IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "G", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos. 3779, 3780 & 3781/Del/2013
Assessment Years: 2007-08, 2008-09 & 2009-10

VODAFONE DIGILINK LIMITED, (FORMERLY VODAFONE ESSAR DIGILINK LIMITED) HARYANA CIRCLE, KUNJPURA ROAD, KARNAL, HARYANA (PAN: AAACA3202D)	VS.	CIT(TDS), C.R. BUILDING, 2ND FLOOR, SECTOR-17, CHANDIGARH
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Salil Kapoor & Ms. Ananya Kapoor, Advocates
Department by : Sh. S.S. Rana, CIT(DR)

AND

ITA Nos. 716, 717, 718/Del/2017
Assessment Years: 2007-08, 2008-09 & 2009-10

VODAFONE MOBILE SERVICES LIMITED, (FORMERLY KNOWN AS VODAFONE DIGILINK LIMITED WHICH STANDS AMALGAMATED WITH VODAFONE MOBILE SERVICES LIMITED) REGISTERED OFFICE:- C-48, PHASE-II, OKHLA INDUSTRIAL AREA, NEW DELHI – 110 020 (PAN: AAACA3202D)	VS.	INCOME TAX OFFICER (TDS) KARNAL
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Tarun Gulati, Ms. Ishita Farsaiya, Sh. Sparsh Bhargava, Advocates
Department by : Sh. S.S. Rana, CIT(DR)

ORDER

PER H.S. SIDHU, JM

The Assessee have filed these appeals, which are emanate from their respective orders of the Ld. Commissioner of Income Tax (TDS), Chandigarh passed u/s. 263 of the I.T. Act, 1961 and orders of Ld. Commissioner of Income Tax (Appeals), Karnal passed u/s. 250(6) of the I.T. Act, 1961 pertaining to A.Yrs. 2007-08, 2008-09 & 2009-10. Since the issues involved in these appeals are identical and inter-connected, hence, the appeals were heard together and are being disposed of by this common order for the sake of convenience.

2. The following are the common grounds taken by the assessee in ITA No. 3779 to 3781/Del/2013:-

> *"The Appellant respectfully submits that:*
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> *On the facts and circumstances of the case and in law, the notice issued under section 263 of the of Income Tax Act, 1961 ('Act') by the learned Commissioner of Income Tax (TDS), Chandigarh (hereinafter referred to as the 'learned CIT (TDS)') and the order passed under section 263 of the*
>
> *Act are illegal, bad in law and without jurisdiction.*
>
> *2 On the facts and in circumstances of the of the case and in law, the learned CIT(TDS) erred in*

assuming the jurisdiction under section 263 of the Act since:-

2.1 the revisionary proceedings under section 263 of the Act have merely been initiated on the basis of the letter received from Assistant Commissioner of Income Tax (TDS), Chandigarh ('ACIT') and the CIT (TDS) did not arrive at any independent satisfaction for initiation of such proceedings.

2.2 by acceding to the request of the learned ACIT, the CIT(TDS) has effectively enhanced the time limitation prescribed under section 201(3) of the Act for completion of201 proceedings by a TDS officer.

2.3 the order passed by the learned ACIT is neither 'erroneous' nor 'prejudicial' to the interest of the revenue since the learned ACIT took one of the two permissible views after conducting a detailed enquiry in respect of applicability of withholding tax provisions on the roaming charges paid by the appellant to the other telecom operators .

3 On the facts and circumstances of the case and in law, the learned CIT(TDS) has erred in not appreciating the fact that the other telecom operators, to whom the roaming charges have been paid, would

have offered income arising from roaming charges received from the appellant to tax and hence, no prejudice would have been caused to the revenue and hence, initiation of 263 proceedings is bad-in-law and void ab-initio.

Without prejudice to the above Grounds

4 On the facts and in circumstance of the case and in law, the learned CIT (TDS) has erred in concluding that roaming charges paid to other telecom operators by the appellant attracts provisions of section 194J without appreciating the facts that -

(i) Roaming charges paid by the appellant to the other telecom operators represent payments made for standard facility provided by such telecom operators and hence, cannot be classified as FTS for the purposes of the Act.

(ii) No human intervention, which is sine qua non for a service to qualify as technical service, is involved in provision roaming services and therefore, roaming charges cannot be construed as Fee for Technical Services for the purposes of the Act.

(iii) The reports of the technical experts clearly establish the fact that roaming payments made to other telecom operators for allowing use of their network to appellant's subscribers are in the nature of provision of a standard facility, which does not involve any human intervention at all and hence, such payments cannot be classified as FTS liable for deduction of tax at source under Section 194J of the Act.

(iv) No demand U/S 2011201(1A) of the Act can be raised where taxes so deductible but not deducted by the payer are directly paid by the recipient and such an action would result in double recovery of the demand.

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

3. The following are the common grounds taken in ITA Nos. 716 to 718/Del/2017:-

The Appellant respectfully submits that:

On facts and circumstances of the case and in law, the learned Commissioner of Income (Appeals), Karnal ['learned CIT(A)'] has erred in passing the order under section 250 of Income Tax Act, 1961 ('Act'), confirming the contentions of the Income Tax Officer - Karnal ('learned TDS officer') that the Appellant is liable to deduct tax at source on 19 charges as per the provisions of the section 194J of the income tax act (' Act').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

Ground No.1 - The order passed by the learned TDS officer is bad in law

1.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order passed by the learned TDS officer, which is bad-in-law.

1.2 On the facts and circumstances of the case and in law, the learned CIT(A) officer has erred in upholding the order of the learned TDS Officer in treating the Appellant as 'assessee in default', despite of the provisions of section

201 (1) read with section 191 of the Act and the judgment of Jagran Prakashan Limited Vs DCIT(TDS) (345 ITR 288) (All HC), as there is no finding by the learned TDS officer with respect to the failure of the roaming partners to pay tax directly, which is a jurisdictional pre-requisite.

Ground No.2 - Disallowance under section 194J of the Act on account of non-deduction of tax at source on domestic roaming charges paid to other telecom operators

2.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the contention of the learned TDS officer 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.

2.2 On the facts and in the circumstances of the case and in law, the learned CIT(A)/TDS officer 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.

2.3 On the facts and in the circumstances of the case and in law, the learned CIT(A)/TDS officer have erred in not appreciating that even as per the statement of technical

experts, 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.

2.4 On the facts and in the circumstances of the case and in law, the learned CIT(A)/TDS officer have erred in ignoring the statement of technical experts recorded by the income-tax authorities in case of Vodafone Cellular Limited (now merged with Appellant itself), in the context of roaming services, wherein it has been clearly observed that roaming services are automated services requiring no human intervention.

2.5 On the facts and in the circumstances of the case and in law and without prejudice to Grounds 2.2 to 2.4, the learned CIT(A)/TDS Officer has erred in not holding that characterization of a payment must be done having regard to the dominant purpose/ intention of the payment.

2.6 On the facts and in circumstances of the case and in law the learned CIT(A} has erred in not following the principles laid down in judicial precedents cited by the Appellant and also ignoring the binding Apex Court judgment in the case of CIT vs Delhi Transco Limited 68

taxmann.com 231 and CIT vs Kotak; Securities Limited 67 taxmann.com 356.

3. Ground No.3 - No TDS demand can be under section 201(1) of the Act can be recovered from the Appellant

3.1 On the facts and circumstances of the case and in law, the order of the learned CIT(A)/TDS Officer is bad in law in so far it seeks to recover tax demand under section 201 of the Act in contradiction to the settled principle that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(IA) of the Act, If any, can be levied in such cases.

3.2 Without prejudice to Ground No. 3.1, on the facts and circumstances of the case and in law, the Ld. CIT(A)/TDS Officer has erred in raising demand under section 201(1) of the Act even though taxes would have been paid on roaming charges by the recipient parties. Such an action has resulted in double recovery of taxes, which is against the rules of taxation principles.

3.3 Without prejudice to Ground No. 3.1 and 3.2 above, on the facts and circumstances of the case and in law, the learned CIT(A)/TDS Officer has erred in not verifying the aforesaid fact, relating to payment of taxes by

the roaming partners, which could have been verified basis the name, address and PAN details furnished by the Appellant.

Ground No.4 - No interest under section 201(1A) of the Act can be charged

4.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the TDS officer in charging interest under section 201(IA) of the Act.

4.2 Without prejudice to Ground No 4.1 above, on the facts and circumstances of the case and in law, consequential interest under section 201 (l A) of the Act should be computed from the due date of payment of withholding tax by the Appellant to the date of payment of taxes by the payees/recipients of such income or filing of original return of income, whichever is earlier.

The above grounds are without prejudice to each other. The Appellant craves leave to add, mend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

4. We first deal with ITA Nos. 3779 to 3781/Del/2013 (AYrs. 2007-08 to 2009-10), together being issues similar and identical, by dealing with ITA No. 3779/Del/2013 (AY 2007-08).

5. The brief facts of the case are that in this case the common order under section 201(1) read with section 201(1A) of the Income Tax Act, 1961 was passed by Income tax Officer (TDS), Karnal on 29.03.2011 for the financial year 2006-07 to 2008-09 relevant to the assessment year 2007-08 to 2009-10. The Joint Commissioner of Income Tax(TDS), Karnal vide his office letter F.No. JCIT(TDS)/Range/KNL/2011-12/775 dated 06.03.2012 has submitted the proposal under section 263 of the Income tax Act, 1961 stating therein that at the time of passing the order under section 201(1) r.w.s. 201(lA), issue relating to TDS on Roaming Charges/Interconnect Charges as Technical Fee u/s 194J was omitted to be verified. Therefore, the order passed by him is erroneous and prejudicial to the interest of revenue. On examining the assessment records it was found that the facts brought to the notice of the Ld. CIT as per proposal under section 263 of the Act are correct, as the Assessing Officer while passing order u/s 201(1) r.w.s. 201(lA)

have not dealt with the issue of TDS on Roaming Charges/Interconnect Charges paid by the Assessee.

In view of above facts and in the interest of natural justice, before passing any order u/s. 263 an opportunity of being heard is given to the assessee, vide Ld. CIT's office letter No. 6518 dated 23.03.2012 and the case was fixed for hearing on 29.03.2012. On said date, a letter requesting to adjourn the case on any other convenient date was received. The case was fixed for hearing on 27.04.2012 and finally on 23.03.2013. The assessee submitted its reply stating therein as under:-

> *In this regard, on behalf of and under instruction of our subject client, we wish to submit that a reply providing our detailed submission against initiation of revisionary proceedings under section 263 of the Act and also on the merits of the case has been filed vide our letter dated April 27, 2012. In the above reply, it was inter-alia submitted as under:*
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> > *Conditions pre-requisite for initiation of revisionary proceeding under section 263 of the Act are not present in the instant case and hence, section 263 of the Act cannot be invoked to hold that the TDS order passed by the*

learned TDS Officer was not erroneous and prejudicial to the interest of the revenue and resultantly, hold VDL as an assessee in default for non deduction to tax at source from roaming charges paid to other telecom operators during the subject financial years.

The aforesaid order passed by the learned TDS Officer was no erroneous as it was passed after due enquiries were conducted by the learned TDS Officer with respect to applicability of withholding tax provisions to the roaming charges paid by VDL to the other telecom operators.

On merits of the ease, roaming charges paid by VDL to other telecom operators are not subject to tax deduction at source under the provisions of the Act and hence, VDL cannot be held as an assessee in default for non-deduction of tax at source thereon.

In addition to the above submission made vide our letter dated April 27, 2012 and the judicial decisions cited therein, we wish to submit as follows.

1. *Proceedings under section 263 of the Act have not been validly initiated*

We wish to draw your attention to a recent decision of the Hon'ble Delhi High Court in the case of DLF Ltd., (ITA No. 236 & 384 of2010), wherein the Hon'ble Court has held that proceedings under section 263 of the Act cannot be initiated in a case where the assessing officer has taken a view out of two possible views.

Further reliance is placed on the recent decision of the Hon'ble Mumbai bench of the Income Tax Appellate Tribunal ('Tribunal') in the case Reliance Communications Ltd (ITA No. 2915/Mum/2012), wherein it has been held that an order passed by the assessing officer cannot be held to be erroneous merely because the assessing officer has adopted one of the two possible views and hence, revisionary proceedings under section 263 of the Act cannot be initiated in such a case. Relevant extract of the decision is reproduced below:

"Suffice to say, we are dealing with proceedings U/S 263. The scope of such proceedings is restricted to revising an order which is erroneous and prejudicial to the interests of the Revenue. An order cannot De

said to be erroneous when the AO followed one of the legally sustainable view out of ihe two views available on the point. The CIT cannot call an assessment order to be erroneous simply because he is inclined to follow the other legally sustainable view in preference to the one followed by the AO. The Hon'ble Summit Court in Malabar Industrial Co. Ltd., v. CIT [(2000) 243 ITR 83 (SC)] has held that: 'Where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. Tthe same view has been reiterated by several Hon'ble High Courts including the Hon'ble Delhi High Court in CIT Vs. Ansal Properties & Ind. Pvt. Ltd., (2009) 315 ITR 225 (Del). In this case it has been noticed that: That at the time when the Commissioner issued the notice under section 263 and passed the order dated March 23, 2004, the question of surcharge on undisclosed income was a debatable one. When an issue was debatable, the provisions of section 263 could not be invoked. From the above discussion it is axiomatic

that no revision can be done on a debatable issue. An issue becomes debatable if two legally sustainable views exist on a particular point. When the AO accepts and adopts one possible view, the power of the CIT is ousted to revise the assessment order on his finding the other legally sustainable view as more logical in preference to the one adopted by the AO.

The aforesaid view also been upheld and followed by the Hon'ble Ahmedabad High Court in the case of Narayan Organics Pvt. (in ITA No. 690/Ahd/2012).

Applicability in case of VDL

We wish to reiterate that in the present case, during the TDS proceedings, the learned TDS officer conducted detailed enquiries regarding various expense heads including roaming charges paid by VDL to other telecom operators and applicability of withholding tax provisions on such charges. Based on the submission filed by VDL, he came to a conclusion that roaming charges paid are not subject to tax deduction at source under the provisions of the Act and thus, did not hold VDL as an assessee in default for non deduction of tax at source thereon.

It cannot be said that the learned TDS Officer had taken an impossible view, rather he had taken one of the legally possible view and the said view was well supported by numerous judicial decisions cited by VDL in the submissions filed with the learned TDS Officer, Since the learned TDS Officer has certainly followed the legally sustainable view while not treating VDL as assessee in default for non deduction of tax at source from roaming charges paid to other telecom operators, the order passed by the learned TDS Officer cannot treated as erroneous.

II. On facts, circumstances and in law, roaming charges are not subject to tax deduction at source under section 194J of the Act.

Without prejudice to the above contention, we wish to submit that roaming charges paid by VDL do not fall within the scope and ambit of the withholding tax provisions contained under the Act and hence, VDL is not under an obligation to withhold taxes thereon.

A. Payment is for use of standard facility.

We wish to reiterate that roaming represents a standard facility provided by a telecom operate to

the subscribers of the other telecom operator and hence, roaming charges do not fall within the purview of the definition of the term fee for technical service (FTS as defined under section 9(1)(vii) of the Act.

Provision of roaming services by the other telecom operators involves provision of standard services resulting into transmission of calls/SMS when a roaming subscriber makes/ receives calls while he is roaming in the telecom service area of the other telecom operator for which it is entitled to receive appropriate service charges from VOL. It is imperative to note that services provided by the other telecom operators are standard automated services, which are available for any telecom operator willing to avail those services (to enable its subscribes to make/receives calls when the subscribers are roaming) in consideration for payment of appropriate charges.

Reliance in this regard is placed on the decision of the Hon'ble Madras High Court in the case of Skycell Communications Vs DCIT 251 ITR 53, wherein it has been held as under:

"Technical service referred in section 9(1) (vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a "for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services."

The Hon'ble High Court thus came to the following conclusion:

"At the time the income tax act was enacted in the year 1961, as also, at the time when explanation 2 to section 9(1)(ii) was introduced by the Finance (No. 2) Act, with effect from April 1, 1977, the products of technology had not been in such wide use as they are today. Any constructions of the provisions of the Act must be in the background of the realities of day-to day life in which the products of technology play an important role in making life smoother and more convenient. Section 194J as also Explanation 2 in section 9(1)(vii) of the Act were not intended to cover the charges paid by the average house-holder or consumer for utilizing the products of modern technology, such as, use of the telephone fixed or mobile, the cable T.V., the internet, the

automobile, the railway the aero plane, consumption of electrical energy, etc. Such facilities which when used by individuals are not capable of being regarded as technical service cannot become so when used by firms and companies. The facility remains the same whoever the subscriber may be -individual, firm or company".

Applying the aforesaid principle to the instant case, VDL enters into an arrangement with other telecom operators merely to enable its subscribers to avail the service provided by the other telecom operator resulting in transmission of their calls SMS while they are roaming in the telecom service area of the other telecom operator. This is merely a standard facility that can be availed by any telecom operator holding a valid telecom license.

Further reliance in this regard on the decision of the Hon'ble Mumbai Tribunal in the case of Pacific Internet India Pvt. Ltd., (318 ITR 179), where in the context of payments made by an internet service providers for obtained bandwidth from MTNI/VSNL for provisions of internet services to its subscribers, the Hon'ble Tribunal has held that bandwidth

represents standard facility provided by MTNI/VSNL and hence, payments made by the assessee for bandwidth availed by the assessee cannot be construed as FTS for the purpose of the Act.

In view of the above judicial precedents, it is clear that payments made for use of standard facility provided by the service provider, even where it involves use of sophisticated equipment and trained personnel by the service provider, cannot be construed as FTS for the purpose of the Act. In the present case as well, roaming charges paid by VDL to other telecom operators represent payments made for standard facility provided by such telecom operators and hence, cannot be classified as FTS for the purpose of the Act.

B. No human intervention is involved in provision of roaming services.

As per section 9 of the Act, FTS has been defined to mean "any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any

construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

In absence of specific meanings of the terms 'technical', 'managerial' and 'consultancy' in the Act, reliance can be placed on the dictionary meanings of such terms. The same has been listed below:

As per the Concise Oxford Dictionary, the term 'technical' has been defined to mean, "requiring special knowledge to be understood". The Black's Law Dictionary defines the word technical as "belonging or peculiar to an art or profession".

The word "management" is derived from the word "manager" which a per the Concise Oxford Dictionary is defined as "a person controlling or administering a business.

In view of the above definitions, we wish to submit that since the word technical is used in conjunction with the word 'managerial" and 'consultancy', applying the rule of Noscitur a sociis, the term 'technical' shall be read in a narrower sense so as to include only those services which involve

human intervention in performance thereof Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Bharti Cellular Limited (330ITR 239), wherein the Hon'ble Apex Court has upheld the above contention and has pbseroed that the term 'technical services' should be read in a narrower sense.

C. *Report of the technical expert of human intervention involved in roaming services. Having discussed the judicial precedents pronounced by the Indian judiciary and their applicability to the present case, we wish to highlight the comments/ observations of an independent technical (Mrs. Vasanthi Ramamurthy -Divisional Engineer, BSNL, Coimbatore) examined by the income tax authorities in Coimbatore during similar proceedings conducted in the case of a group company Vodafone Cellular Limited to ascertain the extent of human intervention involved in provision of roaming services.*

No demand under section 201 (1)/201 (IA) of the act can be raised on account of non-deduction of tax at source under section 194J of the act from roaming charges paid to other telecom operators.

Without prejudice to the contention that the roaming charges paid to other telecom operators do not get covered within the purview of section 194J of the Act, it is humbly submitted that it is trite law that no tax demand under section 201(1) of the act can be raised where taxes so deductible but not deducted by the payer to as the 'Circular'), relevant extract of which is a follows:

"Demand for non/short deduction of tax should not be enforced against the Payer if he satisfies the Income Tax Authority that such taxes have been paid by the Payee".

Reliance in this regard is placed on the judgment in the case of the Deputy Commissioner of Income Tax (TDS) Vs Jaran Prakash Limited (supra), 2012, wherein the Hon'ble Allahabad High Court has not only held that no demand under section 201 of the Act can be raised where the recipient has paid the taxes, but has also held that the deductor cannot be treated as an assessee in default till it is found that the recipient has also failed to pay such tax directly.

CIT Vs Bharti Cellular Limited & other 330 ITR 239 (Supreme Court). The Hon'ble Supreme Court held

that in case where taxes have been paid no demand can be raised under section 201(1) of the Act.

Vodafone Essar Limited Mumbai Vs DCIT (TDS) 113 ITJ 385 (Mumbai Tribunal): The Mumbai Tribunal, relying upon the decision of the Supreme Court in case of Hindustan Coca Cola Beverage Pvt. Ltd., (supra) held that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon.

In view of the aforesaid submissions and facts and in circumstances of the case, we wish to summarize that the order passed by the learned TDS Officer was neither erroneous nor prejudicial to the interests of revenue and hence, 'Section 263 of the Act cannot be invoked in the present case. Even on merits of .the case, roaming charges paid VDL to the other telecom operators do not qualify as FTS for the purpose of the Act and hence, are not subject to tax deduction at source under section 194J of the Act……

6. Ld. CIT on carefully considering the submissions of the assessee and also on going through the orders passed by the Assessing Officer and assessment records, found that the contentions raised by the assessee are having no merits for the reasons discussed as under:

1. That there exists conditions prerequisite for initiating revisionary proceedings under section 263 of the Income tax Act, 1961, as the Assessing Officer neither in his orders under section 201(1) read with section 201(lA) of the Act nor in the questionnaires issued has ever discussed about the issue of roaming / interconnect charges admittedly paid to other networking operators, by the assessee. This is despite the fact that payment of Roaming/Interconnect charges having paid by assessee during these years are not at all denied and disputed. Thus having not examined this issue the orders passed by the AO are erroneous and having not deemed t the assessee an assessee in default for having not deducted tax at source on roaming/Interconnect Charges

paid by it, which is prejudicial to the interest of revenue. I am therefore, satisfied that the provisions of section 263 of the Income tax Act, 1961 are attracted for all the years.

2. The reliance placed by the assessee on the decisions of the Hon'ble Courts are also distinguishable facts and issues, hence not applicable to the present case as the Assessing Officer in this case has not taken any view and decision at all on this issue. Hence the question of two possible views does not arise.

3. The claim of the assessee that Roaming Charges are not subject to TDS under section 194J of the Act is also not correct and admissible for the reason that on this issue the Hon'ble Supreme Court in the case of Bharti Cellular Ltd. has directed the Assessing Officer to examine the extent of human involvement for applicability of provision of Section 194J of the Ad and the-Assessing Officer after following the directions of Hon'ble Supreme Court examined this aspect and established that

human intervention is required to provide fault free services of interconnection. This human intervention is of highly qualified and trained technical professional having expertise and experience in that particular area of relevant technology. In these circumstance, these interconnection charges/roaming charges fall under the ambit of section 194J of the Income tax Act, 1961.

4. In view of the above discussion, Ld. CITI found that the orders passed under section 201(1) read with section 201 (1A) of the Act for the financial year 2006-07 to 2008-09 relevant to the assessment year 2007-08 to 2009-10, are erroneous and also prejudicial to the interest of revenue. Hence the same are set aside with the direction to Assessing Officer to examine the default of the assessee to the extent of not deducting tax at source on oaming/Interconnect Charges paid during these years and chargeability of interest 'under section 201(1) read with section 201(lA) of the Income tax Act, 1961 by examining the issues on the lines as directed by Hon'ble Supreme Court in the case

of M/ s Bharti Cellular Ltd. to the Assessing Officer of Gurgaon who completed the order under section 201(1)/201(lA) of the Income tax Act, 1961.

7. Against the aforesaid order of the Ld. CIT passed u/s. 263 of the Act dated 30.3.2013, assessee is in appeal before the Tribunal.

8. Ld. Counsel of the assessee has stated that the notice issued under section 263 of the of Income Tax Act, 1961 by the learned Commissioner of Income Tax (TDS), Chandigarh and the order passed under section 263 of the Act are illegal, bad in law and without jurisdiction. He further stated that Ld. CIT(TDS) erred in assuming the jurisdiction under section 263 of the Act since the revisionary proceedings under section 263 of the Act have merely been initiated on the basis of the letter received from Assistant Commissioner of Income Tax (TDS), Chandigarh and the Ld. CIT (TDS) did not arrive at any independent satisfaction for initiation of such proceedings; by acceding to the request of the learned ACIT, the CIT(TDS) has effectively enhanced the time limitation prescribed under section 201(3) of the Act for completion of 201 proceedings by a TDS officer; the order passed by the learned ACIT is neither 'erroneous' nor 'prejudicial' to the interest of the revenue

since the learned ACIT took one of the two permissible views after conducting a detailed enquiry in respect of applicability of withholding tax provisions on the roaming charges paid by the appellant to the other telecom operators. He further stated that Ld. CIT has not appreciated the facts that the other telecom operators, to whom the roaming charges have been paid, would have offered income arising from roaming charges received from the assessee to tax and hence, no prejudice would have been caused to the revenue and hence, initiation of 263 proceedings is bad in law and void ab initio. He further stated that learned CIT(TDS) has erred in concluding that roaming charges paid to other telecom operators by the assessee attracts provisions of section 194J without appreciating the facts that - Roaming charges paid by the assessee to the other telecom operators represent payments made for standard facility provided by such telecom operators and hence, cannot be classified as FTS for the purposes of the Act; No human intervention, which is sine qua non for a service to qualify as technical service, is involved in provision roaming services and therefore, roaming charges cannot be construed as Fee for Technical Services for the purposes of the Act; The reports of the technical experts clearly establish the fact that roaming payments made to other telecom operators for allowing use of their network

to assessee's subscribers are in the nature of provision of a standard facility, which does not involve any human intervention at all and hence, such payments cannot be classified as FTS liable for deduction of tax at source under Section 194J of the Act; no demand u/s. 201/201(1A) of the Act can be raised where taxes so deductible but not deducted by the payer are directly paid by the recipient and such an action would result in double recovery of the demand. In support of his arguments, he draw our attention towards the page no. 27 to 32 of the Paper Book which is copy of the order u/s. 201(1) & 201(1A) of the I.T. Act, 1961 dated 29.3.2011 passed by the ITO (TDS), Karnal and relied upon the order of the AO and stated that Section 194J of the Act is not applicable in the present case. He further draw our attention towards page no. 47 of the PB which is a copy of notice of proposal for revision u/s. 263 of the Act issued by the Ld. CIT(TDS) dated 23.3.2012 and further draw our attention towards the page no. 48-76 of the PB filed by the assessee which are the copy of the submission/reply to the show cause notice of the Ld. CIT in which it is was specifically mentioned that the issue in dispute has been duly examined by the AO. Further, Ld. Counsel of the assessee draw our attention towards page no. 77-104 which is copy of submission/ reply dated 28.3.2013 filed before the Ld. CIT(TDS). Ld. Counsel of

the assessee as regards the validity of initiation of revisionary proceedings under section 263 of the Income Tax Act has relied upon the following cases laws, by filing the copies thereof in the shape of paper book:

- CIT vs. Vodafone Essar South Limited (212 Taxman 184) (as affirmed by the Hon'ble Supreme Court in CC 9308/2013) (Page no. 1-8 of PB).
- CIT vs. Vodafone Essar South Limited (CC 9308/2013) – Hon'ble Supreme Court (page no. 9 of PB).
- CIT vs. Sunbeam Auto Ltd. (322 ITR 167) – Delhi High Court (Page no. 10-21a of the PB).

8.1 As regards applicability of section 194J of the I.T. Act on roaming charges paid to roaming partners, the Ld. Counsel of the assessee has relied upon the following case law, the copies thereof are attached with the Paper Book. He further submitted that in these cases the Tribunal held that assessee will not fall under the category of 'Fees for technical serviced' and therefore, the provisions of section 194J of the Act would not be attracted.

- *Dishnet Wireless Limietd vs. DCIT(TDS) 45 ITR(T) 430 Chennai Bench of the Tribunal) (Page no. 53-62 of PB)*

- *CIT (TDS) vs. VodaFone South Limited (290 CTR 436) Hon'ble Karnataka High Court. (Page No. 63-73 of PB) and*
- *Bharti Airtel Ltd. vs. ITO(TDS) (2016) 67 taxmann.com 223 (Delhi-Trib.) and*
- *Vodafone Cellular Limited vs. DCIT(TDS) (ITA No. 2802 & 2803/MDS/2014) (Chennai Bench of the Tribunal) (Page no. 90-96 of the PB).*

8.2 In view of the above, Ld. Counsel of the assessee submitted that AO has passed his order dated 29.3.2011 u/s. 201(1) & 201(1A) of the Income Tax Act, 1961 judiciously after making all the enquiries / verification, which has been replied and on the basis of the said reply, the AO has passed the order by relying upon the Hon'ble High Court and ITAT decision. Despite that the Ld. Commissioner of Income Tax has wrongly invoked Section 263 of the Act, which is not sustainable in the eyes of law and therefore, the same should be quashed.

9. On the contrary, Ld. DR relied upon the order of the Ld. CIT. In support of his contention he filed a copy of the submissions of Revenue on provisions of Income Tax Act and position of law on the issue of Section 263.

10. We have carefully considered the rival submissions and perused the relevant records available with us, especially the impugned order passed by the Ld. CIT u/s. 263 of the Act

alongwith Paper Book filed by the Assessee as well as the Written Submissions filed by the Revenue before us. After perusing the aforesaid order of the Ld. CIT, we are of the considered opinion that the order of the Ld. CIT is wrong in assuming the jurisdiction under section 263 of the Act because the revisionary proceedings under section 263 of the Act have merely been initiated on the basis of the letter received from Assistant Commissioner of Income Tax (TDS), Chandigarh and the Ld. CIT (TDS) did not arrive at any independent satisfaction for initiation of such proceedings; by acceding to the request of the learned ACIT, the CIT(TDS) has effectively enhanced the time limitation prescribed under section 201(3) of the Act for completion of 201 proceedings by a TDS officer; the order passed by the learned ACIT is neither 'erroneous' nor 'prejudicial' to the interest of the revenue since the learned ACIT took one of the two permissible views after conducting a detailed enquiry in respect of applicability of withholding tax provisions on the roaming charges paid by the appellant to the other telecom operators. We further note that Ld. CIT has not appreciated the facts that the other telecom operators, to whom the roaming charges have been paid, would have offered income arising from roaming charges received from the assessee to tax and hence, no prejudice would have been caused to the revenue and hence,

initiation of 263 proceedings is bad in law and void ab initio. He further stated that learned CIT(TDS) has erred in concluding that roaming charges paid to other telecom operators by the assessee attracts provisions of section 194J without appreciating the facts that - Roaming charges paid by the assesse to the other telecom operators represent payments made for standard facility provided by such telecom operators and hence, cannot be classified as FTS for the purposes of the Act; No human intervention, which is sine qua non for a service to qualify as technical service, is involved in provision roaming services and therefore, roaming charges cannot be construed as Fee for Technical Services for the purposes of the Act; the reports of the technical experts clearly establish the fact that roaming payments made to other telecom operators for allowing use of their network to assessee's subscribers are in the nature of provision of a standard facility, which does not involve any human intervention at all and hence, such payments cannot be classified as FTS liable for deduction of tax at source under Section 194J of the Act; no demand u/s. 201/201(1A) of the Act can be raised where taxes so deductible but not deducted by the payer are directly paid by the recipient and such an action would result in double recovery of the demand. This fact was not appreciated and also the fact and information provided by AO, the Ld. CIT wrongly invoked the

provision of 263 of the I.T. Act and directed to AO to examine the default of the assessee to the extent of not deducting tax at source on roaming / interconnect charges paid during these years and chargeability of interest under section 201(1) read with section 201(1A) of the I.T. Act, 1961 by examining the issues on the lines as directed by Hon'ble Supreme Court in the case of M/s Bharti Cellular Ltd. to the AO of Gurgaon who completed the order under section 201/201(1A) of the Income Tax Act, 1961. In our considered opinion, the order of Ld. CIT is wrong and bad in law, because AO has passed the order dated 29.3.2011 judiciously after making all the enquiries / verification, which has been replied and on the basis of the said reply, the AO has passed his order dated 29.3.2011 by relying upon the Hon'ble High Court and ITAT decision. Despite that the Ld. Commissioner of Income Tax has wrongly invoked Section 263 of the Act, which is not sustainable in the eyes of law and therefore, the same deserve to be quashed. We further find that Hon'ble Supreme Court in the case of CIT vs. Green World Corporation 314 ITR 81 (SC) has held as under:-

> "The jurisdiction u/s. 263 can be exercised only when both the following conditions are satisfied:
>
> i) The order of the AO should be erroneous; and
>
> ii) It should be prejudicial to the Revenue interest. These conditions are conjunctive. An order of assessment passed by

the AO should not be interfered with only because another view is possible."

10.1 An order would be erroneous only when the AO makes no enquiries during the course of assessment proceedings. This principle was noticed by the Delhi High Court in Geevee Enterprises vs. Addl. CIT 99 ITR 375 (Del.). In arriving at this decision, the Delhi High Court drew strength from the principles laid down by the Supreme Court in Rampyari Devi Sarogi vs. CIT 67 ITR 84 (SC) and Tara Devi Agarwal vs. CIT, 88 ITR 324 (SC). The underlying principle which emerges from these judgments is that if an assessment order is passed without making any enquiries, then such an order would be erroneous. But in the present case, the order passed by the learned ACIT is neither 'erroneous' nor 'prejudicial' to the interest of the revenue since the learned ACIT took one of the two permissible views after conducting a detailed enquiry and after issue of show cause notice in respect of applicability of withholding tax provisions on the roaming charges paid by the assessee to the other telecom operators; no demand u/s. 201/201(1A) of the Act can be raised where taxes so deductible but not deducted by the payer are directly paid by the recipient and such an action would result in double recovery of the demand; the validity of initiation of revisionary proceedings under section 263 of the Income Tax Act is not proper in the present case in view of the following cases laws:-

- CIT vs. Vodafone Essar South Limited (212 Taxman 184) (as affirmed by the Hon'ble Supreme Court in CC 9308/2013) (Page no. 1-8 of PB).

- CIT vs. Vodafone Essar South Limited (CC 9308/2013) – Hon'ble Supreme Court (page no. 9 of PB).

- CIT vs. Sunbeam Auto Ltd. (322 ITR 167) – Delhi High Court (Page no. 10-21a of the PB).

10.2 And the applicability of section 194J of the I.T. Act on roaming charges paid to roaming partners are not applicable, in view of the following decisions:-

- *Dishnet Wireless Limietd vs. DCIT(TDS) 45 ITR(T) 430 Chennai Bench of the Tribunal) (Page no. 53-62 of PB)*
- *CIT (TDS) vs. VodaFone South Limited (290 CTR 436) Hon'ble Karnataka High Court. (Page No. 63-73 of PB) and*
- *Bharti Airtel Ltd. vs. ITO(TDS) (2016) 67 taxmann.com 223 (Delhi-Trib.) and*
- *Vodafone Cellular Limited vs. DCIT(TDS) (ITA No. 2802 & 2803/MDS/2014) (Chennai Bench of the Tribunal) (Page no. 90-96 of the PB).*

10.3 We further find that the case laws cited by the Ld. DR are not applicable in the present case.

11. In the background of the aforesaid discussions, we hold that the impugned order passed by the Ld. CIT u/s. 263 of the I.T. Act is without jurisdiction and not sustainable in the eyes of law. Accordingly, the impugned order is hereby quashed and appeal of the assessee is allowed.

12. Following the consistent view as taken in ITA No. 3779/Del/2013 (AY 2007-08), as aforesaid, the other Appeals having the similar and identical grounds in ITA Nos. 3780-3781/Del/2013 (Ayrs. 2008-09 & 2009-10) also stand allowed.

13. In the result, all the 03 Appeals i.e. ITA No. 3779 to 3781/Del/2013 (AYrs. 2007-08 to 2009-10) stand allowed.

14. As regards ITA Nos. 716 to 718/Del/2017 (Ayrs. 2007-08 to 2009-10) are concerned, we find that in these cases the AO has passed the common order dated 24.3.2014 u/s. 201(1) & 201(1A) of the I.T. Act, 1961 in compliance of the order dated 30.3.2013 of the Ld. CIT(TDS), Chandigarh passed u/s. 263 of the I.T. Act, 1961. Aggrieved with the order of the AO dated 24.3.2014, assessee appealed before the Ld. CIT(A), who vide his impugned order 02.12.2016 has dismissed the appeal of the assessee. We find that these appeals are consequential in nature and is arising from the

order of the Ld. CIT(TDS), Chandigarh passed u/s. 263 of the Act. Since we have quashed the proceedings u/s. 263 of the Act in the assessee's own case as aforesaid while dealing with ITA Nos. 3779 to 3781/Del/2013 (AYRS. 2007-08 to 2009-10), the consequential appeals being ITA Nos. 716 to 718/Del/2017 (Ayrs. 2007-08 to 2009-10) have become infructuous and the same are dismissed as such.

19. In the result, the ITA Nos. 3779 to 3781/Del/2013 (AYRS. 2006-07 to 2009-10 are allowed and ITA Nos. 716 to 718/Del/2017 (Ayrs. 2007-08 to 2009-10) are dismissed in the aforesaid manner.

Order pronounced on 07/11/2017.

Sd/-	Sd/-
(PRASHANT MAHARISHI)	**(H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:07/11/2017

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY
By Order,

Assistant Registrar,
ITAT, Delhi Benches