आयकर□□□□ अधकरण□□□□□ □□□□□□, □□□□□

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.261/Ind/2018
(Assessment Year:2008-09)

&
ITANo.266 to 269/Ind/2018
Assessment Years:2011-12 to 2014-15)

M/s. Idea Cellular Ltd. 139-140 Electronics Complex Pardeshipura, Indore	Vs.	JCIT-(TDS) Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: BPLI 00953 B		
Assessee by	Shri Sumit Nema, Sr. Adv. And Shri Gagan Tiwari, Adv	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	20.04.2023	
Date of Pronouncement	03.05.2023	

O R D E R

Per Bench:

These five (5) appeals by the assessee are directed against the five separate orders of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A)-II, Indore all dated 01.02.2018 arising from penalty levied u/s 271C of the Income Tax Act for A.Y. 2008-09, 2011-12 to 2014-15 respectively. The assessee has raised common grounds in these appeals, the grounds raised for A.Y. 2008-09 are reproduced as under:

1.That the learned CIT(A) NFAC erred in not holding that the assessment order was bad in law. It was perverse; (2) it was based on irrelevant material; (3) it was un- reasonable; (4) there was mis-application of the provisions of law; (5) the authority misdirected.

2. That the learned CIT(A) NFAC erred in not holding that the assessment order passed by the A.O. was without following rule of natural justice and fair play and was therefore a nullity and the same may be declared null and void.

3. That the learned CIT(A) NFAC erred in passing of an Ex-party Order without allowing any more time. The Appellant Company has changed its Counsel and the mail was not attended by the previous Counsel. Further, the date of hearing was fixed for 27/10/2022 which was during the festival of Deepawali.

4.That the learned CIT(A) erred in maintaining addition of Rs.34,64,131/- on account of interest paid to Hyundai Motor India Ltd.

2. The assessee is a telecom service provider engaged in providing services in Madhya Pradesh and Chhattisgarh. During the course of its business the assessee appoints the distributors for issuing and sale of pre-paid SIM card and recharge vouchers. The department initiated the proceedings u/s 201 & 201(A) of the Income Tax Act due to failure on the part of the assessee to deduct tax on the amount allowed by the assessee to its distributors/dealers which in the opinion of the department was in the nature of commission and therefore was subjected to TDS u/s 194H of the Act. The Ld. AO has passed the orders for various assessment years u/s 201 and 201(A) of the Act treating the assessee as assessee in default. Simultaneously, the AO initiated the proceedings of penalty under section 271 C of the Act for default of non-Deduction of TDS on the amount allowed to the distributors/dealers being commission. Therefore the AO was of the view that assessee has committed a default in compliance of provision of section194H of the Act and consequently liable to be charged with penalty u/s 271C of the Act. Ld. AO has finally levied the penalty vide order dated 1st August 2013 passed u/s 271C equivalent to the tax which the assessee has failed to deduct in compliance to chapter XVII of

I.T. Act. The assessee challenged the action of the AO before the Ld. CIT(A) but could not succeed.

3. Before the Tribunal the Ld. Sr. counsel of the assessee has submitted that the assessee supplied Pre-paid SIM Card, and recharge vouchers to pre-paid distributors at a discounted price. Distributors are free to re-supply then to the Retailer subject to Maximum Retail Price (MRP). The retailer in turn would supply the same to ultimate subscriber against any price subject to MRP. Thus, the distributors have to pay discounted price in advance to the assessee before delivery of SIM and recharge coupon supplied by the assessee. The assessee would deliver the SIM/RV to the distributors only after receipt of the advance payment on discounted price. He has explained the nature of transactions by narrating the facts that the assessee is not assuring any profit of the distributors on the transactions of sale and purchase of SIM Card/RV. The income/loss of the distributors would be depend on the price on which they are supplying to the retailer as well as the expenditure incurred by them. Therefore, these are the transactions of sale by the assessee and the discount allowed by the assessee to the distributors is not in the nature of commission. He has further submitted that on the issue whether this discount allowed by the assessee to the distributors falls in the ambit of commission and thereby in the mischief of the provision of section 194H has been considered and decided by this tribunal as well as Hon'ble High Courts in a series of the decisions. There are differences of opinion on this issue by the Hon'ble High Courts wherein some of the High Courts have decided this issue in favour of the assessee and some other High Courts have decided against the assessee. This is highly debatable issue and now pending adjudication before the Hon'ble Supreme Court in the SLP filed by the assessee as well as department. Since this is a debatable issue and assessee was under the *bona fide* belief that there was no obligation to

deduct tax on this transaction u/s 194H of the Act. Ld. Sr. Counsel for the assessee has relied upon the judgment of Hon'ble

Supreme Court in case of *Singapore Airlines Ltd. Vs. CIT, New Delhi 449*

ITR 203 (SC) and submitted that the liability of levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. The Ld. Sr. counsel for the assessee has submitted that since the assessee was having a bona fide belief that it is not required to deduct tax on these transactions u/s 194H of the Act and it is only because of difference of opinion between the assessee and the revenue, the penalty has been levied by the AO.

4. Thus he has contended that in view of the provisions of section 273B, no penalty u/s 271C shall be levied when this issue has been contested right from the AO to the Hon'ble Supreme Court and there were diversion views on the point whether the discount allowed by the assessee is in the nature of commission attracting the provision of section 194H and thereby assessee could be responsible for deducting tax at source. The assessee has good and sufficient reason for non-deducting the tax at source and therefore, there was a reasonable cause for failure to deduct the tax at source which is cover u/s 273B of the Act.

5. He has also relied upon the judgment of Hon'ble Allahabad High Court in case of CIT-TDS vs. G.M. (Telecom), BSNL dated 13.02.2014, Income Tax Appeal no.39 of 2014 and submitted that there was a decision in assessee's own case on the issue of liability of assessee to deduct at source u/s 194H and consequently, the assessee was under bona fide belief that no tax was liable to be deducted on the alleged commission/discount which constitute a reasonable cause for such failure.

6. Ld. Sr. counsel for the assessee also relied upon the judgment of Hon'ble Rajasthan High Court in case of Hindustan Coca Cola Beverages Pvt. Ltd. v. Commissioner of Income 402 ITR 539 and submitted that the penalty levied u/s 271C is not sustainable and liable to be deleted.

7. On the other hand, Ld. DR has submitted that the assessee was very much aware about the various decisions on this issue that the assessee is

under obligation to deduct TDS as per the provision of section 194H and therefore the assessee cannot take a plea that it was under *bona fide* belief that not required to deduct the tax at source in respect of the commission paid to the distributors. He has relied upon the orders of the authorities below.

8. We have considered rival submission as well as relevant material on record. There is no dispute that whether the transaction of allowing discount/commission to the distributors by the assessee as well as other telecom service providers for sale of SIM Card and pre-paid Recharge Vouchers would fall in the ambit of section 194H or not is a highly debatable issue as there are a series of decisions of this tribunal, as well as various High Courts on this point. Some of the judgment of Hon'ble High courts are in favour of the assessee and some are in favour of the revenue upholding that the transactions of sale of SIM Card and Recharge vouchers are in the nature of sale and discount allowed by the assessee to the distributors is in the nature of commission attracting the provision of section 194H and consequently, the assessee was rightly held as deemed to be an assessee is in default as per the provision of section 201 of the Act. Similarly, a good number of other decisions have held that transaction in question does not fall in the ambit of section 194H and thereby the assessee was not liable to deduct TDS at source on these transactions. Apart from a series of decisions of this Tribunal there are divergent views

of Hon'ble High courts on this issue of liability of the assessee to deduct tax u/s 194H, some of those decisions are as under:

In favour of the assessee

(i).Bharti Airtel Ltd. Vs. DCIT Bangalore (2015) 372 ITR 33 (Karnataka)
(ii). Hindustan Coca Cola Beverage P. Ltd. Vs. CIT (2018) 402 ITR 539 (Rajasthan)
(iii). CIT vs. Dex Travel P. Ltd. 172 Taxman 142 (Delhi)

In favour of the Revenue

(i).Bharti Cellular ltd. Vs. AcIT (2011) 244 ITR 185 (Calcutta)
(ii). Vodafone Essar Cellular ltd. Vs. AcIT (2011) 332 ITR 255 (Kerala)

9. It is clear from the above mentioned decisions that the issue of applicability of section 194H in respect of the transactions in question is highly debatable and now pending adjudication before the Hon'ble Supreme Court in SLP no.22317 of 2011 as well as in SLP no.36446 to 3645 of 2010. The Ld. Sr. counsel for the assessee has stated that the Hon'ble Supreme Court has granted interim relief to the assessee against recovery of tax.

10. It is undisputed fact that this is debatable issue having two possible views and the assessee was of the view that it was not under obligation to deduct tax at source as per the provisions of chapter XVII of Income Tax and particularly u/s 194H of the tax. This belief of the assessee is one of the possible view and therefore failure to deduct the tax at source in respect of the discount/commission allowed to the distributors in light of divergent decisions by the different High Courts as well as by the different benches of this Tribunal clearly established the genuine and bona fide decision of the assessee not to deduct tax u/s 194H. Hence there was a reasonable cause as provided u/s 273B of the Act to have not deducted TDS on these transactions.

11. Hon'ble Supreme Court in the case of *Singapore Airlines Ltd. Vs. CIT (supra)* while considering the issue of penalty levied u/s 271C has held in para 59 to 62 as under:

> *59. The denouement of our examination of these issues concerns the levy of penalties under Section 271C of the IT Act. The Assessing Officer had initially directed that penalty proceedings be commenced against the Assessees for the default in subtraction of TDS but we are informed that this process was put in cold storage while the airlines and the revenue were contesting the primary issue of the applicability of Section 194H before various appellate forums. Section 271C provides for imposition of penalties for failure to adhere to any of the provisions in Chapter XVIIB, which includes Section 194H. This provision must be read with Section 273B which excuses an otherwise defaulting Assessee from levy of penalties under certain circumstances. The twin provisions read as follows:*
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> *Section 271C: Penalty for Failure to Deduct Tax at Source:*
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> *(1) If any person fails to*
>
> *(a) Deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIB; or*
>
> *(b) Pay the whole or any part of the tax as required by or under,*
>
> *(i) Subsection (2) of Section 115O; or*
>
> *(ii) Second proviso to Section 194B, then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid. (2) Any penalty imposable under Subsection (1) shall be imposed by the Joint Commissioner.*
>
> *xxx Section 273B: Penalty not to be imposed in Certain Cases:*
>
> *Notwithstanding anything contained in the provisions of clause (b) of Subsection (1) of Section 271, Section 271A, Section 271AA, Section 271B, Section 271BA, Section 271BB, Section 271C, Section 271CA, Section 271D, Section 271E, Section 271F, Section 271FA, Section 271FB, Section 271G, clause (c) or clause (d) of Subsection (1) or Subsection (2) of Section 272A, Sub section (1) of Section 272AA, or Subsection (1) of Section 272BB or Subsection (1A) of Section 272BB or Subsection (1) of Section 272BBB or clause (b) of Sub section (1) or clause (b) or clause (c) of Subsection (2) of Section 273, no penalty shall be imposable on the person or the assessee, as the case may*

be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.

60. The ambit of "reasonable cause" under Section 273B requires our scrutiny before we reach the conclusion that the Assessing Officer is required to also calculate potential penalties to be levied against the Assessees. This Court in Eli Lilly & Co. (Supra) had elaborated, in the passage extracted below, on the context in which Section 273B may be utilized:

94…Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.

95. In each of the 104 cases before us, we find that nondeduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue… The taxdeductorassessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source.

61. We find some parallels between the facts of the present case and the situation in Eli Lilly & Co. (Supra). The liability of an airline to deduct TDS on Supplementary Commission had admittedly not been adjudicated upon by this Court when the controversy first arose in AY 200102. While learned Counsel for the Revenue, Mr. Kumar, has notified us that various airlines were deducting TDS under Section 194H at that time, this does not necessarily mean that the position of law was settled. Rather, it appears to us that while one set of air carriers acted under the assumption that the Supplementary Commission would come within the ambit of the provisions of the IT Act, another set held the opposite view. The Assessees before us belong to the latter category. Furthermore, as we have highlighted earlier, there were contradictory pronouncements by different High

Courts in the ensuing years which clearly highlights the genuine and bona fide legal conundrum that was raised by the prospect of Section 194H being applied to the Supplementary Commission.

62. Hence, there is nothing on record to show that the Assessees have not fulfilled the criteria under Section 273B of the IT Act. Though we are not inclined to accept their contentions, there was clearly an arguable and "nascent" legal issue that required resolution by this Court and, hence, there was "reasonable cause" for the air carriers to have not deducted TDS at the relevant period. The logical deduction from this reasoning is that penalty proceedings against the airlines under Section 271C of the IT Act stand quashed.

12. The Hon'ble Supreme Court after considering an arguable and nascent legal issue that required resolution by the Apex Court has held that there was a reasonable cause for the airlines who have not deducted TDS at the relevant period and consequently the penalty proceedings u/s 271C were quashed. In case of the assessee before us the issue involved in the quantum proceeding holding the assessee as assessee in default for non-

deduction of tax at source u/s 194H of the Act and consequently, was liable to pay the tax u/s 201 & 201A of the Act has travelled up to the Hon'ble Supreme Court and pending adjudication. The nature of the said issue itself highlights genuine and bona fide belief on the part of the assessee for not deducting tax at source on these transactions as the said issue has undergone the various stages of examination and pronouncements resulting divergent decisions at the level of this Tribunal as well as at the level of the Hon'ble High Courts and finally reached to the Hon'ble Supreme Court for final resolution. The Hon'ble Allahabad High Court in the case of CIT-TDS vs. GM (Telecome) BSNL (supra) has also considered the issue of levy of penalty u/s 271C on the identical facts in para 5 as under:

5. There can be no dispute about the fundamental principle of law that ignorance of law is no excuse. Section 273B of the Act, however, stipulates that notwithstanding anything contained in Section 271C, no penalty shall be imposed on a person or assessee for any failure to deduct tax at source, if it is proved that there was a reasonable cause for such failure. That the assessee was liable to deduct tax at source is beyond dispute. The only issue is as to whether reasonable cause for a failure to deduct tax at source under Section 194H had been shown. The CIT(A) has exercised his discretion particularly having regard to the fact that at the relevant time, there was a decision in Idea Cellular Ltd. (supra) and in view whereof the assessee was under a bona fide belief that tax was not liable to be deducted on commission/trade discount. This is, at least, a possible view to take and which has been sustained by the Tribunal. In fact, it must be emphasised that the Tribunal has not laid down the proposition that ignorance of law can furnish an excuse for non-deduction of tax at source and the learned counsel is right in saying that this proposition would be unsustainable. However, this is a case where, on a review of facts, it was found that a reasonable cause had been shown under Section 2738. Hence, the imposition of penalty which was deleted by the CIT(A) has been affirmed by the Tribunal. 6. The appeal filed by the revenue, in these circumstances, will not give rise to any substantial question of law. It is, accordingly, dismissed."

13. Delhi Bench of the Tribunal in case of Vodafone Idea Ltd. New Delhi vs. ACIT-TDS (supra) while considering this issue of levy of penalty u/s 271C has held in para 10 as under:

"10. We have heard both the parties and perused all the relevant material available on record. The issue on which the penalty u/s 271C is imposed is debatable as different courts have taken diverse views. Therefore, the fact remains that the assessee has reasonable cause for non deduction of tax at source on the discount allowed to the prepaid distributor as there are decisions of the Hon'ble High Courts and Tribunal taking diverse views. Thus, it is contesting issue and the assessee has reasonable cause not to deduct the tax at source. Therefore, the action of non deduction of tax in the present case will not attract the penalty u/s 271C. Since this issue is decided in case of assessee's own case for earlier assessment years the same will be followed."

14. Similar in another decision in case of Vodafone Idea Ltd. New Delhi vs. DCIT-TDS (supra) vide order dated 29.09.2017 the Allahabad

Bench of the Tribunal has decided this issue in para 98 and 99 as under:

98. This takes us to the penalty levied by TDS Officer u/s 271C of the Act. The case of assessee is that under similar circumstances the ITAT Hyderabad Bench (2009) [317 ITR (A.T.) 176] vide its order dated 26.02.2009 had taken a view that the relationship between a cellular operator and distributor is on 'principal to principal' basis and 'discount' given by the assessee cannot be considered as 'brokerage' or 'commission'. It had also taken support of an earlier decision of the ITAT Delhi Bench passed on 28.03.2008 [313 ITR (A.T.) 55] whereby it was concluded that the provisions of section 201(1) and 201(1A) are not applicable, under identical circumstances. In such an event of matter - since the decision of ITAT Delhi Bench was already available before the commencement of Previous Year relevant to Assessment Year 2010-2011 the assessee's stand that it need not deduct tax at source can be taken as a 'reasonable cause'. Hon'ble Supreme Court, in the case of in the case of CIT vs. Eli Lilly (312 ITR 225), observed that if non-deduction of tax at source took place on account of controversial addition and if the tax deductor was under genuine and bonafide belief that it was not under any obligation to deduct tax it amounts to 'reasonable cause' and penalty u/s 271C is not leviable. Hon'ble Delhi High Court in the case of Woodward Governors India Private Limited (supra) observed that the expression "reasonable cause" has to be understood in the backdrop of the circumstances of each case and if an assessee does not deduct tax, based on its understanding of a particular provision, the same may constitute a 'reasonable cause'. Similarly, Hon'ble Delhi High Court, in the case of Pradeep Agencies Joint Venture (supra), observed that when a later judgment is in favour of the assessee, which matches the line of thinking of the assessee it can be considered as a 'reasonable cause'.

99. No doubt assessee has not specifically submitted before the Tax Authorities that non-deduction of tax at source was based on it's understanding of provisions of section 194H of the Act, which in turn constitutes a 'reasonable cause'. But the fact remains that by the time the assessee was under obligation to deduct tax at source for the AYS under consideration, there were judgments in favour of assessee and even after the decisions of Hon'ble Delhi High Court and Kerala High Court, Hon'ble Karnataka High Court had taken a different view of the matter which implies that non- deduction of tax was based on such understanding of relevant provisions of the Act in which event penalty is not imposable u/s 271C of the Act. We therefore set aside the order passed by AO as well as Ld CIT (A) on this aspect and hold

that penalty u/s 271C is not imposable, in the circumstances of the case.

15. In view of the facts and circumstances of the case as discussed above as well as binding precedence of Hon'ble Supreme Court, Hon'ble High Courts and decisions of the Coordinate Benches of this Tribunal in assessee's own case, the penalty levied by the AO u/s 271C is not justified and liable to be deleted. We order accordingly.

16. In the result, appeals of assessee are allowed.

Order pronounced in the open court on 03.05.2023.

Sd/- **Sd/-**

(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, 03.05.2023

Patel/Sr. PS

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore