

**INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI**

**SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER
SHRI OMKARESHWAR CHIDARA, ACCOUNTANT MEMBER**

**ITA No. 1073/Del/2015
(Assessment Year: 2010-2011)**

**Vodafone Digilink Limited
(Formerly Known As Vodafone Essar Digilink Limited)**

C-48, Okhla Industrial Area, Phase – II,
New Delhi – 110020. Maharashtra.
[PAN: AAACA3202D]

..... **Appellant**
Vs

**Deputy Commissioner of Income Tax
Circle 26(2), New Delhi**

..... **Respondent**

**ITA No. 1158/Del/2015
(Assessment Year: 2010-2011)**

**Deputy Commissioner of Income Tax
Circle 26(2), New Delhi**

..... **Appellant**

Vs

**Vodafone Digilink Limited
(Formerly Known As Vodafone Essar
Digilink Limited)**

C-48, Okhla Industrial Area, Phase – II,
New Delhi – 110020. Maharashtra.
[PAN: AAACA3202D]

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Ketan Ved & Shri Ninad Patade
For the Respondent/Department : Shri Pankaj Kumar

Date

Conclusion of hearing : 16.07.2025
Pronouncement of order : 14.10.2025

ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are Cross-Appeals pertaining to Assessment Year 2010-2011 arising from the Final Assessment Order, dated 27/01/2015, passed by the Assessing Officer under Section 144C(1) read with Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the

Act'], as per the directions issued by Dispute Resolution Panel –II, New Delhi [for short '**DRP'**], on 18/12/2014 under Section 144C(5) of the Act.

- 1.1. The facts in brief are that the Assessee-Company filed return of income for the Assessment Year 2010-2011 on 11/10/2010 which was processed under Section 143(1) of the Act. Subsequently, Assessee filed revised return of income on 29/03/2012, inter-alia, on account of demerger of passive infrastructure assets. In the revised return the Assessee declared losses of INR.2,19,52,80,641/- under normal provisions of the Act; and Book Losses of INR.11,91,28,65,401/- for the purpose of Minimum Alternative Tax. The case of the Assessee was selected for regular scrutiny. The Assessing Officer noted that the Assessee Company is engaged in the business of providing cellular mobile telephony services in telecom sector of Haryana, Rajasthan and Uttar Pradesh. Since, the Assessee had entered in the international transactions with its Associate Enterprises. A reference was made to the Transfer Pricing Officer-II(4), New Delhi (in short '**TPO'**) under Section 92CA(1) of the Act to determine the Arms Length Price (ALP) of the international transactions. The TPO passed the Order, dated 27/01/2014, under Section 92CA(3) of the Act proposing the following transfer pricing adjustments – (a) Upward adjustment of INR.27,20,28,430/- in relation to brand royalty payments and (b) Upward adjustment of INR.167,83,26,579/- in respect of reimbursement of advertisement & marketing expenses. Accordingly, the Assessing Officer passed the Draft Assessment Order, dated 27/01/2015, proposing Transfer Pricing Adjustments of INR.195,03,55,009/- along with other proposed corporate tax additions/disallowance. The Assessee filed objections before the DRP against the above Draft Assessment Order which were disposed off vide Order dated 18/12/2014, granting partial relief to the Assessee. Thereafter, the Assessing Officer passed the Final Assessment Order,

dated 27/01/2015, as per directions issued by the DRP vide Order dated 18/12/2014. Both, the Revenue and the Assessee are in appeal before us against the aforesaid Final Assessment Order.

ITA NO.1158/DEL/2015 (REVENUE'S APPEAL)

2. We would first take up the appeal preferred by Revenue. The Revenue has raised the six grounds of appeal in ITA. No.1158/Del/2015 which are taken up hereinafter in seriatim:

Ground No. I

3. The Ground No. I raised by the Revenue pertains the addition of INR.12,92,91,683/- [*i.e. 10% of commission expenses paid to the distributors*] proposed by the Assessing Officer and the same reads as under:

"I. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the ad-hoc addition of Rs.12,92,91,683/- i.e. 10% of commission expenses."

- 3.1. During the assessment proceedings, the Assessing Officer noted that the Assessee had claimed deduction of INR.12,93,91,683/- as commission expenses paid to distributors. On being called upon to furnish details of commission paid to top 25 distributors, the Assessee submitted such details. In support of the deduction, it was submitted that it was providing telecommunication services through two models viz., pre-paid model and post-paid model. The Assessee claimed to have paid commission to its agents only under the post-paid model for maintaining network of distributors over huge geographical area. The Assessee furnished Form No.16A in support of payment of commission to top 25 parties. However, the Assessing Officer, following the view taken in the preceding years, proposed disallowance of INR.12,93,91,683/- being 10% of the commission expense on *ad-hoc* basis.

- 3.2. The Assessee filed objection before the DRP against the aforesaid proposed disallowance. The DRP deleted the disallowance by relying upon the order passed by the Tribunal in the case of the Assessee for the Assessment Year 2009-2010 [**ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, titled Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. reported in [2018] 92 taxmann.com 234 (Delhi)**] and therefore, the Assessing Officer passed the Final Assessment Order without making any addition/disallowance in respect of the aforesaid commission expenses.
- 3.3. Being aggrieved, the Revenue is now in appeal before this Tribunal on this issue.
- 3.4. We have considered the rival submissions and have perused the material on record.
- 3.5. We find that the DRP had followed the decision of the Tribunal in the case of the Assessee for the immediate preceding Assessment Year 2009-2010 [ITA No.1950/Del/2014, dated 14/03/2018] (Supra). We have perused the aforesaid decision of the Tribunal and we find that in identical facts and circumstances, the ad-hoc disallowance of 10% of commission paid to agents proposed by the Assessing Officer for the Assessment Year 2009-2010 was not accepted by the DRP and the DRP had allowed the objection raised by the Assessee by following the decision of Tribunal in the case of Vodafone Mobile Services Ltd. (a sister concern of the Assessee) for the Assessment Years 2000-2001 to 2008-2009 whereby similar disallowances were deleted by the Tribunal. The relevant extract of the decision of the Co-ordinate Tribunal passed in the case of the Assessee for the Assessment Year 2009-2010 [ITA No.1950/Del/2014, dated 14/03/2018] (Supra) reads as under:

- "3. *First ground of the Revenue's appeal is against the deletion of addition of Rs. 14,23,29,976/- on account of commission.*
4. *Briefly stated, the facts of the case are that the assessee is engaged in the business of providing cellular mobile telephony services in the telecom circles of Rajasthan, Haryana and Uttar Pradesh (East). It claimed expenditure of Rs. 1,42,32,99,755/- as commission in its Profit & Loss Account. On being called upon to furnish details of commission paid to top 25 distributors, the assessee submitted such details. In support of the deduction, it was submitted that it was providing telecommunication services through two models viz., pre-paid model and post-paid model. The assessee claimed to have paid commission to its agents only under the post-paid model. The assessee furnished Form No.16As in support of payment of commission to top 25 parties. Following the view taken in the preceding years, the AO disallowed 10% of the commission expense on ad hoc basis, which resulted into disallowance amounting to Rs. 14,23,29,976/-. The assessee approached the Dispute Resolution Panel (DRP) against the addition in the draft order. The DRP got convinced with the assessee's contention and, relying on the order passed for the A.Ys. 2000-01 to 2008-09 deleting similar disallowance in the case of Vodafone Mobile Services Ltd., a sister concern of the assessee, deleted the addition. The Revenue is aggrieved against the deletion.*
5. *We have heard both the sides and perused the relevant material on record. It is observed that the assessee paid commission of Rs. 142.32 crore to the agents in the post-paid segment of its business. The assessee furnished necessary details and also Form no.16As in respect of major payments. Despite this, the AO chose to make an ad hoc disallowance of 10% of the total commission payment. It is observed that the Id. DRP deleted the addition by relying on the order passed for the A.Ys. 2000-01 to 2008-09 in the case of sister concern of the assessee. The Revenue assailed the said order passed by the first appellate authority before the Tribunal. In Dy. CIT v. Vodafone Mobile Services Ltd. [2017] 83 taxmann.com 7 (Delhi - Trib.), the Tribunal has upheld the deletion of addition. Relevant discussion has been made and the conclusion drawn by the Tribunal in para 9 of its order, in which deletion of such ad hoc disallowance has been upheld. No distinguishing factual feature of the assessee vis-a-vis its sister concern, namely, Vodafone Mobile Services Ltd. was placed on record by the Id. DR. Respectfully following the precedent, we uphold the impugned order in deleting the disallowance of commission amounting to Rs. 14.23 crore."*

- 3.6. The Revenue has failed to bring any material on record to distinguish the above decision of the Tribunal either on facts or in law. Therefore, respectfully following the above decision of the Tribunal, we decline to interfere with the directions issued by the DRP and the Final Assessment Order passed by the Assessing Officer on this issue. Accordingly, Ground No.I raised by the Revenue is dismissed.

Ground No. II

4. The Ground No. II raised by the Revenue reads as under:

"II. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the addition of Rs.1,40,33,05,390/- on account of capitalization of Royalty – WPC expenses payable to DOT."

- 4.1. By way of Ground No. II the Revenue has challenged the action of DRP to treat Royalty-WPC expenses of INR.1,40,33,05,390/- payable by the Assessee to Department of Telecom (DOT) as revenue expense and direction given by the DRP to the Assessing Officer to allow deduction for the same.
- 4.2. During the assessment proceedings the Assessing Officer noted that the Assessee had debited to the Profit & Loss Account Royalty-WPC Expenses amounting to INR.140,33,05,390/-. The Assessee was asked to furnish the relevant details and to justify claim for deduction of the aforesaid expenses. In response the Assessee, vide Reply dated 14/02/2014, stated that Royalty-WPC expenses booked in the Profit & Loss Account pertained to spectrum charges paid to DOT on quarterly basis as a percentage of revenue. Every telecom operator in India, in addition to the initial operator license fee, is required to pay GSM spectrum royalty for the usage of spectrum and microwave royalty for given microwave frequency usage on a regular basis. This fee, incurred by the Assessee, is in the nature of a regulatory payment which is necessarily to be incurred on a regular basis for the conduct

of its business. Such expenses were claimed as revenue expenditure by the Assessee for the Assessment Year 2010-2011. The Assessee further submitted that the charges cannot be said to be in the nature of a capital expenditure since no enduring benefit can be said to be accruing to the Assessee on this account. The said payments were in the form of a recurring charge being incurred by the Assessee on a quarterly basis. The government has levied this charge for the purpose of carrying on the telecom operations and not for acquisition of any right. The same accordingly acquired the character of revenue expenditure. The Assessee also contended that it is a well settled principle of law that periodic payments particularly those which are based on turnover of profit and which are not related to any predetermined lump sum amount are deductible as revenue expenditure, even if they are made for the initiation of a business or represent consideration for acquiring a capital asset or an advantage of enduring benefit to the business. The Assessee contended that this issue was squarely supported by the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Fascal Limited [017 DTR 306] 2009 whereby a decision of Delhi Bench of the Tribunal allowing deduction for royalty-WPC expenses as revenue expenditure was confirmed by the Hon'ble High Court. However, the Assessing Officer was not convinced with the submissions made by the Assessee and proceeded to make the disallowance holding as under:

"Thus, this royalty is being paid in order get the right to use the spectrum and is therefore clearly an expenditure of a capital nature. This right is in the nature of an intangible asset which would bring enduring benefit to the assessee and is therefore capitalized. After allowing depreciation @ 25% amounting to Rs.35,08,26,348/- the remaining amount of Rs.105,24,79,043/- (i.e. Rs.140,33,05,390/- - Rs.35,08,26,348/-) is hereby disallowed and added to the income of the assessee. In addition to this amount, a deduction amounting to Rs.19,68,66,057/- is allowed in respect of amounts similarly treated as capital

expenditure in earlier years. Though Hon'ble Delhi High Court has decided the issue in the favour of the assessee, the department is contesting this issue further. Accordingly, net addition of Rs.85,56,12,985/- is proposed to be disallowed."

(Emphasis Supplied)

Thus, the Assessing Officer proposed net disallowance of INR.85,56,12,985/- in respect of royalty-WPC expenses in the Draft Assessment Order.

- 4.3. Being aggrieved, the Assessee filed objections before the DRP which were allowed by the DRP. Deciding the issue in favour of the Assessee, the DRP concluded as under:

"8.1 The assessee has further submitted in this ground of objection (objection no. 5) that the AO has erred in proposing to capitalize 'Royalty -WPC expense of Rs. 140,33,05,390/- payable to DOT and in treating the same as a consideration for acquisition of intangible assets. The assessee has submitted that the license agreement entered into by the assessee with the DOT requires the assessee to pay Royalty-WPC charges for the usage of spectrum and microwave frequency on a quarterly basis, as a percentage adjusted gross revenue & the said fee is in the nature of a regulatory payment which is necessarily required to be incurred on a regular basis for the conduct of business. Further, this issue has been settled by the jurisdiction of Delhi High Court in the case of CIT Tax V Fascel Ltd. (Delhi) (14 DTR 306), where in the Hon'ble Court has held that such royalty WPC charges are to be allowed as revenue expenditure. The DRP in the immediately preceding year i.e. A.Y. 2009-10, has directed the AO to delete such disallowance.

8.2 Considering the submission of the assessee, the AD is directed to delete the said addition, on account of capitalization of Royalty - WPC expense, payable to the DOT." (Emphasis Supplied)

- 4.4. Accordingly, the Assessing Officer passed the Final Assessment Order without making any disallowance in respect of royalty – WPC expenses of INR.1,40,33,05,390/- payable by the Assessee to DOT.
- 4.5. Being aggrieved, the Revenue has preferred the present appeal before

the Tribunal challenging the Final Assessment Order passed by the Assessing Officer as per the directions of DRP whereby objections filed by the Assessee against the proposed disallowance of INR.85,56,12,985/- were allowed.

- 4.6. The Learned Departmental Representative submitted that the Royalty – WPC Expenses were capital in nature. Reliance was placed in this regard upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Bharti Hexacom Ltd. [2023] 155 taxmann.com 322 (SC), dated 16/10/2023.
- 4.7. Per Contra it was contended on behalf of the Assessee that in the case of Bharti Hexacom Ltd. (Supra), it was held by the Hon'ble Supreme Court that the entry fee as well as variable license fee payable to Department of Telecom were capital in nature. Whereas fee under consideration is payable to the Wireless Planning and Co-ordination ('WPC') Wing of the Ministry of Communications. The said fee was in the nature of a regulatory payment which is necessarily to be incurred on a regular basis for the conduct of its business and it is booked as expenses towards have been claimed as revenue expenditure by the Assessee in the year under consideration. This issue under consideration i.e. whether it is capital or revenue in nature, has been decided in favour of the Assessee in its erstwhile group entity case i.e. CIT Vs. Fasel Ltd. ('Vodafone West Limited') (2009) 221 CTR 305 (Delhi). It was vehemently contended that the issue under consideration was different from the one decided by the Hon'ble Supreme Court in the case of Bharti Hexacom Ltd. (supra). It was submitted that the Hon'ble Supreme Court vide its Order dated 30/09/2024 (Diary No.35868 of 2024 in CA No.153 of 2021) has de-tagged the Civil appeal involving identical issue from the rest of the appeals disposed off on 16/10/2023 in the case of Bharti Hexacom Ltd (Supra) and the matter was restored to the file of the Supreme Court

for the purpose of considering the issue of nature of royalty-WPC expenses. Reliance was also placed upon the decision of the Tribunal in the case of Assessee for the immediately preceding Assessment Year 2009-2010 to support claim for deduction of Royalty-WPC Expenses as revenue expenses.

4.8. Having perused the material on record, we find merit in the above submissions advanced on behalf of the Assessee. We find that vide Order, dated 30/09/2024, passed by the Hon'ble Supreme Court in Miscellaneous Application (Diary No.35868 of 2024 in Civil Appeal No.153 of 2021) in the case of Principal Commissioner of Income Tax Vs. Vodafone Idea Ltd. (earlier known as Vodafone Mobile Services Ltd.), the Hon'ble Supreme Court has observed as under:

- "2. An application has been filed for recalling the judgment and restoring by de-linking the Civil Appeal No.153/2021 from the batch of Civil Appeal No.11128/2016 and connected cases (CIT, Delhi Vs. Bharti Hexacom Ltd.) disposed of by this Court on 16.10.2023 on the question of allowability of the varied license fee as a capital on revenue expenditure wherein the revenue appeals were allowed.
3. Learned senior counsel Shri Percy Pardiwala submitted that in so far as the aforesaid issue is concerned, the matter has attained finality in view of the judgment passed by this court on 16.10.2023. However, as far as this assessee is concerned, the issue with regard to whether payment of royalty to the Wireless Planning Commission (WPC) was deductible as revenue expenditure or not is a question which was not considered nor answered in the aforesaid common judgment dated 16.10.2023. Due to inadvertence, the said issue was not at all argued by the assessee herein or revenue.
4. In the circumstances, for the purpose of considering the aforesaid issue regarding nature of royalty payment, this appeal may be segregated from the rest of the civil appeals which were disposed of on 16.10.2023.
5. Learned Additional Solicitor General submitted that insofar as the issue regarding varied license fee is concerned, insofar as

this assessee also, the matter has attained finality. However, only for the purpose of considering the royalty expense for spectrum usage to be treated as revenue or capital expenditure, the matter may be de-tagged.

6. *Considering the aforesaid submission we observe insofar as the allowability of a varied license fee as capital expenditure is concerned, the said issue is covered insofar as this assessee is concerned by the judgment dated 16.10.2023 referred to above. However, this appeal is de-tagged from the rest of the appeals disposed of on 16.10.2023 and restored on the file of this Court for the purpose of considering the issue regarding the nature of royalty payment made by the appellant herein.*

In the circumstances, the office is directed to de-tag this appeal (C.A. No.153/2021) from the rest of the civil appeals disposed of on 16.10.2023 as the same is restored on the file of this court for the purpose of the considering the same on the aforesaid issue only.

7. *The miscellaneous application is consequently allowed and disposed of in the aforesaid terms.” (Emphasis Supplied)*

- 4.9. On the perusal of above order, it becomes clear that both the sides had agreed that in so far as the issue of allowability of a varied license fee as capital expenditure is concerned, the said issue stood decided by the judgment of the Hon’ble Supreme Court in the case of Bharti Hexacom Ltd.(Supra). Whereas the issue of issue of royalty expense for spectrum usage to be treated as revenue or capital expenditure was not argued and therefore, the appeals involving the same were was de-tagged and restored for consideration. Given the aforesaid, we accept the contention of the Assessee that (a) the issue before us pertaining to nature of Royalty- WPC Expenses is different from the one decided by the Hon’ble Supreme Court in the case of Bharti Hexacom Ltd. (supra) and (b) that the decision of the Delhi Bench of the Tribunal in the case of the Assessee for the immediately preceding Assessment Year 2009-2010 [**ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, titled Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd.**]

reported in [2018] 92 taxmann.com 234 (Delhi) continuous to be hold the field. On perusal of the aforesaid decision of the Co-ordinate Bench of the Tribunal, we find that the Tribunal has held the Royalty-WPC expenses were not meant for obtaining a licence to use spectrum but for the actual use of it on regular basis. Therefore, the same were in the nature of revenue expenditure eligible for deduction. The relevant extract of the said decision of the Tribunal read as under:

- "6. *Ground no. 2 raised by the Revenue is against the deletion of addition of Rs. 17,47,28,068/- on account of Royalty WPC expenses.*
7. *The facts of the ground are that the assessee claimed Royalty WPC expenses amounting to Rs. 117.47 crore. On being called upon to justify such deduction, the assessee stated that this amount represent Spectrum charges paid by it to the Department of Telecommunications on quarterly basis as a percentage of revenue. It was submitted that every telecom operator in India, in addition to the initial operator licence fee, is required to pay spectrum royalty for the use of spectrum and microwave royalty for given microwave frequency usage on regular basis. It was further submitted that Royalty WPC was paid on revenue share basis at 2% of Adjusted gross revenue and the same was eligible for deduction. The AO treated such amount as a capital expenditure incurred to get the right to use spectrum and hence covered it under section 35ABB of the Act. After allowing depreciation @ 25%, he made an addition of Rs. 61,85,57,975/-. The DRP ordered to delete the addition, against which the Revenue has come up in appeal before the Tribunal.*
8. *We have heard both the sides and perused the relevant material on record. It is observed that the AO invoked the provisions of section 35ABB for making the addition. This section, in turn, provides that expenditure for obtaining licence to operate telecommunication services, in so far as it is of the nature of capital expenditure, shall be allowed as deduction for each of the relevant previous years on proportionate basis. It transpires that in order to be covered within the ambit of this provision, it is sine qua non that the expenditure for obtaining licence must be of capital nature at the first instance. If payment is in the revenue field, it goes out of purview of this provision. When we*

advert to the nature of royalty paid by the assessee, it clearly emerges that the same is in the nature of spectrum charges paid to Government of India as a percentage of revenue on regular basis. This payment is not meant for obtaining a licence to use spectrum, but for the actual use of it on regular basis. It is in the nature of a revenue expenditure eligible for deduction. Thus, it cannot be construed as a capital expenditure and thus goes out of the ken of section 35ABB. It is further noticed that similar issue was argued before the Tribunal in the aforesaid case of the assessee's sister concern, namely, Vodafone Mobile Services Ltd. After considering the relevant details, the Tribunal in para 14 of its order directed to delete the addition by relying on judgment of the Hon'ble jurisdictional High Court in the case of CIT v. FASCEL Ltd. [2009] 221 CTR 305 (Delhi). Since the facts and circumstances of the instant ground are mutatis mutandis similar to those considered and decided by the Tribunal in the case of Vodafone Mobile Services Ltd. (supra), respectfully following the precedent, we uphold the impugned order in deleting the disallowance. This ground fails." (Emphasis Supplied)

- 4.10. The Revenue has failed to bring any material on record to distinguish the above decision of the Tribunal either on facts or in law. Therefore, respectfully following the above decision of the Tribunal, we decline to interfere with the directions issued by the DRP and the Final Assessment Order passed by the Assessing Officer on this issue. Accordingly, Ground No.II raised by the Revenue is dismissed.

Ground No.III

5. Ground No.III raised by the Revenue reads as under:

"III. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the additions of Rs.9,71,60,276/- and 11,11,53,034/- on account of amortization of advertisement expenses and Granty signs and hoardings."

- 5.1. The relevant facts in brief are that during the Assessment proceedings the Assessing Officer noted that the Assessee had incurred advertisement expenditure amounting to INR.9,71,60,276/- on granty signs and INR.11,11,53,034/- on hoardings. According to

the Assessing Officer, the aforesaid expenditure gave enduring benefit to the Assessee. Therefore, vide notice, dated 12/07/2013, the Assessee was asked to explain as to why the same should not be capitalized. In response the Assessee vide Reply, dated 24/02/2014, submitted that this aforesaid expenditure represented the boards displayed at various locations including at the dealer shops. The granty signs have a very short shelf-life as the same are required to be changed with the change in the product line of the Assessee and did not bring into existence any tangible assets or enduring benefit. The Assessee, thus, argued that the aforesaid expenditure was in the nature of normal advertisement expenditure and should be allowed as revenue expenditure. The Assessee also relied on the judicial precedents in support of the aforesaid contentions. However, the Assessing Officer was not convinced. According to the Assessing Officer the aforesaid advertisement expenditure brought into existence an advantage of enduring nature. The Assessing Officer was of the view that the dealer sign boards were in the nature of assets which would bring enduring benefits to the Assessee by giving wide publicity to the Assessee's brand name and increased the visibility of the Assessee's products. The aforesaid advantage was not limited to one year alone and the same spread over life of product spanning over 3 to 4 years. Therefore, the Assessing Officer amortized the advertisement expenditure over period of 4 years. Accordingly, the Assessing Officer concluded as under:

"The evidence in the case Accordingly, only deduction of Rs.15,62,34,983/- is allowed and remaining is disallowed. However, a deduction amounting to Rs.9,32,07,760/- is allowed in respect of amounts similarly treated as capital expenditure in earlier years. Accordingly an amount of Rs.6,30,27,223 is proposed to be disallowed." (Emphasis Supplied)

Thus, the Assessing Officer proposed net disallowance of INR.6,30,27,223/- in respect of advertisement expenditure incurred

on granty signs and hoarding in the Draft Assessment Order.

- 5.2. Being aggrieved, the Assessee filed objections before the DRP which were allowed by the DRP. Deciding the issue in favour of the Assessee, the DRP concluded as under:

"9.1 The assessee has assailed in this ground of objection (objection no. 6) the disallowance of advertisement expenses i.e. the AO's proposing to amortize over four year, the advertisement expenditure incurred by the assessee in respect of 'Granty signs (dealer signboard) and hoardings amounting to Rs. 9,71,60,276/ and Rs. 11,11,53,034/. The assessee has submitted before the panel that it is operating in the telecom industry where there is significant competition and the company has to come up with innovative schemes from time to time to market its services. Therefore, it is imperative to advertise its products/services through varied advertisement medium. It has also informed that the DRP in the immediately preceding year Le. A.Y. 2009-10, by following catena of judgments on this issue had directed to AO to delete such disallowance.

9.2 Considering the submission of the assessee, the AO is hereby directed by the panel to delete the said disallowance, on account of Amortization of advertisement expenses on Granty signs and hoardings and treating the same as Revenue expenditure." (Emphasis Supplied)

- 5.3. Being aggrieved, the Revenue has preferred the present appeal before the Tribunal challenging the Final Assessment Order passed by the Assessing Officer as per the directions of DRP whereby objections filed by the Assessee were allowed and the proposed disallowance of INR.6,30,27,223/- in respect of advertisement expenditure incurred on granty signs and hoarding was rejected.

- 5.4. We have heard the rival submissions and perused the material on record on this issue. It emerges that identical issue had come up for consideration before the Delhi Bench of the Tribunal in the Assessee for the immediate preceding Assessment Year 2009-2010 [**ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, titled Deputy**

Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. reported in [2018] 92 taxmann.com 234 (Delhi)]. Dismissing identical ground raised by the Revenue, the Co-ordinate Bench of the Tribunal held as under:

- "9. *Ground No. 3 of the Revenue's appeal is against the deletion of addition of Rs. 2,52,28,036/- on account of 'Advertisement expenses.' The assessee claimed deduction for advertisement expenses amounting to Rs. 97.63 lac on product launches and Rs. 14.81 crore on granty signs. The AO opined that since the benefit of this expenditure would be reaped in subsequent years as well, he treated the said amount of advertisement expenses as capital. After allowing deduction @ 25%, he made an addition of Rs. 2,52,28,03,617/-. The DRP got convinced with the assessee's submissions and ordered to delete the addition.*
10. *Having considered the arguments from both the sides and perused the relevant material on record, we find that this issue is no more res integra in view of the judgment of the Hon'ble Delhi High Court in CIT v. Citi Financial Consumer Finance Ltd. [2011] 335 ITR 29/[2012] 20 taxmann.com 452 in which advertisement expenditure has been treated as revenue. In view of the judgment of the Hon'ble jurisdictional High Court, which has been relied by the DRP, we are of the considered opinion that no interference is warranted in the impugned order on this score. This ground is dismissed." (Emphasis Supplied)*

5.5. The Revenue has failed to bring any material on record to distinguish the above decision of the Tribunal either on facts or in law. Therefore, respectfully following the above decision of the Tribunal, we decline to interfere with the directions issued by the DRP in relation to the advertisement expenditure incurred on granty signs and hoardings; and the Final Assessment Order passed by the Assessing Officer allowing deduction for the same. Accordingly Ground No.III raised by the Revenue is dismissed.

Ground No. IV

6. Ground No.IV raised by the Revenue reads as under:

"IV. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the addition of Rs.22,47,77,528/- on account of interest incurred cost on capital work in progress."

6.1. The relevant facts in brief are that during the assessment proceedings, the Assessing Officer noted that the Assessee had made investment in addition to fixed assets. As on 31/03/2010, The Assessee had Capital Work-in-Progress (**CWIP**) of INR.1531.4 million. Due to the huge amount involved, the Assessee was asked to give month wise balances of CWIP and show cause as to why interest cost incurred on such CWIP should not be disallowed. The Assessee filed relevant details of CWIP along with submissions dated 24/03/2014. It was contended by the Assessee that during the subject assessment year, the Assessee had made certain additions to its fixed assets. The acquisition of such fixed assets was for the purpose of assisting the Assessee in carrying on its existing operations and not for the purpose of extension of its business. The extension of business has not been specifically defined in the context of Proviso to Section 36(1)(iii) of the Act. It was contended that based on general/commercial parlance, with respect to the telecommunications business, 'extension' of business may be construed to mean an extension of the geographical area wherein telecommunications services are rendered. The Assessee also submitted that the Assessee had incurred expenditure on CWIP for facilitating its existing operations and not in connection with extension of its existing operations. No disallowance on interest cost was liable to be made since interest on borrowed capital for acquiring assets for the normal running of business (not leading to extension per se) was not covered by the said proviso and was clearly deductible under the provisions of Section 36(1)(iii) of the Act. However, the Assessing Officer was not convinced. The Assessing Officer noted that the Assessee had raised both secured and

unsecured loans during the year under consideration and was also paid huge interest on the said loans. The details filed during the course of assessment proceedings clearly showed that as on 31/03/2009, there was CWIP amounting to INR.1531.4 million. The figures of CWIP submitted by the Assessee alongwith the figures of loan funds of the balance sheet clearly revealed that the Assessee had, during the relevant previous year, utilized the various loan funds for the creation of the CWIP. Further, the utilization of the secured loans was not furnished by the Assessee during the course of the assessment proceedings. It was settled legal position that it was the onus of the Assessee, who claims deduction for any expenditure, to prove that the said expenditure (including the expenditure claimed u/s 36(1)(iii) of the Act), was for business purposes. Therefore, the Assessee was required to prove by demonstrative evidences that on the date on which the expenditure was incurred for CWIP the Assessee had interest free fund and there was no diversion of interest bearing funds for such CWIP. According to the Assessing Officer, the Assessee had failed to do so and therefore, a disallowance of 7.7% of the monthly outstanding balances of CWIP (aggregating to INR.22,47,77,528/-) was proposed by the Assessing Officer in the Draft Assessment Order. However, the aforesaid proposed disallowance was not confirmed by DRP as the DRP allowed the objections raised by the Assessee in this regard by placing reliance upon the decision of DRP for the Assessment Year 2009-2010. Therefore, no disallowance in this regard was made in the Final Assessment Order.

- 6.2. Being aggrieved, the Revenue has carried the issue in appeal before this Tribunal.
- 6.3. During the course of hearing both sides agreed that identical issue has been decided has been decided by the Tribunal in the case of the

Assessee for the immediately preceding Assessment Year i.e. 2009-2010. We note that vide **Order, dated 14/03/2018**, passed in **ITA No.115/Del/2015 (Supra)**, the Tribunal had remanded the issue back to the file of Assessing Officer with the following directions:

- "19. *Ground no. 3 of the assessee's appeal is against the disallowance of interest on capital work-in-progress.*
20. *The facts of this ground are that the assessee declared capital work-in-progress amounting to Rs. 2789.6 million in its balance sheet. The AO observed that addition to fixed assets amounting to Rs. 12828 million was made during the year, which was recorded in the Schedule of fixed assets as an item distinct from capital work-in-progress shown separately in the balance sheet. On being called upon to explain as to why interest cost incurred on such capital work-in-progress should not be disallowed in terms of proviso to section 36(1)(iii), the assessee submitted that there was no 'extension of existing business' as a result of such capital work-in-progress and, hence, disallowance of interest was not called for. The AO did not concur with the assessee's arguments. Relying on certain decisions, he held that the amount of interest incurred in respect of such capital work-in-progress should be disallowed @ 7.7% of monthly outstanding balances as per the Table given on page 43 of the assessment order. The assessee failed to convince the DRP on its line of reasoning as well. This resulted into an addition of Rs. 26,45,28,627/-. The assessee is aggrieved against this addition.*
21. *After considering the rival submissions and perusing the relevant material on record, it is first necessary to understand the nature of the capital work-in-progress capitalised in the balance sheet at Rs. 2789 million. On a pertinent query, the Id. AR submitted that this amount represents the cost of installing new cell site towers to be used for providing better network to its customers. It was stated that roughly a period of three months is spent in the setting up of a tower. During the currency of such period of three months, i.e., when a tower is being set up, the costs incurred on such installation of towers are booked under the head 'Capital work-in-progress'. When installation gets completed, the amount so capitalised is transferred from the 'capital work-in-progress' account to the 'fixed assets' in regular course. From the above narration of factual background, it is clear that a sum of Rs. 2789.6 million represents the amounts incurred by the assessee up to the end of the year on installation of towers, whose process of installation was still on at the end of the year. In other words, this figure represents the value of assets, which have still not been used by the assessee during the year for its business purpose.*

The AO invoked first proviso to section 36(1)(iii) which, at the material time, read as under:—

'Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.'

22. *At this stage, it is relevant to mention that the words 'for extension of existing business or profession' have been omitted by the Finance Act, 2015 w.e.f. 01.04.2016. As we are dealing with the A.Y. 2009-10, such words are relevant for our purpose. A careful perusal of the section 36(1)(iii) in juxtaposition to the first proviso indicates that the amount of interest paid in respect of capital borrowed for the purposes of business or profession is deductible, but, any amount of interest paid in respect of capital borrowed for 'acquisition of an asset for extension of the existing business' for any period till the date on which such asset is first put to use, shall not be allowed.*
23. *The Id. AR vehemently contended that the words 'for extension of the existing business or profession' bring within its ambit the acquisition of an asset which is meant for extension of the existing business and not otherwise. He submitted that the telecommunication business can be considered as 'extended' only when some new Circles are added to the existing Circles in which the business is carried on. This was opposed by the Id. DR who submitted that extension can be within the existing circles de hors new circles.*
24. *We are not convinced with the contention advanced by the Id. AR. The words 'for extension of the existing business' presuppose that there is already a business in existence and capital is borrowed for acquisition of asset for extension of such existing business. 'Extension' can be vertical as well as horizontal. Existing telecommunication business can be extended in different forms. One of such forms can be the one described by the Id. AR in which a Cellular mobile service provider (CMSP) expands its area of business to a different Circle which was not hitherto in its reach. In the same breath, there can be an extension of existing business when a CMSP increases its reach within the allotted Circle itself by means of setting up new towers. To put it simply, if a CMSP has a licence to operate in a particular State, it may initially set up cell towers catering to urban areas for meeting the requirements of population residing therein. With the passage of time, it may try to reach to rural areas and still more rural areas within the same State by establishing towers for providing connectivity in such areas as*

well. With new towers in areas, which were hitherto not having connectivity because of lack of the coverage of adequate existing towers, the service provider will, naturally, be going in 'for extension of existing business.' With such a setting up of new towers, the service provider will increase its customer base within the existing Circle, which is nothing but an extension of existing business.

25. When we advert to the facts of the instant case, it emerges that the assessee was successful in increasing its customer base by setting up new towers, cost of which has been classified as capital work-in-progress. It is evident from the assessee's Director's Report for the year under consideration which records that: "the company has also witnessed a good level of increase in the subscriber base in all the three Circles (UPE, Rajasthan and Haryana) in which it operates. The company has further expanded its network to increase its coverage across all its Circles. During the year, the company added 5096 cell sites to enhance its network coverage closing with 14411 cell sites as at 31st March, 2009." It is evident from the assessee's Director's Report that the setting up of new cell sites has enhanced its network coverage within all the three existing Circles and the resultant customer base, which is nothing, but, an extension of existing business. We, therefore, hold that the argument advanced by the Id. AR that the setting up of new cell sites, the cost of which was capitalised in the balance sheet as Capital work in progress (CWIP), does not lead to extension of existing business, is sans merit and, hence, dismissed.
26. The Id. AR then argued that investment in CWIP was made out of own interest free funds and hence no interest can be attributed to any capital borrowed for the purpose of making such an investment. This was opposed by the Id. DR, who submitted that the assessee failed to file any such details before the AO and hence such a contention cannot be accepted at this stage.
27. Before dealing with this contention, it is worthwhile to mention that the assessee made investment of Rs. 2789.6 Million in its CWIP, which is the centre of dispute. On having a glimpse at the balance sheet of the assessee, it becomes evident that it has paid up Share capital to the tune of Rs. 1011.0 Million and Reserves and Surplus for a sum of Rs. 4571.8 Million. Thus, it is palpable that as against the investment of Rs. 2789.6 Million in CWIP, the assessee has its own shareholders fund for a sum of Rs. 5582.9 Million, which is roughly double the amount of Capital work in progress.
28. Section 36(1)(iii) provides for deduction of interest of the amount of interest paid in respect of capital borrowed for the purpose of business or profession. The essence of this provision is that the interest should be allowed so long as the capital

borrowed, on which such interest is paid, is used for the purpose of business or profession. If, however, an assessee is having its own interest free surplus funds and such funds are utilised as interest free advances even for a non-business purpose, there cannot be any disallowance of interest paid on interest bearing loans. The Hon'ble Bombay High Court in CIT v. Reliance Utilities & Power Ltd. [2009] 313 ITR 340/178 Taxman 135, has held that where an assessee possessed sufficient interest free funds of its own which were generated in the course of relevant financial year, apart from substantial shareholders' funds, presumption stands established that the investments in sister concerns were made by the assessee out of interest free funds and, therefore, no part of interest on borrowings can be disallowed on the basis that the investments were made out of interest bearing funds. In that case, the AO recorded a finding that a sum of Rs. 213 crore was invested by the assessee out of its own funds and Rs. 1.74 crore out of borrowed funds. Accordingly, disallowance of interest was made to the tune of Rs. 2.40 crore. The assessee argued that no part of interest bearing funds had gone into investment in those two companies in respect of which the AO made disallowance of interest. It was also argued that income from operations of the company was Rs. 418.04 crore and the assessee had also raised capital of Rs. 7.90 crore, apart from receiving interest free deposit of Rs. 10.03 crore. The assessee submitted before the first appellate authority that the balance-sheet of the assessee adequately depicted that there were enough interest free funds at its disposal for making investment. The Id. CIT (A) got convinced with the assessee's submissions and deleted the addition. Before the Tribunal, it was contended on behalf of the Revenue that the shareholders' fund was utilized for the purchase of its assets and hence the assessee was left with no reserve or own funds for making investment in the sister concern. Thus, it was argued that the borrowed funds had been utilized for the purpose of making investment in the sister concern and the disallowance of interest was rightly called for. The Tribunal, on appreciation of facts, recorded a finding that the assessee had sufficient funds of its own for making investment without using the interest bearing funds. Accordingly, the order of CIT (A) was upheld. When the matter came up before the Hon'ble High Court, it was contended by the Department that the shareholders' funds stood utilized in the purchase of fixed assets and hence could not be construed as available for investment in sister concern. Repelling this contention, the Hon'ble High Court observed that : "In our opinion, the very basis on which the Revenue had sought to contend or argue their case that the shareholders' fund to the tune of over Rs. 172 crore was utilized for the purpose of fixed assets in terms of the balance-sheet as on March 31, 1999, is fallacious." In upholding the order of the Tribunal, the Hon'ble High Court held that: "If there be interest free funds available to an assessee sufficient to meet its investment and at the same time the assessee had raised a loan, it can be presumed that the

investments were from the interest free funds available". Thereafter, the judgment of the Hon'ble Supreme Court in the case of East India Pharmaceuticals Works Ltd. v. CIT [1997] 224 ITR 627/91 Taxman 185 (SC) and also the judgment of the Hon'ble Calcutta High Court in Woolcombers of India Ltd. v. CIT [1981] 134 ITR 219/[1981] 7 Taxman 188 were considered. It was finally concluded that: "The principle, therefore, would be that if there are funds available both interest free and overdraft and/or loans taken, then a presumption would arise that the investments would be out of interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investment". Consequently the interest was held to be deductible in full

29. *From the above judgment, it is manifest that there can be no presumption that the shareholders' fund of a company was utilized for purchase of fixed assets. If an assessee has interest free funds as well as interest bearing funds at its disposal, then the presumption would be that investments were made from interest free funds at its disposal. Similar view has been taken by the Hon'ble Delhi High Court in CIT v. Tin Box Co. [2003] 260 ITR 637/35 Taxman 145 (Delhi), holding that when the capital and interest free unsecured loan with the assessee far exceeded the interest free loan advanced to the sister concern, disallowance of part of interest out of total interest paid by the assessee to the bank was not justified.*
30. *The legal position set out in the preceding para is applicable if an assessee has a common pool of funds and some part is investment in the disputed amount. This proposition does not hold water, if a specific borrowing is made for making such an investment. When we turn to the facts of the instant case, we find that even though the shareholders' fund is more than the investment in CWIP, but no detail of secured loan is available. In the absence of such specific information, it is difficult to decide the issue at our end. The impugned order is set aside to this extent and the AO is directed to decide this issue afresh in consonance with our foregoing observations. It is made clear that if there is some direct borrowing for investing in CWIP, then interest paid on such borrowing has to be disallowed. If, on the other hand, there is no specific borrowing, the financing of CWIP has to be treated as out of interest-free shareholders' fund. In such a scenario, no disallowance of interest can be made as the interest-free shareholders' fund would be higher than the amount of investment in CWIP."* (Emphasis Supplied)

- 6.4. Since, there is no change in the facts and circumstances of the case in the appeal before us, we also remand the issue back to the file of the Assessing Officer with the directions to decide this issue afresh in consonance with the directions given by the Tribunal while setting

aside the issue to the file of Assessing Officer for the Assessment Year 2009-2010 (reproduced in Paragraph 10.3 above). It is made clear that as per the aforesaid direction if there is some direct borrowing for investing in CWIP, then interest paid on such borrowing shall be disallowed. If, on the other hand, there is no specific borrowing, the financing of CWIP has to be treated as out of interest-free shareholders' fund, and in such a scenario, no disallowance of interest shall be made since the interest-free shareholders' fund would be higher than the amount of investment in CWIP. In terms of aforesaid Ground No. IV raised by the Revenue is allowed for statistical purposes.

Ground No. V

7. Ground No.V raised by the Revenue reads as under:

"V. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the addition of Rs.33,00,00,000/- on account of subscriber based fraud."

7.1. The relevant facts in brief are that the Assessing Officer had proposed disallowance of deduction of INR.33,00,000/- claimed by the Assessee in respect of subscriber fraud under Section 37(1) of the Act. Before the DRP, the Assessee submitted that the Assessing Officer has made a factually incorrect observation that the fraud was towards 'embezzlement of money' by the employees of the Assessee company. Whereas, the deduction of INR.33,00,000/- claimed by the Assessee was in the nature of deduction for bad debts. It was contended that for the Assessment Year 2009-2010, the DRP had allowed identical claim made by the Assessee holding that expense/loss incurred by the Assessee with respect to the subscriber based fraud is allowable expense. The DRP accepted the aforesaid contentions of the Assessee and directed the Assessing Officer to allow the deduction of INR.33,00,000/- as claimed by the Assessee.

Thus, no disallowance was made in this regard in the Final Assessment Order. Being aggrieved, the Revenue has carried the issue in appeal before this Tribunal.

7.2. We have heard both the sides on this issue. It is admitted position that identical issue arising from identical set of facts had come up for consideration before the Delhi Bench of the Tribunal in appeals pertaining to the Assessment Year i.e. 2009-2010. Vide Order, dated 14/03/2018, passed in ITA No.1950/Del/2015, the Tribunal had decided the issue in favour of the Assessee holding as under:

"11. The last ground of the Revenue's appeal is against the deletion of addition of Rs. 31 lac. The facts apropos this ground are that the assessee claimed deduction of Rs. 31 lac towards frauds committed by its customers. The AO treated this amount as not deductible u/s. 37(1) and, accordingly, made an addition. The DRP directed to delete the addition.

12. Having heard both the sides and perused the relevant material on record, we find that the deduction of Rs. 31 lac is not on account of embezzlement by employees, but, for the loss incurred due to frauds committed by the assessee's customers who did not make payments for the bills raised on them by the assessee. This loss, being incidental to carrying on business, cannot be treated as an item of non-revenue nature. We, therefore, uphold the impugned order in deleting the disallowance. This ground is dismissed." (Emphasis Supplied)

From the above it is clear that the deduction claimed by the Assessee was allowed by the Tribunal observing that the loss incurred by the Assessee on account of frauds committed by the customers and/or non-payment by the customers was incidental to running business. Therefore, deduction for the same was allowable under Section 37(1) of the Act.

7.3. Respectfully following the above decision of the Tribunal, we decline to interfere with the Final Assessment Order passed by the Assessing Officer as per directions issued by the DRP on this issue whereby identical loss of INR.33,00,000/- was allowed as deduction under

Section 37(1) of the Act. Accordingly, Ground No.V raised by the Revenue is dismissed.

Ground No.VI

8. Ground No.VI raised by the Revenue reads as under:

"VI. On the facts and in the circumstances of the case, the DRP-II erred in directing to delete the addition of Rs.88,64,94,300/- on account of disallowing depreciation on Passive Infrastructure Assets (PI)."

8.1. The relevant facts in brief are that in terms of the Scheme of Demerger the Assessee transferred certain PI Assets to Vodafone Infrastructure Ltd. without any consideration. This Scheme of Demerger was approved by the Hon'ble Delhi High Court vide Order dated 29/03/2011. No loss, either capital or otherwise was claimed by the Assessee in relation to the above transfer of PI Assets. The loss on transfer of PI Assets of INR.986 Crores debited to the Profit & Loss Account was added back while computing total income for the relevant previous year. It was contended by the Assessee that in absence of any consideration, the Assessee was not required to adjust any amounts from the tax WDV of the block of assets where the PI Assets were capitalized. Nonetheless, the Assessee (in line with its motive of not claiming any tax advantage from this transaction) voluntarily reduced the tax WDV of the PI Assets transferred to Vodafone Infrastructure Ltd. from the said block of assets. The Assessing Officer treated the aforesaid transfer of PI Assets to Vodafone Infrastructure Ltd. as a sham transaction and concluded that the transfer though without consideration did not qualify as gift and therefore, was not exempt under Section 47(iii) of the Act. The Assessing Officer deemed the market value of the PI Assets transferred (i.e. INR.1577.02 Crores) to be the sale consideration. Since PI Assets were depreciable assets, the Assessing Officer reduced the WDV of Plant & Machinery Block by the aforesaid deemed

consideration of INR.1577.02 Crores. Taking note of the fact that the Assessee had suo-moto reduced an amount of INR.986.02 Crores from the said WDV, an additional amount of INR.591 Crores (i.e. INR.1577.02 Crores less INR.986.02 Crores) was reduced from the WDV of the Plant & Machinery Block which resulted in proposed disallowance of depreciation of INR.88.65 Crores (i.e. 15% of 591 Crores) in the Draft Assessment Order.

- 8.2. Being aggrieved, the Assessee filed objections before the DRP. It was contended on behalf of the Assessee that the Scheme of Demerger in terms of which the PI Assets were transferred to Vodafone Infrastructure Ltd. without any consideration was approved by the Hon'ble Delhi High Court. Therefore, the transaction could not be treated as a sham transaction. The aspect of the aforesaid transaction as 'gift' was also confirmed by the Gujarat High Court in the case of Assessee's group Company (i.e. erstwhile Vodafone West Ltd.) wherein a similar scheme was approved by the Hon'ble Gujarat High Court. It was submitted that in the absence of any consideration, the Assessing Officer could not impute sales consideration and reduce the same from the WDV of Plant & Machinery Block. No deduction of the loss arising from the transfer of PI Assets to Vodafone Infrastructure Ltd. was claimed by the Assessee. Thought in the absence of any sale consideration, the Assessee was not required to adjust WDV of the Plant & Machinery Block, the Assessee had, suo-moto, reduced the 'tax WDV' of PI Assets transferred from the Plant and Machinery Block. The aforesaid submissions found favour with the DRP as the DRP concluded that it cannot be said that the Respondent had transferred the PI Assets to Vodafone Infrastructure Ltd. with a view to evade taxes. DRP held that the transaction under consideration was driven by commercial expediency and had been duly approved by the Hon'ble High Courts. Thus, the DRP allowed the objections filed by the Assessee and directed the Assessing Officer to allow depreciation as

claimed by the Assessee. The Assessing Officer passed by the Final Assessment Order without making proposed disallowance of depreciation of INR.88.65 Crores.

- 8.3. Being aggrieved, the Revenue has carried the issue in appeal before the Tribunal.
- 8.4. We have heard both the sides and have perused the material on record.
- 8.5. On perusal of the order passed by the DRP, we find that the DRP has made following observations while deciding the issue in favour of the Assessee:

"18.3 The panel has carefully considered the submission of the assessee in this regard. The assessee has tried to justify the aforesaid transaction to be a purely business decision based on commercial consideration. On the other hand, the AO is of the view that VDL is camouflaging the demerger scheme and getting it legalized by obtaining sanction from the Hon'ble High Court, which too by misrepresenting facts. In fact the assessee has transferred its PI assets just to evade taxes in a manner to benefit Its ultimate holding company, for which it has claimed a loss. However, section 47(iii) of the Act provides that any transfer of a capital asset under a will or an irrevocable trust or as gift will not be regarded as a transfer. In the instant case, the transaction under reference is by way of gift duly approved by the High Court & hence a legitimate transaction and the Act itself recognizes such Gift by corporate. Further, clause 40 of the Memorandum of Association specifically permits the assessee to grant gift to any person. This is in consonance with the decision of Hon'ble Supreme Court in the case of Laksmanswami Mudaliar V. L.I.C. (33 Com Cases 420), where it was observed that a company can make a gift provided that the Memorandum of Association/Charter documents of the company permit such a transaction. Further, the fact that the transaction in the present case is in the nature of gift has been affirmed by the Hon'ble Delhi High Court while approving such scheme, where the Hon'ble Court has observed as below.

"45. For all of the above reasons, and since the objector

has not been able to place any direct authority, precedent or Rule before this Court to support his contention, and in view of the authorities relied on by the petitioners, counsel for the Income Tax has failed to persuade this Court that a transfer by way of gift was not permissible under Section 391 of the Companies Act, 1956, or that the Scheme in question was confiscatory, this objection does not survive this objection does not survive".

Further, the aspect that the aforesaid transaction is a "gift" was also confirmed by the Hon'ble Gujarat High Court in the case of VWL (ie. a group company of the assessee), where in a similar scheme was filed. The Hon'ble High Court specifically observed as under.

"The objection raised by the Income Tax Department that the Appellant should not be permitted to argue that for the purpose of Income Tax Act, the transfer is by way of a gift and that for the purpose of the Companies Act, the same is with consideration is completely misplaced"

It has been further contended by the assessee that it has merely transferred its PI assets to Vinfl, without any consideration. The loss to VDL (assessee) on such transfer was duly added back by VDL in its return of income. Further, even though in absence of any sale consideration, the assessee was not required to adjust its tax block, the assessee Suo-moto reduced the tax WDV of such PI assets from its P&M block. Therefore, it cannot be stated that the assessee transferred PI assets to Vinfl in order to evade taxes but the aforesaid transfer of PI assets was driven solely by business expediency. On careful consideration of the facts of the case, it is amply clear that the business purpose and commercial expediency were the only factors that led to the transfer of the PI assets, as duly approved by the Hon'ble High Court of Delhi. Even otherwise a company is an artificial juridical person with a separate legal entity of its own, unless the Corporate Veil is lifted by court orders. The case of the assessee is that of a real gift and not deemed gift as in the case of CIT V. Tibruz Mustafa Bilgen (1986) 157 ITR 723 (Mad), the Hon'ble Madras High Court has held that section 47(iii) applies only to real gift and not deemed gift. Therefore, the action of the AO in disallowing depreciation on passive Infrastructure Assets (PI) is held by the panel to be not tenable and the AO is therefore directed to delete the said addition." (Emphasis Supplied)

8.6. We are in agreement with the view taken by the DRP. The Scheme of

Demerger which clearly provided that the Assessee shall gift PI Assets to Vodafone Infrastructure Ltd.. Before the Hon'ble Delhi High Court the Revenue had filed objection to the Scheme of Demerger contending, inter alia, that a transfer by way of gift was not permissible under Section 391 of the Companies Act, 1956. However, the aforesaid objection was rejected by the Hon'ble Delhi High Court observing that the Revenue had failed to place any direct authority, precedent or Rule before the Hon'ble Court in support its contention. The aforesaid was taken note of by the DRP while allowing the objections raised by the Assessee. Therefore, we concur with the view taken by the DRP that the transaction of transfer of PI Assets by the Assessee to Vodafone Infrastructure Ltd as gift cannot be regarded as sham transaction having been accepted and approved by the Hon'ble Delhi High Court as part of the Scheme of Demerger after due consideration of the objections raised by the Revenue. DRP has correctly concluded that transaction of transfer of PI Assets by the Assessee to Vodafone Infrastructure Ltd qualified as 'gift' and the same could not be regarded as transfer for the purpose of Section 2(47) of the Act in terms of Section 47(iii) of the Act. It was not disputed by the Revenue that the Assessee had not claimed deduction for loss arising from the transfer of PI Assets to Vodafone Infrastructure Ltd. In view of the aforesaid we are not persuaded to interfere with the Final Assessment Order and the directions issued by the DRP on this issue and therefore, Ground No. VI raised by the Revenue is dismissed.

9. In result appeal preferred by the Revenue is partly allowed.

ITA NO.1073/DEL/2015 (ASSESSEE'S APPEAL)

10. Next we would take up the grounds raised by the Assessee in its appeal. The Assessee has raised eleven grounds of appeal in ITA No. 1073/Del/2015 which are taken up hereinafter in seriatim.

Ground No.1

11. The Ground No.1 raised by the Assessee reads as under:

"1. Ground No. 1- Deduction u/s 80IA on other income

1.1. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in excluding the following incomes while computing deduction u/s 80IA of the Act:*

- *Cellsite sharing revenue amounting to INR 0.81 crores;*
- *Miscellaneous income amounting to INR 5.81 crores;*
- *Interest Income amounting to INR 0.86 crores, which has already been excluded by the Appellant while computing business income;*
- *Provisions no longer required written back amounting to INR 51.58 crores, out of which the Appellant has already excluded INR 49.9 crores while computing business income;*
- *Profit on sale of fixed assets (net) amounting to INR 6.48 crores, which has already been excluded by the Appellant while computing business income;*
- *Foreign exchange gain (net) amounting to INR 6.47 crores, out of which the Appellant has already excluded gains of INR 10.473 crores while computing business income being capital in nature and the balance amount of loss of INR 5.005 crores is revenue loss.*

1.2. *On the facts and in the circumstances of the case and in law, both the learned DRP and the learned AO have erred in importing the phrase derived from and its implication while computing deduction under non-obstante section 80IA(2A) of the Act when the said section does not postulate the concept of 'derived from, instead it provides that to be eligible for deduction u/s 80IA of the Act, income arising should be 'business income of the 'eligible undertaking', i.e. telecom undertaking of the Appellant in the present case.*

1.3. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 1.1 and 1.2, the learned DRP/ AO have erred in not holding that if the above mentioned incomes are not eligible for deduction u/s 80IA, the expenses incurred in*

earning the said incomes must also be excluded and only net income should be excluded while computing the profits eligible for deduction u/s 80IA of the Act.”

11.1. Ground No.1 raised by the Assessee pertains to computation of deduction under Section 80IA of the Act. It is admitted position that the Assessee had claimed and was allowed deduction under Section 80IA of the Act for the first time in Assessment Year 2008-09. As per the provisions of Section 80IA of the Act the eligible telecom undertaking is allowed a deduction for the period of 10 consecutive Assessment Years once the deduction has been claimed. For the Assessment Year 2010-2011, the Assessee did not claim deduction under Section 80IA of the Act on account of losses. However, while making the assessment, the assessed income of the Assessee had turned positive. Therefore, the Assessing Officer allowed deduction of INR.7,10,55,30,405/- under Section 80IA of the Act on the basis of Assessment Orders passed for preceding Assessment Years. However, since the detailed break-up of other income amounting to INR.72,01,00,000/- was not available, the Assessing Officer excluded other income while computing deduction under Section 80IA of the Act in the Draft Assessment Order.

11.2. The Assessee filed objections before DRP challenging the above approach adopted by the Assessing Officer. The Assessee opposed the proposed exclusion of following incomes for the purpose of computation of deduction under Section 80IA of the Act *[while stating that the Assessee had not claimed deduction in respect of provisions no longer required written back amounting to INR.515.80 Million]:*

S.No	Particulars	Amount (INR Million)
1.	Interest Income	8.6
2.	Cellsite Sharing revenue	8.1
3.	Foreign Exchange Gain (net) on revenue account	64.7
4.	Profit on sale of fixed assets	64.8
5.	Misc Income	58.1

11.3. However, the DRP declined to grant any relief. Accordingly, the Assessing Officer passed Final Assessment Order, dated 27/01/2015, concluding as under:

"10. Deduction u/s. 80IA of the Act

The assessee had claimed and was allowed deduction u/s 80IA of the Act for the first time in AY 2008-09. As per the provisions of section 80IA the eligible telecom. undertaking is allowed a deduction for the period of 10 consecutive AY's once the deduction has been claimed. In the subject year, the assessee on account of losses has not claimed any deduction in the return of the income. However, while making the assessment for the subject year, the assessed income has turned positive

Accordingly the deduction u/s.80IA of the Act amounting to Rs. 7,105,530,405 was allowed on the basis of assessment orders of the precedings years, in the draft assessment order. However, as the detailed breakup of other income is not available, the entire other income amounting to Rs. 720,100,000/- was excluded while computing the deduction u/s 80IA of the Act."

Directions of the DRP:

Vide order dated 18-12-2014, the DRP-II considered the objection on this issue and rejected the same giving detailed reasons for the same. The DRP-II concluded as follows:

"The panel has carefully considered the submission of the assessee. It has been observed by the courts that the words 'derived from' are narrower in scope than the words 'attributable to as held in Cambay Electric Supply Industrial Co. Ltd. (1978) 113 ITR 84 (SC). Further, in CIT v. Sterling Foods (1999) 237 ITR 579 (SC), the Apex Court has held that unless the source of income is from an industrial undertaking. such income cannot be regarded as derived from an industrial undertaking. Where the nexus between the profits and gains and the industrial undertaking is not direct but incidental, such income cannot be regarded as having been derived from industrial undertaking. In view of the above judicial precedents, the stand taken by the AO in the relation to 'derived income' is hereby ratified by the panel and the assessee gets no relief on this ground of objection. The DRP for A.Y. 2009-

10 disallowed deduction under section 80IA on 'other income'."

Since the DRP-II has not made any variation in the addition as proposed in the draft assessment order, deduction u/s 80IA is allowed as per DRP order.

With respect to the above the income of the assessee is recomputed as under:

Income from business/profession as per the assessment order	
XX XX	XX XX
Business Income (C)	5,61,93,60,152
<u>Calculation of 80IA deduction</u>	
Income from Business and profession as per assessment order	5,61,93,60,152
Less: Income from other sources (excluding ARO provision written back which assessee has itself reduced while calculating taxable income)	72,01,00,000
Eligible profit u/s.80IA	4,89,92,60,152
Deduction u/s.80IA @100% eligible profits (B)	4,89,92,60,152
Income from other sources (D)	86,21,173
XX XX	XX XX

....." (Emphasis Supplied)

- 11.4. Being aggrieved the Assessee has carried the issue in appeal before the Tribunal.
- 11.5. We have heard both the sides and have perused the material on record.
- 11.6. We find that Assessee had furnished details of Other Income credited to the Profit and Loss Account during the relevant previous year. Vide letter dated 19/12/2013 the Assessee had furnished details of other income credited to the Profit & Loss Account. The relevant extract of the aforesaid letter reads as under:

"18. Details of other income credited to profit and loss account. (Point 34 of the notice dated 12th July 2013)

Details of 'Other income' of INR.720.1 million credited to the profit and loss account of VDL for the subject year is as follows:

Particulars	Amount (INR million)
Liabilities/provisions no longer required written back	515.8
Interest income	8.6
Foreign exchange gain (net)	64.7
Profit on sale of fixed assets (net)	64.8
Cellsite sharing revenue	8.1
Indefeasible right to use ('IRU') revenue	-
Miscellaneous Income	58.1
Total	720.1

From the above it is clear that the basis on which the Assessing Officer has proposed exclusion of other income from the computation of deduction under Section 80IA of the Act was factually incorrect. Further, on perusal of record we find that while declining to the grant/relief the DRP had also relied upon the findings returned by the Assessing Officer in the Draft Assessment Order which are contrary to the material on record.

Interest Income & Profit On Sale Of Fixed Assets

- 11.7. On perusal of the 'statement showing computation of taxable income under normal provisions of the Act' we find that (a) interest income of INR.0.86 Crores and (b) profit on sale of fixed assets of INR.6.48 crores have already been excluded by the Assessee while computing its business income and thus, these amounts are not considered for the purpose of computing deduction under Section 80-IA of the Act. Therefore, the Assessing Officer is directed not to exclude (a) interest income of INR.0.86 Crores and (b) profit on sale of fixed assets of INR.6.48 crores while computing deduction under Section 80IA of the Act.

Provisions No Longer Required And Written Back

- 11.8. Further, the provisions no longer required and written back aggregating to INR.51.58 Crores credited to the Profit & Loss A/c.,

consisted of INR.49.90 Crores that was excluded by the Assessee while computing business income and therefore, the said amount was also not considered for the purpose of computing deduction under Section 80-IA of the Act. Therefore, the Assessing Officer is directed not to exclude provisions no longer required and written back aggregating to INR.49.90 Crores while computing deduction under Section 80IA of the Act.

Foreign Exchange Gain

11.9. As regards foreign exchange gain (net) of INR.6.47 Crores credited to the Profit & Loss A/c is concerned, the same was computed as under:

Particulars	Amount (INR.)
Realised foreign exchange fluctuation gain on capital account.	7.66 crores
Unrealised foreign exchange fluctuation gain on capital account	3.81 crores
Total	11.47 crores
Less: Loss on revenue account as a result of exchange rate fluctuations on re-instatement of foreign exchange liabilities on balance sheet date and settlement date	(5.00 crores)
Foreign exchange fluctuation gain (Net) credited to the Profit & Loss A/c.	6.47 crores

On perusal of 'statement showing computation of taxable income under normal provisions of the Act' we find that the Assessee has excluded 'Realized Foreign exchange fluctuation gain on capital account' of INR.7,66,32,862/- and 'Unralized Foraging exchange fluctuation gain on capital account' of INR.3,81,00,013/-. Thus, foreign fluctuations gains (realised and unrealized) on capital account aggregating to INR.11.47 crores were disallowed by the Assessee while computing its business income and therefore, the said amount was also not considered for the purpose of computing deduction under Section 80-IA of the Act. Therefore, the Assessing Officer is directed not to exclude foreign exchange fluctuation (net) of INR.6.47 Crores while computing deduction under Section 80IA of the Act.

Cellsite Sharing Revenue

11.10. As regards cellsite sharing revenue is concerned, the Learned Authorized Representative for the Assessee had placed reliance upon the order passed by Co-ordinate Bench of the Tribunal in Assessee's own case for the Assessment Year 2009-2010 [**ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, titled Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. reported in [2018] 92 taxmann.com 234 (Delhi)**]. In that case it was held that the Assessee was entitled to claim deduction under Section 80IA of the Act in respect of the cellsite sharing revenue. The relevant extract of the aforesaid decision reads as under:

"52. Third item is 'Cell site sharing' revenue of Rs. 42,85,79,640/-. This income was earned by the assessee on sharing the available spare space/capacity on its telecommunication cell sites with other telecom operators for setting up their respective antennas and placing microwave and BTS equipments. We find that there is a direct link of such income with the eligible business of providing telecommunication services. The Id. DR likened such hire charges to the earning of rental income from letting out property and contended that the same cannot be considered as profits and gains of business of telecommunications. In our view, this analogy drawn by the Id. DR is not correct. We are concerned with a situation in which income has resulted from sharing of surplus space on cell sites with other telecom operators. The cell sites are the tools of the assessee's business, without which its business cannot run. If there remains some surplus space on such business tools, which is let out by the assessee, the resultant income will be income from the business of telecommunications. Example of simplicitor hiring of building cited by the Id. DR is not germane to the issue. Such a rental income would obviously fall under the head 'Income from house property' and would not be eligible for deduction. Since the underlying assets in the situation under consideration are cell towers, which are in the nature of tools of the assessee's business, income from their commercial exploitation, in our opinion becomes 'business income' qualifying for deduction in contradistinction to income from simple hiring of property

retaining the character of 'Income from house property'. It is, therefore, directed to be considered as eligible for deduction u/s. 80IA of the Act."

In view of the above decision of the Co-ordinate Bench of the Tribunal, exclusion of cellsite sharing revenue of INR.0.81 Crores from the business income while computing deduction under Section 80IA of the Act cannot be sustained. Therefore, the Assessing Officer is directed to grant benefit of Section 80IA of the Act in respect of Cellsite Sharing Revenue of INR.0.81 Crores.

Miscellaneous Income

11.11. As regards Miscellaneous Income of INR.5.81 Crores are concerned, reliance was placed on behalf of the Assessee upon the decision of Mumbai Bench of the Tribunal in group company's case of the Assessee (erstwhile 'Vodafone India Ltd.'). In that case, vide **Order dated 28/11/2022 passed in ITA No. 5078/Mum/2017 (AY 2005-06)**, the Co-ordinate Bench of the Tribunal had concluded that Assessee was entitled for deduction under Section 80IA of the Act in respect of miscellaneous income since in terms of non-obstinate clause used in Section 80IA(2A), deduction for telecommunication services is available in respect of "profits of eligible business" and is not restricted to "profits derived from eligible business" as mentioned in Section 80IA(1) of the Act. The relevant extract of the aforesaid decision of the Tribunal reads as under:

"23. The assessee has filed appeal assailing the findings of CIT(A) in respect of disallowance of deduction u/s. 80IA of the Act on other incomes. The assessee in appeal has raised three grounds. The Id. Counsel for the assessee stated at Bar that he is not pressing ground No.1 of the appeal. The ground no.1 of appeal is accordingly dismissed as not pressed.

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

"2. Disallowance of deduction under section 80IA of the Act on 'Other Income' 2.1 On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in upholding that deduction u/s 80IA of the Act can be allowed only on direct income derived from the specified activity, thereby ignoring the

non obstante sub-section 2A of section 80IA which provides that to be eligible for deduction u/s 80IA of the Act, income arising should be business income of the eligible undertaking, i.e. telecom undertaking of the Appellant in the present case

2.2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the order of the learned AO in excluding the following incomes while computing deduction u/s 80IA of the Act: (a) Interest income amounting to INR. 6,09,99,174; and (b) Miscellaneous income amounting to INR 4,98,14,610;”*

25. *The Id. Counsel for the assessee submits that the assessee had earned interest income of Rs.6.09 crores and miscellaneous income of Rs.4.98 cores. The assessee claimed deduction u/s. 80IA of the Act in respect of the aforesaid income. The same was disallowed by the Assessing Officer and the CIT(A). The Id. Counsel for the assessee submitted that Delhi Bench of the Tribunal in the case of Bharat Sanchar Nigam Ltd.(BSNL) reported as 156 ITD 847 (Del-Trib) has held that deduction for telecommunication services is allowable in respect of “profits of eligible business and not restricted to profits derived from eligible business as mentioned in section 80IA of the Act.”*

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

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

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

Tribunal after examining and comparing the provisions of section 80IA(1) and 80IA(2A) held as under:

"13.2. On a reading of sub-section (1) of section 80-IA, we find that the legislature specifically uses the words meaning and import of which is plain and unambiguous in the context it is to be construed. Deduction under section 80-IA in terms of subsection (1) is available to "gross total income" of an assessee where "gross total income" is restricted to "profits and gains derived by..... from any business referred to in sub-section (4)". The deduction is available of an amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years" subject to the provisions of the section. The meaning and intention of the legislature has been legally settled and well understood to mean that only those profits come under the ambit which can be said to be "derived from" such business. The intention of the legislature on a plain reading of the said sub-section is loud and clear. Reference to the decisions which establish a nexus of the first degree at this stage is refrained from as the position is well-settled legally and at this stage is not an issue for consideration in the present proceedings as both the parties agree that sub-section (1) of section 80-IA envisages only first degree nexus for the purposes of claiming deduction. The fact that deduction is available to hundred percent of the profits for a period of ten consecutive years is also not an issue under debate and even otherwise we find that the above provision in the said extent is clear and unambiguous.

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

The Co-ordinate Bench further held that:

"13.10. Thus the dispute of bringing sub-section (1) into play for a tax payer falling in sub-section (2A) of section 80-IA to our minds cannot arise. According to the assessee sub-

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

13.11. Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, wherever it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play"

The Tribunal finally concluded that in terms of non- obstinate

clause used in section 80IA(2A), deduction for telecommunication services is available in respect of "profits of eligible business" and is not restricted to "profits derived from eligible business" as mentioned in section 80IA(1) of the Act. The aforesaid findings of the Tribunal were affirmed by the Hon'ble Delhi High Court. We further observe that the DRP in directions dated 21/09/2017 for assessment year 2013-14 has observed that no SLP has been filed against the decision of Hon'ble Delhi High Court by the Revenue and allowed assessee's claim of deduction u/s. 80IA of the Act in respect of other incomes. Respectfully following the decision of Hon'ble Delhi High Court in the case of BSNL(supra), we direct the Assessing Officer to allow the benefit of deduction u/s. 80IA of the Act +in respect of interest 37 ITA NO.5598/MUM/2017(A.Y.2005-06) ITA NO.5078/MUM/2017(A.Y.2005-06) Income as well as miscellaneous income. Ground No.2 of the assessee's appeal is thus allowed."

In view of the above decision of the Co-ordinate Bench of the Tribunal, exclusion of miscellaneous income of INR.5.81 Crores from the business income while computing deduction under Section 80IA of the Act cannot be sustained. Therefore, the Assessing Officer is directed to grant benefit of Section 80IA of the Act in respect of miscellaneous income of INR.5.81 Crores.

11.12. In view of the Paragraph 12.6 to 12.11 above, Ground No.1 raised by the Assessee is partly allowed.

Ground No.2

12. Ground No.2 raised by the Assessee reads as under:

"2. Ground No. 2-Disallowance of license fee u/s 37(1) of the Act

2.1. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in holding that the annual revenue share based license fee of INR 2,26,09,97,608 payable by the Appellant to the Department of Telecommunications ('DoT'), qualifies as a capital expenditure being consideration for obtaining the telecom license and hence, amortisable u/s 35ABB of the Act.*

2.2. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not applying the decision of the jurisdictional Delhi High Court in the case of Bharti Cellular Limited and others 221 Taxman 323 on identical issue, on the basis that it is pending adjudication before the Supreme Court."*

12.1. Ground No.2 raised by the Assessee pertains to disallowance of license fees amounting to INR.1,40,20,51,723/- claimed as deduction under Section 37(1) of the Act. Both sides agreed that the issue in dispute stands covered by the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Vs. Bharti Hexacom Ltd. [2023] 155 taxmann.com 322 (SC), dated 16/10/2023**. On perusal of the judgment of Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Bharti Hexacom Ltd. (Supra), we find that the Hon'ble Supreme Court had held that the annual license fees paid by the Telecom Companies was capital in nature and will be capital in nature and is accordingly required to be amortised under Section 35ABB of the Act. The Learned Authorized Representative for the Assessee had submitted that the license fees paid by the Telecom Companies in terms of the National Telecom Policy (NTP) - 94, being in the nature of capital expenditure was not claimed as business expenditure under Section 37(1) of the Act as the same was amortized in terms of Section 35ABB of the Act. Pursuant to the implementation of the NTP-99 the variable license fee was annual fee payable in the normal course of business for operating and providing telecommunication services and the fees paid covered the relevant previous year only, the Telecom companies claimed the entire amount of variable license fees paid to the Department of Telecommunication as deductible revenue expenditure under Section 37(1) of the Income Tax Act from financial year 199-2000 onwards. However, the Hon'ble Supreme Court has, in the case of Bharti Hexacom Ltd. (Supra), held that even the annual fees paid by telecom operators was capital expenditure covered under Section 35ABB of the Act. The aforesaid judgment of the Hon'ble Supreme Court does not result into

permanent disallowance but lead to staggered allowance of annual license fees over the period of license. Accordingly, the amount of variable license fees paid to the Department of Telecommunication annually and debited to Profit & Loss Account would get disallowed and consequential deduction would be allowed to the Assessee over the balance period of license on amortization basis which shall also include consequential deduction towards past year disallowance. During the course of appellate proceedings, the Learned Authorised Representative for the Assessee filed working showing that in view of the aforesaid a disallowance to the extent of INR1.41 Crores would get sustained as per the aforesaid judgment of the Hon'ble Supreme Court. Accordingly, we direct the Assessing Officer to verifying the working furnished by the Assessee and compute the quantum of disallowance as per the judgment of the Hon'ble Supreme Court in the case of Bharti Hexacom Ltd. (Supra). Accordingly, in terms of aforesaid, Ground No.2 raised by the Assessee is partly allowed.

Ground No.3:

13. Ground No.3 raised by the Assessee reads as under:

"3. Ground No. 3-Disallowance of depreciation on provision for Asset Restoration Cost ('ARC') obligation

- 3.1. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in disallowing tax depreciation of INR 16,00,000 claimed by the Appellant on the addition to fixed assets on account of ARC obligation.*
- 3.2. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not including the amount of ARC as a part of the cost of the telecom towers u/s 43(1) of the Act.*
- 3.3. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 3.1 and 3.2, the learned DRP/AO have erred in not allowing deduction for ARC as a revenue expense u/s 37(1) of the Act.*
- 3.4. *On the facts and in the circumstances of the case and in law and*

without prejudice to Grounds 3.1 to 3.3, the learned DRP/ AO have erred in not allowing deduction for ARC on a proportionate basis over the period of lease.”

- 13.1. Ground No.3 raised by the Assessee pertains to depreciation on provision for Assets Restoration Cost (ARC) made by the Assessing Officer as per directions of the DRP.
- 13.2. The relevant facts in brief are that the Assessee was in the business of providing mobile telephonic service and the same required setting up of large number of transmission towers for providing sufficient network coverage in the licensed territory. The Assessee entered into lease agreements with various owners of premise for setting up of telecom towers for duration of about 15-20 years. As per the said lease agreements, the Assessee was required to remove the towers from the said leased premises on the expiry of the lease period. According to the Assessee, an obligation was cast upon the assessee to restore the lease premises to their original form and therefore, following Accounting Standard-29 (AS-29), estimated cost to be incurred for meeting the aforesaid obligation was determined. As per notes to the Audited Financial Statement for the relevant previous year the aforesaid estimated cost was treated as directly attributable to the cost of the acquisition of the capital asset (i.e. telecom towers) and therefore, it was treated as part of the cost of acquisition of the said capital asset and accordingly, depreciation of INR.16,00,000/- was claimed in respect of the same. Before the Assessing Officer it was contended that obligation cost was expenditure necessary to bring such capital asset into existence and put them in working condition and therefore depreciation claimed should be allowed. Alternatively, obligation cost should be allowed on proportionate basis over the period of the lease. The Assessing Officer rejected the aforesaid contentions and disallowed the depreciation claimed concluding that the obligation cost was in the nature of unascertained

liability; it was not possible for anybody to say with certainty as to what will be the expenditure required to restore the leased premises to original position at the time of vacating it; and therefore; any allocation made in that regard at the time of acquisition of the assets was only in the nature of the provision for an unascertained liability, which was not allowable as deduction under the provisions of the Act.

13.3. The objections filed by the Assessee before the DRP were rejected and the Assessing Officer passed Final Assessment Order making disallowance of depreciation of INR.16,00,000/- concluding as under:

"3. Disallowance of depreciation claimed on the addition to fixed assets on account of Asset Restoration Cost Obligation

As per the tax audit report filed by the assessee for the subject assessment year, the assessee has capitalized certain sum on account of asset restoration cost obligation, being the estimated cost to be incurred at leased and shared network sites and office premises to restore them to their original condition at the end of the leased period. Tax depreciation claimed on such ARO obligation has not been furnished by the assessee. Hence, the balance of Rs 64 lacs as depicted in note 11 of schedule 19. Thus by applying the rate of 25% on 64 lacs, the depreciation comes out to be Rs 16,00,000. Since, the asset restoration cost obligation was not in the nature of an ascertained liability, the amount so allocated was only in the nature of a provision. Therefore, no depreciation is allowable on the same. Thus, vide notice dated 12.07.2013 the assessee was asked to justify the claim of depreciation on the asset restoration cost obligation. In response the assessee submitted that as per Accounting Standard-29 issued by ICAI it was compulsorily required to make this provision, It was required as the assessee had entered into lease agreement with various owners for its office space and for setting up of cell site towers and such lease agreements put the assessee company under obligation to restore the leased premises to its original form at the time of vacating such premises It was argued that these obligations were directly attributable to the acquisition of capital asset and therefore formed part of the cost of acquisition. The assessee pleaded that the asset restoration obligation cost was expenditure necessary to

bring such assets into existence and put them in working condition and so the depreciation claimed on the same should be allowed. The assessee has relied on various decisions in support of its contention Without prejudice to the above claim of the assessee, the assessee has raised an alternate contention that the liability shall be allowed as revenue expenditure under section 37(1).

The above submissions of the assessee and the documents filed in this regard have been duly considered. As per the Schedule - 20 related to the "Statement of Significant Accounting Policies", the basis and the method of accounting regarding Asset Restoration Cost is given, which is reproduced as below:

"4 Fixed Assets, Depreciation and Amortization.

(a) Asset restoration obligation are capitalized when it is probable that an outflow of resources will be required to settle the obligation and a reliable estimate of the amount can be made"

The above accounting policy statement makes it clear that the outflow on account of ARC is probable and the amount of outflow of resources on account of restoration is purely estimated. Further, it has to be analyzed as to whether there is any legal obligation cost on the assessee company to restore the leased premises to its original position after the expiry of the lease period.

It is a fact that the lease periods are having gestation period of 15 to 20 years and thus the assessee as a lessee is going to enjoy the leased premises for a sufficient long period of time. However, it is not clear as to show the assessee has calculated the expenses, which he is supposed to incur in future and that also after a period of 20 years.

To examine further, it is worthwhile to refer to the sample lease agreement filed by the assessee company. The assessee has relied on the 'Sample Agreement to claim that there is liability on assessee Company to restore the leased premises to its original condition. In this regard, it is submitted that there is nothing in the agreement, which casts an obligation on the assessee to incur expenditure after the expiry of the lease period for restoration of the leased premises. The agreement simply states that the assessee company shall carry out all work at its own cost and expense and the licensor is indemnified in respect thereof. This provision of the agreement is quite unambiguous and clear. It simply states that whatever expenditure is to be done regarding the installation of the cell site has to be borne by the licensee i.e.

the assessee company. Further, the agreement also gives the permission to the licensee (assessee company) to install the equipments at the cell site. Thus, there is no provision in the lease agreement, which creates a liability on the licensee to incur expenditure on the restoration of the leased premises to its original condition after the expiry of the lease period. Since there is no legal binding on the assessee to incur Asset Restoration Cost the expenses op account of ARO are neither allowable u/s 37(1) nor it can be capitalized under the provisions of the I.T. Act, 1961.

As per the Accounting Standard 29 (AS-29), the assessee company is entitled to create a provision but only when there is a present obligation on the assessee company to incur the expenditure, which is not so in the present case. Further, no reliable estimate can be made of the Asset Restoration Cost Obligation on the basis of an event which is going to happen after 20 years.

The AS-29 has been introduced to make provisions for ascertained liabilities which has crystallized during the year under consideration and has to be booked by the assessee on mercantile basis of accounting. Under the "mercantile accountancy system", the net profit or loss is calculated after taking into account all the income and all the expenditure relating to the period, whether such income has been actually paid or not. That is to say, the profit computed under this system is the profit actually earned, though not necessarily realized in cash, or the loss computed under this system is the loss actually sustained, though not necessarily paid in cash. The distinguishing feature of this method of accountancy is that it actually received, and it brings into debit expenditure the amount it becomes legally due and before it is actually has been incurred before it actually disbursed. The assessee company is not entitled to distort the accounting standards to make claims on account of fictitious and non existing cost/expenses.

It is further to see that as to whether the expenses which have to be incurred in future can be set to form part of the 'actual cost' as per sub section (1) of Section 43. The definition of the term "Actual Cost" as per Section 43(1) is reproduces hereunder:-

- 1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:*

Thus, actual cost means the actual cost of the assessee but does not include estimated cost to be incurred by the assessee in future. So, the natural question which arises is -" What is includible in actual cost? The expression "actual cost" should be construed in the sense in which no man of commerce would

misunderstand. For this purpose, it would be necessary to ascertain the connotation of the expression in accordance with the normal rules of accountancy prevailing in commerce and industry. The accepted accounting rule for determining cost of fixed asset is to include all expenses directly relatable to acquisition of the asset (viz, cost price of the asset, interest on money borrowed for the purchase of the asset, bank charges). Expenses necessary to bring the asset to site, install it and make it fit for use (viz, carriage inwards, loading and unloading charges, installation charges, etc.) and expenses incurred to facilitate the use of the asset (viz, cost of repairs and modification prior to use the asset to make it workable, training expenses of the staff before the use of the plant, expenses on essential construction work such as cold storage rooms, cooling towers, etc.) and expenses on insurance, power and fuel, incurred before the commencement of business. Thus, according to the meaning of the term 'actual cost' discussed above, the Asset Restoration Cost Obligation cannot form part of the 'actual cost of the asset.

As per Section 32 of the I.T. Act, 1961, there are certain conditions laid down for claiming depreciation and for availing the same, one has to satisfy the following conditions:-

Condition 1: Asset must be owned by the assessee.

Conditions 2: It should be used during the relevant previous year.

Condition 3: It should be used during the relevant previous year.

Condition 4 Depreciation is available on tangible as well as intangible assets.

The asset must be owned by the assessee, in order to be entitled for the claim of depreciation allowance. In case of the assessee, the asset is not owned by the assessee company. Thus, the assessee is not fulfilling even the Condition 1 as stated above and hence is not entitled for depreciation allowance on Asset Restoration Cost.

As regards the claim of the assessee u/s 37(1) of the IT. Act, 1961 is concerned, it is stated that only revenue expenditure is allowable as deduction and not the capital expenditure under the provisions of section-37(1). As discussed above, the leased premises have been taken on rent for a long period of time (15-20 years) by the assessee company, the expense cannot be said to be of revenue nature. It is further stated that u/s 37(1) only actual expenses, which have been incurred during the year under consideration are allowable. Admittedly, the assessee company has not incurred any expenditure on account of Asset Restoration Cost Obligation. Further, the section 37(1) does not allow

imaginary expenses, which have neither been incurred nor whose liability to incur has arisen during the year under consideration.

Further, the claim of the assessee that liability on account of ARO has arisen in the year in which the lease agreement has been entered into is also without any basis. The expense on account on account of ARO on leased premises is allowable u/s 37(1) to the assessee company in the year in which such expenses are actually incurred by the assessee on the completion of the lease period or on termination of the lease agreement, whichever is earlier.

The Hon'ble DRP, New Delhi on similar facts for the assessee's own case for AY 2009-10 has upheld the disallowance.

Thus, it is clear that at the time of the acquisition of the asset, the liability to restore the asset to its original form at the time of vacating it is still an unascertained liability. At the time of the acquisition of the asset, it is not possible for anybody to say with certainty as to what would be the expenditure required to restore the asset to its original form at the time of vacating it. Thus, any allocation made in this regard at the time of acquisition of the asset is only in the nature of a provision for an unascertained liability which in any case is not allowable, Therefore, there is no question of there being allowed any depreciation on the same. Hence, the depreciation claimed by the assessee amounting to Rs. 16,00,000/- on the capitalization of the asset restoration obligation cost was disallowed and added to the income of the assessee in draft assessment order.

However, the assessee filed its objections before the Hon'ble DRP.

Directions of DRP:

Vide order dated 18-12-2014, the DRP-II considered the objection on this issue and rejected the same giving detailed reasons for the same. The DRP-II concluded as follows:

"The panel has considered the submission of the assessee. While it is true that an assessee, particularly a corporate assessee normally makes a provision for an expense or expenditure etc. in the accounts of an estimated basis. However, there should be a genuine basis based on statistical information and past experience and also a reasonable estimate of liability fastened on the assessee. In the instant case, it cannot be said that provision for Asset Restoration Cost (ARC) is based on ascertained or crystallized liability that is based on historical data, computed in a scientific manner. Therefore, the stand taken by the AO is found to be tenable by the panel as such liability is contingent in nature. For A.Y. 2009-10, the DRP has upheld the disallowance of depreciation on provision of ARC. The assessee, therefore gets no relief on this ground of objection."

Since the DRP-II has not made any variation in the addition as proposed in the draft assessment order, an addition of Rs. 16,00,000/- is made to the total income on account of disallowance of depreciation claimed on the ARC-provision. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately on this account."

- 13.4. Being aggrieved, the Assessee has carried the issue in appeal before this Tribunal.
- 13.5. We have heard both the sides and have perused the material on record.
- 13.6. We find that identical issue had come up for consideration in the case of Vodafone Mobile Services Limited (formerly known as Vodafone Digilink Ltd. which stands amalgamated with Vodafone Mobile Services Limited Vs. Deputy Commissioner of Income Tax, Circle 26(2), New Delhi (Jurisdiction realigned from Circle 17(1), New Delhi) [ITA No.4189/Del/2017, Assessment Year 2007-2008, dated 22/05/2025]. After taking into consideration the identical contentions raised by both the sides, the Tribunal disposed off the issue with the following directions:

"9. *Before us the Ld. counsel for the assessee submitted that similar disallowances of depreciation on ARC obligation was made by the Assessing Officer in subsequent assessment year 2009-10, which was challenged before the Tribunal but the Tribunal vide order dated 14.03.2018 reported in (2018 117 ITAT 430)(Delhi Tribunal) upheld the stand of the Assessing Officer and the Ld. dispute resolution panel (DRP) that depreciation was in the nature of unascertained liability. Further the Ld. counsel submitted that the appeal was filed by the assessee against the said order of the Tribunal before the Hon'ble Delhi High Court and Hon'ble Delhi High Court in its recent decision reported in the (2025) 172 taxman.com 378 (Delhi) has held that ARC is allowable as deduction u/s 37(1) of the Act. The finding of the Hon'ble Delhi High Court is reproduced as under:*

- "34. *One cannot possibly doubt the imperative requirement of civil works being undertaken on premises in order to erect cell towers. This would necessarily be liable to be removed upon the end of the license term in light of the contractual obligation which stands imposed upon the assessee. Since this would necessarily entail dismantling as well as restoration of the site to its original condition, the assessee appears to have estimated the cost likely to be incurred based on past experience and the inevitability or, to put it differently, the evident probability of such a cost being incurred. The contractual covenant cast a duty upon the assessee to remove the BTS equipment in such a manner that the aesthetics/structural design/architecture of the building is not disturbed. It was also placed under a positive obligation to restore the premises to its original state at its own cost/ The respondents, however, would contend that the aforesaid liability was contingent upon damage if any that may be caused. In our considered opinion, the view so taken is clearly untenable for the following reasons.*
35. *We are of the firm view that the usage of the phrase if any damage is caused' in the lease agreement cannot be construed as detracting from the right of the assessee to provision for a liability which flowed from an existing obligation and the occurrence of which was not liable to be viewed as an improbability. In our opinion, the phrase if any damage is caused' as it occurs in the agreement would only be germane to the issue of actual computation of the expenditure that would be incurred in the course of restoration. The qualificatory language as adopted in the agreement is thus liable to be viewed as merely being pertinent to identification of actual damage at the end of the lease term and the true or concrete expense to be incurred in repair and restoration. The said qualification would, in any case, have to be read in conjunction with the primary obligation to restore the premises to its original condition. The obligation to repair and restore forms the core of the contractual obligation which stood placed upon the assessee. It was therefore entitled to provision for such an expense provided it was considered probable and could be quantified on the basis of a reasonable estimation. The usage of the phrase if any damage is caused did not transform that obligation into a contingent liability. We thus find ourselves unable to*

countenance the view expressed by the Ld.AO and the Tribunal in this respect.

36. *A provision can be validly made, provided it be in line with the prescriptions set out in AS-29. That accounting standard is not concerned with events of certainty or an ascertained liability as the AO and the Tribunal understood. In our considered view, the stand taken by the respondents firstly proceeds on the incorrect premise of the liability being one which already exists and in respect of which there cannot possibly be a doubt. It is while proceeding on this fundamental postulate which has led to the Tribunal seeking to discern the existence of an ascertained liability. This clearly runs contrary to the express language of AS 29 when it defines a liability to be one whose settlement is expected to result in an outflow. AS 29 while explaining when a provision may be justifiably made speaks of the probability of an outflow. The usage of the expression 'probable' is equated to more likely than not. Thus, it is the reasonable likelihood of the outflow as opposed to a remote or uncertain possibility which is deemed to be germane and relevant. It thus has to be viewed as distinct from unforeseen liabilities and obligations. As we view the contract term, we have no hesitation in recognising the same as being the manifestation of a positive commitment to repair and restore. The duty to repair and restore stands attached to the removal of equipment as well as the liability to restore the premises to its original condition. The contract thus constitutes the past event and which in turn creates an obligation in praesenti pertaining to a liability which is probable and ascertainable. Thus, the only facets which are left to conjecture are the exact timing and the amount of outflow that may occur.*
37. *A contingent liability on the other hand is concerned with a possible obligation and which may or may not arise since it would be dependent upon the occurrence or non-occurrence of an uncertain future event. These are liabilities which are neither considered probable nor can they be reasonably estimated. The obligation and outflow which is spoken of in connection with contingent liabilities are prefaced by the words 'possible, one or more uncertain future events' and where the occurrence or non-occurrence of those events is itself unclear and uncertain.*

A contingent liability is one where both the obligation as well as the occurrence of the event which would trigger the same are to be found in the realm of conjecture. It is the facet of such liabilities neither being probable, more likely not to occur and being immeasurable which distinguishes these liabilities from those in respect of which a provision may be legitimately made.

38. *The provision as made thus, clearly appears to follow lines similar to the site restoration situation which the Madras High Court had an occasion to review in Vedanta Ltd. As was held by that High Court, the words laid out or expended are not confined to an immediate expenditure but would also comprehend an expenditure which may arise in the future. Their Lordships noted that the assessee in that case was placed under the contractual obligation to expend monies on site restoration and the creation of the provision itself being based on empirical principles. It thus held that all that Section 37(1) requires is that the expenditure should be "laid out" or "expended" for the purposes of business.*
39. *The Madras High Court also had an occasion to notice a whole body of precedent which had, while speaking of provisions for liabilities being made, clearly interpreted the words laid out or expended as including an expenditure likely to be incurred in the future. It was thus held that the provision so made, on the basis of and informed by commercial prudence would clearly qualify the prescriptions of Section 37.*
40. *We are thus of the considered opinion that the provisioning for ARC qualified the prescriptions of AS 29 and the assessee was thus justified in accounting for the same. The ARC obligation clearly met the test of a positive obligation flowing from a past event, being a conceivable probability as well as being measurable. In any event, both the AO as well as the Tribunal appear to have proceeded on the basis that only an ascertained liability could have been provisioned for. That view is not only erroneous but also unsustainable in law.*
41. *We are also of the view that the Tribunal in any case failed to notice or engage with the contention of the assessee in the alternative and which was based on*

Section 37 of the Act. By placing its case within the ambit of Section 37, the assessee stood relieved of getting into the quagmire of actual cost' and other related issues. All that it was left to establish was that the expenditure had been laid out. As the Madras High Court correctly explains in Vedanta, the usage of the expression laid out and expended' in Section 37 are indicative of that section not being confined to immediate expenditure but also factoring for situations where an amount may be set apart for a determined or specified objective. The appellant was thus clearly entitled to succeed on this point."

10. *On the contrary, Ld. DR submitted that assessing officer rejected the claim of the assessee of the depreciation as well as alternative claim u/s 37(1) on the ground of unascertained liability and therefore he did not examine the genuine computation of the quantum of the deduction and hence the matter might be restored back to the file of the assessing officer for deciding in the light of the decision of Hon'ble Delhi High Court.*
11. *We have heard rival submission of the parties and perused the relevant material on record. The issue in dispute is in respect of provision created by the assessee for the cost of the obligation for restoring the lease premises to their original position at the end of the lease period. The assessee has estimated such asset restoration expenses and debited in the books of account as provision. For the purpose of Income-tax purposes, the assessee, firstly, considered the same as part of the cost of the acquisition of the asset and claimed depreciation, but also alternatively prayed for considering those expenses allowable u/s 37(1) of the Act. The Revenue however is of the view that such expenses can't be estimated with any accuracy at the time of taking the premises on lease. It is further submitted that quantum of the same also cannot be estimated in 15-20 years in advance. Ld. DR submitted that such expenditure can be allowed as revenue expenditure in the year of their actual incurred. However, we find that Hon'ble Delhi High Court (Supra) has already decided the issue and allowed relief to the assessee in respect of the alternative prayer. Since the quantum of claim of the assessee was not examined or verified by the assessing officer at the stage of the assessment proceeding, we feel it appropriate to restore the issue and dispute back to the file of the assessing officer with the direction for deciding in the light of the decision of Hon'ble Delhi High Court (supra) and also*

examine the depreciation already claimed by the assessee for deletion. The ground No.2 of the appeal of the assessee is accordingly allowed for statistical purposes.

12. *In the result, the appeal of the assessee is allowed for statistical purposes."*

13.7. We concur with the above view taken by the Co-ordinate Bench of the Tribunal rendered in identical factual matrix. Admittedly, there is no change in the facts and circumstances of the present case. For the Assessment Year 2010-2011 also, the quantum of claim made by Assessee was not examined or verified during the assessment proceedings. Therefore, respectfully following the above decision of the Tribunal, we restore the issue back to the file of the Assessing Officer with the direction for deciding the issue in the light of the judgment of the Hon'ble Delhi High Court [*reported in the (2025) 172 taxman.com 378 (Delhi)*] after verifying the quantum and computation of deduction/depreciation claimed by the Assessee in respect of obligation cost. Thus, Ground No.3 raised by the Assessee is allowed for statistical purposes.

Ground No.4

14. Ground No.4 raised by the Assessee reads as under:

"4. Ground No. 4-Disallowance u/s 40(a)(ia) of the Act on account of non-deduction of tax at source on domestic roaming charges paid to other telecom operators

4.1. *On the facts and in the circumstances of the case and in law, the learned DRP/ AO have erred in making an addition u/s 40(a)(ia) of the Act on account of non-deduction of taxes at source on roaming charges of INR 88,88,09,342 paid/payable by the Appellant to other telecom operators for the financial year relevant to the subject AY.*

Grounds with respect to applicability of TDS:

4.2. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in holding that the Appellant was*

required to deduct tax under section 194J of the Act on the roaming charges' paid/payable by the Appellant to other telecom operators, during the subject financial year.

- 4.3. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not appreciating the fact that roaming services are standard automated services requiring no human intervention which is sine qua non for a service to qualify as a technical service for the purposes of section 194J of the Act.*
- 4.4. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not appreciating that the examination of technical experts by the TDS officer subsequent to the judgment of the Hon'ble Supreme Court in the case of Vodafone Mobile Services Limited ('VMSL' sister concern of the Appellant) for AY 2003-04 was in the context of interconnect services ('IUC services') and not roaming services.*
- 4.5. *On the facts and in the circumstances of the case and in law and without prejudice to Ground 4.4, the learned DRP/AO have erred in not appreciating that even as per the statement of technical experts recorded in the context of IUC services in the case of the Appellant itself, it has been stated that the carriage of calls is an automatic activity and human intervention, if any, is required only at the stage of inter-connect set-up, capacity enhancement, monitoring, maintenance, fault identification, repair, etc.*
- 4.6. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in ignoring the statement of technical experts recorded by the income-tax authorities in Coimbatore during proceedings conducted in the case of a group company of the Appellant Vodafone Cellular Limited, in the context of roaming services, wherein it has been clearly observed that roaming services are automated services requiring no human intervention.*
- 4.7. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 4.2 to 4.6, the learned DRP/AO have erred in not holding that characterization of a payment must be done having regard to the dominant purpose/ intention of the payment.*

Grounds with respect to applicability of section 40(a)(ia) these grounds are without prejudice to the grounds stated above with respect to applicability of TDS on roaming charges:

- 4.8. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not holding that no disallowance can be made u/s 40(a)(ia) of the Act since the Appellant is of a bonafide belief that no tax was required to be deducted at source on roaming charges.*
- 4.9. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not restricting the disallowance u/s 40(a)(ia) of the Act to the amount which remains payable at the end of the year.*
- 4.10. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 4.2 to 4.7, the learned DRP/AO have erred in not adjudicating and holding that since the insertion of second proviso to section 40(a)(ia) of the Act vide Finance Act, 2012 is curative in nature, the benefit of the same should be extended to the past years and accordingly, the learned AO be directed:*
- a. *to allow deduction in respect of the disallowance of INR 88,88,09,342 made u/s 40(a)(ia) of the Act for the subject AY in the subsequent year's, basis the conditions prescribed in the second proviso to section 40(a)(ia) of the Act;*
 - b. *to allow deduction in the subject AY (i.c. AY 2010-11) for the similar disallowance made in prior years basis the conditions prescribed in the second proviso to section 40(a)(ia) of the Act."*

14.1. Ground No. 4 raised by the Assessee is directed against the disallowance of roaming charges made by the Assessing Officer under section 40(a)(ia) of the Act holding that the Assessee had failed to deduct tax from the same. During the relevant previous year, the Assessee incurred domestic roaming charges amounting to INR.88,88,09,342/-. The roaming charges were paid by the Assessee to telecom operators towards roaming services provided by such operators to the subscribers of the Assessee. According to the Assessing Officer even though the process of carriage of calls was fully automated and no human intervention was involved, there was an element of human intervention at the time of setup, monitoring,

fault identification etc and therefore, the Assessing Officer was of the view that the roaming charges were subject to tax deduction at source in terms of Section 194J of the Act. Since the Assessee had failed to deduct tax at source in compliance with the provisions of Section 194J of the Act, the Assessing Officer made disallowance of INR.88,88,09,342/. in respect of roaming charges invoking provisions contained in Section 40(a)(ia) of the Act in the Draft Assessment Order, dated 31/03/2014.

14.2. In the objections filed by the Assessee on this issue. However, the DRP rejected the objections holding as under:

"12.1 The assessee has further assailed in this ground of objection (objection no. 9), the disallowance u/s 40(a)(ia) of the Act on account of non deduction of tax at source on domestic roaming charges paid/payable to other telecom operators of Rs. 88,88,09,342/- for the F.Y. relevant to the subject AY. The assessee has contended that roaming charges do not qualify as Fee for Technical Services (FTS) under the Act since roaming services are standard automated services i.e. standard facility requiring no human intervention, as the entire process of transmission of the call is fully automatic.

12.2 However, the panel is of the opinion that provisions of section 194J of the Act is clearly applicable in case of roaming charges as in the case of Inter connect services (IVC Services), [Refer CIT v. Bharti Cellular Ltd (2011) 330 ITR 239 (SC)], where human intervention is required. Therefore, the stand taken by the assessing officer is ratified by the panel. The alternative plea of the assessee that provision of section 40(a)(ia) of the Act is only applicable for the amount which remains 'payable' at the year end cannot be accepted in view of the decision of Hon'ble Gujarat High Court in the case of CIT v. Sikandar Khan N. Tunvar (Tax Appeal No. 905, 709, 710, 832, 857, 894 and 928 of 2012 and Tax Appeal No. 12, 51, 58, 218 and 333 of 2013) where it has been held that the provision of Sec. 40(a)(ia) are clear and the disallowance u/s 40(a)(ia) is not restricted to amounts 'payable' at the end of the previous year since section 40(a)(ia) does not require that the amount sought to be disallowed u/s 40(a)(ia) must be 'payable' at the end of the previous year. Similar views have been upheld by the

Calcutta High Court in Crescent Export Syndicate/Md. Jakir Hossain Mondal. The DRP for A.Y. 2009-10 upheld disallowance of roaming charges paid by the assessee on account of non deduction of tax at source, u/s 40(a)(ia) of the Act. Therefore, the stand taken by the AO is hereby confirmed and the assessee gets no relief on this ground of objection.” (Emphasis Supplied)

- 14.3. Accordingly, in the Final Assessment Order, dated 27/01/2015, the Assessing Officer made disallowance of INR.88,88,09,342/- under Section 40(a)(ia) of the Act.
- 14.4. Being aggrieved, the Assessee has carried the issue in appeal before the Tribunal.
- 14.5. We have considered the rival submissions and perused the material on record.
- 14.6. During the course of hearing, both the sides agreed that identical issue had come for consideration before the Tribunal in the case of the Assessee in appeals pertaining to Assessment Year 2009-2010. Vide **Common Order, dated 14/03/2018**, passed in [**ITA Nos. 1169&1950/Del/2014, titled Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. reported in [2018] 92 taxmann.com 234 (Delhi)**] pertaining to **Assessment Year 2009-2010** [reported in **(2018) 170 ITD (Delhi – Trib)**] 2009-2010 the Co-ordinate Bench of the Tribunal decided this issue in the favour of Assessee and deleted the disallowance of roaming charges under Section 40(a)(ia) of the Act holding that the provision of Section 194J of the Act were not attracted in case of payments made by the Assessee towards roaming charges to other domestic telecommunication companies for use of their respective networks. The relevant extract of the aforesaid decision of the Tribunal reads as under:

- "31. The next ground is against the disallowance of Rs. 70,86,29,294 u/s. 40(a)(ia) of the Act on account of 'Roaming charges'.
32. The facts apropos this ground are that the assessee incurred expenditure of Rs.70,86,29,294/- on domestic roaming charges on which no deduction of tax at source was made. On being called upon to explain as to why such payment be not considered as 'fees for technical services' under section 9(1)(vii) of the Act, the assessee contended that the payments made for inter-connectivity/roaming charges did not involve any human intervention and, hence, such amount could not be considered as 'fees for technical services.' In support of its contention, the assessee relied on the judgment of the Hon'ble jurisdictional Delhi High Court in *CIT v. Bharti Cellular Ltd. [2009] 319 ITR 139/[2008] 175 Taxman 573 (Delhi)* in which it has been held that the services rendered by MTNL and other telecommunication companies qua inter-connection do not involve any human interface and, hence, the same cannot be regarded as a 'technical service' so as to require deduction of tax at source u/s. 194J of the Act. Not convinced, the AO treated such payment as 'fees for technical services' requiring deduction of tax at source and in the absence of non-deduction of tax, the disallowance was made. The assessee has come up in appeal before the Tribunal on the disallowance.
33. We have heard both the sides and perused the relevant material on record. It is noticed that the judgment relied by the assessee before the authorities below in *Bharti Cellular Ltd.'s case (supra)* came up for consideration before the Hon'ble Supreme Court. Vide its judgment dated 12.08.2010, the Hon'ble Supreme Court in *CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239/[2010] 193 Taxman 97* remanded the matter to the AO with a direction to seek expert evidence for showing if any human intervention was involved during the process when call takes place so as to bring the payments of inter-connection charges within the ambit of 'fees for technical services' u/s. 194J of the Act. It is pertinent to note that pursuant to this judgment, a detailed statement of technical experts of C-DOT was recorded in the case of *Vodafone Essar Mobile Services Ltd.*, based on which the AO in the instant case opined that the provision of section 194J were attracted and, hence, the failure to deduct tax at source invited the wrath of section 40(a)(ia). The AO in the impugned order has also referred to the statement of Shri Tanay Krishna from C-DOT based on which he reached the conclusion that section 194J was attracted. It is pertinent to mention that when Shri Tanay Krishna was cross-examined, he admitted that no human intervention was involved in the entire process of carriage of call from one operator to another. An elaborate discussion has been

made in this regard by the Kolkata Bench of the Tribunal in Vodafone East Ltd. v. Addl. CIT [2016] 156 ITD 337/61 taxmann.com 263 (Kol. - Trib.). After discussing the issue at length, the Tribunal eventually held that the payment of roaming charges did not require any deduction of tax at source either u/s. 194C or 194I or 194J and, hence, no disallowance could be made u/s. 40(a)(ia) of the Act.

34. *At this stage, it is relevant to mention that after the judgment of the Hon'ble Supreme Court in Bharti Cellular Ltd. (supra), there is some further development of law. In Bharti Cellular Ltd. (supra) the Hon'ble Supreme Court remitted the matter to the AO for having expert opinion to ascertain if any human intervention was involved so as to consider the attractability or otherwise of the definition of 'technical services' under section 9(1)(vii) of the Act. In a later decision in CIT v. Kotak Securities Ltd. [2016] 383 ITR 1/239 Taxman 139/67 taxmann.com 356 (SC), the Hon'ble Supreme Court, after considering its earlier decision in Bharti Cellular Ltd. (supra), observed that: "modern day scientific and technological developments tend to blur the specific human element in an otherwise fully automated process by which such service may be provided." It was held that: 'the transaction charges, which were core of dispute in that case, were paid for services fully automated in respect of every transaction.' The Hon'ble Supreme Court held that if there is certain exclusive or customised service rendered by the Stock Exchange to individual person, that would fall within the ambit of 'technical services' and, if, however, such services are available to all the members of the Stock Exchange, it will cease to be a technical service. Similar view has been reiterated in DIT (IT) v. A.P. Moller Maersk A.S [2017] 392 ITR 186/246 Taxman 309/78 taxmann.com 287 (SC) in which their Lordships applied the test laid down in Kotak Securities Ltd. (supra), and held that automated software based communication system set up by the assessee for use to its agent enabling them to access customer and documents etc. was not 'fees for technical services.' It is significant to mention that the Hon'ble Karnataka High Court in CIT v. Vodafone South Ltd. [2016] 241 Taxman 497/72 taxmann.com 347 has considered the judgment of the Hon'ble Supreme Court in the case of Kotak Securities Ltd. (supra) and has eventually held that the roaming processes between the participating companies cannot be termed as technical services and, hence, no deduction of tax at source is required. In view of the foregoing discussion, we are satisfied that the payment of roaming charges by the assessee to other domestic players for use of their respective networks does not amount to payment of fees for technical services within the meaning of section 9(1)(vii) of the Act and, hence, no deduction of tax was required u/s. 194J. Ex*

consequenti, no disallowance u/s. 40(a)(ia) is called for. We, therefore, order to delete the disallowance.” (Emphasis Supplied)

- 14.7. Respectfully following the above decision of the Tribunal in the case of the Assessee for the preceding Assessment Year 2009-10, the Assessing Officer is directed to delete the disallowance made under Section 40(a)(ia) of the Act in respect of roaming charges. Ground No. 4 raised by the Assessee is allowed.

Ground No.5

15. Ground No.5 raised by the Assessee is directed against the disallowance of deduction for discount extended by the Assessee to the Pre-paid Distributors by invoking the provisions contained in Section 40(a)(ia) of the Act and the same reads as under:

“5. Ground No. 5-Disallowance u/s 40(a)(ia) of the Act on account of non-deduction of tax at source on the discount extended to prepaid distributors

- 5.1. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in making an addition u/s 40(a)(ia) of the Act on account of non-deduction of tax at source on the discount of INR 1,44,45,51,001 extended to distributors of prepaid SIM cards/talktime during the financial year relevant to the subject assessment year.*
- 5.2. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in concluding that the relationship between the Appellant and its distributors is that of a Principal and Agent.*
- 5.3. *On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in not holding that no disallowance can be made u/s 40(a)(ia) of the Act since the Appellant is of a bonafide belief that no tax was required to be deducted at source on discount extended to distributors of prepaid SIM cards/talktime.*
- 5.4. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 5.1 to 5.3, the learned DRP/AO have erred in not restricting the disallowance u/s 40(a)(ia) of the*

Act to the amount which remains payable at the end of the year which stands at 'NIL'.

5.5. *On the facts and in the circumstances of the case and in law and without prejudice to Grounds 5.1 to 5.4, the learned DRP/AO have erred in not adjudicating and holding that the insertion of second proviso to section 40(a)(ia) of the Act vide Finance Act, 2012 is curative in nature and its benefit should be extended to the past years and accordingly the learned AO be directed to allow benefit of the same after verification of supporting documents to be submitted by the Appellant and accordingly, the learned AO be directed:*

- a. *to allow deduction in respect of the disallowance of INR 1,44,45,51,001 made u/s 40(a)(ia) of the Act for the subject AY in the subsequent year/s, basis the conditions prescribed in the second proviso to section 40(a)(ia) of the Act;*
- b. *to allow deduction in the subject AY (ie. AY 2010-11) for the similar disallowance made in prior years (i.e. in AYS 2007-08 to 2009-10) basis the conditions prescribed in the second proviso to section 40(a)(ia) of the Act."*

15.1. The relevant facts in brief are that during the relevant previous year, discount amounting to INR.1,44,45,51,001/- were extended by the Assessee to its distributors of pre-paid products (for short 'Pre-paid Distributors'). The discount extended represented the difference between the Maximum Retail Price (MRP) of the talk-time & pre-paid connections; and the price at which these were transferred to the Pre-paid Distributors. The Assessing Officer and the DRP were of the view that the upfront discount given by the Appellant to the Pre-paid Distributor was in the nature of 'commission' liable to withholding of tax at source under section 194H of the Act. Since the Appellant had failed to deduct tax at source, the Assessing Officer passed the Final Assessment Order, dated 27/01/2015, making disallowance of INR.1,44,45,51,001/- under Section 40(a)(ia) of the Act.

15.2. Being aggrieved, the Appellant has carried the issue in appeal before

this Tribunal.

- 15.3. We have considered the rival submissions and perused the material on record.
- 15.4. It emerges that identical issue had come up for consideration before the Mumbai Bench of the Tribunal in **case of the Assessee for the Assessment Year 2009-10 [ITA No. 1121 & 1885/Mum/2014, common order dated 08/11/2023]**, and identical disallowance made under Section 40(a)(ia) of the Act by the Assessing Officer in respect of the upfront discount was deleted by the Tribunal holding as under:

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

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

"2.8.2. We find that in the case before the Co-ordinate Bench of Pune Tribunal in the case of Idea Cellular Limited vs DCIT (TDS) in ITA Nos. 1041, 1042, 1953 -1955/Pun/2013 and ITA Nos. 1867 19 M/s. Vodafone India Ltd. 1870 /Pun/2014 dated 04/01/2017, the lower authorities had held that relationship between assessee and its distributors was Principal and Agent. It was only the Pune Tribunal which after examining the distributors agreement came to the conclusion that the relationship is that of Principal to Principal. In fact Pune Tribunal also examined the very same agreement which is the subject matter of agreement before us in the instant case before us, as it is not in dispute that all the distributors agreements are standard agreements across India. We also find that the Pune Tribunal relied on para 62 of the decision of Hon'ble Karnataka High Court in the case of Bharti

Airtel Ltd vs DCIT reported in 372 ITR 33 (Kar). We find that the Pune Tribunal had taken note of the fact that Hon'ble Karnataka High Court in 372 ITR 33 had distinguished all the three High Court judgements (i.e. Kerala, Calcutta and Delhi) relied upon by the Id. DR hereinabove. Effectively Pune Tribunal adopted the decision of Hon'ble Karnataka High Court. The Id. DR relied on para 64 of decision of Hon'ble Karnataka High Court and argued that it is against assessee for the first 7 months since discount is separately shown in the books of the assessee as an expenditure. In our considered opinion, what is to be seen is the broader question raised before the Hon'ble Jurisdictional High Court in Income Tax Appeal No. 1129 of 2017 dated 13/01/2020 in assessee's own case against the order of Pune Tribunal. For the sake of convenience, the entire order is reproduced hereunder:-

"Heard learned counsel for the parties.

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

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

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

"(a) Whether on the facts and circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in holding the discount given by the assessee to its distributors on prepaid SIM Cards does not require deduction of tax under Section 194H of the Income Tax Act ?

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

5. The Tribunal noted the observations of the Assessing Officer that the discount allowed to the distributors by the Respondent - assessee company is on account of principal to principal relationship and not that of principal to agent. The Tribunal followed the decision of the Karnataka High Court in the 20 M/s. Vodafone India Ltd. case of Bharati Airtel Ltd. vs. DCIT [372 ITR 33] and held that the sale of SIM cards/recharge coupons at discounted rate to the distributors was not commission and therefore not liable to deduct the TDS under Section 194H. The Tribunal noted that there was no decision of this Court on this issue on that date.

6. Learned counsel for the parties have tendered the copy of the order passed in Income Tax Appeal No. 702 of

2017 subsequently in the case of Pr. Commissioner of Income Tax-8 vs. M/s. Reliance Communications Infrastructure Ltd ., where same issue arose for the consideration of this Court. The Division Bench of this Court while holding against the Appellant - Revenue observed thus :-

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

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

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

2.8.3. With regard to reliance placed by the Id. DR vehemently on the decision of Hon'ble Delhi High Court in assessee's own case reported in 325 ITR 148 (Del) is concerned, we find that the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd (372 ITR 33) referred supra had after considering the decision of Hon'ble Delhi High Court referred supra and decided the issue in favour of the assessee. We find that the Hon'ble Karnataka High Court had also followed the decision of Hon'ble Jurisdictional High Court in the case of Qatar Airways reported in 332 ITR 21 M/s. Vodafone India Ltd. 253 (Bom). Hence the reliance placed on the decision of Hon'ble Delhi High Court by the Id. DR does not advance the case of the revenue. In any case, the decisions of

Hon'ble Delhi High Court, Hon'ble Kerala High Court and Hon'ble Calcutta High Court referred supra had been considered and distinguished by the Hon'ble Karnataka High Court referred supra.

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

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

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

"Idea Cellular

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

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

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

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

in respect of identical issue.

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

2.8.7. The Id. DR before us vehemently submitted that the orders of Hon'ble Rajasthan High Courts and Hon'ble Jurisdictional High Courts and Hon'ble Karnataka High Court had not attained finality as they had been appealed by the revenue before the Hon'ble Supreme Court. This argument of the revenue, in our considered opinion, cannot be a deterrent for this Tribunal to follow those High Court orders. We find that the similarly worded distribution agreement had been subject matter of adjudication and examination by the Hon'ble Rajasthan High Court and Hon'ble Jurisdictional High Court wherein the Hon'ble High Courts had taken a categorical view that the relationship between assessee and distributor is only that of Principal to Principal. Hence this finding cannot be disturbed by this tribunal by respectfully following the judicial hierarchy. Infact no contrary materials on facts were even brought on record by the revenue before us to

disturb the findings of Hon'ble High Courts. Hence we have no hesitation in holding that the relationship between assessee and distributor is only that of Principal to Principal and not that of Principal to Agent and accordingly there is no obligation for the assessee to deduct tax at source in terms of section 194H of the Act.

2.8.8. *In view of the aforesaid observations and findings given thereon, we do not deem it fit to adjudicate other arguments advanced by the Id. AR on the applicability of second proviso to section 40(a)(ia) read with section 201 of the Act, as it would become academic in nature. This aspect of the issue is left open."*

3.31. *In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that the sale of prepaid sim cards/recharge vouchers by the assessee to distributors cannot be treated as commission/discount to attract the provisions of section 194H of the Act and hence there cannot be any obligation on the part of the assessee to deduct tax at source thereon and consequentially there cannot be any disallowance u/s 40(a)(ia) of the Act. Accordingly, the Ground No. II raised by the assessee is allowed. The Ground No. I raised by the assessee is only supporting the Ground No. II for furnishing of additional evidences, the adjudication of which becomes academic in nature. Hence Ground No. I is also allowed."* (Emphasis Supplied)

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

- 15.5. On perusal of above extract of the decision of the Co-ordinate Bench of the Tribunal it can be seen that the Tribunal had concluded that tax was not required to be withheld under Section 194H of the Act from the upfront discount offered to Pre-paid Distributors, and consequently, no disallowance could be made under Section 40(a)(ia) of the Act for failure to deduct tax at source. The above decision of the Tribunal has been followed by the Co-ordinate Benches of the Tribunal while deciding identical issue in favour of the Assessee in appeal preferred for the Assessment Years 2011-2012 & 2012-13 [ITA

No.884/Mum/2016 & 2834/Mum/2017, common order dated 17/05/2024]
and for the Assessment Year 2013-2014 [*ITA No.6671/Mum/2017, dated 22/10/2024*].

- 15.6. Therefore, respectfully following the above decisions of the Tribunal in the case of the Assessee, the disallowance of INR.1,44,45,51,001/- made under Section 40(a)(ia) of the Act in respect of the upfront discount extended to Pre-paid Distributors is deleted. Ground No. 5 raised by the Assessee is allowed.

Ground No.6

16. Ground No.6 raised by the Assessee is as under:

"6. Ground No. 6-On Disallowance of Penalty paid to DoT:

6.1. On the facts and in the circumstances of the case and in law, the learned DRP/AO have erred in disallowing penalty paid to the DoT amounting to INR 2,41,63,000 under section 37(1) of the Act."

- 16.1. Ground No. 6 raised by the Assessee pertains to disallowance of penalty paid to Department of Telecommunications ('DoT'). During the relevant previous year, the Assessee paid INR.2,41,63,000/- to DoT as penalty for non-compliance of the various requirements prescribed by the DoT in connection with verification of subscribers. According to the Assessee the aforesaid penalty was levied on account of default committed in compliance with the terms of the license agreement entered into between the Assessee and DoT, it represented a contractual liability arising as a result of breach/non-compliance of the terms of the contract and not a statutory liability imposed under the provisions of any statutory enactment. Accordingly, the aforesaid penalty levied by DoT was not disallowed by the Assessee in the computation of income. However, the Assessing Officer was of the view that aforesaid penalty amount could not be allowed as deduction under Section 37 of the Act. Therefore, in the Draft Assessment

Order, dated 31/03/2014, the Assessing Officer proposed disallowance of the aforesaid penalty paid to DoT by invoking provisions of Section 37 of the Act. However, the objections filed by the Assessee against the proposed disallowance were rejected by the DRP. Accordingly, as per the directions of the DRP the Assessing Officer passed the Final Assessment Order, dated 27/01/2015 making disallowance of INR.2,41,63,000/- invoking Section 37 of the Act read with Explanation thereto. The relevant extract of the Final Assessment Order, giving the applicable facts and contention of both the sides, reads as under:

"7. *Penalty amounting to Rs 2,41,63,000/-*

The assessee was asked to show cause as to why penalty paid of Rs 2,41,63,000/- be not disallowed vide show cause dated 24.02.104. It was submitted that the amount was paid to DoT as penalty for non compliance of various guidelines prescribed by DOT/irregularing. However they submitted u/s 37(1) there is disallowance for infringement of law but not contractual obligation. As per the provisions of section-4 of the Indian Telegraph Act, 1885, the Central Govt has the exclusive privilege of establishing, maintaining and working in telegraphs within the territory of India. The provisions appended thereto, however confer power upon the Central Government to part with its right of exclusive privilege by grant of licenses on such terms and conditions and on such consideration as it think fit and proper for the aforementioned purpose.

Further, Section-7(3) provides that in the event of any breach of any conditions of license, the Central Government may by rules, prescribe fines for the conduct of any telegraphs established, maintained or worked by any person licensed under the act. Further, Section-20 provides for penalties for breach of conditions of license.

Thus, the contention of the assessee that the said fines are contractual in nature and are flowing through the license agreement is not true as the terms provided in the license agreement arise from section-7(3) of the Indian Telegraphs Act, 1885 which clearly states that that in the event of any breach of any conditions of license, the Central Government may by rules,

prescribe fines for the conduct of any telegraphs established, maintained or worked by any person licensed under the act. The penalties have arisen on account of anomalies and irregularities in the Customer Identification Form (CIF) and Customer Acquisition Form (CAF) are serious in nature and pertain to the security of the nation and as such do not constitute contractual violations but are arising out of non-adherence to law. As per the explanation provided under section-37(1) of the Income Tax Act, 1961, whereby it is declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure, the said payment towards penalty which is an infringement of law amounting to Rs. 2,41,63,000/- was disallowed u/s 37(1) and added into the income of the assessee as per draft assessment order.

However, the assessee filed its objections before the Hon'ble DRP on this issue.

Directions of the DRP:

Vide order dated 18-12-2014, the DRP-II considered the objection on this issue and rejected the same giving detailed reasons in its order. The DRP-II concluded as follows:

"However, from the fact of the matter, it is clear that explanation to section 37(1) is clearly applicable for such violation on account of contractual provisions For the AY 2009-10, the DRP has upheld the disallowance. Hence, the addition made by the AO is hereby confirmed."

Since, the DRP-II has not made any variation in the addition as proposed in the draft assessment order, an addition of Rs.2,41,63,000/- is made to the total income on account of disallowance of penalty amount. I am satisfied that the assessee has filed inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately on this account."

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

- 16.3. We have heard the rival submissions and perused the material on record.
- 16.4. It emerges that this is a recurring issue and had also come up for consideration before the Tribunal in the case of **Vodafone East Limited Vs. ACIT [2016] 156 ITD 337** and in **Assessee's own case** for the **Assessment Year 2009-2010 [Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. [ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, reported in [2018] 92 taxmann.com 234 (Delhi), (2018) 193 TTJ 150 (Delhi Trib)]**. In identical facts and circumstances, the disallowance made under Section 37 of the Act in respect of penalty paid to DOT was deleted by the Tribunal holding that penalty paid to DOT was for the breach of contractual obligation and hence, the same was allowable as a deduction under Section 37 of the Act read with Explanation thereto. The relevant extract of the decision of the Delhi Bench of the Tribunal in the Assessee's own case for the immediate preceding Assessment Year 2009-2010 reads as under:

- "43. *The next ground is against the disallowance of penalty paid to Department of Telecommunications (DoT) amounting to Rs. 63,83,000/-.*
44. *Succinctly, the facts of this ground are that the assessee paid a sum of Rs. 63,83,000/- to DoT as penalty for non-compliance. The AO observed that the penalties were levied on account of anomalies and irregularities in the Customer Identification Form (CIF) and Customer Acquisition Form (CAF). Such amount was considered as hit by Explanation 1 to section 37(1) as in the opinion of the AO, it was an expenditure incurred for a purpose which is an offence or prohibited by law. No relief was allowed by the DRP which resulted into an addition of Rs. 63.83 lac by the AO in the impugned order. The assessee has assailed this addition before the Tribunal.*

45. *We have heard both the sides and perused the relevant material on record. The AO has correctly recorded that penalty of Rs. 63.83 lac was paid by the assessee on account of anomalies and irregularities in CIF and CAF. For giving a hue of penalty to such an amount as magnetized under Explanation 1 to section 37(1) of the Act, the AO referred to the provisions of section 7(3) and section 20 of the Indian Telegraphs Act, 1885. We have gone through the relevant provisions of the Indian Telegraphs Act, 1885 and find that anomalies and irregularities in CIF and CAF are not covered under any of the specific provisions of the Indian Telegraphs Act. Rather, such penalties were imposed for non-compliance with the contractual obligations under the Licence agreement. As the payment by the assessee is not for an offence, nor is it prohibited by law, the same being failure to comply with the contractual obligations, cannot fall within the domain of Explanation 1 to section 37(1) of the Act. Similar issue came up for consideration before the Kolkata Bench of the Tribunal in the case of Vodafone East Ltd. (supra). The Tribunal has held in para 10.5 of its order that the amount paid under similar circumstances cannot be disallowed under Explanation 1 to section 37(1) of the Act. No contrary decision has been brought to our notice by the Id. DR. Respectfully following the precedent, we hold that the addition of Rs. 63.83 lac has been wrongly made and the same is directed to be deleted."*

16.5. The Revenue has failed to bring any material on record to distinguish the above decision of the Tribunal either on facts or in law. Therefore, respectfully following the above decision of the Tribunal, we delete the disallowance made by the Assessing Officer in respect of penalty paid to DOT and direct the Assessing Officer to allow deduction of INR.2,41,63,000/- as claimed by the Assessee under Section 37(1) of the Act. Accordingly, Ground No.6 raised by the Assessee is allowed.

Ground No.7

17. Ground No.7 raised by the Assessee is as under:

"7. Ground No. 7-Disallowance of network site rentals:

7.1. *On the facts and in the circumstances of the case and in law, the learned DRP has exceeded its jurisdiction in directing the learned AO to verify the crystallization of "network site rentals' which is in direct conflict with the provision of section 144C(8) of the Act,*

which prohibits the learned DRP from issuing any direction for further enquiry.

- 7.2. *Without prejudice to ground 7.1, on the facts and in the circumstances of the case and in law, the learned DRP erred in directing the learned AO to verify whether network site rental expenses of INR 396.25 crores crystallised during the subject AY, instead of the amount paid/payable by the Appellant to Indus Towers Limited ('Indus') as network site rental.*

The below grounds under point 7 are without prejudice to Grounds 7.1 and 7.2.

- 7.3. *On the facts and in the circumstances of the case and in law, the learned AO has erred in disallowing expense of INR 396.25 crores appearing as 'network site rental' in the P&L account for the subject year.*
- 7.4. *On the facts and in the circumstances of the case and in law, the learned AO has erred in alleging that the Appellant has failed to furnish any evidence to substantiate whether such expenses crystallized in the subject AY*
- 7.5. *Without prejudice to grounds 7.3 and 7.4, on the facts and in the circumstances of the case and in law, the learned AO has erred in rejecting the Master Services Agreement under which the aforesaid charges were billed by Indus, audited financial statements and list of Passive Infrastructure sites, which were furnished by the Appellant as evidence of crystallisation of the aforesaid expenses.*
- 7.6. *On the facts and in the circumstances of the case and in law, the learned AO grossly. erred in directing the Appellant to justify reasonableness/genuineness of network site rental expense, despite express directions of the Hon'ble DRP which required him to allow deduction for "network site rentals' if the same had crystallized' in the subject AY.*
- 7.7. *Without prejudice to grounds 7.3 to 7.6, on the facts and in the circumstances of the case and in law, the learned AO has erred in rejecting the third party confirmation additionally sought and submitted by the Appellant, wherein Indus confirmed that Indus billed service charges amounting to INR 418.71 crores to the Appellant during the subject year towards rendition of Passive Infrastructure services.*

7.8. *Without prejudice to grounds 7.3 to 7.7, on the facts and in the circumstances of the case and in law, the learned AO has erred in disallowing the entire expense of INR 396.25 crores appearing as network site rental in the P&L account of the subject year, instead of the amount which actually represents network site rentals paid/ payable by the Appellant to Indus."*

- 17.1. Ground No. 7 raised by the Revenue pertains to disallowance of Network Site Rentals. We have heard both the sides on this issue and have perused the material on record.
- 17.2. The issue before us pertains to implementation of the directions issued by the DRP. It was contended by the Learned Authorised Representative for the Assessee that the Assessing Officer had exceeded jurisdiction by making disallowance of Network Site Rental expenses under Section 40A(2)(b), while the Learned Authorised Representative for the Assessee supported the Final Assessment order and submitted that the Assessee had failed to comply with directions of the DRP and place on record relevant documents and details. On perusal of the order passed by the DRP we find that the DRP had concluded that the provisions of Section 40A(2)(b) of the Act were not applicable in the facts of the present case. The amount of Network Site Rentals charged by 'Indus Towers Ltd.' ['Indus'] was neither excessive nor unreasonable and that there is no evasion of taxes or reduction of tax liability once the Hon'ble High Court had approved the Scheme of Demerger. However, the DRP had directed the Assessing Officer allow the deduction for Network Site Rentals charged claimed by the Assessee to the extent the same had crystallised during the relevant previous year.
- 17.3. Pursuant to the DRP directions, the Assessing Officer issued a notice, dated 13/01/2015, calling upon the Assessee to furnish detailed working of the Network Site Rental charges paid to Indus and also to justify the reasonability of the rent so paid. In response, the Assessee filed Reply Letter, dated 23/01/ 2015 [*placed at page Nos. 375 to 376 Paper Book-Vol. 2 filed by the Assessee*] furnishing certificate issued by

Indus confirming that it has billed service charges to the Appellant for the captioned year towards rendition of passive infrastructure services. Reference was made to (a) the Master Service Agreement entered into between Indus and the Appellant (alongwith supplementary agreements) documenting the arrangement between Indus and the Appellant for rendition of the passive infrastructure services; (b) the Tax Audit Report obtained by the Appellant wherein no qualification under clause 17(k) 'amount debited to Profit & Loss A/c. which is of contingent in nature' was made; and (c) the Financial Statements of the Appellant. The Assessee also furnished details/chart of Network Site Rental charges paid to Indus. Thus, perusal of record shows that the Assessee had furnished the aforesaid documents/details for substantiating crystallisation of the expenses during the relevant previous year and therefore, we reject the contention of the Revenue that the Assessee had not furnished any documents/details in compliance with the directions of the DRP. To the contrary we note that the Assessing Officer had rejected the submission of the Assessee stating that the documents/details furnished were not sufficient without pointing out any infirmity in the said documents. We note that the DRP had already concluded that the provisions of Section 40A(2)(b) of the Act were not attracted. The relevant extract of the decision of the DRP reads as under:

"19.1. It has been contended in this ground of objection (objection no. 16) that the AO has erred in proposing to disallow expenses of Rs. 396.25 crores appearing as 'network site rental in the P&L Account for the subject year u/s 40A(2)(b) of the Act. The assessee has submitted that it is a subsidiary of Vodafone East Ltd (VEL) who is a subsidiary of Vodafone India Ltd (VIL), engaged in provision of mobile telephony services and Vodafone Infrastructure Ltd (VinFL) was another wholly owned subsidiary of VIL, which was registered as infrastructure provider, VDL together with its group entities transferred their PL assets to Vinfl, without any consideration, which thereafter merged with Indus together, with the tower companies of Bharti & Idea group. The intent of transferring the PI assets to Indus was to promote passive infrastructure sharing for administrative ease of running and maintaining such PI assets and also to enable the

operators to provide improved quality of services. Further, post merger, VDL pays service charges to Indus for the tower services provided and during the financial year relevant to the subject AY, charges of Rs. 396.25 crores has been claimed as a fully deductible revenue expenses out of which VMSL has paid Indus Rs. 393.92 crores. On the other hand, the AO concluded in the draft assessment order that the entire scheme of transfer of PI assets was to evade taxes and reduce tax liability. For using the PI assets, that have been transferred by VDL for nil consideration, VMSL has paid Rs. 393.92 crores as network rental to Indus and hence the entire network site rental paid to Indus is excessive and unreasonable u/s 40A(2)(b) of the Act.

- 19.2 *The assessee has further submitted before the panel that amendment in section 40A(2)(b) (v) of the Act to bring in its ambit companies which have common shareholders, having substantial interest, was brought in by the Finance Act, 2012, w.e.f 1 April, 2013 and accordingly the said amendment is not applicable for the AY 2010-11. Moreover, the payment made to Indus for availing tower services does not fall under the purview of the provisions of section 40A(2)(b) of the Act, since there is no substantial interest of indus in the business of VDL. From the shareholding structure of the Vodafone group Indus Towers Ltd (Ann I), it is evident that the basic requirement of section 40A(2)(b) of the Act i.e. the recipient of the payment (i.e. Indus) having a substantial interest in the payer company (i.e. VDL) is not met. Without prejudice to the above, the site network rentals were genuine business expenses and the very provisions of section 40A(2)(b) of the Act, under which expenses have been disallowed by the AO cannot be applied to the facts of the present case. As regards whether Vodafone Group (the ultimate holding company of VDL) has received any dividend from M/s Indus Towers Ltd, the assessee has submitted that Indus was operative from 1 April, 2009 and it has distributed dividend to its shareholders for the first time in F.Y. 2012-13 and the details of dividend received by the Vodafone group from Indus till date is as under, on which DDT has been paid.*

<i>F.Y.</i>	<i>A.Y.</i>	<i>Amount (In INR. Millions)</i>
<i>2012-13</i>	<i>2013-14</i>	<i>4050</i>
<i>2013-14</i>	<i>2014-15</i>	<i>2200</i>

Moreover, dividend distribution tax u/s 115 O of the Act has duly been paid by Indus, while distributing such dividend. Further, the assessee has submitted and placed on record the fact that while network site rentals paid by the assessee are bonafide expenses for the assessee, the said charges recovered by Indus have been duly offered to tax by Indus in the nature of business income. Moreover, it is the DOT that in a bid to create a high quality low cost, rapid, wide coverage mobile telecommunication network in India, proposed through the project 'MOST a system

of sharing of PI assets by the telecom operators, with the further objective of reducing the number of towers and thus optimizing the capital and operational expenditure of the telecom operators. It is in line with the above that it was agreed among Vodafone, Bharti and Idea groups to transfer their PI assets to Indus (Including those belonging to the VDL) in order to promote PI sharing for administrative ease of running and maintaining such PI assets. Further, this aspect is also clearly brought out in the scheme of demerger filed by the assessee with the Hon'ble Delhi High Court. Therefore, the expenses should be allowed as genuine business expenses.

- 19.3 *The panel has carefully considered the submission of the assessee. The Hon'ble Supreme Court in Upper India Publishing House Pvt. Ltd v. CIT (1979) 117 ITR 569 (SC) has held the expenses or payment cannot be disallowed unless it is held that the expenditure is excessive or unreasonable. U/s 40A(2)(b), any payment made to related persons, if considered excessive or unreasonable by the AO is not allowed as deduction and the AO can make such disallowance on the basis of the fair market value of goods, services or facilities or the legitimate needs of the business or profession or the benefit derived or accruing there from. The specified related persons in the case of company Includes Any Director of the Company or any relative of such a Director and also any person in whose business or profession, the assessee or Director or any relative of such person has a substantial interest (i.e. 20% or more of voting power/profits). However, companies having the same holding company are also to be included but effective from AY 2013-14. Therefore, the amendment that was brought in by the Finance Act 2012, applicable from 1" April, 2013 (AY 2013-14) is not applicable in the case of the assessee for the AY 2010-11. **Moreover, the payment made to Indus by the assessee for availing tower services does not fall under the purview of substantial interest, as contemplated u/s 40A(2)(b), as there is no substantial interest of Indus in the business of the assessee. Therefore, the very provisions of section 40A(2)(b) of the Act under which the expenses have been disallowed by the AO cannot be applied to the facts of the present case.. Even otherwise, the payments cannot be termed as excessive or unreasonable as the AO has not provided the details regarding such excessiveness or unreasonableness based on certain instances except for merely stating that the entire scheme of transfer of PI assets was to evade taxes and reduce tax liability and for using PI assets that have been transferred by the assessee for nil consideration, the assessee has paid Rs. 393.92 crores (Rs. 396.25 crores has been claimed as deductible) as network rental to Indus. This fact of the matter has already been brought out in the scheme of merger filed by the assessee as duly approved by the Hon'ble Delhi High Court. Therefore, the AO Is directed to***

delete the said addition of Rs. 396.25 crores as appearing in the P & L Account, made u/s 40A(2)(b) of the Act and allow the said expenses, if the same have crystallized in the subject assessment years.” (Emphasis Supplied)

Thus, it is clear that the DRP had directed the Assessing Officer to allow the said expenses if the same have been crystallised during the captioned year. Pursuant to the DRP directions, the Assessing Officer issued a notice dated 13/01/ 2015 [*placed at page No. 374 of Paper Book Vol. 2 furnished by the Assessee*] calling upon the Assessee to furnish detailed working of the rent paid to Indus and also to justify the reasonability of the rent so paid. We hold that the approach adopted by the Assessing Officer cannot be countenanced. Therefore, Assessing Officer is directed to follow the directions issued by the DRP and allow deduction for Network Site Rental expenses after verifying that the expenses had crystallized during the relevant previous year.

17.4. In this regard, we note that the Assessee had made following submission in this regard before the Assessing Officer vide 23/01/2015.

"Crystallisation of Site Network Charges:

- *At the outset, we wish to submit that out of the total network site expenses of Rs 396.25 crores debited to the profit and loss account of VDL during the subject AY, a significant portion pertains to charges paid to Indus, which should have in fact been disallowed by your office instead of disallowing the entire expense as appearing in the books.*
- *Without prejudice to the above, as regards the issue of crystallization/ accrual of network site charges amounting of Rs 396.25 crores, we wish to submit that the very fact that the same are appearing under schedule 13 of the audited Financial Statements of the subject AY, and as there is no qualification in the Tax Audit Report under clause 17(k)' amount debited in profit and loss account which is of contingent in nature, establishes that the aforesaid expense have indeed crystallised/ accrued during the subject AY. Copy of the audited Financial Statements and the tax audit report for the subject AY has already been filed before your office on 19 December 2013 and*

28th January 2014. However, for your ready reference the same is again attached as Annexure 2 and 3 respectively.

- Therefore, the aforesaid information is sufficient for your office to determine that such expenses indeed crystallized/ accrued in the subject AY. However, without prejudice to our contention that exercise undertaken and information sought by your office is patently illegal, in the interest of justice and to eliminate any doubt which your office may have on the question of crystallization of such charges, we wish to submit the following information/documents with your office:
 - Certificate issued by Indus confirming that Indus billed service charges amounting to Rs 418.71 crores to VDL during the subject AY towards rendition of Passive Infrastructure services to VDL Certificate enclosed as Annexure 6.
 - Indicative list of sites in the Rajasthan, UP (East) and Hariyana circles -enclosed in CD due to large file size
 - Master Services Agreement dated March 7, 2008 between Indus and VDI. (together with supplementary agreements) documenting the arrangement between Indus and VDL for rendition of the Passive Infrastructure services-enclosed in CD due to large file size.

In view of the above discussion and the abovementioned direction of the Hon'ble DRP, we request your office to provide relief of Rs 396.25 crores incurred on site network charges paid by VDL during the subject AY and thereby delete the disallowance made under section 40A(2)(b) of the Act by your office in the draft assessment order passed for the subject AY."

17.5. The Assessing Officer is directed to consider afresh the above submissions made by the Assessee and examine the documents relied upon by the Assessee for the purpose of implementing directions of the DRP to verify if the expenses have been crystallised during the year and grant deduction for the expenses so verified. Since we have directed the Assessing Officer to implement the directions given by the DRP, the Assessee is granted liberty to place before the Assessing Officer such supporting documents/details as the Assessee may deem

fit to establish crystallization of expenses during the relevant previous year. In terms of aforesaid, Ground No.7 raised by the Assessee is allowed for statistical purposes.

Ground No.8

18. Ground No.8 raised by the Assessee is as under:

"8. Ground No. 8-Addition on account of unsecured loans:

8.1. On the facts and in the circumstances of the case and in law, the learned AO has erred in making an addition of security deposits amounting to INR 3,94,50,000 obtained by the Appellant from the distributors under Section 68 of the Act."

18.1. Ground No.8 raised by the Assessee pertains to disallowance of addition made by the Assessing Officer under Section 68 of the Act on account of unsecured loan.

18.2. During the assessment proceedings the Assessing Officer noted that the according to the tax audit report the Assessee had received INR.3,94,50,000/- as additional loans/advances during the relevant previous year. The Assessee was required to furnish the copy of PAN, current address, copy of ledger, confirmation from the parties from whom this amount has been received during the relevant previous year. The Assessee claimed that the aforesaid amount represented the aggregate deposits received by the Assessee from the distributors during the relevant previous year. However, according to the Assessing Officer Assessee failed to furnish any confirmation or any other documentary evidence during the assessment proceedings and merely relied upon the particulars furnished by the tax auditor in their tax audit report. Therefore, the Assessing Officer concluded that the Assessee has failed to establish identity of lenders and the source of credit. Accordingly, in the Final Assessment Order addition of INR.3,94,50,000/- was made in the hands of the Assessee invoking the provisions contained in Section 68 of the Act.

18.3. During the course of hearing both the sides had agreed that in case of **Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. [ITA Nos. 1169 & 1950/Del/2014, dated 14/03/2018, reported in [2018] 92 taxmann.com 234 (Delhi), Assessment Year 2009-2010]** the Tribunal had set aside this issue to the files of the Assessing Officer with a direction to the Assessee to furnish all the relevant details/information to satisfy the Assessing Officer about the genuineness of the transactions. The relevant extract of the decision of Co-ordinate Bench of the Tribunal in the case of the Vodafone Essar Digilink Ltd. (Supra) for the Assessment Year 2009-2010 reads as under:

- "54. *Ground no.8 of the assessee's appeal is against the addition of Rs.2,00,75,850/- made by the AO u/s. 68 of the Act.*
55. *Briefly stated, the facts of this ground are that the assessee showed unsecured loans in its audited balance sheet at Rs. 4,45,76,609/-. On being called upon to prove the genuineness of the loans, the assessee did not furnish any confirmation or any other documentary evidence to support the fresh cash credits received during the year. The AO noticed that in case of 816 parties, neither there were complete addresses nor even the PANs mentioned in the tax audit report. The assessee showed to have received Rs. 25,000/-each from 803 parties; Rs. 50,000/- each from 9 parties and Rs. 1 lac each from four parties. Total amount from these 816 parties came at Rs. 2.00 crore and odd. The AO treated the same as unexplained cash credit u/s. 68 in the draft order. The assessee contended before the DRP that these 816 creditors were its 'Distributors' who deposited security through banking channel. The DRP accepted the assessee's contention and held that no addition should be made in case the identity of these persons to whom regular commission/discount was paid, was established. The AO was directed to verify the claim of the assessee in this regard.*
56. *In the consequential proceedings, the assessee furnished PAN details only in respect of 264 cases. Even in such cases where PAN details were furnished, the assessee did not furnish any address. The assessee's contention that the amount of security deposits were received through banking channel and, hence, they should*

per se be considered as genuine, was turned down by the AO. This resulted into an addition of Rs. 2.00 crore against which the assessee has come up before the Tribunal.

57. *Having heard both the sides and perused the relevant material on record, it is seen that the assessee claimed to have received security deposits from its 'distributors' to whom commission etc. was also paid. We agree with the view point of the AO that a mere receipt of an amount through banking channel cannot prove the genuineness of credit in terms of section 68 of the Act. The assessee is not only required to prove identity and capacity of the creditor, but also genuineness of transactions so as to escape the clutches of section 68 of the Act. Adverting to the facts of the instant case, we find that the claim of the assessee of having received such amounts from Distributors has not been corroborated before the AO and hence the same cannot be accepted. The Id. AR contended that the necessary details are available for production and one more opportunity be granted to it. Considering the totality of the facts and circumstances of the instant case, we are of the considered opinion that it would be in the fitness of things if the impugned order on this score is set aside and the matter is restored to the file of the AO for a fresh decision. We order accordingly and direct him to decide this issue afresh. The assessee is also directed to furnish all the relevant details/information as called for by the AO to satisfy himself as to the genuineness of the transactions. If the assessee again fails to furnish necessary details as called for, the AO will be entitled to draw an adverse inference against the assessee."*

- 18.4. It is admitted position that in fact and circumstances identical to Assessment Year 2009-2010, addition of INR.3,94,50,000/- was made under Section 68 of the Act for the Assessment Year 2010-2011. Therefore, in the line of the above decision of the Tribunal in the case of Vodafone Essar Digilink Ltd. for the Assessment Year 2009-2010 (Supra), we deem it appropriate restore the issue back to the file of the Assessing Officer with identical directions. Accordingly, the addition of INR.3,94,50,000/- is set aside, and the issue is restored to the file of the Assessing Officer for a fresh adjudication. The Assessee is directed to furnish all the relevant details/information as called for by the Assessing Officer to establish the genuineness of the transactions. It is clarified that in case the Assessee fails to furnish

necessary documents/details, the Assessing Officer would be at liberty to draw an adverse inference against the Assessee. In terms of the aforesaid, Ground No. 8 raised by the Assessee is allowed for statistical purposes.

Ground No. 9

19. Ground No.9 raised by the Assessee is pertains to the following transfer pricing adjustments and the same reads as under:

"9. Ground No. 9-Transfer pricing adjustment

- 9.1. *On the facts and in the circumstances of the case and in law, the learned DRP has erred in confirming the adjustments aggregating to INR 195,03,55,009 made by the learned AO and the Additional Director of Income-tax, Transfer Pricing Officer-II(4), New Delhi (hereinafter referred to as 'the learned TPO') u/s 92CA of the Act.*

Transfer Pricing adjustment-Disallowance of brand royalty payment

- 9.2. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have erred in rejecting the economic analysis undertaken by the Appellant using comparable uncontrolled price method ('CUP') and transactional net margin ('TNMM') Method to determine the arm's length price (ALP) of the royalty payments made to associated enterprises ('AEs').*
- 9.3. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have erred in determining the ALP of the royalty transaction at Nil price without application of any transfer pricing method prescribed u/s 92C of the Act.*
- 9.4. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have exceeded its jurisdiction in determining the ALP of the royalty transaction at Nil price by challenging the business and the commercial decision of the Appellant of making royalty payments to AEs and by erroneously holding that Appellant has not derived any benefits from royalty payments to AEs despite holding that the advertisement, marketing and promotion ('AMP') expenditure incurred by the Appellant has increased the value of the brands owned by such*

AEs.

Transfer Pricing adjustment - Reimbursement of excessive advertisement & marketing spend

- 9.5. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have erred in holding AMP expenditure incurred by the Appellant is a separate international transaction u/s 92B of the Act, without appreciating the functional profile of the Appellant according to which such expenses were incurred as part of the Appellant's roles and responsibilities as a telecom service provider and not under a separate arrangement agreement with AEs to promote brands owned by such enterprises.*
- 9.6. *On the facts and in the circumstances of the case and in law, the learned TPO/Assessing Officer/DRP have erred in not appreciating the fact that the AMP expenses were incurred by the Appellant on its own account and the same didn't require any separate compensation/reimbursement from the AEs.*
- 9.7. *On the facts and in the circumstances of the case and in law, the learned TPO/Assessing Officer/DRP have erred in arbitrarily re-characterizing the Appellant to earn its remuneration in accordance with such re-characterised business model without appreciating the fact that the Appellant is an entrepreneurial telecom service provider engaged in provision of telecommunication services in its licenses telecom circle(s).*
- 9.8. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have erred in applying the 'bright line method to determine the excessive/non-routine AMP expenses given the fallacies and deficiencies in applying such quantitative parameters without having regard to the nature of business carried by the Appellant and the industry in which it operates & by using inappropriate set of comparable companies.*
- 9.9. *Without prejudice to the above, on the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP have erred in considering expenses in the nature of selling & distribution expenses & sales promotion expenses while applying brightline. Further, while doing so, the learned TPO/AO/DRP have erred in not following the findings of various benches of the jurisdictional ITAT on this issue.*

9.10. *On the facts and in the circumstances of the case and in law, the learned TPO/AO/DRP erred in holding that the Appellant has rendered a service to its AE by incurring excessive AMP expenses and hence should have charged an additional mark-up of 12.50% on the alleged excessive AMP expenses from the AEs. Further, while doing so, the learned TPO/AO/DRP erred in appreciating that if at all a mark-up of 12.50% has to be applied, then the same should have been applied only on the value-added expenses (excluding third party costs) incurred by the Appellant for providing the alleged service in the nature of brand promotion.*

19.1. We would first take up Ground No. 9.1 read with 9.2 to 9.10 raised by the Assessee pertaining to the transfer pricing adjustment of INR. in respect of Brand Royalty Expenses.

19.2. The relevant facts in brief are that during the Financial Year 2009-2010, the Assessee along with its group companies had entered into a 'Trademark License Agreement' with Rising Group Limited and Vodafone Ireland Marketing Limited for use of 'Vodafone' and ESSAR' name and trademark while providing telecommunication services in India. In terms of the aforesaid agreements, the Assessee made following payments during the relevant previous year:

S.No.	Description of transaction	Value (INR.)
1	Payment for software development charges to AE	1,06,49,210
2	Payment of royalty fee to AEs for the grant of right to use "Vodafone" and "Essar" trademark/trade name	27,20,28,430
Total		66,07,05,614

19.3. The Assessee bench-marked the royalty payments by using three comparables:

SNo.	Name of the Licensor	Name of Licencee	Royalty Rate (%)
1.	OmniReliant. Inc.	Net Talk.com Inc.	1
2.	Harnishfeger Technologies Inc.		.75
3.	Jean michel Cousteau ocean future society Inc.	UltrastripMorris material handling Inc. systems Inc.	2
Mean			1.25

It was contended on behalf of the Assessee Since the royalty payments of 0.5% and 0.25% of net service revenue was lower than the royalty payments being made under comparable third-party agreements (mean being 1.25%), the royalty payments made by Appellant were established to be at an ALP.

During the Assessment proceedings, the TPO issue show cause notice dated 20/12/2013 requiring the Assessee to furnish details/submissions in relation to royalty payments. In response the Assessee filed submissions vide letter dated 20/01/2014 in the said submissions the Assessee added another comparable using CUP Method to bench mark payments of royalties. The summary of the said comparable is as under:

Licensor	Licensee	Period of existences of agreement	Product description	Rate of royalty
Motorola Inc., USA	Forward Industries INC., USA	January 2008 – March 2009	Trademark license for the use of the 'Motorola' signature and the M logo (insignia)	7% of the net sales

According to the Assessee the royalty amounts paid to VIML and Rising Groups Limited were lower than the royalty payments being made under comparable third-party agreements, and therefore, no Transfer Pricing Adjustment was warranted.

19.4. However, the TPO rejected the aforesaid submissions of the Assessee and concluded as under:

"9. *Thus it can be easily concluded that there seems to be no rationale behind Payment of Royalty to Essar and Vodafone by the assessee. It was a device used by the assessee to shift profits out of the country disguised as Royalty to its AE's outside the country. Thus the payment was not at Arm's Length.*

In view of the above facts and discussions I have reached following conclusions:

- The taxpayer did not produce any evidence / documentation on how the royalty rate has been fixed. As an arm's length, party paying royalty would like to see the profitability from future revenue streams before fixing a royalty rate*
- The taxpayer did not produce any cost benefit analysis at the time of entering into the agreement with its AE showing the: the royalty rate is not fixed based on expected benefit*
- The taxpayer has also not been able to show that it derived any economic benefit from the alleged use of name and trademark of the AEs and it has failed to provide any details regarding payment of such royalty in the past.*
- The profit that accrues to the licensee may not arise solely through the engine of the use of name and trademark. There are returns from the mix of assets it employs such as fixed and working capital and the returns from intangible assets such as distribution systems, trained workforce, etc. Allowances need to be made for them. In the absence of any data provided by the taxpayer, it is impossible to know what percentage of profits the licensee would like to share at an arm's length after removing the returns from assets employed and other economic factors.*
- The taxpayer did not give the details of royalty rates in the industry and has not been able to benchmark this transaction properly so as to prove that it was at Arms Length.*

Thus the taxpayer has failed to discharge its onus to produce any primary evidence, e.g..(i) how the royalty rate has been fixed to justify that the payment of royalty is at arm's length, (ii) cost benefit analysis, (iii) economic benefit derived by the assessee and (iv) details of royalty rates in the industry etc. CUP data or any other data to support its payment being at arm's length.

- 10. In view of the detailed discussions in the preceding paragraphs the arm's length price of royalty is determined at Rs. Nil in place of Rs.27,20,28,430. The amount of Rs.27,20,28,430 is*

treated as adjustments U/s/92CA as the value of royalty transactions in uncontrolled conditions is treated as Rs Nil under CUP and in the absence of any substantiation to show that substantial benefit has accrued to the taxpayer."

- 19.5. Thus, vide Order dated 27/01/2014, passed under Section 92CA(3) of the Act the TPO proposed the Transfer Pricing Adjustment of INR.27,20,28,430/- which was incorporated in the Draft Assessment Order dated 31/03/2014 passed under Section 143(3) read with Section 144C(1) of the Act.
- 19.6. The Assessee filed objection against the aforesaid proposed Transfer Pricing adjustment before DRP which were dismissed by the DRP vide order dated 18/12/2014 passed under Section 144C(5) of the Act. Accordingly, the Assessing Officer passed Final Assessment Order, dated 27/01/2015, under Section 144C(1) read with Section 143 of the Act making the Transfer Pricing Addition of INR.27,20,28,430/-.
- 19.7. Being aggrieved, the Assessee carried the issue in appeal before the Tribunal.
- 19.8. Meanwhile, in appeal preferred by the Assessee against the Order, dated 14/03/2018, passed by the Delhi Bench of the Tribunal for the Assessment Year 2009-2010 [ITA No.1950/Del/2014], the Hon'ble Delhi High Court passed Order, dated 01/06/2018, issuing certain directions to the Tribunal. Pursuant thereto, Interim Order, dated 25/03/2019, was passed by the Co-ordinate Bench of the Tribunal in relation to Assessment Years 2009-2010 to Assessment Year 2012-2013. Against the aforesaid Interim Order passed by the Delhi Bench of the Tribunal in the present appeal [ITA No.1073/Del/2015], the Assessee approached Hon'ble Delhi High Court and vide Order, dated 22/05/2019, passed in Writ Petition (Civil) No.5606/2019, the Hon'ble Delhi High Court clarified that the Tribunal shall adjudicate the Transfer Pricing grounds on merits uninfluenced by the Interim Order

dated 25/03/2019 passed by the Tribunal.

19.9. Thereafter, vide letter dated 15/05/2019, the Assessee filed fresh comparability analysis for benchmarking of royalty payments (Placed at Page 96 to 109 of the Paper Book). As per the fresh comparability analysis performed by the Assessee the royalty rate as per Internal Comparable Agreements came to 0.7% to 1.7% and External Comparable Agreements (Mean rate) came to 5.20%. According to the Assessee, the rate at which the Assessee paid royalty to its AEs was less than the aforesaid royalty rates, and therefore, no transfer pricing adjustments were warranted. Thereafter, the Assessee filed another submission on 06/06/2019 placing on record benchmarking analysis for the Assessment Year 2009-2010 which, according to the Assessee were also relevant for the Assessment Year 2010-2011. In response the Assessing Officer filed a common remand report for Assessment Years 2009-2010 to 2012-2013 objecting to the fresh comparability analysis done by the Assessee and reiterated the conclusion drawn by TPO. The Assessee was confronted with the aforesaid remand report and in response to the same the Assessee file submissions dated 16/09/2019 rebutting the objections raised in the remand report.

19.10. We find that the identical issue had come for consideration before the Co-ordinate Bench of the Tribunal in the case of the Assessee for the Assessment Year 2009-2010 [**ITA Nos. 1169/Mum/2014, dated 12/02/2025, titled Vodafone Digilink Limited Vs. Deputy Commissioner of Income Tax, Circle 17(1), New Delhi**]. Paragraph 4 of the said order of the Tribunal, recording identical set of the facts, reads as under:

"4. *Ground of appeal No.9 related Transfer Pricing adjustment relating to payment of royalty:*

4.1. *During the alleged assessment year, the assessee paid royalty for*

use of trademark/ trade name to the following Associated Enterprises ['AES']:

<i>Name of the AE</i>	<i>Amount of royalty paid (in INR.)</i>	<i>Rate of royalty</i>	<i>Agreement</i>
<i>Vodafone Ireland Marketing Limited ['VIML']</i>	<i>7,64,77,939</i>	<i>0.30% of the net service revenues for the use of 'Vodafone' trademark/ trade name</i>	<i>Trademark Licence Agreement dated 19 December 2008 (effective date – 29 June 2007) (refer page Nos.178 to 195 of paper book Volume I dated 17 October 2014.</i>
<i>Rising Group Limited ['RGL']</i>	<i>3,82,38,969</i>	<i>0.15% of the net service revenues for the use of 'Essar' trademark/ trade name</i>	<i>Trademark License Agreement dated 19 December 20008 (effective date – 29 June 2007) (refer page Nos.196 to 208 of the paper book Volume I dated 17 October 2017)</i>

- 4.2. *The assessee inter-alia benchmarked the aforesaid transaction of payment of royalty using the Comparable Uncontrolled Price ['CU'] as the most appropriate method wherein it selected the license agreement entered into between 'Motorola Inc., USA ['Motorola'] and 'Forward Industries Inc., USA' for the use of 'Motorola' trade name and trademark as the CUP data. The summary of this comparable agreement is given hereunder:*

<i>Licensor</i>	<i>Licensee</i>	<i>Period of existence of agreement</i>	<i>Product description</i>	<i>Rate of royalty</i>
<i>Motorola Inc., USA</i>	<i>Forward Industries Inc., USA</i>	<i>January 2008 – March 2009</i>	<i>Trademark license for the use of the 'Motorola' signature and the M logo (insignia)</i>	<i>7% of the net sales</i>

- 4.3. *Since the royalty payment of 0.15% and 0.30% of net service revenues made by the assessee was lower than the royalty payment being made under comparable third-party agreement, royalty payments made by the assessee were considered to be at an arm's length.*
- 4.4. *The TPO in terms of Order dated 29/01/2013 determined the arms length price ['ALP'] of the royalty transactions at Nil on account of the following reasons:-*
- the CUP analysis undertaken by the assessee is incorrect since Motorola is involved in the business of designing and*

selling wireless network infrastructure equipment such as transmission base stations and signal amplifiers whereas the assessee is engaged in providing telecommunications services. Thus, the royalty payments made by the assessee cannot be compared with the royalty payment made by Motorola.

- the payment of royalty by the assessee to its foreign AEs has not resulted in the increase in the profitability of the assessee and, hence, the use of Vodafone and Essar trademark/ trade name have not brought any commercial benefit to the assessee.*
- the assessee did not produce any cost benefit analysis undertaken at the time of entering into the agreement with its AEs and hence, royalty rate paid by the assessee was not fed based on expected benefit accruing from the use of trademark trade name;*
- the assessee did not provide any details of the royalty rates in the industry; and*
- the increase in the sales of the assessee cannot be solely attributed to the big brands. A subscriber's choice of service provider is not exclusively dependent on a particular trademark/ trade name. Varied factors like overall service quality, free calls, free SMS's networks capability, reliability of services, network innovations, low rates charges, accessibility, promotion with discounts, refund and free samples, geographic network coverage, customer care, family and friends influence the preference of a subscriber. Thus, it is the attributes related to the service provider which forms the basis or reason for a customer for preferring any particular service provider over another.*

4.5. The DRP vide its Directions dated 18/12/2013 upheld the findings of the TPO and held that there are considerable differences between the royalty agreement for Motorola and between the AEs and the assessee and, hence, the Motorola. transaction cannot be treated as a CUP, Further, the DRP held the assessee has failed to provide any evidence to show how the royalty payment has benefitted its business and, hence, upheld the findings of the TPO of treating the ALP of the royalty transaction as Nil.

4.6. Considering the DRP Directions, the Ld. AO in terms of the final assessment order dated 30/01/2014 inter-alia made an addition of

Rs. 11,47,16,908/- to the income of the assessee being the TP adjustment made by the TPO on the transaction of royalty payments.

- 4.7. Thereafter, pursuant to the order of the assessee's case ITAT-Delhi Bench bearing ITA No. 1950/Del/2014 date of pronouncement 14/03/2018 and the Hon'ble Delhi High Court's Order dated 01/06/2018, the coordinate ITAT Bench passed an interim Order bearing ITA Nos. 1169,1073/Del/2014 dated 25/03/2019. In terms of the furnish a remand report w.r.t issue of royalty payments to examine the comparability analysis for determination of its ALP.*
- 4.8. Aggrieved by the aforesaid interim Order dated 25/03/2019 passed by the Coordinate Bench, the assessee filed a Writ Petition before the Hon'ble Delhi High Court. The Delhi High Court vide Order 29/04/2019 wherein the Hon'ble High Court once again directed the Hon'ble Tribunal to decide the two transfer pricing issues keeping all the rights and contentions of both the parties open.*
- 4.9. Thereafter, the assessee vide its letter dated 15/05/2019 furnished a fresh comparability analysis and its search process/matrix for determining the ALP of the royalty rate for the year under consideration. In terms of the fresh analysis conducted by the assessee, it arrived at the royalty rate of 0.70%-1.70% as internal CUP basis an agreement between 'VIML and OG FJARSKIPTI EHF' and 5.20% as external CUP basis a set of five comparable.*
- 4.10. The TPO vide its letter dated 29/08/2019 furnished his Remand Report to the Tribunal. In terms of the said Remand Report, the TPO submitted that the ALP of payment of royalty to both AEs, i.e., Rising Group Ltd (in short RGL) and Vodafone Ireland Marketing Ltd (in short VIML) should be considered as Nil. Without prejudice to the aforesaid, the TPO also submitted that the agreement between Virgin Enterprises Ltd." and "Virgin Mobile USA LLC" may be taken as a comparable in respect of 'Vodafone' brand wherein royalty at the rate of 0.25% has been charged and on which detailed discussions have been made in the orders passed by the TPO for the AY 2013-14 to 2015-16 and also confirmed by the DBP for the AY 2013-14.*
- 4.11. Further, in the said Remand Report, the TPO alleged that none of the comparable selected by the assessee by applying external CUP are comparable in true sense and the search conducted by the*

Appellant has not yielded correct results. With respect to the comparable agreement used by the assessee as an internal CUP, the TPO rejected the same by stating that no details of this transaction were given during the course of proceedings earlier and observed that the assessee has not entered into any transaction with the other Group entity. He also stated that a copy of the said agreement used as internal CUP has not been furnished by the assessee.

- 4.12. *In response thereto, the assessee vide letter dated 16/09/2019 filed its rebuttals to the Remand Report and pointed out flaws in the Remand Report issued by the TPO. The assessee also pointed out that because of the confidentiality clause in the Agreement the internal CUP agreement was not filed and even otherwise the TPO during the course of the Remand proceedings had never called for the same but, nonetheless, it filed a copy of the same with the Bench and the Ld. DR. The assessee prayed that the rate of royalty of 0.70% to 1.70% arrived at by applying internal CUP should be accepted as the ALP and, in the alternative, to accept the fresh comparables submitted by it with the mean of 5.20% arrived at by applying external CUP."*

19.11. After recording the relevant facts, the Tribunal recorded submission made by both the sides in relation to transfer pricing adjustment on respect of brand royalty payments made by the Assessee for the Assessment Year 2009-2010 which were identical to those made for the Assessment Year 2011-2012 before us and the same can be summarized as under.

- (a) It was submitted in behalf of the Assessee that:
- the determination of arm's length price (ALP) of the Royalty transaction at 'NIL' was erroneous in the light of the following judicial precedence (i) CIT Vs. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi); and (ii) LG Polymers India Pvt. Ltd. Vs. ACIT (2011) 48 SOT 269 (Vishakhapatnam).
 - the use of Vodafone Brand has resulted in the financial growth including increase in footprint in the market and thus, the ALP at zero by the TPO is erroneous.
 - The Ld. Counsel has taken the objection that this comparable proposed by the TPO in the Remand Report is a related party transaction between two Associated Enterprises and therefore

not a valid comparable.

- An internal CUP was available for the transaction under consideration whereby the Assessee had considered the transaction between Vodafone India Mobile Ltd.' and 'OGF" (unrelated party) as an internal CUP and the same was not examined by the TPO.

(b) On the other hand it was contended on behalf of the Revenue that:

- Ld. DRP and TPO has been clearly established that regardless of the use of Vodafone' Brand, the assessee has not provided any evidence to show how the royalty payment has benefitted its business and so the ALP of the transaction has been determined at NIL
- Without prejudice, the TPO in the Remand Report dated 29.08.2019 has discussed the comparables selected by the appellant using Powerk database for computing the ALP of royalty transactions under the Comparable Uncontrolled Price method (CUP) and has rejected all of the comparables due to differences in the functions performed by the tested party, i.e., the appellant and the comparables. As the CUP method requires strong similarity in the function, asset and risk analysis, the comparable selected by the appellant were very divergent from the functions of the appellant. The TPO thereafter, made an independent analysis and has stated in the Remand Report that the royalty agreement between Virgin Enterprises Ltd. and Virgin Mobile USA LLC as a valid comparable having close similarity in the functions performed, where the royalty was paid at the rate of 0.25% for the use of the Virgin' brand name.
- The TPO, at para 5 in the Remand Report has stated that contention of internal CUP was never raised before the TPO or Ld. DRP and the same has been raised for the first time during the course of preparation of the Remand Report. The contract between VIML and OGF for royalty payment have not been provided to the TPO to examine the details of the royalty payment between the tested party and unrelated third party entity.

19.12. Identical submissions are made by both sides for the Assessment Year 2009-2010.

19.13. On perusal of the decision of the Tribunal in the case of Vodafone Digilink Limited (supra) for the Assessment Year 2009-2010 it becomes clear that after taking into consideration, the factual matrix, the stand taken by the parties and the letter/documents furnished by the Assessee as well as the remand report submitted by the Assessing Officer, the Tribunal decided the issue in favour of the Assessee, concluding as under:

"8. *The Ld. CIT-DR vehemently argued.....*

xx xx

Respectfully reliance is placed on the judgment in EKL Appliances Ltd. (supra), which establishes that Rule 108(1)(a) of the Rules does not permit the disallowance of any expenditure on the grounds of necessity or prudence. Additionally, we respectfully rely on the Third Member decision in Technimont ICB Pvt. Ltd. (supra), wherein it was held that the ALP of an international transaction must be determined exclusively by comparing it with comparable controlled transaction. The uncontrolled transactions and not with a determination of ALP at 'Nil' without applying any of the prescribed methods is unjustified. Accordingly, the adjustments aggregating to Rs.11,47,16,908/- made by the Ld. AO are deleted.

In light of the above, the order of the DRP is set aside, and the assessee's ground of appeal is allowed.

10. *In the result, the appeal of the assessee Ground No-9 is allowed."*

19.14. Plain reading of the above makes it clear that the Tribunal accepted the contention advanced by the Assessee (identical to those raised in the present appeal for the Assessment Year 2010-2011) and deleted the Transfer Pricing Addition in relation to brand royalty payment for the Assessment Year 2009-2010. For the Assessment Year 2010-2011) there is no change in the facts and circumstances of the case and the Revenue has failed to bring on record any material to

distinguish the above decision in the case of the Assessee/Vodafone Digilink Limited (supra) for the Assessment Year 2009-2010 either on facts or in law. We note that even in the submissions filed on behalf of the Revenue vide a Letter, dated 16/07/2025, reliance was placed on the Order, dated 27/01/2014, passed by the Transfer Pricing Officer and not to the remand report dealing with the fresh benchmarking analysis furnished by the Assessee during the proceedings before the Tribunal. We note that identical contentions of the Revenue were taken into consideration and rejected by the Tribunal while deleting identical transfer adjustment made the case of the Assessee for the Assessment Year 2009-2010. For the Assessment Year 2010-2011 also, the Transfer Pricing Officer had questioned the commercial prudence of the Assessee to pay royalty and had arrived at ALP without referring to any of the prescribed methods. While the Assessing Officer has rejected the transfer pricing method and the comparable adopted by the Assessee, the TPO/Assessing Officer has failed to provide/apply alternative method and has arrived at ALP by placing reliance on a control transaction. The aforesaid approach of the TPO for the assessment year 2009-2010 stands rejected by the Tribunal. We are the view that there is nothing on record to persuade us to take a view different from the view taken with Tribunal in the case of for Assessment Year 2009-2010. Accordingly, addition of INR.27,20,28,430/- made in respect of brand royalty payments is hereby deleted.

- 19.15. Ground No.9 read with Ground No.9.5 to 9.10 raised by the Assessee pertain to the transfer pricing adjustment made in respect of Advertisement, Market and Promotion (AMP) Expenses incurred by Assessee. As was the case with the transfer pricing adjustment made in case of the brand royalty payments, the transfer pricing adjustments in relation to AMP Expenses was deleted by the Tribunal in the case of the Assessee for the Assessment Year 2009-2010

holding as under:

"11. *Ground of appeal No. 10 (Transfer Pricing adjustment relating to AMP expenditure):*

11.1. *During the alleged previous year, the assessee had incurred the following expenses aggregating Rs. 282.24 crores under the expense heads of 'distribution expenses' and 'advertisement/sales promotion expense'. These expenses were incurred in relation to the provision of the telecommunication services:*

xx xx

11.2. *The TPO in terms of the Order dated 20/01/2013 alleged that the aforesaid expenses of Rs. 282.24 crores result in creating a marketing tangible for the 'Vodafone' and 'Essar' trademark/trade name and, thus, the assessee ought to have been reimbursed by its foreign AEs for such expenses. While doing so, the TPO also held that distribution expenses like commission paid to distributors, payments for subscriber verification, payment collection, etc. are also in the nature of brand promotion. The TPO also alleged that the assessee has incurred excessive AMP expenditure which has benefitted the brand owned by the AEs of the assessee and hence the assessee should be reimbursed by its foreign AEs. The TPO applied the 'bright line limit' while holding that the AMP expenses incurred by the assessee are excessive. The TPO also applied a mark-up of 15.46% on the assessee's alleged excessive AMP expenses.*

11.3. *The DRP vide its directions dated 18/12/2013, relying on the decision of the Special Bench of the Tribunal in the case of LG Electronics India Pvt. Ltd. vs. ACIT (2013) 140 ITD 41 (Delhi) (SB), upheld the applicability of the bright line test while computing the ALP of the AMP expenditure. It further upheld the TPO's stand of adding a markup of 15.46% on the ALP of the AMP expenditure. Pursuant to the DRP Directions, the Ld. AO in terms of the Final Assessment Order dated 30/01/2014 inter-alia made an addition of Rs. 2,84,68,27,994/- to the income of the assessee being the transfer pricing adjustment made by the TPO on the transaction of AMP expenditure.*

11.4. *Mr. Pardiwalla submits that the revenue has not discharged the onus cast on it by bringing any material on record to prove that there is an understanding / arrangement or an action in concert*

between the assessee and the AEs for promotion of trademark/ trade name owned by the AEs. The AMP expenses have been incurred as a function as part of the assessee's roles and responsibilities as a service provider and not under a separate arrangement/ agreement with the AEs to promote brands owned by such AEs. The assessee has the license to provide telecommunication services in India and the AEs cannot provide such services in India since it does not have such license and, hence, the AMP expenses have been incurred as a function by the assessee.

11.5. The assessee further submits that no cost/ income can be attributed only to 'brand promotion'. The entire advertisement expenditure incurred by the assessee was intended to reach out to the subscriber base in order to inform them about the different services rendered by it. The advertisement agencies do not charge different rates for advertisements for unbranded services vis-à-vis advertisements for branded services. Thus, it is evident that there is no expenditure incurred towards trademark/trade name. It is further submitted that basis the functions performed, and risks assumed, it has been characterised as a full-fledged telecom service provider engaged in the provision of telecommunication services. However, while determining the appropriateness of AMP expenses, the TPO has characterised the assessee as a distributor without providing any reasons for the same, thereby, leading to an inaccurate transfer pricing analysis. It is submitted that it is a long-settled jurisprudence that the business model chosen by the assessee has to be respected and it is not open to the revenue to dictate any other model to the assessee. The application of bright line method does not take into consideration the impact of various factors on deciding the appropriateness of the level of AMP expenses incurred by an assessee. The TPO has not established functional similarities between the assessee and the comparable chosen by him for application of bright line method and, thus, bright line method cannot be applied.

11.6. In this connection, the Ld. AR submits that this issue is covered in its favour by the decision of the coordinate Bench ITAT-Mumbai in the case of 'Vodafone India Ltd.' bearing ITA No. 884/Mum/2016 dated 17/05/2024 wherein the Hon'ble Bench relying on the judgement of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. v/s. CIT (2016) 381 ITR 117

(Delhi) deleted the transfer pricing adjustment made by the TPO in respect of AMP expenditure.

The facts of the aforesaid case before the Bench are detailed in para Nos. 12.4 to 12.5 on page Nos. 40 to 42 of its Order, the said findings are extracted hereunder for ready reference:

".....12.4. We have considered the rival submission and perused the material on record including the chart of issues filed by the Assessee.

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

Expenditure of INR 22,01,14,350/- cannot be sustained and is, therefore, deleted. Ground No. 7.3 raised by the Assessee is allowed and Ground No. 7.4 to 7.8 are dismissed as being infructuous.....”

- 11.7. *Attention is also invited to the judgement of the Hon'ble Delhi High Court in the case of CIT v/s. Whirlpool of India Ltd. (2016) 381 ITR 154 (Delhi) wherein too the Hon'ble High Court held that the TPO cannot proceed to determine the ALP of AMP expenditure by inferring the existence of an international transaction based on bright line test if he has not been able to demonstrate with tangible material if there is an international transaction involving AMP expenditure between the assessee and its AE. It is further submitted that the SLP filed by the Revenue challenging the aforesaid decision of the Hon'ble High Court stands dismissed by the Supreme Court vide in recent order dated 20/11/2024 reported in (2024)169 taxmann.com 95 (SC).*
- 11.8. *The Ld. Dr argued and stated that with respect to the adjustment relating to AMP argued that the incurrence of the said expenses by the assessee has resulted in an indirect benefit to the AE and hence the assessee ought to be compensated for the same.*

"4. TP adjustment of AMP transaction –

The Ld. Counsel has submitted that the TPO has not brought any material on record to prove that there is an understanding/arrangement or an action in concert between the appellant and the AEs for promotion of trademark/tradename owned by the AEs and therefore any existence of any international transaction of AMP is not established.

The Ld. Counsel further submits that adoption of bright line test for holding the excessive AMP expenses compared to the third party comparables is erroneous as the TPO has not established functional similarities between the appellant and the comparables chosen by him for the application of bright line method.

Further, the Ld. Counsel submits that the AMP issue is already covered in its favor by the decision of the Hon'ble

Mumbai ITAT in the case of Vodafone India Ltd. in ITA No.884/Mum/2016 dated 17.05.2024.

In this regard, I rely on the order of the Transfer Pricing Officer and of the Ld. DRP wherein the TPO has discussed elaborately the details of the AMP transaction and the reasons for holding it as an international transaction and benchmarking it by adopting the most appropriate method."

- 11.9. *This issue too, as was argued during the course of the hearing, has been addressed by the Hon'ble Delhi High Court in the case of Maruti Suzuki India Limited (supra) - relevant portion of the same is extracted hereunder for ready reference:*

"73.The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also enures to building the brand of the foreign AE for which the foreign AE is obliged to compensate the Indian entity. The burden of the Revenue's song is this: an Indian entity, whose AMP expense is extraordinary (or 'nonroutine') ought to be compensated by the foreign AE to whose benefit also such expense ensures. The 'non-routine' AMP spend is taken to have 'subsumed' the portion constituting the 'compensation' owed to the Indian entity by the foreign AE. In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X. 37 ITA No.1169 /Mum/2014 Vodafone Digilink Limited

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction.....

75.

76. As explained by the Supreme Court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294/5 Taxman 1 and PNB Finance Ltd. v. CIT [2008] 307 ITR 75/175 Taxman 242 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught

with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise.....”

11.10. *We heard the rival submission and considered the documents available record. The revenue has not demonstrated, through any material or tangible evidence, that there exists an understanding, arrangement, or concerted action between the assessee and its AEs for promoting trademarks or trade names owned by the AEs. This failure to establish an international transaction de hors the bright line test invalidates the adjustment. We respectfully consider the decisions of higher judicial authorities, including the Hon’ble Delhi High Court in Maruti Suzuki India Ltd (supra). and Whirlpool of India Ltd (supra)., have categorically held that the bright line test cannot be used to presume the existence of an international transaction in the absence of evidence. The Hon’ble Supreme Court’s dismissal of the revenue’s SLP further reinforces this position. The AMP expenses incurred by the assessee were essential to its business functions as a telecom service provider and were aimed at expanding its subscriber base, not at promoting the brand of its AEs. These expenses were inextricably linked to the assessee’s business operations and cannot be arbitrarily segregated as brand promotion for the AEs. The TPO’s characterization of the assessee as a mere distributor, without any substantive reasoning, contradicts the assessee’s established role as a full-fledged telecom service provider. The business model chosen by the assessee is to be respected, as per settled jurisprudence, and cannot be re-characterized arbitrarily by the revenue. The application of the bright line test without ensuring functional comparability of the selected comparable and without considering business-specific factors renders the adjustment methodologically flawed. In subsequent assessment years, no adverse inference has been drawn, and no transfer pricing adjustments have been made concerning AMP expenses. This consistency further weakens the revenue’s case for the disputed year.*

In light of these observations, it is respectfully submitted that the transfer pricing adjustment of Rs. 2,84,68,27,994/- made in respect of AMP expenditure is devoid of merit and should be

deleted. Therefore, the adjustment is set aside, and the assessee's appeal is allowed. (Emphasis Supplied)

19.16. There is nothing on record to distinguish the above decision of the Tribunal for the Assessment Year 2009-2010 either on facts or in law. We note that the Tribunal has taken a view in favour of the Assessee and had deleted the transfer pricing addition in respect of AMP Expenses after taking into consideration identical submission made by both the sides.

19.17. In view of the above, we are not persuaded to take a view different from the view taken by the Tribunal in the case of the Assessee/Vodafone Digilink Limited (supra) for the Assessment Year 2009-2010. Accordingly, we delete the transfer pricing addition of 167,83,26,579/- made in the hands of Assessee.

20.1. In view of above Ground 9 to 9.10 raised by the Assessee are allowed.

Ground No. 10

20. Ground No.10 raised by the Assessee reads as under:

10. Ground No. 10-Non-grant of full credit in respect of Tax Deducted at Source ('TDS') and MAT credit

10.1. On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for TDS of INR 62,40,00,444 instead of INR 71,38,85,165 claimed by the Appellant in its revised return of income for the subject AY.

10.2. On the facts and in the circumstances of the case and in law, the learned AO has erred in non-granting MAT credit of INR 72,32,07,600 as claimed by the Appellant in its revised return of income for the subject AY.

20.1. Ground No.10 raised by the Assessee pertains to Non-grant of full credit in respect of Tax Deducted at Source ('TDS') and MAT credit.

The Assessing Officer is directed to verify the records and grant credit of TDS and MAT as per law after verification.

20.2. In terms of the above, Ground No.10 raised by the Assessee is allowed for statistical purposes.

Ground No. 11

21. Ground No.11 raised by the Assessee reads as under:

11. Ground No. 11 – Interest u/s.234B of the Act

11.1. On the facts and in the circumstances of the case and in law, the learned AO has erred in levying interest u/s.234B of the Act.”

21.1. Ground No.11 raised by the Assessee is pertains to levy of interest under Section 234B of the Act and the same is disposed off as being consequential in nature.

22. In result appeal preferred by the Assessee is partly allowed.

23. In conclusion, both the appeals preferred by the Assessee [ITA No.1073/Del/2015] and Revenue [ITA No.1158/Del/2015] are Partly allowed.

Order pronounced on 14.10.2025.

Sd/-
(Omkareshwar Chidara)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 14.10.2025
Milan, LDC

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त/ The CIT
4. प्रधान आयकर आयुक्त/ Pr.CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT,
Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार /(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai