

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री भागचन्द, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 67/JP/2015
निर्धारण वर्ष/Assessment Year : 2011-12.

Vodafone Digilink Ltd., (Formerly known as Vodafone Essar Digilink Limited) 5 th Floor, Gaurav Towers, Malviya Nagar, Jaipur.	बनाम Vs.	The Income Tax Officer (TDS)-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./TAN No. JPRA 02455 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Ms. Ishita Farsaiya (Adv.)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 06.03.2018
घोषणा की तारीख / Date of Pronouncement : 08/03.2018.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 25th November, 2014 of Id. CIT (A)-III, Jaipur arising from the order passed under section 201(1)/201(1A) of the I.T. Act, 1961 for the assessment year 2011-12. The assessee has raised the following grounds :-

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

1.1 *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not holding that the order passed by the TDS officer is bad-in-law.*

1.2 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that the order of the learned TDS Officer*

treating the Appellant as 'assessee in default' is bad in law in view of the provisions of sec. 201(1) read with section 191 of the Act and the judgement of Jagran Prakashan Limited Vs DCIT(TDS) (21 Taxman.com 489) (Allahabad High Court), as there is no finding by the learned TDS officer with respect to the failure of deductees to pay taxes directly, which is a jurisdictional pre-requisite.

1.3 *Without prejudice to Ground No 1.2 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding the order of the learned TDS officer as bad in law in so far it seeks to recover tax demand under section 201 of the Act in contradiction to the settled principle enunciated by Allahabad High Court in the case of Jagran Prakashan Limited (supra) 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(1 A) of the Act, if any, can be levied in such cases.*

2. **Ground No. 2 - The Appellant is not liable to deduct tax on discount extended to its pre-paid distributors on distribution of pre-paid SIM cards/ talktime**

2.1 *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the order of the learned TDS officer that the Appellant is to be treated as an 'assessee in default' for non-deduction of tax at source under section 194H of the Act on discount extended to the distributors of its pre-paid SIM cards/ talktime during the subject financial year.*

2.2 *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the decision of the learned TDS officer that the relationship between the Appellant and the pre-paid distributors is not that of 'Principal to Principal' and the discount allowed to them is in nature of commission liable for tax deduction at source, as envisaged under section 194H of the Act.*

2.3 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the provisions of section 194H of the Act would be applicable to the Appellant's case without taking cognizance of the fact that the Appellant is not responsible to make any payment/ credit to the prepaid distributors towards the discount extended to them and responsibility/ obligation to make payment/ credit is a condition*

precedent for application of section 194H of the Act, which is absent in the present case.

2.4 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that discount allowed by the Appellant is not income in the hands of its distributors and that income, if any, arises only when the pre-paid SIM cards/ talktime is further distributed by the distributors.*

2.5 *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in not appreciating the fact that there is no flow of monies from the Appellant to the distributor of pre-paid SIM card/ talktime but rather from the distributor to the Appellant, and hence, the provisions of section 194H of the Act fail to apply.*

2.6 *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in not appreciating the difference between a SIM card and a pre-paid recharge voucher since while a SIM card enables a subscriber to get connected to the network of the telecom service provider, a pre-paid recharge voucher entitles the holder to receive telecom services equivalent to the value embedded in it, and hence, the terms 'SIM card' and 'pre-paid recharge voucher' cannot be used inter-changeably.*

3. **Ground No. 3- The appellant is not liable to deduct tax at source under section 194J of the Act on roaming charges paid to other telecom operators**

3.1 *On the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the order of the learned TDS officer that the Appellant was required to deduct tax under section 194J of the Act on roaming charges paid/payable by the Appellant to other telecom operators, during the subject financial year.*

3.2 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that roaming facility is a standard automated facility which cannot be construed as Fee for Technical Services ('FTS') for the purposes of the Act and hence, section 194J of the Act is not applicable.*

3.3 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that no human intervention, which is sine qua non for a service to qualify as technical*

service, is involved in provision of roaming services and therefore, roaming charges cannot be construed as FTS for the purposes of the Act.

3.4 *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in misapplying the statement of technical expert recorded by the income-tax authorities in Coimbatore during proceedings conducted in the case of a group company of the Appellant - Vodafone Cellular Limited on the same issue, wherein it has been clearly observed that roaming facility is an automatic facility and does not involve any human intervention.*

3.5 *On the facts and in the circumstances of the case and in law and without prejudice to grounds 3.1 to 3.4, the learned CIT(A) has erred in not holding that characterization of a payment must be done having regard to the dominant purpose/intention of the payment.*

3.6 *On the facts and circumstances of the case, the learned CIT (A)/ TDS Officer has erred in not appreciating the fact that deduction of tax at source from interconnect charges, was purely on a conservative basis and does not alter the nature of roaming charges and thus, does not lead to a conclusion that such charges qualify as FTS.*

4. **Ground No. 4- No demand under section 201(1) of the Act can be recovered from the Appellant**

4.1 *Without prejudice to Ground Nos. 1 to 3 above, on the facts and in the circumstances of the case and in law, the learned CIT(A) has failed to appreciate that no demand can be raised under section 201(1) of the Act since taxes would have been paid by the recipient parties and such an action of the learned TDS officer has resulted in double recovery of taxes, which is against the rules of taxation principles.*

4.2 *Without prejudice to Ground No. 4.1, on the facts and in the circumstances of the case and in law, the CIT(A) has erred in not directing the learned TDS officer to verify the aforesaid fact relating to payment of taxes by the payees basis the details of payees (viz Permanent Account Number, address) submitted by the Appellant.*

4.3 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in ignoring the ruling of the Mumbai bench of ITAT in the case of Vodafone Essar Limited (ITA Nos. 6058, 6059, 6060/Mum/2009) (December 2010) (Mumbai Tribunal) wherein the*

ITAT directed the Assessing officer to invoke his powers under the Act and verify payment of taxes by the payees from the respective Assessing officers assessing the payees with the help of the Permanent Account Numbers of the payees furnished by the assessee.

5. **Ground No. 5- No Interest under section 201(1A) of the Act can be charged**

5.1 *On the facts and in the circumstances of the case and in law, the learned TDS officer has erred in charging interest under section 201(1 A) of the Act.*

5.2 *Without prejudice to Ground No. 5.1, on the facts and circumstances of the case and in law, consequential interest under section 201(1 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 payee/recipient of such income.*

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."

2. **Ground No. 1** is general in nature and does not require any specific adjudication.

Ground No. 2 is regarding applicability of section 194H in respect of discount allowed to the distributors on distribution of pre-paid SIM cards/talk time.

3. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. At the outset, we note that an identical issue was considered and decided by this bench of the Tribunal in assessee's own case for the assessment years 2012-13 and 2013-14 vide order dated 19th January, 2018 in ITA Nos. 68 &

69/JP/2015 and 71/JP/2016 and the observations of the Tribunal in para 7 are as under :-

"7. We have heard the Id AR as well as the Id CIT DR and considered the relevant material on record. At the outset, we note that this issue of liability of the assessee to deduct tax at source in respect of discount allowed to the distributors on pre paid SIM cards and recharge vouchers has been considered by the Hon'ble Jurisdictional High Court in assessee's own case for the A.Y. 2007-08 to 2009-10 in D.B. Income Tax Appeal No. 99 to 105/2016 vide judgment dated 11/7/2017 wherein the Hon'ble High Court has framed the question of law as under :

- "1. Whether in the facts and circumstances of the case, the Tribunal was justified in holding that whether the assessee is liable to deduct TDS u/s. 194H of the IT Act, as the relation between assessee and distributor is that of principal to agent.
2. Whether in the facts and circumstances of the case, the Tribunal has erred in law in deleting the demand u/s. 201(1) for non deduction of TDS u/s 194H on commission payment to various distributors.
3. Whether in the facts and circumstances 'of the case, the TDS is applicable u/s. 194J on roaming charges paid for facility provided by service provider as this interconnection is managed/controlled monitored by human intervention.
4. Whether in the facts and circumstances of the case, TDS u/s. 194J is applicable on roaming charges paid for facilities provided by service providers.
5. Whether in the facts and circumstances of the case, the Tribunal has erred in deleting the interest u/s. 201(1A) on the tax demand raised under section 201(1) of the Act."

While deciding the above said questions of law, the Hon'ble High Court has held in para 43 to 48 as under:

“43. We have heard learned counsel for the parties.

44. Now, the first question which has come up for our consideration is, ‘whether in the facts and circumstances of the case the learned Tribunal was right and justified in holding that assessee was liable to withhold tax at source under S. 194H of the Income Tax Act, 1961 amounting to Rs. 19,74,842/- (including interest) in respect of sales to its distributors, which are on principal to principal basis and wherein property in the goods is transferred to the distributor’.

45. Taking into account the provisions of Section 182 of the Contract Act and the arrangement which has been entered into between the company and the distributor and taking into account the provisions of Section 194H, the Tribunal while considering the evidence on record, in our considered opinion, has misdirected itself in considering the case from an angle other than the angle which was required to be considered by the Tribunal under the Income Tax Act. The Tribunal has travelled beyond the provisions of Section 194H where the condition precedent is that the payment is to be made by the assessee and thereafter he is to make payment. In spite of our specific query to the counsel for the department, it was not pointed out that any amount was paid by the assessee company. It was only the arrangement by which the amount which was to be received was reduced and no amount was paid as commission.

46. In that view of the matter, if we look at the provisions of Section 194H and even if explanation is taken into consideration, there is no occasion of invoking provisions of Section 194H, since the amount is not paid by the assessee.

47. Taking into account the conclusion which has been arrived at by the Tribunal is misdirected in view of the (arrangement which has been arrived at between the company and the Distributor. Assuming without admitting, if the contention which has been raised before the Tribunal is accepted, the

same can be at the most expenses which are not allowable under the Income Tax Act, if at all claimed without proper basis but to conclude that they are covered under Section 194H and the income tax or the TDS is required to be deducted is not correct and accordingly disallowance on that basis is not correct. In our considered opinion, from which amount of tax is to be deducted is doubtful proposition inasmuch as the Management Information System which has been sought to be relied upon for alleging that expenditure has been claimed could not have been relied upon by the Tribunal or the authorities under the Income Tax Act.

(i) The findings which are given by the Tribunal regarding Distributor being Agent in view of the discussion made here-in- above, the arrangement which has been made between the Company and the Distributor is on Principal to Principal basis and the responsibility is on the basis of agreement entered into between the parties.

(ii) Regarding MRP, the findings which are arrived at is a price which has been fixed by the assessee company and other expenses, namely; commission given to the retailer and everything is to be managed by the Distributor.

In that view of the matter, the restrictions which are put forward will not decide the relation-ship of Principal and Agent.

(iii) The Distributor has all rights to reduce his margin. He can increase the margin of retailer and will reduce the margin from 10% to anything between 1% to 10%. There is no restriction by the assessee to give commission amount to the retailer.

(iv) Regarding area of operation, it is the business policy of the assessee to give Distributor-ship for a particular area. Only on that basis, it will be erroneous to held that it is on Principal to Principal basis. For deciding

the relation-ship on Principal to Principal basis, the criteria will not be of area of operation but agreement entered into between the parties.

- (v) *Regarding the change in price it is always between the assessee or the company and the Distributor to decide who will absorb the loss.*

In that view of the matter, the findings arrived at by the Tribunal is erroneous.

- (vi) *Regarding the return of goods after expiry date, it is always the understanding between the manufacturer and company that the product is not for preparation or consumed before expiry date, the consumed items cannot be allowed otherwise manufacturer will invite criminal liability. To avoid any criminal liability or any criminal act is done for taking back the goods, will not deter the relation-ship of Principal to Principal basis.*

- (vii) *Regarding supervision, it is always for the manufacturer and the company to look into the matter that his Distributor or ~~Sub~~-Distributor or Retailer ~~will~~ not induct in mal practice.*

- (viii) *Regarding goods sold to the Distributor, it is always a matter of contract how further goods will be distributed. Restriction on sub-distributor will not change the transaction from Principal to Principal.*

- (ix) *Regarding expenses which are described by the Tribunal and one of the reason is that it is always for the assessee to allow any special allowance or expenses to promote the sale. In a competitive world to promote the sale, if the Distributor is not given any encouragement, the business will not grow.*

In that view of the matter, in view of the observations the Supreme Court, the Income Tax Officer cannot enter into the shoes of the

assessee. (S.A. Builders Vs. Commissioner of Income Tax (2007) 288 ITR 1 (SC).

(x) Regarding providing a vehicle it was very clear that by providing vehicle and getting list of expenses will not decide the relation-ship of Principal and Agent.

48. In our considered opinion, Section 194H pre-supposes the payment to be made to the third party namely, Distributor or the Agency and if on a close scrutiny of Section 182, Distributor is not an agent, therefore, in our considered opinion, the provisions of Section 194H have wrongly been invoked, and therefore, the first issue is answered in favour of assessee and against the Department.

Respectfully following the decision of the Hon'ble Jurisdictional High Court in assessee's own case for the A.Y. 2007-08 to 2009-10, we decide this issue in favour of the assessee and consequently set aside the orders of the authorities below qua this issue."

We note that the issue involved in the year under consideration in respect of deduction of TDS under section 194H is identical to the assessment years 2012-13 and 2013-14 (supra) and accordingly by following the decision of the Coordinate Bench of the Tribunal as well as the judgment of the Hon'ble Jurisdictional High Court in assessee's own case, this issue is decided in favour of the assessee and against the revenue.

Ground No. 3 is regarding deduction of TDS under section 194J in respect of roaming charges paid to other telecom operators.

4. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. At the outset we note that an identical issue has been

considered by this Tribunal in assessee's own case for the assessment years 2012-13 and 2013-14 and the Tribunal has decided the issue in para 9 by observing as under

:-

"9. We have heard the Id AR and Id. CIT DR and considered the relevant material on record. At the outset, we note that an identical issue was considered by this Tribunal in assessee's own case for the A.Y. 2004-05 to 2010-11 in ITA No. 75 to 81/JP/2013 vide order dated 05/2/2016. The findings of this Tribunal is as under:

"3.2. We have heard the rival contentions and perused the material available on record. The facts of the present appeal and as that of the appeal bearing no. 656/JP/2010 are same and, therefore, the judgment passed by the Coordinate Bench is equally applicable to the cases in hand. For ready reference, we are hereby reproducing the facts mentioned in para 3 of the order passed by the AO TDS. The same are as under :-

" The assessee has relied on the decision of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd. – On the basis of which the Hon'ble Apex Court has remanded the matter to the AO for fresh adjudication. Firstly, the matter is pending before the AO and thus the issue has not reached finality in that case. Secondly, the facts of this case are entirely different from the present case. The issue under consideration in the case relied by the assessee above was payment of part access / interconnect charges whereas in the present case, the issue is regarding payment of roaming charges. Further, in the above case, the Hon'ble court found that there was no involvement of human interface in providing interconnect/part access facility whereas in present case there is necessarily human interface involved in providing roaming service. There is no doubt that there is intensive use of sophisticated machines and modern technology but simultaneously there is constant involvement of human mind and skill which is required for providing roaming services. For example, there is

requirement of technical and skilled employees for following procedures involved in providing roaming services :-

1. To maintain and operate customer care centre round the clock for the subscribers of assessee company.
2. To implement GSM services in accordance with the GSM specifications.
3. Settlement of Bills.
4. To monitor technical aspects concerning both the pre-commercial and commercial phases of GSM national roaming.
5. To implement fraud prevention procedures.

All the above activities require constant human involvement for monitoring and for unhindered operations. Moreover, Service Tax Act has also recognized the roaming as service for the purpose of service tax vide the Finance Bill, 2007. Thus the reliance on the decision in the case of Bharti Cellular Limited placed by the assessee is misplaced.

Here it is also pertinent that "The definition of "fees for technical services" is very wide. It covers within its ambit any managerial, technical or consultancy services rendered by a person. The service of this nature involves human skill as well as computerized machines. It is not automatic. But it is fully supported by services of personnel and requires human application of mind along with technical equipments."

The facts mentioned in the order of the Tribunal in ITA No. 656/JP/2010 at para 9 are to the following effect :-

"9. Now the assessee is in appeal before us. The Id AR of the assessee has submitted that the revenues proposition is that though the roaming happens automatically but because equipment is used to render the roaming service, because technical manpower is needed to operate and maintain the technical equipment therefore, roaming per se is rendering of technical services and therefore, the amount paid for roaming is technical fee in terms of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act. The Id AR explained the roaming service and submitted that Hexacom subscriber in Jaipur travels of Mumbai switches on his mobile device after reaching Mumbai. Where the subscriber travels by land he automatically receives a message transferring to the roaming network on visiting another telecom, circle.

- * *Visiting network (e.g. Airtel in Mumbai) locates mobile device and identifies that it is not registered with its systems, i.e. VLR.*
- * *Visiting network automatically contacts home network of Hexacom subscriber, i.e. HLR and gets service information about roaming device using IMSI number-IMSI number is a unique subscriber identity number granted to the customer at the time of subscription.*
- * *Visiting network maintains temporary subscriber record for the said mobile device and provides an internal temporary phone number from backend system to the mobile device which is not visible to human.*
- * *Home network also updates its register to indicate that the mobile is on visitor network so that information sent to that device is correctly routed.*
- * *The Hexacom's subscriber in Mumbai, who is temporarily registered as Airtel's subscriber makes calls in Mumbai and the minutes are registered in his identity for which he has to pay through Hexacom Jaipur.*
- * *Alternatively, a called from Jaipur makes a call to Hexacom's subscriber which is routed to the home network of Hexacom subscriber in Jaipur.*
- * *Home network then forwards all incoming calls to the temporary phone number which terminates at the device of roaming, subscriber (in Mumbai) who is now using the services of the visiting network (i.e. Airtel):*
- * *The entire process above is automatic and does not involve any human intervention at any stage.*

Billing process

- * *Usage of roaming subscriber in visited network is captured in a file called TP, i.e. transferred account procedure for GSM/CIBER, i.e., cellular inter-carrier billing exchange record for.*
- * *TAP file contains details of calls made by subscriber, viz., location, calling party, time of call and duration, etc.*
- * *TAP/CIBER files are rated as per tariffs charged by visiting network operator.*
- * *Such TAP/CIBER file is transferred to home network of subscriber (i.e. to Hexacom).*

- * *Home network (i.e. Hexacom) then bills these calls to the Hexacom's subscriber and pays roaming charges based on the TAP to the visited network operator (i.e. Airtel). The roaming operator charges as per the roaming agreement with Hexacom, whereas the subscriber is billed as per the tariff subscribed.*
- * *The entire process is automatic.*

It is concluded that the above transaction flow that the service of providing airtime by visiting telecom circle is directly to the subscriber and not to Hexacom. The subscriber of Hexacom uses the network set up by the visiting circle and instead of amount being recovered from the roaming subscriber, the visiting circle sends the air minutes to be recovered from the roaming subscriber to the Home circle for recovery from the subscriber who had visited the visiting circle.

Technical fees

- * *It is an accepted fact that technical service can be said to have been rendered if there is an involvement of human element or there have been use of cerebral faculties in the provision of technical services by the recipient of fee.*
- * *This is so because the word "technical" comes in between the words "managerial and consultancy services". Based upon the principles of "nositur a sociis" there has to be an element of manual intervention at the time when the service is being rendered.*
- * *Technical services should have a fact situation of imparting technical knowledge involving or concerning applied and industrial science.*

The Id AR further argued that finding of the Id CIT(A) are based on contract between two operators but contract has no relevancy on the nature of the service whether technical or otherwise. The Id CIT(A) partly accepted that roaming process is technical because it uses various instruments such as MSC (Mobile Switching Centre), VLR (Visitor Location Register), Radio network, towers, BTC etc. but the system is operated/managed by the Highly skilled professionals. The assessee's argument was that the roaming service is managed automatically by machines and payment for roaming charges are not fees for technical services. In case of fault in a breakdown of a system, the professional people are required to monitor the telecom network to be in a robust

condition in order to do business for self. This monitoring does not have any connection with roaming charges paid by the subscriber. If a telecom network breaks down there is no business and thus no payment. Existence of IMSI is only a facility to communicate and does not result the roaming services provided on a standard facilities to be a technical service. The whole roaming process is automatically and there is no human interference in it. The human interference is required to maintain the robust network only to ensure break down free service to the subscriber. The network owner has to maintain for itself, its network in robust condition. The technical support of the staff is required to maintain the equipment and gazettes but it is not a service for roaming facility provided to the subscriber. There is commercial arrangement to connect the technical networks basically to be able to do business. In fact DOT mandates that it should be so connected. There is no payment made for connecting the networks. Payments are made for calls which the roaming subscriber makes. If no calls are made no payment is made in spite of the fact that the networks are inter connected. He further relied on the decision in the case of CIT Vs. Bharti Cellular Ltd. 319 ITR 139 (Del) wherein it has been held by the Hon'ble Delhi High Court that roaming services not involving human interference and is not technical services as contemplated under Explanation 2 to Section 9(1)(vii) of the Act and not liable for tax deduction at source U/s 194J of the Act. This view has been earlier held by the Hon'ble Madras High Court in the case of Skycell Communications Ltd. Vs. DCIT (2001) 251 ITR 53 (Mad) order dated 23/2/2001 wherein the Hon'ble High Court has held that provisions of Cellular mobile telephone facility to subscribe is not a technical service. Deduction of tax at source need not to be made from subscriptions U/s 194J of the Act. He further relied on the decision in the case of Jaipur Vidyut Vitran Limited Vs. DCIT (2009) 123 TTJ 888 (JP Trib) wherein it has been held that Section 194J would have application only when the technology or technical knowledge of person is made available to other

and not where by using technical systems, services are rendered to others. Rendering of services by allowing use of technical system is different from charging fees for tendering technical services. The applicability of Section 194J would come into effect only when by making payment of fee for technical services, assessee acquires certain skill/knowledge/intellect which can be further used by him for its own purpose/research. Where facility is provided by use of machine/robot or where sophisticated equipments are installed and operated with a view to earn income by allowing the customers to avail of the benefit by user of such equipment, the same does not result in the provision of technical service to the customer for a fee. Therefore, he argued that in roaming charges paid by the assessee to the other operators are not fees for technical services. The Id AR further relied on the decision in the case of iGATE Computer Systems Ltd. Vs. DCIT in ITA No. 1301 to 1303& 1616/PN/2013 for A.Y. 2007-08 to 2010-11 wherein the Hon'ble Pune Bench of ITAT had considered whether any human intervention is required for providing the data link services and are liable to be deducted TDS U/s 194J of the Act and held that payments made for utilizing such services was not in the nature of technical services governed by Section 194J of the Act. He further relied on the decision of ITAT Ahmadabad Bench in the case of Canara Bank Vs. ITO 305 ITR (AT) 189 wherein MICR charges paid to SBI held not to be covered U/s 194J read with Section 9(1)(vii) Explanation-2. He also relied on the decision of Hon'ble Bangalore ITAT in the case of Bangalore Electricity Supply Co. Ltd. Vs. ITO(TDS) order dated 16/3/2012 2012(20) ITR (Trib) 265 wherein payment made by State Load Dispatch Center (SLDC) is held not liable to be deducted TDS U/s 194J of the Act. The Id AR further relied on the decision of Hon'ble Mumbai ITAT in the case of Maharashtra State Electricity Distribution Co. Ltd. 25 Taxman 164, Siemens Limited 30 Taxmann.com 200, ITAT Kolkata Bench decision in the case of Right Florists Pvt. Limited ITA No. 1336/Kol/2011 and ITA Delhi bench decision

in the case of Delhi Transco Ltd. (ITA No. 755(Del)/2011 A.Y. 2005-06. He also relied on the decision in the case of DCIT Vs. Parasrampuriah Synthetics Ltd. 20 SOT 248 (Delhi). The revenue filed appeal against the order of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd. before the Hon'ble Supreme Court. The Hon'ble Supreme Court has held as under:-

"In cases requiring examination by technical experts, the Department ought not to proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with technological advancement, the Department ought to examine technical experts so that the matters could be disposed of expeditiously. Further, this would enable the appellate forum, including the Supreme Court, to decide the legal issues based on the factual foundation.

Held accordingly, remanding the matters for determination with technical assistance, that in these cases, in which a cellular provider under an agreement pays interconnect/access/port charges to BSNL/MTNL, the question whether the cellular provider has rendered technical services and has to deduct tax at source, depended on whether the charges were for technical services, and this involved determination of whether any human intervention was involved, which could not be determined without technical assistance.

Decision of the Delhi High Court in CIT v. BHARTI CELLULAR LTD. [2009] 319 ITR 139 set aside and matter remanded to the Assessing Officer with directions.

After this decision, the Id Assessing Officer examined the technical expert of the C-DOT on 29/09/2010 in respect of IUC and which were cross examined on 04/10/2010 by M/s Bharti Cellular Limited, Delhi. The technical experts reexamined on 04/10/2010 on this issue and admitted that roaming services does not require any human intervention, it operates automatically. The Id AR also drawn our attention on independent opinion taken from Director CMAI, Ex-Director (C&M), BSNL, Ex-Member Telecom Commission on 24/12/2010 and admitted that whole interconnected uses process, no manual intervention is required. He further drawn our attention on page No. 651 to 652 for postpaid as well as prepaid roaming charges charged between the operators from Mr. Kapoor Singh Guliani. The appellant also taken

opinion from Former Chief Justice of India Mr. Kapadia on IUC post technical examination, cross examined and reexamination. Who also opined that Hon'ble Supreme Court decision dated 12/08/2010 is an order not judgment as the principle of law was not res-integra. The word technical services have got to be read in narrow since as held by the various Hon'ble High Courts and the Tribunal by applying principles of "nositur a sociis" particular because the word technical service in Section 9(1)(vii) read with Explanation-2 in between word managerial consultancy services. Finally he opined that such setting up/installation, repairing, servicing, maintenance are separate activities, they are back office functions and are require human intervention. But the roaming process between participating entities is fully automatic and does not require any human intervention. Accordingly, the interconnected uses charge will not attract the provisions of Section 194J read with Section 9(1)(vii) read with Explanation-2 thereto. Therefore, he prayed to delete the addition.

If we examine the issue in both the matters, a irresistible conclusion about the lis involved in both the appeals are the same. Accordingly, we have no hesitation to apply the reasoning given in ITA No. 656/JP/2010 to the present set of facts. For the sake of clarity, we are hereby reproducing para 6 of the said order as under :-

"6. We have heard the rival contentions of both the parties and perused the material available on the record. Recently this Bench has decided similar issue in the case of Tata Tele Services, which is identical to the assessee's case. The facts of the case has been demonstrated by the AR that the assessee was issuing bill on net amount on MRP has been fixed on prepaid card sold. The assessee has not transferred any income to the distributor but the distributor was allowed to avail the airtime to the extent of MRP price. In books of account, the assessee had credited these receipts on net basis. The finding on the case of Tata Tele Services is reproduced as under:

"2.23. We find merit in the contention of Id. Counsel that there is no jurisdictional high court judgment on this issue. Hon'ble Karnataka High Court Judgment is elaborate, detailed, considers the previous Delhi and Kerala High Court judgment against the assessee and is latest comprehensive adjudication on the issue. Even if it is held that there exist divergence of judicial opinion a view favourable to the assessee is to be adopted as held by Hon'ble Supreme Court in Vegetable Products Ltd. And Vatika township case (supra). From this angle also in these facts and circumstances Hon'ble Karnataka High Court judgment is applicable to the assessee's case. Respectfully following the same we hold that:

- a. The relationship between assessee and its distributors qua the sale of impugned products is on principal to principal basis; the consideration received by assessee is sale price simpliciter.*
- b. There is no relationship of Principal and agent between assessee and distributors as held by authorities below their orders are reversed.*
- c. Looking at the transaction being of Sale/Purchase and relationship being of principal to principal the discount does not amount to commission in terms of sec. 194H, the same is not applicable to these transactions. Therefore, assessee cannot be held in default; impugned demand raised applying sec. 194H is quashed. Assessee's grounds are allowed."*

By respectfully following our own decision on similar fact, we reverse the order of the Id CIT(A) and allow the appeal of the assessee on this ground."

- 3.3. In the light of above, respectfully following the decision of Coordinate Bench in the matter of M/s. Bharti Hexacom Ltd. for the assessment year 2009-10, we hereby reverse the order of Id. CIT (A) and allow the appeals of the assessee relating to Ground Nos. 2, 3 & 4. Having allowed the appeals, we deem it appropriate to put caveat to the effect that in case the Hon'ble Supreme Court in the matter of Vodafone decides the issue of roaming charges against the assessee, the AO or any other Officer authorized in this behalf may move an appropriate application."

Thus, the Tribunal decided the issue in favour of the assessee by holding that the fee paid for roaming charges does not fall in the ambit of fee for technical services as no human intervention is required in providing the roaming services by the mobile service provider. The revenue challenged this order of the Tribunal before the Hon'ble High Court and the Hon'ble High Court vide decision dated 11/7/2017 by following the decision of the Hon'ble Karnataka High Court in the case of CIT TDS, Bangalore Vs Vodafone South Ltd. (2016) 241 Taxman 497 (Kar) has decided this issue in favour of the assessee and against the revenue in para 53 to 55 as under:

- “53. Regarding Section 194J of the Act, the in view of the Kerela High Court decisions, the issue is answered in favour of the assessee and third issue even as per the statutory definition, there is no service and Sections 201 and 194H would not apply in view of the agreement as referred hereinabove.*
- 54. In view of the agreement the issue regarding 194H and 194J as held in other cases, both the issues are answered in favour of the assessee.*
- Vodafone*
- 55. Issues regarding Sections 194H, 194J and 201 of the Act, they are answered in favour of assessee.”*

Thus, in view of the orders of this Tribunal in assessee's own case as well as the judgment of the Hon'ble Jurisdictional High Court, we decide this issue in favour of the assessee and against the revenue. The orders of the authorities below qua this issue are set aside. ”

Following the earlier orders of this Tribunal, we decide this issue in favour of the assessee and against the revenue.

5. Ground Nos. 4 & 5 are consequential and accordingly stand disposed off in terms of the findings in ground nos. 2 & 3.

6. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 08/03/2018.

Sd/-
(भागचन्द)
(BHAGCHAND)
लेखा सदस्य/Accountant Member

Sd/-
(विजय पाल रॉव)
(VIJAY PAL RAO)
न्यायिक सदस्य/Judicial Member

Jaipur
Dated:- 08/03/2018.
Das/

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

1. The Appellant- Vodafone Digilink Ltd., Jaipur.
2. The Respondent – The ITO (TDS-2), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 67/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

