

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH**

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

[Through Virtual Court]

ITA. Nos: 09, 10 & 11/Ahd/2018 (Assessment Years: 2008-09 to 2010-11)
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Vodafone India Ltd. (Formerly known as Idea Cellular Limited), Vodafone House, Building A, Corporate Road, Off S.G. Highway, Ahmedabad-380015		Assistant Commissioner of Income-tax (OSD), TDS, Ahmedabad
PAN No. AAACB2100P		
(Appellant)		(Respondent)

Appellant by : Shri Ronak Doshi, A.R. Respondent by : Ms. Pallavi, Sr. D.R.
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(आदेश)/ORDER

Date of hearing : 05-03-2021
Date of Pronouncement : 04 -06-2021

PER MAHAVIR PRASAD, J.M.

1. These three appeals have been filed by the Assessee are directed against the common order passed by the Commissioner of Income Tax (‘hereinafter called CIT(A)’) order

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no. CIT(A)-8/10037/2017-18, 10039/2017-18 & 10040/2017-18 order dated 13/10/2017. Assessee has taken following grounds of appeal:

Ground of Appeal

GROUND NO. I: ORDER PASSED BY LD. CIT(A) IS BAD IN LAW.

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order passed by the Ld. AO wherein the Assistant Commissioner of the Income Tax (OSD), TDS ("the TDS Officer") has not followed the directions of the Hon'ble Income Tax Appellate Tribunal, Ahmedabad ("Tribunal").*

2. *The Appellant prays that the order passed by the TDS Officer u/s. 201(1)/201(1A) of the Act be quashed/ annulled.*

WITHOUT PREJUDICE TO GROUND NO. I,

GROUND NO. II: TREATING THE ASSESSEE AS "ASSESSEE IN DEFAULT" U/S. 201(1).

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order passed by the TDS Officer treating the Appellant as an 'assessee in default' under section 201 r.w.s. 194H of the Act without ascertaining and proving that whether the recipient had paid taxes on the alleged income received / receivable from the Appellant as required u/s. 191 of the Act.*

2. *The Appellant prays that it be held that in absence of above exercise by the TDS officer, Appellant cannot be held as 'assessee-in-default' u/s.201 r.w.s 194H.*

WITHOUT PREJUDICE TO GROUND NOS. I & II,

GROUND NO. III: NON DEDUCTION OF TAX AT SOURCE ("TDS") U/S. 194H OF THE ACT ON DISCOUNT ALLOWED TO THE DISTRIBUTORS IN RESPECT OF SUPPLY OF SUBSCRIBER IDENTITY MODULE ("SIM") /RECHARGE VOUCHERS ("RV").

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1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the order passed by the TDS Officer under section 201(1)/201(1A) of the Act, by treating "discount" offered by the Appellant to the distributors as "commission" and thereby treating the Appellant as an 'assessee in default' under section 201(1) r.w.s. 194H of the Act.*

2. *The Ld. CIT(A) failed to appreciate and ought to have held that:*

i. *Relationship between the Appellant and its Distributors is on Principal to Principal basis and, thus no TDS u/s. 194H is required to be deducted.*

ii. *Without prejudice, if mechanism to deduct tax at source fails as there is neither 'payment' nor 'credit' of the difference between Maximum Retail Price and Distributor Price in favour of the Distributor and Appellant is not person responsible for paying any income to the Distributor, 194H does not apply.*

3. *The Appellant prays that the discount allowed to the Distributors be held as not liable to TDS u/s. 194H of the Act and therefore, the Appellant cannot be held as an "assessee in default" under section 201(1) of the Act.*

GROUND NO. IV: INTEREST LEVIED UNDER SECTION 201(1A) OF THE ACT.

1. *On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in confirming the order passed by the TDS Officer in holding the Appellant as 'assessee in default' under section 201(1) of the Act and thereby levying the interest u/s. 201(1A) of the Act.*

2. *The Appellant prays that the interest levied under section 201(1 A) of the Act be deleted or be appropriately reduced.*

GROUND NO. V: GENERAL.

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

2. Brief facts of the case are that except for the figures, the issues involved in case of the appellant in all the three different assessment years, addition are different however

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issues are common. Therefore for the sake of brevity, we would like to dispose of these appeals by way of a common order.

3. The appellant is a telecom service provider engaged in providing services in Gujarat. In the course of its business, it appoints various distributors for the sale of SIM cards and the recharge cards etc. Lower authorities held that the payment made by the appellant to the prepaid distributors is in nature of commission and liable for TDS u/s. 194H of the Act and treated the appellant as “ assessee in default” and raising following demand:

Rs. 17,71,940/- (AY 2008-09)

Rs. 27,90,440/- (AY 2009-10)

Rs. (-)29,79,336 (AY 2010-11)

Being the net of demand payable after payment of demand under protest, for non-deduction of tax at source under section 194H of the Act and the interest under section 201(1)/201(1A) of the Act.

