

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH**

BEFORE MS. DIVA SINGH, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA Nos. 21 to 24/CHD/2018

The DCIT (TDS), Chandigarh.	A.Ys: 2005-06,2006-07,2008-09 2009-10 Vs.	M/s Idea Cellular Ltd., C-105, Industrial Area, Phase-VII, Mohali. PAN No. : AABCB9505H
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(Appellant)

(Respondent)

Appellant by :	Smt. Chanderkanta, Addl. CIT
Respondent by :	Shri Ronak G. Doshi, CA

Date of hearing :	01.05.2018
Date of Pronouncement :	28.06.2018

ORDER

PER BENCH

By these are four appeals, the Revenue assails the correctness of the separate orders dated 17.10.2017 of CIT(Appeals)-2 Chandigarh pertaining to 2005-06, 2006-07, 2008-09 and 2009-10 assessment years on identical issues. Accordingly, it was the common stand of the parties before the Bench that the arguments advanced in ITA 21/CHD/2018 would address the issues in the remaining three appeals also as facts, circumstances and position of law thereon continues to remain the same.

2. Although the present appeals have been filed by the Revenue, the ld. AR made a mention at the outset that the present appeals filed by the Revenue are fully covered in favour of the assessee by virtue of the consistent orders of the ITAT in assessee's own case alongwith decision of different Benches of the Tribunal wherein identical issues have been considered by the ITAT and consistently the issue has been decided in assessee's favour relying on decisions of the different High Courts and also the Apex Court. Copies of the decisions referred to in the impugned order, it was submitted, are compiled and are available in the Paper Book filed. Reliance was placed upon these decisions. The list of cases indexed is extracted hereunder :

1	Skycell Communications Limited Vs. DCIT (251 ITR 53) (Mad.)
2	CIT vs. Bharti cellular and others (175 taxman 573) (Del. HC)

3	CIT vs. Bharti cellular (193 Taxman 97) (SC)
4	CIT v Vodafone South Ltd. (241 Taxman 497) (Ear.)
5	Appellant's own case (ITA No. 94-96/JP/2013 and 917/JP/2012 order dated July 24, 2015)(TJaipur)
6	Appellant's own case before Hon'ble Rajasthan High Court (87 tax.mann.com 295)(Raj.)
7	Appellant's own case (ITA No. 758-761/Bang/2014 order dated November 06, 2015) (T Bang)
8	M/s. Dishnet Wireless Limited vs. DCIT (ITA No. 320 to 329 / Mds / 2014, dated July 20, 2015) (Chennai)
9	Vodafone East Limited vs. Additional CIT (61 taxmann.com 263) (Kol.)
10	Bharti Airtel Ltd vs. Income-tax Officer (TDS) (178 TTJ 708) (TDel)
11	DCIT vs Vodafone Essar Digilink Ltd (ITA No. I950/Del/2014)(TDel)
12	Tata Teleservices Ltd vs ITO (3328 to 3332/Del/2015)(TDel)

2.1. Accordingly, it was his submission that in case the Revenue seeks time to go through the decisions, he would pose no objection but it may be communicated to him at the outset as he is traveling from outstation.

3. The ld. Sr.DR Ms. Chanderkanta stated that though she is familiar with the facts, however she sought a pass over to consider the decisions relied upon and stated that in case she needs time, she will indicate it at the earliest. Accordingly, a pass over was given and the remaining matters were taken up as per the Cause List.

4. After some time, the ld. Sr.DR on going through the record and the decisions in the intervening period, made a mention that she has gone through the decisions and would seek to place reliance upon the assessment order. No distinguishing fact or decision was referred by her to for taking a contrary view.

5. The ld. AR addressing the background submitted that in 2005-06 assessment year the issue had travelled to the CIT(A) in the first round and the issue was remanded for fresh adjudication in order to comply with the position of law as laid down by the Apex Court in the case of M/s Bharti Cellular Ltd. 193 Taxman 97. Pursuant to this order the Department had sought technical reports from the Experts. Considering the Reports, the TDS Officer passed an order dated 24.02.2014. The correctness of the said decision was challenged before the CIT(A) who allowed the relief considering various decisions passed in the case of similarly situated cases on the same issue and the present appeals emanate from these orders. It was submitted that since the position on facts and law was not disputed by the Revenue, he would not make any

further arguments apart from placing heavy reliance on the impugned order and the decisions cited.

6. We have heard the rival submissions and perused the material on record. The relevant facts of the case are that the assessee is engaged in the business of providing telecommunication services in telecom circles of Punjab for which purposes, it had entered into roaming agreements with OTOs. The AO noticed that no TDS has been deducted by it from the roaming charges paid by the assessee. The AO held the assessee to be assessee in default u/s 201(1) r.w.s. 194 J of the Act as he was of the view that roaming is nothing but fees for technical services and since there was human intervention during the roaming process, TDS u/s 194J of the Act should have been deducted.

6.1 It is seen from the record that the assessee preferred an appeal against the order of the AO. The CIT(A) while deciding the appeals of the assessee for the assessment year 2005-06 directed the AO to take a fresh decision on the applicability of Section 194J to the payment made for national roaming charges paid by the assessee in the light of the observations of the Hon'ble Supreme Court in the case of M/s Bharti Cellulars Ltd. (193 Taxman 97).

6.2 The record shows that in compliance of the directions of the Hon'ble Supreme Court, the Department had sought the services of C-DOT, a Government of India undertaking after making certain enquiries. The C-DOT deputed Mr. Tanay Krishna and Mr. Ashok Mittal, technical experts for this purpose. The TDS officer recorded the statements of the above technical experts on 08.01.2014 and copies of the statements so recorded were made available to the assessee. Subsequently, the assessee requested for a cross examination of the technical experts which was allowed on 31.01.2014. Copies of the cross examination statements were also made available to the assessee and the assessee filed its reply on 12.2.2014 and 17.2.2014. After considering the opinion of the technical experts as well as the explanation of the assessee, the TDS officer held that, *"the process of interconnection for the purpose of carriage of calls involves many processes like maintenance, supervision and monitoring, fault detection and rectification, monitoring and quality of signals, provisions of additional capacity when the installed capacity gets exhausted, capacity of medicine etc. The entire process is dependent*

upon the services of highly technical manpower and installations of network having various peripheral, hardware and software which are technical in nature. This hardware, software along with peripherals needs continuous monitoring, maintenance etc. to ensure fault free carriage of call for purpose of interconnection. This essentially involves the human intervention." Accordingly, it was held that the payments made for interconnection are fees for technical services and need to be covered u/s 194J of the Income tax Act 1961.

7. Aggrieved by this, the assessee filed an appeal before the CIT(A). The CIT(A) relying upon order dated 12.06.2015 in the case of M/s Bharti Hexacom Ltd. Vs ITO(TDS)-II, Jaipur in its order dt. 12.6.2015 in ITA No. 656/JP/2010 and on the decision rendered by the Co-ordinate Bench at Jaipur in assessee's own case in ITA 94 to 96/JP/2013 and also relying upon yet another decision in assessee's own case on similar set of facts and circumstances rendered by the Co-ordinate Bench at Bangalore in ITA 608 to 651/Bang/2014 which had been confirmed and upheld by Hon'ble Karnataka High Court in the case of CIT, TDS, Bangalore Vs Vodafone South Ltd. (2016) 72 Taxmann.com 347 allowed the appeal of the assessee. The present appeals emanate from the said orders dated 17.10.2017 of CIT(A)-2 Chandigarh.

7.1 We have gone through the material available on record and we note that the assessee before the CIT(A) made the following submissions on facts and law which have been summarized by the CIT(A) in para 5.3 of his order as under :

5.3 During the course of the appellate proceedings the appellant filed written submissions dt. 24.03.2017 and 22.06.2017 and claimed that the payments made by it for roaming facilities do not attract provisions of section 194J of the Act since they are not in the nature of payment, for technical services. In its support, the appellant relied upon various decisions including decisions on the issue in question in its own case as well as the following ones:

- 1. M/s Bharti Hexacom Ltd. vs ITO (TDS) (ITA No. 656/JP/2010)(ITAT, Jaipur);*
 - 2. M/s Idea Cellular Ltd. vs ITO (ITA No. 94 to 96/JP/2013 and 917JP2012)(ITAT, Jaipur);*
 - 3. M/s Hindustan Coca Cola Beverages Pvt. Ltd. and Others vs CIT(2017)(ITA No. 205/2005)(HC, Rajasthan)*
 - 4. M/s Idea Cellular Ltd. vs ACIT (ITA No. 648 to 65 l/Bang/2014)(ITAT, Bangalore);*
 - 5. CIT vs M/s Vodafone South Ltd. (241 Taxmann.com 496)(HC, Karnataka);*
 - 6. M/s Vodafone East Ltd. vs Addl. CIT(2015)(61 Taxrnnn.com 263)(ITAT, Kolkota);*
 - 7. M/s Bharti Airtel Ltd. vs ITO (TDS) (67 Taxmann.com 223)(ITAT, Delhi);*
- Accordingly, the appellant made the following submissions:*

"Thus, the appellant humbly submits that following the view taken by various High Courts and Tribunals, especially the latest decisions of the Hon'ble Jaipur Tribunal & Hon 'ble Bangalore Tribunal in appellant's own case(supra) and also in the case of Bharti Hexacom (supra) and the Hon'ble Chennai Tribunal in case of Dishnet Wire less (supra) and the Hon'ble Kolkota Tribunal in the case of Vodafone (supra) after considering the judgment of the Hon'ble Supreme Court in case of Bharti Airtel (supra), as discussed in Proposition-I and Proposition-II, and also in the absence of any contrary judgments as on date of any of the Hon'ble High Courts, no tax is deductible at source u/s 194J of the Act on payment of roaming charges to the OTOs. "

7.2 We further find that considering this the issue was decided by the CIT(A) in the following manner :

5.4 *I have gone through the order of AO₅ the decisions that the appellant has relied upon in its support and have carefully considered the various submissions made by the appellant. Since the grounds of appeal preferred by the appellant are inter-connected as well as consequential to each- other, they are not dealt separately and are considered together. It would not be out of contort to reproduce the observation and findings of Hon'ble ITAT, Jaipur in the case of M/s Bharti Hexacom Ltd. Vs ITO(TDS)-II, Jaipur in its order dt. 12.6.2015 in ITA No. 656/JP/2010 as under:*

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through border of the assessing officer, Ld. CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT, TDS, New Delhi in the case of M/s Bharti Cellulare Ltd; thereafter cross examination made by M/s Bharti Cellulare Ltd; also opinion of Hon'ble the then Chief Justice of India Mr. S.H.Kapadia dated 03/09/2013 and also various judgment is given by the ITAT, Ahmedabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance/capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and do not require any human intervention. The term Interconnecting User Charges (IUC) also signifies charges for connecting two entities. The coordinate bench also considered the Hon'ble Supreme Court decision in the case of M/s Bharti Cellulare Ltd in the case of i-Gate Computer Systems Ltd and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in section 194J read with section 9(1) (vii) read with Explanation-2 of the Act Respectfully following above judicial precedents, we hold that the charges are not fees for rendering any technical services as envisaged in section 194J of the Act. "

The above finding of fact was again reiterated by Hon'ble ITAT, Jaipur in appellant's own case in ITA-Nos. 94 to 96/JP/2013 as well as by Hon'ble ITAT Bangalore in appellant's own case in ITA Nos. 608 to 651/Bang/2014. This was also confirmed and upheld by Hon'ble Karnataka High in the case of CIT, TDS, Bangalore vs Vodafone South Ltd (2016) 72 Taxmann.com 347 in which their lordship held that -

"Reading of the above order clearly show that fact-situation was essentially similar to the one here in the case of the assessee. Assessee was also treated as one in default for failure to deduct tax at source on roaming charges paid to other distributors. Therefore the coordinate bench of the Tribunal in the case of Bharti Hexacom Ltd (supra) would squarely apply. We also find that the said decision has been followed by Ahmedabad bench in the case of Vodafone Essar Gujarat Ltd v. ACIT (TDS) (ITA NO.386/Add/2011, dt.07.07.2015). Following these, we are of the opinion that assessee could not have been

deemed as one in default for non-deduction of tax at source on roaming charges paid by it to other service providers. Ground 3 is allowed. "

Similar findings are also rendered by Hon'ble ITAT Kolkata in the case of Vodafone East Ltd. vs Addl. CIT (2015) 61 Taxmann.com 263 as well as by Hon'ble ITAT, Delhi in the case of Bharti Airtel Ltd. vs ITO, TDS (2016) 67 Tamann.com 223. More recently, in the case of Hindustan Coca Cola Beverages Pvt. Ltd and others (D.B. ITA No. 205/2005), the Hon'ble Rajasthan High Court had the occasion to examine the issue as to whether TDS is applicable u/s 194J of the Act on roaming charges paid for facilities provided by service provider, as this interconnection is managed/controlled/monitored by human intervention. In their order dt. 11.07.2017, while disposing. off a bunch of appeals involving various mobile service providers including the appellant, M/s Tata Teleservices Ltd., M/s Bharti Hexacom Ltd. and M/s Vodafone Digilink Ltd. the Hon'ble High Court dismissed the Departmental appeals on this issue. The facts and the issues involved in the present appeal are identical to the issues considered by Hon'ble High Courts of Karnataka and Rajasthan as has been discussed above. Accordingly, respectfully following the decisions of Hon'ble Karnataka High Court in the case of CIT, TDS, Bangalore vs Vodafone South Ltd., Hon'ble Rajasthan High court in the case of case of Hindustan Coca Cola Beverages Pvt. Ltd and others as well as in the decision of Hon'ble Jaipur Tribunal & Hon'ble Banglore tribunal in appellant's own case (supra), it is held that payments made for interconnection are not fees for rendering any technical services as envisaged in section 194J of the Act. Therefore, no tax is deductible at source u/s 194J of the Act on payment of roaming charges to the OTOs and the appellant therefore can't be treated as an assessee in default."

8. On a careful reading of the impugned order wherein consistently there are orders of Co-ordinate Benches in similar set of facts in the case of the assessee itself, which we note, have not been distinguished either on facts or in law nor have been upset by any higher Forum. In these peculiar facts and circumstances, we find that departmental appeals are without any merit. The facts taken on record which have not been upset are that for installation/setting up/repairing/servicing/maintenance/capacity augmentation etc. human intervention is required, however after this process is complete, the interconnection between the operators is automatic and at that stage, no human intervention is required. These conclusions have been arrived after considering the Reports of the technical experts, their cross-examination etc. We note that Interconnecting User Charges (IUC) which signifies charges for connecting two entities. The Co-ordinate Benches have relied upon the order in the case of i-Gate Computer Systems Ltd where decision of the Apex Court in the case of M/s Bharti Cellulares Ltd. has been considered and also on the decision of Data Link transfer wherein considering similar facts, it has been held that it does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in section 194J read with section 9(1) (vii) read with Explanation-2 of the Act. We find that in the absence of any change in facts or law, the payments made for interconnection are not fees for rendering any

technical services as envisaged in section 194J of the Act. Therefore, no tax is deductible at source u/s 194J of the Act on payment of roaming charges to the OTOs and the assessee therefore cannot be treated as an assessee in default. Apart from the various decisions of High Courts and ITAT orders cited, the issue stands concluded in favour of the assessee by the consistent orders of ITAT Bangalore and Jaipur Benches in assessee's own case. In the absence of any distinction on facts, circumstances or position of law, the departmental appeals are dismissed.

9. In the result, the appeals of the Revenue are dismissed.

Order pronounced in the Open Court on 28.06.2018.

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

'Poonam'

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR

Asstt. Registrar
ITAT Chandigarh