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IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.VIJAYAKUMARAN, JM and SANJAY ARORA, AM

I.T.A. Nos. 108,110,111 & 113/Coch/2009
Assessment Year : 2005-06, 2006-07, 2007-08 & 2008-09

Vodafone Essar Cellular Ltd., XL/5115, Ashis Building, Second Floor, Shanmugham Road, Ernakulam. [PAN:CHNB 00637A]	**Vs.**	The Assistant Commissioner of Income-tax, TDS, Kochi.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri Ronak G. Doshi, CA
Revenue by	Shri T.J.Vincent, DR

O R D E R

Per Sanjay Arora, AM:

These are a set of four Appeals by the Assessee for assessment years (AYs) 2005-06 to 2008-09. The appeals by the assessee for the said years, contesting the separate orders, i.e., u/s. 201 and 201(1A) of the Income-tax Act, 1961 ('the Act', hereinafter) in it case, stood decided by the Tribunal in the first instance per its Order dated 30.4.2009. The assessee subsequently moved Miscellaneous Petitions (MPs) for all the years separately *qua* the orders u/ss. 201 and 201(1A), which stood disposed of by the tribunal vide its order dated 12/3/2010.

2.1 It was, while hearing the MPs, *inter alia*, contended by the assessee that its Ground No. 5 III (2) in respect of section 201 Order stood not adjudicated by the tribunal. The tribunal, per its s. 254(2)/12.3.2010 order, while dismissing the assessee's MPs afore-mentioned on all other grounds, concurred with the assessee's contention in respect of its this claim vide para 5.7 of the said order. The corresponding appeals were, therefore, restored *qua* the said ground. It is this ground which is the subject matter of the present hearing. Vide the same, the assessee agitates the recovery of tax deductible at

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source, which it claims the Revenue cannot, having regard to the fact that the tax on the corresponding income stands already paid by its distributors, i.e., the recipients of the income, so that it is absolved of its liability to pay the demand u/s. 201(1) of the Act.

2.2 Before we proceed further, it would be pertinent to enlist the objection raised by the Revenue during the hearing to the maintenance of the present appeals, along with our reasons for finding the same unacceptable. It was submitted by the ld. DR that the assessee's appeals, arise as they do due to the part-acceptance of its miscellaneous petitions, are not maintainable as it had preferred an appeal before the hon'ble jurisdictional high court against the order of the tribunal, and which has since confirmed the same (vide *Vodafone Essar Cellular Limited v. CIT (Asstt.)* in ITA No. 1742 of 2009 dated 17/8/2010), holding the provision of access to its network by the assessee-service provider to its customers through the network of distributors (whether under the prepaid or post-paid category) as only a service, of which the distributors, thus, are an integral part. The supply of sim cards (i.e., the device through which the said access is provided) at a discount to the distributors for onward supply to the users, at the full, stipulated rate, is only a manner of remunerating the distributor for his services, even as held by the tribunal and, therefore, by definition, `commission'. Accordingly, the provision for tax deduction at source would apply. In view of the same, it was contended, there is no scope for even a part allowance of the assessee's miscellaneous applications; the hon'ble high court having upheld the order of the tribunal, and which, in any case, stands merged with the order by the hon'ble court, placing a copy of the same on record.

We cannot agree. And for the simple reason that per its instant appeals the assessee had raised an alternate contention, and which remained undecided by the tribunal. It is only toward the same that the appeals under reference are, as afore-stated, recalled, and no further. It is only on the rejection of its claims, and the concomitant finding of the TDS provision as being attracted, that the question of recovery of the tax deductible or the enforcement of the demand raised – which the assessee seeks to restrain - arises. That the assessee had approached the hon'ble high under the appellate procedure, was not lost sight of by the tribunal while deciding its miscellaneous petitions, and is of no consequence. This is as the assessee stood aggrieved by and challenged before the

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hon'ble court what stood decided, and not that was omitted to be decided, by the tribunal. Of course, it would have been a different matter if the assessee had succeeded in appeal, so that its alternate ground would not have survived, or at least before the tribunal. The hon'ble court has, we may clarify, not expressed any opinion *qua* the assessee's alternate ground before the tribunal, being not an issue before it. The Revenue's objection is thus of no moment.

3.1 The assessee's claim, put succinctly, is that even though it may have failed to deduct TDS u/s. 194H of the Act in terms of section 201(1) of the Act, it cannot be treated as in default, and no recovery of tax in respect of the impugned demand could be made there-from, inasmuch as tax on the corresponding income/s has already been paid by its distributor/s. This is the settled legal position, per, as for example, the decision in the case of *Hindustan Coca Cola Beverages (P.) Ltd. v. CIT* (2007) 293 ITR 226 (SC); the appellant also placing on record the decision in the case of *CIT v. Dewan Chand*, 178 Taxman 173 (Del.), holding like-wise. This is for the simple reason that tax deduction at source admittedly represents one of the modes of recovery of tax, and there could possibly be no double recovery. As such, once the payee has paid tax on the income on which tax at source is deductible, no further liability or obligation is cast on the payer to deposit the said tax, which is paid only for and on behalf of the deductee.

3.2 Continuing further, so however, the onus to establish the said payment of tax by the payee is only on the payee. Also, the interest liability would stand on account of the timing difference, if any, i.e., the time at which the tax was to be deducted/deposited as per the extant TDS provisions, and the time when it has actually been. In view of the same, the assessee was called upon by the Bench to establish its claim, at least on a sample basis. Toward this, the assessee has filed certificates from the concerned distributors, stating that the income arising from the distribution of the pre-paid talk time cards, secured by them at discounted prices, stands duly offered by them to tax per their returns of income for the relevant years. Copies of the acknowledgments of some returns have also been placed on record in support. The ld. AR was questioned by the Bench as to how it would be apparent from the said acknowledgments that the entire amount of

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commission allowed to the distributors stood duly returned by them. This is more so as the certificates/declarations issued are without any reference to the amount of the commission income, which is the subject matter of TDS and, thus, being returned to the Revenue. In this regard, in response, it was submitted by him that the assessee could demonstrate the same before the Assessing Officer (AO), and which we consider as only reasonable in view of the voluminous data involved; our objective in the matter being limited to examining if the assessee had a *prima facie* case, and which we find it as so. It was further submitted by the ld. AR that, so however, the matter, in view of the `manner' of the payment, presented a peculiar problem. There has been, it may be appreciated, no direct payment by the appellant to its distributors. The delivery of the pre-paid talk time there-to is at a discounted rate, and which stands sold by them only in due course of time. As they maintain a reasonable stock, it is not unlikely that the some of the talk-time would be held in stock as at the year–end, and sold only in the following year, even as the receipt for the current year would include that *qua* the stock held as at the beginning of the year. Even as observed by the Bench, in response there-to, the assessee, thereby, in effect, rebuts its case to some extent. This is as the income corresponding to the talk–time not sold during the year/s of its acquisition/purchase by the distributors, stands admittedly not returned by them to the Revenue.

3.3 The pre-paid talk time having been issued by the assessee to its distributors at a discounted price, and the difference between the same and the MRP thereof, having been held as only commission allowed there-to by the assessee; toward the services rendered by it there-for, there is a deemed payment or allowance of the said commission in the year in which prepaid talk time stands secured by the distributors from the assessee at the discounted price. Nothing further is to be paid by the service provider to the distributor for his services. The deduction of tax at source has to be at the time of payment or credit, whichever is earlier. As such, while tax becomes deductible on the delivery of the talk time to the distributor at the discounted rate, the same is imbedded in the cost of goods and would be realized as and when the same are sold/distributed in the regular course of his business. While the talk time sold during the year would only lead to a inconsequential timing difference; the income on the same being generated and,

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consequently, returned to the Revenue, resulting only in at best a liability *qua* interest u/s. 201(1A), to the extent not sold, it cannot be stated, as contended before us on the assessee's behalf, that the relevant `income' stands duly returned by the distributors to the Revenue for the relevant year/s.

3.4 The issue, it needs to be appreciated, arises, as income on which the tax is to be deducted, i.e., is deductible, need not necessarily constitute the `income' of the payee/beneficiary for the year in which the same is allowed or paid to it. This could happen for any reason; the most likely being the difference in the method of accounting, i.e., *qua* the transaction under reference, between the payer and the payee, both of whom are entitled to follow consistently its adopted method of accounting, i.e., so long it is acceptable, in terms of it leading to determination of correct profits. That, however, would not impede or constrain the application of the provision *qua* deduction of tax, the obligation for which is not conditional or in any manner required to match - in terms of time or even otherwise - the revenue recognition by the payee, i.e., is independent of it. The matter is essentially a timing issue, though the obligation to deduct tax to the extent of non-revenue recognition by the payee obtains in any case. It may be argued that it is neither practical nor feasible to anticipate or predicate the extent to which the sim cards would remain unsold with the distributors as at the year/s-end, for the assessee to deduct tax thereon. The argument is misconceived. We are not in any manner suggesting that the TDS provision is applicable only to that extent, but only that the ultimate liability in respect of the tax not deducted would obtain only *qua* such unsold stock. It is to be borne in mind that it is only the question of recovery of the tax not deducted or deposited, or the extent to which the demand raised on it could be enforced by treating the assessee as an assessee in default, which is being decided. The following extract from a recent order by the tribunal (in the case of *ITO v. Shri Anupallavi Finance & Investments* in ITA 1828/Mds./2009 dated 10/12/2010) would be illustrative:

"4.1 …….*Put differently, the deduction of tax at source does not necessarily, or is not required to, march alongside the corresponding income, recognition of which by the recipient could be either on accrual or on receipt basis. The accrual of the tax liability on income would arise only on the same being/becoming assessable. There is thus an inherent mismatch, in terms of time, between the payment of tax (per TDS) and the*

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accrual of tax liability against the corresponding income, i.e., given the fact of admission of income as per the relevant provisions of law. It is in view of and to address this mismatch in time, so that the tax stands deducted while the corresponding income, though accrued has yet to be received, or though received, as by way of an advance, is yet to accrue, that the law [per section 199 r/w ss. 190 & 191] clarifies that the credit for the TDS shall be available for the year for which the corresponding income is assessable. It, i.e., the law as provided by the statute, to our mind, could not get clearer than this."

3.5 The credit for TDS, which the payer is obliged to deduct, would inure to the payee only for the year/s for which the corresponding income is disclosed to the Revenue. The matter, though governed by the explicit and unambiguous language of the statute (s. 199 r/w ss. 190 & 191), has witnessed an almost unanimous view by the tribunal, even as the matter has attained finality at its end with the decision in the case of *Pradeep Kumar Dhir v. CIT (Asstt.)*, 107 ITD 118 (Chd.). Further still, the conclusion part of the order in the case of *ITO v. Shri Anupallavi Finance & Investments* (supra) would be relevant:

"5. *Conclusion*

The issue arising for our adjudication, i.e., the year of allowance of credit for TDS stands addressed by the clear language of the provisions itself, which make it abundantly clear that the TDS is qua *income, and the credit thereof, accordingly, is for the year/s of its assessment. The same, rather, presents an ideal situation where the course yielded by plain common sense matches with that statutorily provided, i.e., allow credit for TDS against the corresponding income on its assessment, so that even the absence of section 199 would yield the said course in view of the dictum by the hon'ble apex court that tax laws should be applied, as far as circumstances may admit, in an equitable manner* [refer: CIT v. Ghotla J.H. (1985) 156 ITR 323 (SC)]. *In fact, in all the decisions cited by the Revenue in its favour, i.e., except for the Third Member decision, the tribunal's verdict arises following this approach, and is without reference to section 199 of the Act. Rule 37BA further validates the Revenue's stand. The same stands brought on the statute with effect from a later date, to provide for a comprehensive guideline for all matters relating to the allowance of credit for TDS in the variety of situations that generally obtain. The argument of non-retrospectivity of the said Rule - which has not been applied by the Revenue - by the ld. A.R., is both misconceived and specious."*

Conclusion

4. The difference between the normative rates and the discounted rate, irrespective of whether the relevant (pre-paid) talk-time stands sold out by the concerned dealer/distributor or not, being only in the nature of a commission against services

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rendered, stands paid/allowed on the delivery of the Same (in the form of the access device) and, thus, liable for tax deduction at source. To the extent not sold, so that the commission to that extent has not been realised by the distributor/s, the assessee could not validly plead for the entire commission allowed to the distributors as being tax-paid - which is even otherwise a matter of verification - so that no recovery toward the non deduction of TDS could be made. In view of the foregoing, we only consider it fit and proper under the circumstances, that the matter is remitted back to the file of the Assessing Officer to enable the assessee a reasonable opportunity to present its case before him in respect of the extent to which the liability to TDS could be considered as satisfied for the reason of the corresponding income having been disclosed by the payee to the Revenue, and tax thereon paid, and who shall do so per a speaking order, in accordance with law, keeping in view the observations by the hon'ble jurisdictional high court in its case, as well as by us aforesaid. We decide accordingly.

5. In the result, the assessee's appeals are allowed for statistical purposes.

sd/-	sd/-
(N.VIJAYAKUMARAN)	(SANJAY ARORA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Ernakulam
Dated: 25th January, 2011
GJ
Copy to:
1. Vodafone Essar Cellular Ltd., XL/5115, Ashis Building, Second Floor, Shanmugham Road, Ernakulam.
2. The Deputy Commissioner of Income Tax, TDS, Kochi.
3. The Commissioner of Income-tax (Appeals)-III, Kochi
4. The Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)