4. Appellant relied on the decision of Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. vs. DCIT (2012) (345 ITR 288) (All.) wherein it was held that where tax has not been deducted at source or short deducted by the assessee then the assessee is only liable for interest and penalty. The tax amount, which was already paid by the recipients on their income, is not required to be recovered from the assessee since it would amount to taxing and recovering the tax twice.
5. But Ld. A.O. did not agree with the plea of the assessee and held that payment made by the assessee company to the prepaid distributors is in the nature of commission liable for TDS u/s. 194H of the Act. The assessee is treated as assessee in default u/s. 201(1)/201(1A) for not deducting TDS u/s. 194H of the Act.

6. Therefore in appeal before the Ld. CIT(A) who confirmed the action of the Ld. A.O. and held that appellant is liable to deduct TDS u/s. 194H of the Act and held that assessee in default u/s. 201(1)/201(1A) for not deducting u/s. 194H.
7. We have heard both the parties and gone through the relevant record and impugned order. Ld. D.R. heavily relied on the order of the A.O. and Ld. CIT(A) whereas Ld. A.R. contention was that appellant cannot be considered as assessee in default.
8. With regard to deduction of TDS on prepaid SIM cards and Recharge cards, different High Courts' have taken contrary view by holding that while the service cannot be sold, right to service can always be sold. And Hon'ble Karnataka High Court did not agree with the judgment of Hon'ble Delhi High court wherein it is held that cellular companies are liable to deduct TDS on the commission paid to Franchise for selling of SIM cards and Recharge cards.
9. The Hon'ble Delhi High Court and the Rajasthan High Court have given contrary findings with regard to applicability of Section 194H in case of the appellant for the same transaction in the case of the appellant. On similar transactions of other telecom operators, the Calcutta and Kerala High Courts have upheld applicability of section 194H. The Hon'ble Supreme Court in the case of Synco Industries Ltd. vs. AO 299 ITR 444 (SC) followed and upheld the view taken by majority of the High Courts even though such view was against the assessee as under:

"11. The above discussion makes it very evident that pre-dominant majority of the High Courts have taken the view that while working out, gross total income of the assessee the losses suffered have to be adjusted and if the gross total income of the assessee is 'nil' the assessee will not be entitled to deduction under Chapter VI-A of the Act. It is well settled that where the pre-dominant majority of the High Courts have taken certain view on the interpretation of certain provisions, the Supreme Court would lean in favour of the predominant view. Therefore, this Court is of the opinion that the High Court was justified in holding that gross total income must be

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determined, by setting off against the income, the business losses of earlier years, before allowing deduction under Chapter VI-A and if the resultant income is 'nil', then the assessee cannot claim deduction under Chapter VI-A."

Thus, the argument that only the view favorable to the appellant taken by the courts should be followed and the view taken in favour of the revenue by majority of High Courts should be ignored is not a universal rule of application and in the present circumstances, where majority of the High Courts have taken the view against the appellant on an issue, respectfully such view is required to be followed.

10. Ld. A.R. cited an order of Co-ordinate Bench in assessee's own case (2015) 60 Taxmann.com 214 (Ahmedabad Tribunal) wherein all relevant case laws including aforesaid have been discussed by the Co-ordinate Bench with following observations:

"Where assessee engaged in business of providing mobile telephone services, sold prepaid vouchers to its distributors at a rate lower than its face value, difference between face value and selling price of prepaid voucher could not be regarded as commission requiring deduction of tax at source under section 194H".

11. And relevant Head Note of the aforesaid order is as under:

"Section 194H of the Income-tax Act, 1961 - Deduction of tax at source - Commission or brokerage etc. (Sale of prepaid vouchers) - Assessment year 2008-09 - Whether where assessee, engaged in business of providing mobile telephone services, sold prepaid vouchers to its distributors at a rate lower than its face value, since said sale took place on principal to principal basis and there was no income accruing or arising to distributor at point of time of sale of prepaid card, difference between face value and selling price of prepaid voucher could not be

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regarded as commission requiring deduction of tax at source under section 194H - Held, yes [Para 24] [In favour of assessee]”

12. Ld. A.R. also cited an order of Co-ordinate Bench in assessee's own case in ITA Nos. 1317 & 1318/Ahd/2016 dated 04.03.2018.

13. Since on similar facts and circumstances, Co-ordinate Bench granted relief to the assessee in ITA Nos. 1317 & 1318/Ahd/2016 for Assessment Years 2011-12 & 2012-13. Thus in parity with the aforesaid order, we allow the appeal of the assessee.

14. In the result, appeals filed by the Assessee are allowed. .

Order pronounced in Open Court on 04- 06- 2021
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Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER **True Copy**
Ahmedabad: Dated 04/06/2021

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad