

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. Nos. 2195 & 2196/Ahd/2016
(Assessment Years : 2008-09 & 2009-10)

The ACIT,
TDS Circle,
Ahmedabad-380014

Vs. M/s. Bharti Airtel Ltd.,
Circle Officer,
II Floor, Rudra Square,
Opp: Gurudwara,
S.G. Highway,
Ahmedabad – 380 009.

[PAN No. AAACB 2894 G]

(Appellant)

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(Respondent)

Appellant by : Shri Vinod Tanwani, Sr. D.R.
Respondent by : Shri Anil Bhalla, A.R.

Date of Hearing 10/12/2018
Date of Pronouncement 28/02/2019

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeals filed by the Revenue are against the order dated 10.06.2016 passed by the Commissioner of Income Tax (Appeals)-8, Ahmedabad under section 201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter referred as to “The Act”) arising out of the order dated 26.03.2014 by the Dy. Commissioner of Income Tax, TDS Circle, Ahmedabad for the Assessment Years 2008-09 & 2009-10.

2. The revenue has challenged the order mainly on the aspect that the Learned CIT(A) has erred on facts and in law in deleting the demand raised u/s 201(1A)/201(1) of the Act on roaming charges paid to other telecom companies of Rs.71,30,810/- (including interest u/s 201(1A) of the Act) for A.Y. 2008-09 & Rs. 38,07,820/- (including interest u/s

201(1A) of the Act) for A.Y. 2009-10 by invoking provisions of Section 194J of the Income Tax Act.

3. Since common issues are involved in both the matters the same are heard analogously and are being disposed of by a common order.

4. The assessee company is running business of telecom operations and providing telecom services. Initially on 02.01.2009, the Assessing Officer passed an order u/s 201(1)/201(1A) of the Act holding that the payment by the company to the other telecom company for roaming charges should have been subjected to deduction u/s 194J and 194C of the Act thereby treating the assessee as “assessee in default” for not deducting TDS. The said order was upheld by the Learned CIT(A) when an alternate plea was raised by the Learned AO stating that roaming charges is nothing but the rent paid for the use of machinery equipment and the assessee is require to deduct TDS at source under the provisions of section 194I of the Act, which was confirmed by the said Learned CIT(A). In appeal, preferred by the assessee, the Hon’ble Tribunal relying upon the judgment passed in the matter of CIT-vs-Bharti Cellular Ltd. reported in 330 ITR 239 dated 12.08.2010 restored the matter to the file of the Assessing Officer to determine whether any manual intervention is in existence in the process of traffic of calls and consequently applicability of section 194J upon seeking opinion of technical expert on the modalities of operations of roaming facilities. As a result whereof the Learned AO initiated fresh proceeding and ultimately by and under an order dated 26.03.2014 passed u/s 201(1)/201(1A) r.w.s. 254 of the Act rejected the claim of the assessee by declaring the assessee as “assessee in default” for non-deduction of TDS on roaming charges payment of Rs.5,56,59,409/- and Rs. 3,14,09,608/- respectively for A.Y. 2008-09 and 2009-10 thereby raised the demand of Rs.71,30,810/- and Rs.38,07,820/- respectively.

5. In appeal, the Learned CIT(A) deleted such demand on the roaming charges paid to the other telecom companies for both the A.Y. 2008-09 & 2009-10 following the judgment passed by the Hon'ble ITAT Kolkata Bench in the case of Vodafone East Ltd., in ITA No.1864/Kol/2012 for A.Y. 2009-10, the decision passed by the Hon'ble ITAT Chennai in the case of DCIT-vs-M/s. Dishnet Wireless Ltd. in TS-409-ITAT-2015(CHNY) and the decision of Delhi ITAT in assessee's own case in ITA No.3593 to 3596/DEL/2012 where it was consistently held that there is no manual or human intervention involved in the process of interconnection charges upon considering the technical expert opinion and their cross examination. It was held by those pronouncements that interconnection charges paid by the appellant to other telecom operators are not in the nature of fee for technical services and therefore there is no liability to deduct tax thereon. In appeal, the Learned CIT(A) deleted the such addition made by the Learned AO. Hence the instant appeal preferred by Revenue before us.

6. At the time of hearing of the instant appeal the Learned Counsel appearing for the assessee submitted before us that the case of the assessee is covered by number of judgments passed by the different Tribunals where it was held that in the process of roaming services no human intervention is required and therefore payment of roaming charges does not fall under the ambit of TDS provisions u/s 194J of the Act. He further relied upon the order passed by the Circuit Bench at Mysore in the matter of M/s. Bharti Airtel Ltd.-vs.-ACIT in ITA No.990/Bang/2014 for A.Y. 2005-06 and ITA Nos.743, 744/Bang/2015 for A.Ys. 2006-07 & 2007-08 respectively. The order passed by the Learned Tribunal of Jaipur Bench in the matter of M/s. Bharti Hexacom Ltd.-vs-ITO(TDS) passed in ITA No.656/JP/2010 for A.Y. 2009-10. the order passed by the Hon'ble High Court of Karnataka in the matter of CIT(TDS)-vs-M/s. Vodafone South Ltd. were also relied upon by the Learned AR. On the contrary the Learned DR failed to controvert the contentions made by the assessee.

7. Heard the Learned representative of the respective parties, perused the relevant materials available on record. We find from different judgments placed before us that the issue involved in the matter as to whether roaming services require any human intervention and thereby payment of roaming charges whether falls under the ambit and purview of TDS provisions u/s 194J of the Act has been held in favour of the assessee holding that there is no manual or human intervention involved in the process of interconnection charges. In fact it is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the calls get connected automatically without any human intervention and it is for this, the roaming charges is paid by the assessee to the visiting operator for providing this service. The interconnection charges paid by the appellant to other telecom operators are therefore, not in the nature of fees for technical services and therefore there is no liability to deduct tax thereon. The judgment passed by the Mysore Bench relied upon the order passed by the Jurisdictional Karnataka High Court in the matter of CIT-vs-Vodafone South Ltd. reported in 290 CTR 436 (Kar) held that the process involved in the roaming connectivity does not involve the human intervention and thus the services do not fall within the ambit of "technical services". Therefore, the assessee was not required to deduct tax at source on such payment. The operative portion whereof is as follows:

"13. After hearing the ld standing counsel for the Revenue and perusing material on record, we find that the issue in this present appeals is covered against the Revenue by the decision of Jurisdictional High Court in the case of CIT vs. Vodafone South Ltd., vide 290 CTR 436 (Kar) wherein the Hon'ble High Court after referring to the technical expertise of C-Dot on 29/09.2010 in respect of IUC Ltd., and the technical experts reexamined the matter and opined that the roaming services does not require any human intervention and it operates automatically, wherein at paras 7 to 12 of the order it is held as under:

"We have heard Mr. K.V. Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to the other service provider can

be said as 'technical services'; one was the decision of the Apex Court in the case of Commissioner of Income-tax, Delhi vs. Bharti Cellular Limited, reported at [2010] 193 Taxinan 97 (SC); and the another was the decision of the Apex Court in the case of Commissioner of Income-tax-A, Mumbai vs. Kotak Securities Limited, reported at [2016] 67 taxmann.com 356 (SC) and it was submitted that if the observations made by the Apex Court in the above referred decisions are considered, the decision of the Tribunal would be unsustainable and consequently, the questions may arise for consideration before this Court in the present appeals.

9. *We may record that in the decision of the Apex Court in the case of Bharti Cellular Limited (supra) the Apex Court after having found that whether human intervention is required in utilizing roaming services by one telecom mobile service provider Company from another mobile service provider Company, IS an aspect which may require further of the evidence and therefore, the matter was remanded back to the Assessing Officer. Further, in the impugned order of the Tribunal, after considering the above referred decision of Bharti Cellular Limited, the Tribunal has further not only considered the opinion, but found that as per the said opinion the roaming process between participating entities is fully automatic and does not require any human intervention. Therefore, we do not find that the aforesaid decision in the case of Bharti Cellular Limited, would be of any help to the appellants - Revenue.*

10. *In the another decision of the Apex Court, in the case of Kotak Securities Limited, the matter was pertaining to the charges of the Stock Exchange and the Apex Court, ultimately, found that no TDS on such payment was deductible under Section 194J of the Act. But the learned Counsel for the appellants - Revenue attempted to contend that in paragraphs 7 and 8 of the above referred decision of the Apex Court, it has been observed that if a distinguishable and identifiable service is provided, then it can be said as a "technical services".*

Therefore, he submitted that in the present roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".

11. *In our view, the contention is not only misconceived, but is on non existent premise, because the. subject matter of the present appeals is not roaming services provided by mobile service provider to its subscriber or*

customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

12. *As such, even if we consider the observations made by the Apex Court in the case of Bharti Cellular Limited, supra, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as technical services" or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. Coupled with the aspect that the tribunal has relied upon the decision of the Delhi High Court for taking support of its view.*

13. *In our view, the Tribunal is ultimately fact finding authority and has held that the roaming process between participating company cannot be termed as technical services and, therefore, no TDS was deductible. We do not find that any error has been committed by the Tribunal in reaching to the aforesaid conclusion. Apart from the above, the questions are already covered by the above referred decision of the Delhi High Court, which has been considered by the Tribunal in the impugned decision.*

14. *Thus, following the decision of Hon'ble Jurisdictional High Court we hold that the process involved in the roaming connectivity does not involve any human intervention and, therefore, the services does not fall within the ambit of "technical services". Hence, it is not required to deduct tax at source on such payments."*

8. The order passed by the Learned Tribunal Jaipur Bench in ITA No.656/JP/2010 had also been carefully considered by us. While passing orders in favour of the assessee, the Learned Tribunal observed as follows:

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, Id 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 Bharti Cellular Ltd.; thereafter cross

examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad 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 does not require any human intervention. The term Inter Connecting 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 Bharti Cellular Ltd. in the case of i-GATE Computer System 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. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the ld CIT(A) and assessee's appeal is allowed on this ground also."

9. The Hon'ble High Court of Karnataka in the matter of CIT(TDS)-vs-M/s. Vodafone South Ltd. also had taken the same view in favour of the assessee. While doing so, the judgment passed by the Hon'ble Jurisdictional High Court in the matter of Vodafone Essar Gujarat Ltd-vs-ACIT(TDS) was also taken into consideration. The relevant portion of the said judgment is as follows:

"13. In our view, the Tribunal is ultimately fact finding authority and has held that the roaming process between participating company cannot be termed as technical services and, therefore, no TDS was deductible. We do not find that any error has been committed by the Tribunal in reaching to the aforesaid conclusion. Apart from the above, the questions are already covered by the above referred decision of the Delhi High Court, which has been considered by the Tribunal in the impugned decision."

We find from the order passed by the Learned CIT(A) that all the judgments as discussed hereinabove were considered by the Learned CIT(A) while allowing the claim of the applicant in deleting the demand of Rs.71,30,810/- & Rs.38,07,820/- raised u/s

194J for A.Y. 2008-09 & 2009-10 respectively with the conclusion that the roaming charges paid by the appellant to other telecom companies are not covered under 'fee for technical service' and such payments are out of the purview of TDS provision of 194J of the Act. We find no infirmity in the order passed by the Learned CIT(A). We, therefore, do not hesitate to confirm the same. Therefore, revenue's appeal is devoid of any merit and hence dismissed.

10. In the result, both the appeals of the revenue is dismissed.

This Order pronounced in Open Court on

28/02/2019

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 28/02/2019

Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-8, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad