

आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, PUNE

**BEFORE SHRI S.S.GODARA, JM
AND SHRI DR. DIPAK P. RIPOTE, AM**

आयकर अपील सं. / **ITA No.729 to 735/PUN/2019**
निर्धारण वर्ष / Assessment Year : 2013-14 to 2016-17

DCIT, TDS, Pune,

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Vodafone Idea Ltd.,
F.P.No.27, S.No.-21,
Old Mumbai Pune Highway,
Shivajinagar,
Pune – 411 019.

PAN : AAACS4457Q

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ronak Doshi
Revenue by : Shri Sardar Singh Meena

सुनवाई की तारीख / Date of Hearing : 19.07.2022
घोषणा की तारीख / Date of Pronouncement : 27.07.2022

आदेश / ORDER

PER S. S. GODARA, JM :

1. These Revenue’s seven appeals pertain to a single assessee herein M/s. Vodafone Idea Ltd. i.e. successor entity arising from merger of M/s. Vodafone Mobile Services Ltd. “VMSL” with M/s. Idea Cellular Ltd. “ICL” . These seven cases pertain to various assessment years between 2013-14 to 2016-17. They arise against the CIT(A)-10 Pune’s separate orders; all dated 05.03.2019 passed in case Nos. PN/CIT(A)-10/DCIT-TDS/09,36,08,37,7,06 &

38 /18-19; respectively, in proceeding u/s.201(1) r.w.s 201(1A) of the Income Tax Act, 1961; in short the “Act”.

Heard both the parties. Case files perused.

2. We note at the outset Revenue’s identical substantive grounds raised in all these seven appeals reads as follows:-

1. *On the facts and circumstances of the case and in law, the Learned CIT(A)-10, Pune erred in holding the amount paid by the assessee to the SIM Card Distributors was in the nature of “Discount” and not in nature of ‘Commission’ within the meaning of Section 194H of the Act as held by the Assessing Officer and erred in not holding the Appellant as an ‘assessee in default’ for the non deduction of tax at source u/s. 201(1) r.w.s. 194H of the I.T. Act 1961.*
- 1.1 *On the facts and in the circumstances of the case and in a law, the order passed by the Learned CIT(A)-10, Pune on the above issue without appraising and evaluating the relevant facts and evidences and, on the contrary, on the basis of irrelevant considerations, not perverse.*
- 1.2 *The Learned CIT(A)-10, Pune ought to have dismissed the appeal of the assessee and allow the appeal of the revenue on the facts and in the circumstances of the case and in law, and should have confirmed the order of the Assessing Officer which is self speaking.*
- 1.3 *The order of the Learned CIT(A)-10, Pune is otherwise bad in law not maintainable on the facts and circumstances of the case and contrary to the provisions of the Income Tax Act, 1961 and the Rules framed there under.*

1.4 *The order of the Learned CIT(A)-10, Pune may be vacated and that of the Assessing Officer be restored.*

Ground No.2 :

The appellant craves have to add, alter or amend any or all the grounds of appeal.”

3. Both the learned representative next took us to the CIT(A)’s identical discussion reversing the assessment findings raising the impugned TDS demand against the assessee as follows :-

“5.1.1 The appellant further submitted a copy of the order of the Hon’ble ITAT Pune Bench “B” dated 04.01.2017 in its own case in ITA Nos. 817, 818, 1577, 1578, 1961 8s 1962/PUN/2013 for AYs 2007-08 to 2012-13, wherein while deciding an exactly identical issue in the earlier years, the Hon’ble ITAT in paras 34 to 36 of the said order has held as under: -

“34. No decision of the jurisdictional High Court on this issue was brought to our notice. Since the facts of the instant case are identical to the case before Hon’ble Karnataka High Court, therefore, respectfully, following the decision of Hon’ble Karnataka High Court we hold that sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s. 194H of the I.T. Act. However, the Hon’ble High Court while holding so has remitted the matter back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not reflected as set out above in para 60 of the order, section '194H is not attracted. Therefore, in line of the above observation of the Hon’ble High Court we restore the matter to the file of the Assessing Officer for necessary verification. The grounds raised by the assessee are accordingly allowed for statistical purposes.

35. Identical grounds have been raised by the assessee for the remaining years wherein the assessee has challenged the order of the CTT(A) in upholding the action of the Assessing Officer in treating the assessee as an assessee in default for non deduction of tax at source on discount extended by the assessee to the distributors and its prepaid SIM cards/ talktime and therefore liable to pay tax u/s 201(1) and interest u/s.201(1A) of the I.T.Act.

36. In view of our discussion in the preceding paragraphs we hold that the sale of SIM cards/recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s.194H of the I.T. Act. However, we have restored the issue to the file of the Assessing Officer for necessary verification in the light of the decision of Hon'ble Karnataka High Court (supra). Therefore, the grounds for the other years on the issue of liability u/s,194H are allowed for statistical purposes. We hold and direct accordingly."

5.1.2 The appellant also brought to my notice during the course of appellate proceedings that pursuant to the decision of the Hon'ble ITAT Pune on an exactly identical issue in its favour in earlier years, consequent appeal effect had been given by the AO in the said years vide order dated 30.06.2017 re-computing the demand raised at Rs. NIL, post verification of accounting entries. In view of the submissions made by the appellant and discussions held thereupon, it was found necessary to call for remand report from the DCIT(TDS) Pune in respect of accounting treatment given to the sale price and discount in the books of accounts maintained by the appellant during the relevant previous year. Accordingly, remand report in this regard was called for, after stating the facts, from the DCIT(TDS) as per the provisions laid down u/s 250(4) of the Act vide this office's letter No. PN/CIT(A)-10/Verification/Vodafone Idea/2018-19/384 dated 02.01.2019, which is reproduced as under:-

1. *The appeal proceedings in case of the above mentioned appellant are under progress in this office. The appeal was filed against an order u/s 201(1)/201(1A) of the I.T.Act passed by your office for A. Y, 2013-14 raising demand of Rs. 14,31,98,195/-. In this regard, A.R. of the appellant attended and submitted that the 'discount extended to pre-paid distributors' during the relevant*

previous year is not commission and hence provisions of section 194H are not applicable on the same. Further, reliance was placed on the Hon'ble ITAT Pune's decision in appellant's own case for previous years A.Y. 2007-08 to A.Y. 2012-13 vide order dated 04.01.2017 wherein the identical issue has been decided in its favour by the ITAT in light of the decision of Hon'ble Karnataka High Court, but subject to necessary verification by the AO.

2. *Subsequent to the directions given by the ITAT for those earlier years and in obedience to ITAT's order, your office has given appeal effect for the said years vide order dated 30.06.2017 re-computing the demand at Rs. NIL, post verification of accounting entries.*
3. *Since, the issue involved in the year under consideration is claimed to be similar to the issue decided by the ITAT Pune for earlier years in which necessary verification has been done by your office, you are hereby required to make necessary verification in the case of the appellant for A.Y. 2013- 14 to find out as to how the books of accounts are maintained, how the sale price and sale discount is treated and whether the sale discount is reflected in the books of accounts maintained by the appellant for the said year.*
4. *While making such verification, you may call the appellant seeking more details which may help you in preparing the report u/s 250(4) of the I.T. Act, 1961...."*

5.1.3 *In response to the same, the DCIT (TDS), Pune vide letter dated 18.01.2019 forwarded through the Addl. CIT (TDS) Range, Pune and received in this office on 22.01.2019 had sent a report inter-alia as below :-*

"2. Your office has directed to verify the issue of commission in light of Pune ITAT's decision. The details had been called from the assessee and following facts are seen related to commission payment:

a) Related to Sale price and sale discount:

It is verified from the Invoices that the sale to the distributor is on net basis (MRP less discount) and accordingly the bill is raised at net selling price.

b) Related to Books of Accounts:

It is verified from the accounting entries that the revenue is recorded in the books at net of trade discount and only the net income is credited in the books. The sale discount is not reflected in the books of accounts.

3. *The assessee has maintained books on net of basis and not debited commission/discount separately.*

4. It is worth mentioning here that, the department still considers the nature of transaction claimed by deductor as discount is commission as there is Principal to Agent relationship between the Assessee and the distributors and TDS was required to be deducted on the same. The method of recording entries in books of accounts cannot determine character of payment.

5. Submitted for kind perusal and necessary direction, if any.”

5.1.4 It is also observed that the comments of the Addl. CIT(TDS) Range, Pune in the forwarding letter No. 709 dated 22.01.2019 were as below:-

“ With reference to above, kindly find enclosed herewith the letter dated 18/01/2019 received from Dy. CIT(TDS), Pune on the above mentioned subject. As directed, the Dy.CIT(TDS), Pune has verified the issues of commission paid to the distributor in view of Pune ITAT’s decision in the case. On the issue related to sale price and sale discount, it is verified by the AO from Invoices that the sale to the distributor is on net basis (MRP less discount) and accordingly the bill is raised at net selling price. Further, on the issue related books Of account, it is verified by the AO from the accounting entries that the revenue is recorded in the books at net of trade discount and only the net income is credited in the books and the sale discount is not reflected in the books. The assessee has maintained books on net basis and not debited commission/discount separately.

2. The AO has further submitted that the Department still considers the nature of transaction claimed by the deductor as discount is commission, as there is Principal to Agent relationship between assessee deductor & distributors and TDS was required to be deducted at source. The method of recording entries in books of accounts cannot determined character of payment.”

5.1.5 The above said remand report received from the AO was sent to the appellant for counter comments, if any, vide this office’s letter no.435 dated 23.01.2019; in response to which A.Rs of the appellant appeared on 31.01.2019 and submitted a rejoinder vide letter dated 31.01.2019 which is reproduced as under :-

“In this regard, on behalf of and under the instructions of our subject client, we wish to submit that learned TDS officer, post verification of accounting entries, has accepted

the contentions of the Company that it recognizes the sale of 'right to pre-paid services' in its books of accounts on net basis and the discount is not credited to the account of the distributor.

*As regards the contention of the learned TDS officer that he still considers that discount extended by the Company to its pre-paid distributors is in the nature of commission on the basis that relationship between the Company and its distributors is Principal - Agent relationship, we wish to re-iterate that the arrangement between the Company and its pre-paid distributors for distribution of 'right to pre-paid services' is on a 'Principal to Principal' basis. This fact has also been upheld by the Hon'ble jurisdictional Pune bench of the Income Tax Appellate Tribunal ('Tribunal') in the Company's own case for prior years i.e. FYs 2006-07 to 2011-12 as well as by the other benches of the Hon'ble Tribunal. It was further submitted that the directions of the Hon'ble Tribunal are in line with the principle enunciated by the Hon'ble Karnataka High Court in the case of *Bharti Airtel Limited Vs DCIT (372 ITR 33)*, which has been specifically followed/ cited by it.*

Therefore, considering that the relationship between the Company and the pre-paid distributors is that of 'Principal to Principal' which has also been accepted by the Hon'ble Court/ Tribunal, the issue of non-applicability of withholding tax provision on discount extended by the Company to its pre-paid distributors should be decided in favour of the Company."

5.2 I have perused the order passed by the AO levying tax and interest u/s. 201(1) & 201(1A) of the Act treating the appellant as an 'assessee in default' within the said provisions levying tax and interest of Rs. 8,59,59,112/- and Rs. 5,72,39,083/- respectively, totaling to an amount of Rs. 14,31,98,195/-, the submissions made by the appellant, the order passed by the Hon'ble ITAT in the case of appellant on identical issue for earlier years, the relevant portions of which have already been quoted above, the Remand Report received from the AO and also the Rejoinder submitted by the appellant. I find that the Hon'ble Karnataka High Court, in the case of **Bharati Airtel Ltd vs DCIT 372 ITR 33**, in para 11 held that sale of SIM cards/ Recharge Vouchers at to distributors is not commission and therefore the

assessee is not liable to deduct TDS u/s. 194H of the Act. As already quoted above the Honhble Pune Tribunal, in appellant's own case in para 36 of the order, following the decision of the Hon'ble Karnataka High Court, held that **"we hold that the sale of SIM cards/ recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s. 194H of the I.T. Act"**. The Honhble Tribunal, Pune, however, following the said High Court's decision had remitted the matter back to the AO **"only to find out how the books are maintained and how the sale price and the sale discount is treated /and whether the sale discount is reflected in their books."** It was further held that if the accounts are not reflected as set out above in para 60 of the order, section 194H is not attracted. The above issue was only the factor of the Assessing Officer, which required **"necessary verification"**, as per the said order of the Pune ITAT. Therefore, from the facts as above, it is explicitly expressed by the Hon'ble Pune ITAT that sale of SIM cards/ recharge coupons at discounted rates to distributors is not commission and therefore not liable to TDS u/s. 194H of the Act.

I find that in Remand Report sent by the AO dated 18.01.2019, he had given his findings exceeding the brief beyond the issue as asked from him while calling for report u/s. 250(4) of the Act vide this office's letter dated 02.01.2019, wherein specifically mentioning the order of the Hon'ble ITAT Pune dated 04.01.2017 who had decided the identical issue specifically holding that the sale of SIM cards/ recharge coupons at discounted rate to distributors is not commission and therefore not liable to TDS u/s. 194H of the Act and further of giving effect to the said orders by the AO on 30.06.2017 re-computing the demand at Rs. NIL post verification of accounting entries, he was asked to report after necessary verification of the accounting entries as to how the sale price and sale discount was treated and whether the sale discount was reflected in the books of accounts maintained by the appellant for the said year, but the AO even though offering his comments on the issue involved pertaining to verification of accounting entries went beyond to state that **"the**

department still considers the nature of transactions claimed by deductor as discount is commission as there is Principal to Agent relationship between the assessee and the distributors and TDS was required to be deducted on the same. The method of recording entries in books of account cannot determine character of payment”; though the AO had reported nothing adverse about the accounting entries, rather had given his comment regarding sale price and sale discount that **“It is verified from the In-invoices that sale to the distributor is on net basis (MRP less discount) and accordingly the bill is raised at net selling price”** and as regards relating to books of accounts, it was reported in the Remand Report that **“It is verified from the accounting entries that the revenue is recorded in the books at net of trade discount and only the net income is credited in the books. The sale discount is not reflected in the books of accounts”** and also that **“The assessee has maintained books on net of basis and not debited commission/discount separately”**.

In this regard, the A.R. of the appellant while submitting his counter comments vide letter dated 31.01.2019, which has already been reproduced above, has stated that the TDS officer has agreed to the fact that the appellant recognizes the sale of 'right to pre-paid services' in its books of accounts on net basis and the discount is not credited to the account of the distributor. Further, with regards to the contention laid down by the AO in his remand report that the department still considers the discount offered by the appellant to its distributors to be in the nature of commission on the basis that relationship between the company and its distributors is of Principal to Agent nature, the appellant has reiterated the facts as stated in earlier submissions about the arrangement between it and the distributors. The appellant has also thrown light on the fact that the jurisdictional Pune bench of the Hon'ble ITAT has also upheld the same and held that the relationship between the company and its pre-paid distributors is that of 'Principal to Principal' and as such

the issue of non-applicability of withholding tax provision on the discount extended by the appellant company to its pre-paid distributors should be decided in its favour.

*I completely agree with the view taken on behalf of the appellant in this regard since no adverse findings have been made by the DCIT(TDS) Pune in his remand report regarding the accounting treatment of the sale price and discount being offered by the appellant company to its distributors. The same is found to be in line with the claims made by the appellant in its submissions and therefore, it cannot be said that the same has to be treated as commission. Moreover, the AO has himself accepted the fact that the sale bill is raised on the net basis and even for the purposes of accounting; revenue is recorded in the books of accounts at net of trade discount. When there are no adverse findings with regards to the treatment of discount given by the appellant to its distributors during the year, then the conclusion given by the AO in his remand report, that the department still considers that the nature of transaction claimed by the deductor as discount is commission, although being beyond his scope yet even if considered is totally unfounded and seems to be based on some probable presumptions. At this juncture, I also find it pertinent to mention that the then DCIT (TDS) Pune in his order u/s. 201(1)/ 201(1A) of the Act dated 27.03.2018, in para 4, has specifically mentioned that the Department has filed appeal against the order of the Pune Tribunal favoring appellant on identical issue involved in FYs 2006-07 to 2011-12. It is quite clear that the jurisdictional Tribunal had decided the issue of dispute in favor of the appellant in earlier years; nevertheless instead of following the said judicial precedent, the AO had opined that “ **there is no judicial finality on the said issue and further to keep the matter alive, the order under section 201(1)/(1A) is being passed for AY 2013-14 treating the assessee company as an ‘assessee in default’, for non-deduction of tax u/s. 194H of the I.T. Act, on ‘Discount extended to pre-paid distributors’ for Rs. 85,95,91,118/-.**” I hold that the AO had not only disregarded the decision of the Hon’ble jurisdictional Pune*

ITAT but also the decision of the Hon'ble Karnataka High Court and in fact had ignored the judicial norm that if there is no decision of the jurisdictional High Court/ Supreme Court on a particular issue but the decision of any other High Court(s) is available on such issue, and there is a decision of the Hon'ble jurisdictional Tribunal on such issue, it is the obligation of the AO to follow the decision of the jurisdictional Tribunal or the High Court(s). As stated above, it is conspicuous that the AO has not decided the issue of dispute accordingly, perhaps looking into the quantum of demand raised.

In view of the above, without going into further nitty-gritty of the detailed submission made by the appellant in both Statement of Facts filed with form no. 35 and written submission quoted above and also various grounds raised for adjudication separately; in view of the report submitted by the AO in respect of treatment of discount in the books of accounts maintained by the appellant company for the year under consideration and following the view taken by the Hon'ble ITAT Pune in its decision in appellant's own cases for prior years, it can be appropriately concluded that the discount offered by the appellant company to its prepaid distributors is not in the nature of commission since the sale of any right to prepaid services by the appellant to its distributors is on net basis as evident from the bills and invoices raised by the appellant during the said year, also the accounting treatment of sale price in its books of accounts has been given on the net basis by the appellant and hence it cannot be held to be an assessee in default within the meaning of provisions laid down u/s 194H of the Act. Further, in view of the above elucidated facts, I find force in the submission advanced on behalf of the appellant before me during the course of appellate proceedings wherein it has been stated that the sale of any such prepaid services to the distributors is on the discounted price and there appears no question of any commission since no payment has been made by the appellant company to any of the distributors; hence I do not find any reason to differ from the view taken by the Hon'ble ITAT in the above quoted decision in appellant's own cases for earlier years since

*the facts involved and the issues raised herein are exactly identical to those in the said cases. In my considered opinion, the AO has grossly erred in arriving at the conclusion that the discount offered by the appellant is in the nature of commission and hence within the ambit of provisions laid down u/s 194H of the Act. Accordingly, I hold that the AO was not justified in treating the appellant as an 'assessee in default' for non-deduction of tax u/s. 194H of the Act on Discount extended to pre-paid distributors for Rs. 85,95,91,118/- and also levying tax on the same u/s. 201(1) at the rate of 10% at Rs. 8,59,59,112/- and interest u/s. 201(1A) at the rate of 1% at Rs. 5,72,39,083/-, totaling to Rs. 14,31,98,195/-. The AO is, therefore, directed to delete the tax levied and interest so charged thereupon against the appellant for the relevant previous year. Ground Nos. 1 to 3 and their sub-grounds are accordingly **allowed.***

4. Learned CIT-DR vehemently argued in support of Revenue's pleading that the CIT(A) has erred in law and on facts in holding that the amount in issue paid by the assessee; a cellular operator to its sim card distributors was not in the nature of commission u/s. 194 H of the Act requiring TDS deduction but only amounted to a "discount".

5. The assessee has drawn strong support from the CIT(A)'s foregoing detailed discussion.

6. We have given our thoughtful consideration to the rival submissions and find no merit in the Revenue's stand. We make it clear that the Revenue has not been pin-point any distinction on facts or law so far as assessee's identical issue of prepaid sim cards issued to various distributors is

concerned. It's only case is that the said sim cards involved a pre-embedded element of commission which ought to have been subjected to TDS deduction u/s. 194(4) of the Act. We find this sole issue to be no more re integra as learned co-ordinate bench's order in assessee's appeal ITA No. 807 /PUN/2016 & 808/PUN/2016 dated 14.05.2018 involving M/s. Idea Cellular Ltd. (supra) had rejected the very departmental stand which stood approved in Revenue's tax appeal in ITA No. 302/PUN/2019 decided on 13.01.2020 before the hon'ble jurisdictional high court. That being the case, we conclude the instant issue of assessee's obligation to deduct TDS on its prepaid sim card supplied to distributors involving the discount component therein; has attained the finality. We thus affirm the CIT(A)'s order(s) in all these Revenue's appeals. It's sole substantive grievance fails.

No other argument or ground has been raised or pressed before us.

7. These Revenue's seven appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the Open Court on this 27th day of July, 2022.

Sd/-

Sd/-

(DR.DIPAK P.RIPOTE)

(S.S. GODARA)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

न्यायिक सदस्य/ **JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 27th July, 2022.

Ashwini

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-10, Pune.
4. The CIT(TDS), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

ITA No.729 to 735/PUN/2019,
A. Y.: 2013-14 to 2016-17
M/s. Vodafone Idea Ltd.,

S.No.	Details	Date	Initials
1	Draft dictated on	19.07.2022	
2	Draft placed before author	22.07.2022	
3	Draft proposed & placed before the Second Member		
4	Draft discussed/approved by Second Member		
5	Approved Draft comes to the Sr. PS/PS		
6	Kept for pronouncement on		
7	Date of uploading of Order		
8	File sent to Bench Clerk		
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R.		
11	Date of Dispatch of order		