital by dividing the period of license fee before and after 31 July, 1999. The relevant extract of the said decision is cited herein under for ease of reference:

> *26. As per the Policy of 1999, there was to be a multi-licence regime inasmuch as any number of licences could be issued in a given service area. Further, the licence was for a period of twenty years instead of ten years as per the earlier regime. The migration to the Policy of 1999 was on the condition that the entire policy must be accepted as a package and consequently, all legal proceedings and disputes relating to the period upto 31 July, 1999 were to be closed. If the migration to the Policy of 1999 was accepted by the assessees herein or the other service providers, then all licence fee paid upto 31 July, 1999 was declared as a one time licence fee as stated in the communication dated 22 July, 1999 which was treated to be a capital expenditure. The licence granted under the Policy of 1999 was non-transferable and non-assignable. More importantly, if there was a default in the payment of the licence fee, the entire licence could be revoked after sixty days notice. The provisions of the Telegraph Act particularly section 8 thereof are also to the same effect. Having regard to the aforesaid facts and in light of the aforesaid conclusions, we hold that the payment of entry fee as well as the variable annual licence fee paid by the respondents-assessees to the DoT under the Policy of 1999 are capital in nature and may be amortised in accordance with section 35ABB of the Act. In our view, the High Court of Delhi was not right in apportioning the expenditure incurred towards establishing, operating and maintaining telecom services, as partly revenue and partly capital by dividing the licence fee into two periods, that is, before and after 31 July, 1999 and accordingly holding that the licence fee paid or payable for the*

period upto 31 July, 1999 i.e. the date set out in the Policy of 1999 should be treated as capital and the balance amount payable on or after the said date should be treated as revenue. The nature of payment being for the same purpose cannot have a different characterisation merely because of the change in the manner or measure of payment or for that matter the payment being made on annual basis.

27. Therefore, in the ultimate analysis, the nomenclature and the manner of payment is irrelevant. The payment post 31 July, 1999 is a continuation of the payment pre 31 July, 1999 albeit in an altered format which does not take away the essence of the payment. It is a mandatory payment traceable to the foundational document i.e., the license agreement as modified post migration to the 1999 policy. Consequence of nonpayment would result in ouster of the licensee from the trade. Thus, this is a payment which is intrinsic to the existence of the licence as well as trade itself. Such a payment has to be treated or characterized as capital only.

28. In the result, the judgment of the Division Bench of the High Court of Delhi, dated 19 December, 2013 in ITA No. 1336 of 2010 and connected matters, is hereby set aside. The judgments passed by the High Courts of Delhi, Bombay and Karnataka, following the judgment of the Division Bench of the High Court of Delhi, dated 19 December, 2013, are also consequently set aside."

57. From the above observation, it is evident that though the Tribunals in assessee's case for earlier years have allowed the same u/s. 37(1) of the Act by relying on the decision of the various High Courts, issue now has reached finality by the decision of the Hon'ble Apex Court holding the same to be a capital expenditure which is to be amortized u/s. 35ABB of the Act. By respectfully following the Hon'ble Apex Court, we hereby restore this issue back to the file of the ld. AO to decide this issue afresh in view of the decision of the Hon'ble Supreme Court in the case of ***Bharti Hexacom Ltd. (supra).*** Hence, the ground no. 4 raised by the revenue is hereby allowed as per the above terms to recompute the disallowance in view of the decision of the Hon'ble Apex Court.

58. In the result, ground no. 4 raised by the revenue is hereby allowed.

59. Ground no. 5 pertains to the disallowance u/s. 40(a)(ia) of the Act for short deduction of tax amounting to Rs. 86,59,127/-. It is observed that the assessee has deducted TDS at earlier rate as per Annexure 14B of TAR which was liable to be taxed at higher rate under Chapter XVII-B of the Act. The ld. AO disallowed the same u/s. 40(a)(ia) of the Act for the reason that the assessee has not complied with provisions of the Act in

Chapter XVII-B, where TDS is to be deducted on different rates depending upon the nature of the expenses. The assessee contends that since the assessee has deducted TDS at lower rate, the same is allowable. The ld. AO proceeded to disallow Rs. 86,59,127/- challenging which the assessee was in appeal before the first appellate authority.

60. The ld. CIT(A) allowed this ground of appeal raised by the assessee by relying on assessee's own case for A.Y. 2010-11 in assessee's own case, where the Tribunal has held that no disallowance u/s. 40(a)(ia) of the Act can be made for deduction of tax at lower rate. The assessee has also relied on the decision of the Calcutta High Court in the case of ***CIT vs. S. K. Tekriwal (361 ITR 43) Calcutta High Court*** and Hon'ble Delhi High Court in the case of ***PCIT vs. Future First Info Services (P.) Ltd. [2022] 447 ITR 299 (Delhi High Court),*** wherein it was held that Section 40(a)(ia) of the Act provided for two limbs, where the assessee will have to deduct tax and has to pay the same to the government and further in short fall in deduction if any, then the assessee can held 'assessee in default' u/s. 201 but no disallowance u/s. 40(a)(ia) of the Act can be made on such circumstances. The same has been reiterated by the Hon'ble High Court of Delhi in the case of ***Future First Info Service Pvt. Ltd. (supra)***.

61. From the above observations, we find no infirmity in the order of the ld. CIT(A) in deleting the disallowance u/s. 40(a)(ia) of the Act on short fall in deduction of tax. We therefore dismiss the ground no. 5 raised by the revenue.

62. In the result, the ground no. 5 raised by the revenue is hereby dismissed.

63. Ground no. 6 pertains to disallowance of lease charges paid to Quipo Telecom Infrastructure Ltd. (QTIN) during the year under consideration, where the assessee is said to have transferred 747 sites in A.Y. 2008-09 and 128 sites in A.Y. 2009-10 to one

SREI Infrastructure Pvt. Ltd. which had in turn transferred this assets to QTIN and these towers were leased back by the SREI Infrastructure to the assessee vide an agreement dated 31.12.2007 and 01.01.2008 between the assessee and SREI and assessee and QTIN, respectively. The assessee had claimed lease rent of Rs. 52.52 crores as revenue expenditure. The ld. AO disallowed the same as being a colourable device adopted by the assessee as the same has not been well substantiated by the assessee with supporting evidence. In an appeal before the ld. CIT(A), the same was allowed by relying on his own order for A.Y. 2012-13, where it was held that the sale of lease back transaction entered into by the assessee was duly registered with department of telecommunication and hence cannot be termed as a non-genuine transaction. The ld.AR for the assessee had relied on the decision of the Hon'ble Gauhati High Court in the case of ***CIT vs. George Williamson (Assam) Ltd. [2004] 265 ITR 626 (Gauhati High Court)*** and in the case of Delhi High Court in ***CIT vs. Cosmo Films Ltd. [2011] 338 ITR 266 (Delhi High Court)***, wherein it was held that the assessee can manage its tax affairs to attract a lesser tax as permitted by law and where the assets have been sold and leased back the same cannot be categorized as a colourable device, where the assessee has got substantial benefit by selling and leasing. The relevant extract of the said decision of the Hon'ble Gauhati High Court in the case of ***George Williamson (Assam) Ltd. (supra)*** is cited herein under for ease of reference:

> ***"11.*** *The Supreme Court has approved a decision of the Madras High Court in M.V. Valliappan v. ITO [1988] 170 ITR 2381, where the Madras High Court has held that Azadi Bachao Andolan's case (supra) [at page 758] : "the decisions in McDowell [1985] 154 ITR 148 (SC) cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavour."*

12. *In view of the aforesaid legal principles laid down by the Supreme Court, it is clear that the principles laid down by Duke of Westminster's case (supra) are still applicable in this country and it is open for assessees to arrange their affairs in such a manner that it would not attract the tax liabilities, so far, it can be managed within the permissible limit of law. The assessees can very well manage their tax affairs so that the tax attracted in the transaction is less and would not fall outside the four corners of the law applicable at the relevant time. The tax management is permissible, if the law authorises so.*

13. *In the present case, the first appellate authority and the Tribunal have held that the transactions were genuine and validly entered into and that the assets were sold and leased back purely on business considerations and there is no question of any colourable device because in the said transaction, the assessee-company has got a substantial benefit by selling its plant and machinery to the leasing company and the advantage, which the assessee-company has acquired, cannot be considered to be artificial or dubious and there was no motive on the part of the assessees to defraud the Revenue. The object of the transaction was to augment funds which were invested by the assessees in the Unit Trust of India. From the aforesaid finding it is apparent to us that the assessees entered into transactions with the parties to sell and lease back the assets, on the sale price which was determined by an independent valuer. This has been done to minimize the tax liability, which in our opinion, is permissible under the law. In the aforesaid view, we do not find any infirmity or illegality in the impugned orders passed by the Appellate Tribunal and the appeals are dismissed."*

64. From the above observation, it is evident that the Hon'ble High Courts have approved of the transactions of the assessee in selling and leasing out the same property to be a genuine transaction and as part of the tax planning adopted by the assessee to mitigate the tax liability. As far as the revenue has not established the same to be a fraudulent transaction for the purpose of the evading tax by cogent evidence, we deem it fit to hold the transaction to be genuine and permissible in law. We therefore deem it fit to hold that there is no infirmity in the order of the ld. CIT(A) and thereby dismiss ground no. 6 raised by the revenue.

65. In the result, the ground no. 6 raised by the revenue is hereby dismissed.

66. In the result, the appeal filed by the revenue is hereby partly allowed.

ITA No. 5765/Mum/2017 (Assessment Year: 2012-13)

67. This appeal has been filed by the assessee challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2012-13.

68. The assessee has raised the following grounds of appeal:

"Ground No. 1: Directing the Assessing Officer ("the AO") to verify the claim of deduction of discount pertaining to earlier years on payment basis:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in directing the AO to verify the claim of deduction of discount disallowed in earlier years u/s 40(a)(ia) of the Act which ought to be allowed in the year under appeal on payment basis.

Ground No. II: Disallowance of year end provision of commission amounting to Rs. 9,94,45,056/- u/s 40(a)(ia) of the Act for non-deduction of taxes:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the year-end provision for commission of Rs.9,94,45,056/- u/s. 40(a)(ia) of the Act on the alleged ground that the Appellant has not deducted tax at source disregarding the fact that the payees were not identifiable at the time of making the provision.

Ground No. III: Violation of principles of natural justice:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing depreciation claimed by the Appellant on right to use 3G Spectrum on the ground other than that alleged by the AO without providing an opportunity to the Appellant to rebut the same.

Without prejudice to Ground No. III,

Ground No. IV: Disallowance of depreciation claimed u/s. 32(1) of the Act on right to use 3G Spectrum amounting to Rs. 5,16,33,50,000/-

On the facts and in the circumstances of the case, the Hon'ble CIT(A) erred in disallowing

depreciation amounting to Rs. 5,16,33,50,000/- claimed u/s 32(1) on the right to use 3G Spectrum by holding that the provisions of section 35ABA of the Act are retrospective in nature and thus charges paid to acquire right to use spectrum is to be amortized over the period of validity of the right to use spectrum and thereby allowing only 1/20th of the expenditure incurred.

Without prejudice to Ground No. III and IV,

Ground No. V: Not allowing the entire 3G Spectrum cost u/s 37(1) of the Act:

On the facts and in the circumstances of the case, the Hon'ble CIT(A), having rejected the Appellant's contention that the expense is a capital expenditure eligible for depreciation u/s 32, erred in not allowing the entire 3G Spectrum cost as a deduction u/s 37(1) of the Act."

69. Ground no. 1 pertains to the disallowance of claim of deduction of discount pertaining to earlier years on payment basis. As this ground is identical as ground no. 1 of ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

70. In the result, the ground no. 1 raised by the assessee is hereby allowed for statistical purpose.

71. Ground no. 2 pertains to the disallowance of year end provision of commission amounting to Rs. 9,94,45,056/- u/s 40(a)(ia) of the Act for non-deduction of taxes. As this ground is identical as ground no. 5 of ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

72. In the result, ground no. 2 raised by the assessee is hereby allowed for statistical purpose.

73. Ground no. 3 pertains to the disallowance of depreciation claimed by the assessee on right to use 3G Spectrum on the ground that the ld. AO has not provided the assessee an opportunity to rebut the same and without prejudice the assessee has claimed depreciation u/s. 32(1) of the Act on right to use 3G Spectrum amounting to Rs. 516,33,50,000/- by holding that the provision of Section 35ABA of the Act are retrospective in nature and the charges paid to acquire right to use 3G Spectrum has to be amortized over the period of right to use 3G Spectrum, thereby allowing only 1/20th

of the expenditure incurred. The assessee without prejudice prayed that such expenses ae capital expenditure eligible for depreciation u/s. 32 of the Act, if the same is not allowed as deduction u/s.37(1) of the Act.

74. The facts of the said ground are that the assessee during F.Y. 2010-11 was a successful bidder in the 3G Spectrum auction for 11 telecom circles amounting to Rs. 5768.59 crores for which during the year under consideration, the assessee has capitalized Rs. 2080,49,00,000/- in its balance sheet and tax audit report. The ld. AO observed that in the allotment letter issued by the DOT, the right to use 3G Spectrum was for the period of 20 years for which the ld. AO sought for details from the assessee as to why the said expenses should not be amortized over a period of 20 years and the depreciation claimed by the assessee ought to be disallowed with respect to intangible assets. The assessee contended that under the New Telecom Policy, 1999, cellular licenses were bifurcated from Spectrum, wherein earlier it was to pay license fee fixed for a license period of 10 years, where no separate charges for use of Spectrum was applicable. The assessee further contended that as per clause 3.6 of the notice inviting application to allow the right to use specified frequencies by means of auction, if the license expired before the duration of 3G Spectrum, the license pertaining only to 3G Spectrum would be extended to 20 years from the date of allotment of 3G Spectrum. Further, the assessee contended that the depreciation on such intangible assets was claimed at 25%, where bid price paid for the allotted Spectrum was one time cost and has to be capitalized as intangible assets as block of intangible assets from A.Y. 2010-11 onwards which was alleged to have been accepted by the revenue. The assessee further contended that as the spectrum was allotted for 20 years, the same was intangible asset eligible for

depreciation u/s. 32 of the Act, irrespective of the period for which it was owned by the assessee. The assessee without prejudice claimed the same to be revenue expenditure u/s. 37, if depreciation was disallowed. The assessee also relied on the various decision in support of its contention.

75. The ld. AO rejected the assessee's contentions on the ground that the assessee has paid one time spectrum fees for usage of the same for a period of 20 years for the reason of earning revenue for the Government and also for stability of business of the assessee and hence, the same cannot be capital asset which requires to be capitalized under the block of intangible assets. The ld. AO further held that the said expenditure has to be spread over a period of 20 years as it is in the nature of prepaid expenses for which only 1/20th of such expenditure ought to be allowed in the first year of obtaining of license. The ld. AO relied on the decision of the Hon'ble Bombay High Court in the case of ***CIT vs. Reliance Communication Infrastructure Ltd. (2012) 79 DTR 198***. The income of the assessee spread over a period of 20 years and similar treatment has to be given in case of expenditure also as in the assessee's case thereby, disallowing Rs. 1976,46,55,000/- after allowing Rs. 1,04,02,45,000/- for the year under consideration.

76. Aggrieved the assessee was in appeal before the first appellate authority, who had dismissed this ground of appeal raised by the assessee by relying on the provisions of Section 35ABA which provides for the expenditure for obtaining right to use spectrum for telecommunication services, were the same is in the nature of the capital expenditure which is allowed deduction for each of the relevant previous years equal to the appropriate fraction of the amount of such expenditure. It had also substituted the word 'license' to the word 'spectrum'. The ld. CIT(A) further held that the said provision

though was inserted w.e.f. 01.04.2017 was applicable retrospectively as the same was a clarificatory amendment. The ld. CIT(A) relied on the decision of the Hon'ble Apex Court in the case of ***CIT Bombay vs. Poddar Cement (P.) Ltd. (1997) 5 SCC 482*** and ***CIT vs. Gold Coin Health Food Pvt. Ltd. 304 ITR 308 (SC)*** and ***Zile Singh vs. State of Haryana [2004] 8 SCC 1***, thereby holding that the amendment to the provision was retrospective and upheld the action of the ld. AO in disallowing the depreciation claimed on spectrum and amortizing the same.

77. Aggrieved by the said order, the assessee is in appeal before us.

78. It is observed that the Tribunal in assessee's case for earlier years has been consistently allowing the depreciation claimed by the assessee on right to use 3G spectrum u/s. 32 of the Act. Further, the revenue's contention that after insertion of Section 35ABA, the assessee was not entitled to claim deprecation u/s. 32 of the Act but rather the same has to be amortized over the license period as per the specific provision which was inserted by Finance Act, 2016 w.e.f. 01.04.2017 on expenditure for obtaining right to use 3G Spectrum for telecommunication services which according to the revenue is applicable retrospectively.

79. We do not find force in the argument of the revenue that the said provision applies retrospectively for the reason that the explanatory notes to Finance Act, 2016 specifically states that this amendment shall take effect from 1st April, 2017 and will accordingly apply from A.Y. 2017-18 and subsequent assessment years. Further, it is observed that the new provision was inserted for the purpose of avoiding any future litigation as to whether the spectrum is intangible asset and the spectrum fees paid is eligible for depreciation u/s. 32 of the Act or whether the same is in the nature of license

to operate telecommunication business and eligible for deduction u/s. 35ABB of the Act. It is therefore evident that the insertion of the said provision was a conscious decision taken by the legislature in inserting the new provision which is to take effect prospectively were there is no express language which mandates that the provision is to apply retrospectively. Wherever the amendment was to be applicable retrospectively, there will be a specific mention of the same either in the Finance Act or by CBDT circulars to that effect. The insertion of the Section 35ABA of the Act is a substantive provision and not merely clarificatory and the same is to be construed prospectively w.e.f. 01.04.2017. The same cannot be treated as clarificatory and given retrospective effect. We therefore by taking a consistent view, allow the depreciation claimed by the assessee on the right to use 3G spectrum u/s. 32 of the Act and allow ground no. 3 and 4.

80. As ground no. 3 and 4 raised by the assessee has been allowed, ground no. 5 raised by the assessee become infructuous.

81. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

ITA No. 5945/Mum/2017 (Assessment Year: 2012-13)

82. This appeal has been filed by the revenue challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2012-13.

83. The revenue has raised the following grounds of appeal:

1. *"Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in disallowing the discount of Rs 764.02.18.208/- allowed to the distributors u/s 40(4)(la) of the Act on the alleged ground that such discount was, in reality, "commission from which the appellant had failed to deduct tax at source u/s 194H of the Act"*
2. *Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in deleting the disallowance made by the AO of Rs 49.28.213/-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 deleting the disallowance of revenue share license fees ("RSLF") amounting to Rs. 1462,97,07,807/- paid to the Department of Telecommunications ("the DOT")*
4. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Lease Charges of Rs 43.06,34,844/- paid to Quipo Telecom Infrastructure Ltd."*
5. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs 3,58,75,373/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESOP")*
6. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was correct in holding that payments made for roaming services is not in the nature of FTS and deleting the disallowance made by the AP u/s 40(a)(ia) without appreciating the fact that such services necessarily involve human intervention and therefore such payments attract provisions of section 194J of the Act."*
7. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was right deciding the issue in favor of assessee ignoring Hon'ble Kerala High Court decision in the case of CIT vs P.V.S. Memorial Hospital Ltd. (60 taxmann.com 69] wherein it was contended that section 40(a)(ia) was applicable in case of short deductions also."*
8. *The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of case."*
9. *The Appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."*

84. Ground no. 1 pertains to the disallowance of net discount given to the prepaid card distributors u/s. 40(a)(ia) of the Act for non-deduction of tax u/s. 194H of the Act. As the facts of this ground is identical to that of ground no. 2 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

85. In the result, the ground no. 1 raised by the revenue is hereby dismissed.

86. Ground no. 2 pertains to the disallowance u/s. 14A of the Act r.w.r. 8D of the Income Tax Rules, 1962 amounting to Rs. 49,28,213/-. As the facts of this ground is identical

to that of ground no. 1 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

87. In the result, the ground no. 2 raised by the revenue is hereby dismissed.

88. Ground no. 3 pertains to the disallowance of Revenue Share License Fees to the DOT amounting to Rs. 14,62,97,07,807/-. As the facts of this ground is identical to that of ground no. 4 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

89. In the result, the ground no. 3 raised by the revenue is hereby allowed.

90. Ground no. 4 pertains to the disallowance of lease charges paid to Quipo Telecom Infrastructure Ltd. amounting to Rs. 43,06,34,844/-. As the facts of this ground is identical to that of ground no. 6 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

91. In the result, the ground no. 4 raised by the revenue is hereby dismissed.

92. Ground no. 5 pertains to the disallowance of amount debited to the profit and loss account towards amortization of the intrinsic value of shares under the employee stock option plan (ESOP). As the facts of this ground is identical to that of ground no. 3 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

93. In the result, the ground no. 5 raised by the revenue is hereby dismissed.

94. Ground no. 6 pertains to the disallowance of roaming charges paid to telecom operators u/s. 40(a)(ia) of the Act for non-deduction of taxes u/s. 194J amounting to Rs. 88,21,94,192/-. As the facts of this ground is identical to that of ground no. 2 in ITA

No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

95. In the result, the ground no. 6 raised by the revenue is hereby allowed.

96. Ground no. 7 pertains to the disallowance u/s. 40(a)(ia) of the Act for short deduction of taxes. As the facts of this ground is identical to that of ground no. 5 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

97. In the result, the ground no. 7 raised by the revenue is hereby dismissed.

98. In the result, the appeal filed by the revenue is partly allowed.

ITA No. 1776/Mum/2018 (Assessment Year: 2013-14)

99. This appeal has been filed by the assessee challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2013-14.

100. The assessee has raised the following grounds of appeal:

Ground No. I: Disallowance of roaming charges paid/payable to the Foreign Telecom Operators (the FTO's') amounting to Rs. 27,73,48.862/-/s. 40(a)(i) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of roaming charges amounting to Rs. 27,73,48,862/- on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in not following his own order of the other years in absence of any change in facts.

3. He further erred in holding that the international roaming charges fall within the ambit of royalty as per the Double Tax Avoidance Agreements ('DTAAs') without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAS.

Ground No. II: Disallowance of interconnection charges paid to the FTOs amounting to Rs. 163,60,00,000/- u/s. 40(a)(i) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in enhancing the assessment made by the AO and additionally disallowing the international interconnection charges paid to the FTOs amounting to Rs. 163,60,00,000/- u/s. 40(a)(i) of the Act on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in holding that the international interconnection charges fall within the ambit of royalty as per the DTAAs without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAs.

Ground No. III: Disallowance of year end provision of commission amounting to Rs.5.55,86,818/-u/s. 40(a)(ia) of the Act for non-deduction of taxes:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the year-end provision for commission of Rs.5,55,86,818/-u/s. 40(a)(ia) of the Act on the alleged ground that the Appellant has not deducted tax at source disregarding the fact that the payees were not identifiable at the time of making the provision.

101. Ground no. 1 pertains to the disallowance of roaming charges paid/payable to Foreign Telecom Operators (FTO) u/s. 40(a)(ia) of the Act for non-deduction of taxes. As the facts of this ground is identical to that of ground no. 3 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

102. In the result, the ground no. 1 raised by the assessee is hereby allowed.

103. Ground no. 2 pertains to the disallowance of interconnection charges paid to FTOs u/s. 40(a)(ia) of the Act for non-deduction of taxes amounting to Rs. 1,63,60,00,000/-. As the facts of this ground is identical to that of ground no. 4 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

104. In the result, the ground no. 2 raised by the assessee is hereby allowed.

105. Ground no. 3 pertains to the disallowance of year end provisions u/s. 40(a)(ia) of the Act for non-deduction of Rs. 5,55,86,818/-. As the facts of this ground is identical to that of ground no. 5 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

106. In the result, the ground no. 3 raised by the assessee is hereby allowed for statistical purpose.

107. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 2179/Mum/2018 (Assessment Year: 2013-14)

108. This appeal has been filed by the assessee challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2013-14.

109. The revenue has raised the following grounds of appeal:

1. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in disallowing the discount of Rs 532,21,15,067/- allowed to the 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."*
2. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.3,19,290/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESOP")*
3. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance made by the AO of Rs 28,03,66,927/- u/s 14A of the Act r.w.r Bd of the Rules towards expenses incurred for making tax-free investment."*
4. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of revenue share license fees ("RSLF") amounting to Rs. 1348,27,08,897/- paid to the Department of Telecommunications ("the DOT").*
5. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in holding that section 40(a)(ia) was not applicable in cases of short deduction of tax, ignoring Hon'ble Kerala High Court decision in the case of CIT vs P.V.S. Memorial Hospital Ltd. [60 taxmann.com 69] which ruled to the contrary and in favour of revenue."*
6. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Lease Charges of Rs.51,33,42,392/- paid to Quipo Telecom Infrastructure Ltd."*

7. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs. 2,33,12,548/- being write back of creditors claimed by assessee to be for capital goods though not substantiated during assessment proceedings nor before CIT(A)."*
8. *"The Appellant prays that the order of the CIT(A) on the above ground be set aside and that of the assessing be restored."*
9. *"The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

110. Ground no. 1 pertains to the disallowance of net discount given to the prepaid card distributors ("Distributors") u/s. 40(a)(ia) of the Act for non-deduction of Tax u/s. 194H of the Act amounting to Rs. 5,32,21,15,067/-. As the facts of this ground is identical to that of ground no. 2 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

111. In the result, the ground no. 1 raised by the revenue is hereby dismissed.

112. Ground no. 2 pertains to the disallowance of amount debited to the profit and loss account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan (ESOP) amounting to Rs. 3,19,290/-. As the facts of this ground is identical to that of ground no. 3 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

113. In the result, the ground no. 2 raised by the revenue is hereby dismissed.

114. Ground no. 3 pertains to the disallowance u/s. 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 amounting to Rs. 28,03,66,927/-. As the facts of this ground is identical to that of ground no. 1 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

115. In the result, the ground no. 3 raised by the revenue is hereby dismissed.

116. Ground no. 4 pertains to the disallowance of revenue share license fees paid to the DOT amounting to Rs. 11,07,64,42,826/-. As the facts of this ground is identical to that

of ground no. 4 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

117. In the result, the ground no. 4 raised by the revenue is hereby allowed.

118. Ground no. 5 pertains to the disallowance u/s. 40(a)(ia) of the Act for short deduction of Taxes amounting to Rs. 24,12,857/-. As the facts of this ground is identical to that of ground no. 5 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

119. In the result, the ground no. 5 raised by the revenue is hereby dismissed.

120. Ground no. 6 pertains to the disallowance of lease charges paid to Quipo Telecom Infrastructure Ltd. amounting to Rs. 51,33,42,392/-. As the facts of this ground is identical to that of ground no. 6 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

121. In the result, the ground no. 6 raised by the revenue is hereby dismissed.

122. Ground no. 7 pertains to the addition on account of write back of creditors for capital goods amounting to Rs. 2,33,12,548/-.

123. It is observed that the assessee had written back Rs. 2,33,12,548/- on account of creditors for capital goods which the assessee claimed to be not a trading liability and has not claimed the same as expenses in any earlier assessment years. The assessee contends that the same is a capital receipt and therefore was written back. The ld.AO held the same to be taxable u/s. 41(1) of the Act for the reason that the assessee has failed to respond to the show cause notice issued on the same.

124. In an appeal before the ld. CIT(A) it was held to be in the nature of capital receipt and not claimed as expenses by the assessee and further directed the ld. AO to delete disallowance as the same being a capital write back not chargeable to tax.

125. Aggrieved the revenue is in appeal before us, challenging the same.

126. The learned Authorised Representative ('ld. AR' for short) for the assessee contended that Section 41(1) of the Act can be invoked only when any allowance or deduction has been granted in any assessment year pertaining to loss, expenditure or trading liability which subsequently has been received by the assessee in cash or in any other manner, any amount pertaining to such trading liability by way of remission or cessation of such liability. The ld. AR further stated that in the present case, the assessee has written back on account creditors for capital goods which is not akin to remission of trading liability and had relied on the following decisions:

a. *CIT vs. Mahindra and Mahindra Ltd. [2003] 261 ITR 501 (Bom HC)*
b. *CIT vs. Compaq Electric Ltd. [2019] 101 taxmann.com 400 (SC)*
c. *CIT vs. Xylon Holdings (P.) Ltd. [2012] 26 taxmann.com 333 (Bombay HC)*
d. *DCIT vs. Ramani Exports [2023] 153 taxmann.com 465 (Mumbai – Trib.)*

127. On perusal of the above decisions, it is now settled proposition of law that when there has been no deduction granted to the assessee in earlier years, Section 41(1) of the cannot be invoked. Further, in the decision of the Hon'ble Apex Court in the case of ***Mahindra and Mahindra [2018] 93 taxmann.com 32 (SC)***, it was held that Section 41(1) of the Act is specifically for remission of trading liabilities and waiver of loan tantamount to cessation of liability which is other than trading liability. It had further reiterated that when deduction u/s. 36(1)(iii) of the Act has not been claimed in any

previous year and further in case of mere waiver of loan, Section 41(1) would not be applicable as the same does not amount to trading liability.

128. By respectfully following the said proposition, we find force in the argument of the ld. AR and are hence inclined to dismiss this ground of appeal raised by the revenue.

129. In the result, the ground no. 7 raised by the revenue is hereby dismissed.

130. In the result, the appeal filed by the revenue is partly allowed.

ITA No. 1777/Mum/2018; (Assessment Year: 2014-15)

131. This appeal has been filed by the assessee challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2014-15.

132. The assessee has raised the following grounds of appeal:

ITA No. 1777/Mum/2018 (A.Y. 2014-15)

Ground No. I: Disallowance of roaming charges paid/pavable to the Foreign Telecom Operators (the FTO's") amounting to Rs. 27.39,18,420/-u/s. 40(a)(i) of the Act for non-deduction of taxes;

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of roaming charges amounting to Rs. 27,39,18,420/- on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in not following his own order of the other years in absence of any change in facts.

3. He further erred in holding that the international roaming charges fall within the ambit of royalty as per the Double Tax Avoidance Agreements (DTAAs) without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAA

Ground No. II: Disallowance of interconnection charges paid to the FTOs amounting to Rs. 170,70,00,000/-u/s, 40(a)(ia) of the Act for non-deduction of taxes:

1. On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in enhancing the assessment made by the AO and additionally disallowing the international

interconnection charges paid to the FTOs amounting to Rs. 170,70,00,000/- u/s. 40(a)(i) of the Act on the alleged ground that the said payment is in the nature of Royalty u/s. 9(1)(vi) of the Act.

2. He further erred in holding that the international interconnection charges fall within the ambit of royalty as per the DTAAs without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAS.

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

133. Ground no. 1 pertains to the disallowance of roaming charges paid/payable to Foreign Telecom Operators (FTOs) u/s. 40(a)(i) of the Act for non deduction of taxes amounting to Rs. 27,39,18,420/-. As the facts of this ground is identical to that of ground no. 3 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

134. In the result, the ground no. 1 raised by the assessee is hereby allowed.

135. Ground no. 2 pertains to the Disallowance of interconnection charges paid to the FTOs amounting to Rs. 170,70,00,000/-u/s, 40(a)(ia) of the Act for non-deduction of taxes. As the facts of this ground is identical to that of ground no. 4 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

136. In the result, the ground no. 2 raised by the assessee is hereby allowed.

137. In the result, the appeal filed by the assessee is allowed.

ITA No. 2180/Mum/2018(Assessment Year: 2014-15)

138. This appeal has been filed by the revenue challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2014-15.

139. The revenue has raised the following grounds of appeal:

1 "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in disallowing the discount of Rs. 256.27.13.237/- allowed to the 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."

2 Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the disallowance of Rs. 4,30,74,601/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESOP")

3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the disallowance made by the AO of Rs. 10,61,81,123/- u/s 14A of the Act r.w.r 80 of the Rules towards expenses incurred for making tax-free investment."

4 "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting disallowance of revenue share license fees (RSLF") amounting to Rs. 1507,61.42.241/-paid to the Department of Telecommunications ("the DOT")

5 "Whether on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the disallowance of Lease Charges of Rs. 50,57,67,342/- paid to Quipo Telecom Infrastructure Ltd.

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

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

140. Ground no. 1 pertains to the disallowing the discount of Rs. 256.27.13.237/- allowed to the 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. As the facts of this ground is identical to that of ground no. 2 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

141. In the result, the ground no. 1 raised by the revenue is hereby dismissed.

142. Ground no. 2 pertains to the disallowance of Rs. 4,30,74,601/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the

Employee Stock Option Plan ("ESOP"). As the facts of this ground is identical to that of ground no. 3 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

143. In the result, the ground no. 2 raised by the revenue is hereby dismissed.

144. Ground no. 3 pertains to the disallowance made by the AO of Rs. 10,61,81,123/- u/s 14A of the Act r.w.r. 80 of the Rules towards expenses incurred for making tax-free investment. As the facts of this ground is identical to that of ground no. 1 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

145. In the result, the ground no. 3 raised by the revenue is hereby dismissed.

146. Ground no. 4 pertains to the disallowance of revenue share license fees (RSLF") amounting to Rs. 1507,61.42.241/-paid to the Department of Telecommunications ("the DOT"). As the facts of this ground is identical to that of ground no. 4 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

147. In the result, the ground no. 4 raised by the revenue is hereby allowed.

148. Ground no. 5 pertains to the disallowance of Lease Charges of Rs. 50,57,67,342/- paid to Quipo Telecom Infrastructure Ltd. As the facts of this ground is identical to that of ground no. 6 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

149. In the result, the ground no. 5 raised by the revenue is hereby dismissed.

150. In the result, the appeal filed by the revenue is partly allowed.

ITA No. 2150/Mum/2019 (Assessment Year: 2015-16)

151. This appeal has been filed by the assessee challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2015-16.

152. The assessee has raised the following grounds of appeal:

Ground No. 1: Disallowance of International Roaming Charges paid/payable to the Foreign Telecom Operators (the FTO's') amounting to Rs. 24,95,66,459/- under Section 40(a)(i) of the Act for non-deduction of taxes:

1 On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of International roaming charges amounting to Rs. 24,95,66,459/- on the alleged ground that the said payment is in the nature of Royalty under the normal provisions of the Act.

2 He further erred in holding that the international roaming charges fall within the ambit of royalty as per the Double Tax Avoidance Agreements (DTAAs') without specifically examining the relevant DTAAs and also in holding that amendments made in the Act can be read into the DTAAS.

Ground No. II: Disallowance of interconnection charges paid to the FTOs amounting to Rs. 148,79,23,288/- under Section 40(a)(i) of the Act for non-deduction of taxes:

1 On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the AO with respect to the international interconnection charges paid to the FTOs amounting to Rs. 148,79,23,288/- u/s. 40(a)(i) of the Act on the alleged ground that the said payment is in the nature of Royalty under the normal provisions of the Act.

2 He further erred in holding that the international interconnection charges fall within the ambit of royalty as per the DTAAs without specifically examining the relevant DTAAS and also in holding that amendments made in the Act can be read into the DTAAS.

Ground No. III: Disallowance of year end provision of commission amounting to Rs.2.83,40,573/-u/s. 40(a)(ia) of the Act for non-deduction of taxes:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the year-end provision for commission of Rs.2,83,40,573/- u/s. 40(a)(ia) of the Act on the alleged ground that the Appellant has not deducted tax at source disregarding the fact that the payees were not identifiable at the time of making the provision.

Without Prejudice to Ground No. III,

Ground No. IV: Disallowance of entire year end provision of commission made on account of non-deduction of tax at source:

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the AO of disallowing the entire year-end provision for commission of Rs.2,83,40,573/-u/s. 40(a)(ia) of the Act on the ground that the Appellant has not deducted tax at source as against only thirty percent disallowable in accordance with the amended provisions of Section 40(a)(ia) of the Act.

Ground No. V: Disallowance of Director's Commission amounting to Rs. 10,00,00,000/- as prior period expenses:

On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance made by the AO in respect of commission amounting to Rs. 10,00,00,000/- paid to non-executive directors for FY 2013-14 on the alleged ground that the same is a prior period expense without appreciating the fact that the liability crystallized for the first time only in the year under appeal.

Without Prejudice to the outcome of the appeal filed by the Department for earlier years, Ground No. VI: Allowance of Discount amounting to Rs. 327,15,72,342/- pertaining to other vears against which payment of TDS under protest is made in the captioned year:

The Appellant prays that the discount amounting to Rs. 327,15,72,342/- pertaining to other years against which payment of TDS under protest is made in the captioned year be allowed in the year under appeal on payment basis as per the provisions of Section 40(a)(ia) of the Act.

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

153. Ground no. 1 pertains to the Disallowance of International Roaming Charges paid/payable to the Foreign Telecom Operators (the FTO's') amounting to Rs. 24,95,66,459/- under Section 40(a)(i) of the Act for non-deduction of taxes. As the facts of this ground is identical to that of ground no. 3 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

154. In the result, the ground no. 1 raised by the assessee is hereby allowed.

155. Ground no. 2 pertains to the Disallowance of interconnection charges paid to the FTOs amounting to Rs. 148,79,23,288/- under Section 40(a)(i) of the Act for non-deduction of taxes. As the facts of this ground is identical to that of ground no. 4 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

156. In the result, the ground no. 2 raised by the assessee is hereby allowed.

157. Ground no. 3 pertains to the Disallowance of year end provision of commission amounting to Rs.2.83,40,573/-u/s. 40(a)(ia) of the Act for non-deduction of taxes. As the facts of this ground is identical to that of ground no. 5 in ITA No. 1775/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

158. In the result, the ground no. 3 raised by the assessee is hereby allowed for statistical purpose.

159. Ground no. 4 pertains to the Disallowance of entire year end provision of commission made on account of non-deduction of tax at source. As we have decided ground no. 3 without prejudice ground raised by the assessee become infructuous and had hereby dismissed.

160. In the result, the ground no. 4 raised by the assessee is hereby dismissed.

161. Ground no. 5 pertains to the Disallowance of Director's Commission amounting to Rs. 10,00,00,000/- as prior period expenses.

162. It is observed that the assessee has claimed Director’s commission in its profit and loss account under the head ‘administration and other expenses’ amounting to Rs. 25 crores out of which Rs. 10 crores relates to previous year. The assessee contended that

it had claimed deduction of commission of Rs. 10 crores to non-executive directors pursuant to the resolution of the shareholders at the annual general meeting held on 26.09.2014, where the said commission was distributed amongst the non-executive directors based on their attendance and contribution at the Board and various other factors and the same is payable to the directors on permissible limit as per Companies Act, 2013 subject to the net profit earned by the company and passing of the resolution by the shareholders which takes place only after the close of the financial year, thereby the liability to pay commission has crystalized only during the year under consideration. The ld. AO not being convinced by the assessee's submission for the reason that the assessee had been following mercantile system of accounting in which income and expenses had to be booked in the year to which it relates and accrues, thereby disallowed Rs. 10 crores towards the Director's commission as being expenses pertaining to earlier years which is to be disallowed as prior period expenses.

163. Aggrieved the assessee was in appeal before the first appellate authority, who then upheld the disallowance made by the ld. AO.

164. The assessee is in appeal before us, challenging the impugned disallowance.

165. The ld. AR for the assessee contended that the claim for prior period expenses are to be allowed during the relevant year in which it was crystalized inspite of the fact that the assessee was following Mercantile System of Accounting. The ld. AR extensively relied on the decision of the Hon'ble Jurisdictional Bombay High Court in the case of ***Mahanagar Gas Ltd. vs. DCIT 221 Taxman 80 (Bombay HC)*** were this issue has been decided in favour of the assessee.

166. The ld. DR on the other hand controverted the said fact and relied on the orders of the lower authorities.

167. Having heard the rival submission and perused the materials available on record. The only question that requires adjudication is whether the payment of remuneration paid to the directors is to be allowed as prior period expenses when the same pertains to earlier year were the assessee was following Mercantile System of Accounting. It is observed that the liability to make payment in earlier years has crystalized only in the current assessment year subsequent to the special resolution passed in the annual general meeting were the shareholders approved the quantum of commission to be paid to the directors for A.Y. 2013-14 and that of subsequent years as per the statutory requirement of Section 197 of the Companies Act, 2013 and the Articles of Association (AOA), thereby making the liability crystalized only during the year under consideration. Identical issue has been decided by the Hon'ble Jurisdictional High Court in the case of ***Mahanagar Gas Ltd. (supra),*** wherein it has been held that prior period expenses which has crystalized during the impugned year was to be allowed by the revenue when the bills are received and payments made in the subsequent year. The Hon'ble High Court rejected the revenue's contention that in Mercantile System of Accounting, the assessee is entitled to claim expenditure in the year in which the service was received and not when the bills were received or payments were made. As it is now settled proposition of law, we deem it fit to allow this ground of appeal raised by the assessee in terms of the proposition laid down in ***Mahanagar Gas Ltd. (supra)***. By respectfully following the same, we hereby allow ground no. 5.

168. In the result, ground no. 5 raised by the assessee is hereby allowed.

169. Ground no. 6 pertains to the Allowance of Discount amounting to Rs. 327,15,72,342/- pertaining to other years against which payment of TDS under protest was made by the assessee in the impugned year. The assessee has raised without prejudice ground subject to the outcome of the appeal filed by the department for earlier years on allowing discount pertaining to other years against which payment of TDS under protest has been made during the relevant year.

170. The assessee's contention is that in view of the Hon'ble Apex Court decision in the case of ***Bharti Cellular Ltd. vs. ACIT [2024] 462 ITR 247 (SC)***, pertaining to ground no. 1 of revenue's appeal, the assessee was at no obligation to deduct TDS on prepaid discount and the disallowance u/s. 40(a)(ia) of the Act for earlier assessment year have been deleted. The assessee contends that this should not be consequentially allowed deduction u/s. 40(a)(ia) of the Act in the year in which the demand in respect of non-deduction of TDS was deposited under protest. As this is a consequential ground pertaining to the payment of TDS under protest, the ld. AO is directed to allow the claim of the assessee subject to verification and hence this ground requires no separate adjudication. This ground of appeal raised by the assessee is hereby allowed for statistical purpose.

171. In the result, ground no. 6 raised by the assessee is hereby allowed for statistical purpose.

172. In the result, the appeal filed by the assessee is hereby partly allowed.

ITA No. 2987/Mum/2019; (Assessment Year: 2015-16)

173. This appeal has been filed by the revenue challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), passed u/s.250 of the

Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2015-16.

174. The revenue has raised the following grounds of appeal:

1. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of Rs 281,26,55,660/-made u/s 40(a)(ia) of the Act, being the sum claimed as "discount" given to distributors, without appreciating that such sum was, in reality in the nature of "Commission" from which appellant failed to deduct tax deduct tax at source u/s 194H of the Act."

2. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of Rs 31,32,93,942/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESQP)"

3. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance made by the AO of Rs 10,89,47,837/-u/s 14A of the Act r.w.r.8D of the Rules towards expenses incurred for making tax-free investments,

4. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance of revenue share license fees ("RSLF") amounting to Rs 1758,98,89,914/- paid to the Department of Telecommunications ("DOT")."

5. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Lease Charges of Rs 48,41,53,610/- paid to Quipo Telecom Infrastructure Ltd."

2. The appellant prays that the order of the Ld.CIT (A) be set aside and the order of the AO be restored.

3. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary."

175. Ground no. 1 pertains to the disallowance of Rs 281,26,55,660/-made u/s 40(a)(ia) of the Act, being the sum claimed as "discount" given to distributors. As the facts of this ground is identical to that of ground no. 2 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

176. In the result, the ground no. 1 raised by the revenue is hereby dismissed.

177. Ground no. 2 pertains to the disallowance of Rs 31,32,93,942/- debited to the Profit & Loss Account towards amortization of the intrinsic value of shares under the Employee Stock Option Plan ("ESOP). As the facts of this ground is identical to that of ground no. 3 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

178. In the result, the ground no. 2 raised by the revenue is hereby dismissed.

179. Ground no. 3 pertains to the disallowance made by the AO of Rs 10,89,47,837/-u/s 14A of the Act r.w.r.8D of the Rules towards expenses incurred for making tax-free investments. As the facts of this ground is identical to that of ground no. 1 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

180. In the result, the ground no. 3 raised by the revenue is hereby dismissed.

181. Ground no. 4 pertains to the disallowance of revenue share license fees ("RSLF") amounting to Rs 1758,98,89,914/- paid to the Department of Telecommunications ("DOT"). As the facts of this ground is identical to that of ground no. 4 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

182. In the result, the ground no. 4 raised by the revenue is hereby allowed.

183. Ground no. 5 pertains to the disallowance of Lease Charges of Rs 48,41,53,610/- paid to Quipo Telecom Infrastructure Ltd. As the facts of this ground is identical to that of ground no. 6 in ITA No. 2178/Mum/2018 for A.Y. 2011-12, the finding given in the said appeal shall apply mutatis mutandis to this ground also.

184. In the result, the ground no. 5 raised by the revenue is hereby dismissed.

185. In the result, the appeal filed by the revenue is partly allowed.

Order pronounced in the open court on 24.07.2025

Sd/-	**Sd/-**
(RENU JAUHRI)	**(KAVITHA RAJAGOPAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated: 24.07.2025
Karishma J. Pawar (Stenographer)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai