

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.6703 /DEL/2018 (A.Y 2014-15)
Along with S.A No. 753/DEL/2018 (A.Y 2014-15)**

AT & T Communication Services India Pvt. Ltd. Vatika Triangle, 3 rd Floor, Sushant Lok-1, Block-A, Gurgaon Haryana AACCA8033E (APPELLANT)	Vs	DCIT Circle-3(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Kanchan Kaushal, AR
Respondent by	Sh. Sanjay Goyal, CIT DR

Date of Hearing	19.03.2019
Date of Pronouncement	28.03.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal and Stay Application are filed by the assessee against the order date 25/09/2018 passed by DCIT, Circle-3(2), New Delhi for Assessment Year 2014-15.

2. The grounds of appeal are as under:-

1. Disallowance of year-end accruals

"1.1. On the facts, in the circumstances of the case and in law, the Ld. AO/ DRP erred in making a disallowance of INR 1,10,930/- on account of year-end accruals, representing accruals created towards normal business expenditure incurred by the Appellant, ignoring that such accruals were in accordance with 'matching principle'.

1.2. On the facts, in the circumstances of the case and in law, the Ld.

AO/DRP failed to appreciate that as per the accounting standards notified under section 145(2) of the Act, the appellant was required to make provision for all liabilities/expenses for the subject financial year.

1.3. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating that the appellant produced evidences to the extent of more than 99% for utilization/ reversal made in subsequent years and no adverse finding has been given by Ld.AO/DRP on the same.*

1.4. *On the facts, in circumstances of the case and in law, the aforesaid disallowance on account of year end accruals is grossly incorrect as the same is squarely covered in favour of the appellant by the order of Hon'ble ITAT in its own case for AY 2010 -11.*

1.5. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not allowing deduction of year-end accruals of INR 6,76,11,402/- disallowed in the preceding assessment year (i.e. AY 2013-14).*

1.6. *Without prejudice, on the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not observing that, disallowance made in respect of the aforesaid accruals for the subject year, should be allowed as deduction in the subsequent year in which such accruals are reversed or utilized*

2. Addition on account of mark-up not charged on Support Service charge.

2.1. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in making an addition of INR 64,45,195/- on account of non-charging of mark-up on support service charges billed to AT&T Global Network Services India Private Limited ('AGNSI'), an affiliate company of the Appellant.*

2.2. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating that both the Appellant and AGNSI are profit making entities and hence, there was no incentive / tax saving for either of the parties in entering into such cost recharge arrangement.*

2.3. On the facts, in circumstances of the case and in law, the aforesaid addition on account of mark-up not charged to AGNSI is grossly incorrect, as the same is squarely covered in favour of the appellant by the order of Hon'ble IT AT in its own case for AY 2010-11.

3. Disallowance on account of non-deduction of tax at source on reimbursement made to AT&T World Personnel Services Inc. ('AWPS')

3.1. On the facts, in the circumstances of the case and in law, Ld. AO/DRP erred in disallowing an amount of INR 2,11,84,268/- (reimbursed to AWPS for salaries paid to the employees seconded to Appellant) on account of non-deduction of tax at source under section 40(a)(i) of the Income-tax Act, 1961 ("the Act").

3.2. On the facts, in the circumstances of the case and in law, Ld. AO/DRP failed to appreciate that the impugned payment remitted to AWPS does not constitute Fees for Included Services/Fees for Technical Services in terms of India-US Double taxation Avoidance Agreement as well as under section 9(l)(vii) of the Act and thus, was not liable for tax deduction at source under section 195 of the Act.

3.3. On the facts and circumstances of the case and in law, Ld. AO/DRP erred in not appreciating the fact that Appellant deducted taxes at source under section 192 of the Act in respect of salaries paid to such employees and therefore, reimbursement to AWPS cannot again be subjected to tax deduction at source under section 195 of the Act.

3.4. On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating that provisions of Section 195 of the Act are not per se applicable in the present case as the payments made by the appellant company to AWPS are in the nature of pure reimbursement on cost to cost basis and thus, there is no sum chargeable to tax in India.

3.5. Without prejudice to the above, on the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating that since the appellant has recouped the entire amount remitted to AWPS alongwith mark-up thereon, which has been offered to tax in India, no addition is warranted.

4. Short credit for Tax Deducted at Source

4.1. *On the facts, in the circumstances of the case and in law, the Ld. AO erred in not granting appropriate credit of taxes deducted at source as allowable to the Appellant for the year under consideration.*

5. **Levy of interest u/s 234B and 234C of the Act.**

5.1. *On the facts, in the circumstances of the case and in law, the Ld. AO erred in incorrectly charging interest u/s 234B and 234C of the Act.*

6. *Initiation of penalty proceedings.*

6.1. *On the facts, in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act against the Appellant on account of the above adjustments made in the final assessment order.”*

3. AT&T Communication Services (India) Private Limited (hereinafter referred to as the 'Assessee' or 'ACSI'), a company incorporated on April 23, 1996 under the Companies Act, is a wholly owned subsidiary of AT&T Communication Services International Inc., USA ('AT&T US'). The business of ACSI is divided into three broad segments:

- i) Network Connectivity Services;
- ii) Market research, administrative support and liaison services; and
- iii) Managed Network Services

For the Assessment Year ('AY') under consideration, the Assessee filed its original return of income on November 28, 2014 declaring an income of Rs. 97.87 crores. As against this return of income, the Assessing Officer passed the assessment order u/s 144C read with section 143(3) ("the impugned order") on 25.09.2018 assessing a total income of Rs. 100.64 crores and raised a demand of Rs. 1.49 cr. From a review of the final assessment order passed by the Assessing Officer and the computation of tax and interest demand attached thereto, it was noticed that short TDS credit of Rs. 21,079 was

granted by the Assessing Officer as claimed by the Assessee in its return of income. The Assessee filed a rectification application before the Assessing Officer on October 09, 2018 against the final assessment order with the Assessing Officer, which is pending for disposal. A summary of the additions made is as under:-

<i>Sl No.</i>	<i>Additions</i>	<i>Ground No. of ITA</i>	<i>Amount (Rs.)</i>
	<i>Returned Income</i>		<i>97,87,15,770</i>
<i>1</i>	<i>Year End accruals</i>	<i>1</i>	<i>1,10,930</i>
<i>2</i>	<i>Mark up not charged to AGNS</i>	<i>2</i>	<i>64,45,195</i>
<i>3</i>	<i>Disallowance u/s 40 (a) (ia)</i>	<i>3</i>	<i>2,11,84,268</i>
	<i>Total additions</i>		<i>2,77,40,393</i>
	<i>Assessed Income</i>		<i>100,64,56,163</i>

4. Being aggrieved by the assessment order, the assessee is before us.

5. As regards Ground No. 1, the Ld. AR submitted that the assessee follows mercantile system of accounting and accordingly in order to arrive at the correct profit for any given year, it is required to account for all expenses pertaining to the year, in accordance with the accounting principles. Hence, during the financial year relevant to the said assessment year as well, the assessee had accounted all the expenses relatable to the subject Financial Year for which bills/invoices would have been received/paid after close of the Financial Year by way of year ending accruals. As and when the invoices relatable to the aforesaid year end accruals, were received/paid by the assessee in the subsequent years, the aforesaid year end accruals were reversed and the actual expense was charged as an expense and debited to the profit and loss account. The Ld. AR submitted that the matter is squarely

covered by the order of the Tribunal in assessee's own case for Assessment Year 2010-11 being ITA No. 1016/Del/2015 order dated 15.02.2018 and Assessment Year 2011-12 being ITA No. 1653/Del/2016, order dated 31/10/2018.

6. The Ld. DR relied upon the order of the Assessing Officer and the order of the CIT (A).

7. We have heard both the parties and perused the material available on record. The issue in the present appeal is squarely covered in favour of the assessee by the Tribunal in assessee's own case for Assessment Year 2010-11 and 2011-12. The Tribunal held in A.Y. 2010-11 as under:

"17. AO disallowed an amount of Rs. 56,15,035/- and added back the same to the income of the taxpayer on the ground that the taxpayer does not have the basis of recording year end accrual. The ld. DRP approved the proposed addition on this account.

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24. *Hon'ble Supreme Court in case cited as Rotork Controls India (P) Ltd. (supra) decided the identical issue in favour of the taxpayer by returning the following findings :-*

" Held, reversing the decision of the High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective; that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price; in other words, the warranty stood attached to the sale price of the product. In this case the warranty provisions had to be recognized because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of the obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income-tax Act, 1961.

The present value of a contingent liability, like the warranty expense, if Properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the

contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced.

A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37.”

25. *When undisputedly no mistake has been pointed out by the AO in the calculation nor it is the case of the AO that the taxpayer had not paid certain bills and the taxpayer is following mercantile system of accounting and the expenses are having element of estimation as well as scientific basis, keeping in view the past trend, the expenses are required to be allowed in the year of creation itself, particularly, when the Revenue authorities has allowed the entire claim of expenditure in the subsequent years.*

26. *So, following the law laid down by the Hon'ble Apex Court in Rotork Controls India (P) Ltd. (supra) and the decision rendered by the coordinate Bench of the Tribunal in AGNSI in ITA No. 1059/Del/2015 for AY 2010-11, we are of the considered view that when the taxpayer has worked out the liability by using a substantial degree of estimation by proving 95% of the invoices on the basis of historical trend, no disallowance can be made. So, we order to delete this addition.”*

In the present Assessment Year as well the Assessing Officer has not pointed out any mistake in the calculation nor there was case by the Revenue that assessee has not paid certain bills. In fact during the financial year relevant to the said assessment year, the assessee had accounted all the expenses relatable to the subject Financial Year for which bills/invoices would

have been received/paid after close of the Financial Year by way of year ending accruals. Thus, the issue is identical in the present assessment year as well, hence Ground No. 1 is allowed.

8. As regards Ground No.2 relating to addition on account of non-charging of mark up on support services charges able to AGNS amounting to Rs. 64,45,195/-. The Ld. AR submitted that this issue is also covered by the order of the Tribunal in assessee's own case for Assessment Year 2010-11 being ITA No. 1016/Del/2015 order dated 15/2/2018.

9. The Ld. DR relied upon the assessment order and the order of the CIT (A).

10. We have heard both the parties and perused the material available on record. The Tribunal in A.Y. 2010-11 held as under:

“14. Issue of non-charging of mark up on support services being built up to AGNSI has come up in the appeal for AGNSI for AY 2008-09 to AY 2011-12 wherein the Revenue has raised a ground that such support services expenditure should be disallowed in the books of account of AGNSI.

15. The coordinate Bench of the Tribunal in case of AGNSI for AY 2009-10 in ITA No.2538/Del/2014 upheld the decision rendered by the ld. DRP in favour of the assessee on identical issue by returning the following findings:-

“75. We have carefully considered the rival contentions and perused the facts of the case. The facts of the case as explained by the appellant are that, ACSI, a group company of appellant and an entity in operations for more than 10 years by then, was having developed support services functions. Accordingly, since such functions were already housed in ACSI, appellant entered into a support services agreement with ACSI for provision of the aforesaid support services to appellant. We have gone through the submission of the assessee and find that necessary evidences in the form of the support service agreement, invoices, the details of

payments made and the bank statements evidencing the payment thereof have been furnished by the assessee to prove the genuineness of the expenses. We find that no evidence has been brought on record by the Department to dispute the said claim. Rather, the Department's claim is merely based on suspicion as also noted by the DRP while deleting the above disallowance. We also find that even otherwise, both ACSI and appellant are profit making entities and hence, there was no tax incentive for the parties to deflate the revenues earned by appellant. The decision was totally based on commercial considerations. By transferring the cost from ACSI to appellant no added tax advantage is being availed by appellant. We are also of the view that commercial expediency of a particular expenditure incurred by businessman should be examined from the perspective of the business person and no third part, including the tax authorities, is entitled to question the commercial reasoning/ justification of the expenditure so incurred. Reliance in this regard is placed on the following judicial precedents furnished by the assessee:

- i. CIT v. Panipat Woollen & General Mills Co Ltd (103 ITR 66) (Supreme Court)*
- ii. CIT v. Sales Magnesite (P) Ltd [1995] 214 ITR 1*
- iii. Binodiram Balchand vs. Commissioner of Income Tax (48 ITR 548)*
- iv. Calcutta Landing and Shipping Co Ltd vs. CIT (65 ITR 10 (Cal High Court) v. CIT vs B Dalmia Cement Ltd (254 ITR 377)*

76. Respectfully following the principles laid down in the aforesaid judicial precedents, we find that where the appellant has actually incurred the aforesaid support services cost and no evidence has been brought by the department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the ld DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed.”

16. So, in the instant case also, the Revenue has failed to controvert the invoices, the details of payment made and evidencing the payments thereof to dispute the genuineness of the expenses and the fact that the taxpayer as

well as AGNSI are profit making entities and there was no tax incentives for the purpose to deflate the revenues earned by the taxpayer, the Revenue has based its decision on commercial consideration. Moreover, in case of both the resident parties, terms and conditions of the arrangement cannot be questioned by the Revenue unless specifically provided under the Act. In case of a contract by both the parties who are admittedly resident Indian entities, they make the law for themselves which cannot be interfered unless contract is unlawful or specially barred by the law of the land. Moreover by such a decision of not charging mark up by the taxpayer on support services charges billed to AGNSI, no loss of tax has been caused to Revenue. So, the findings of the TPO/DRP that the taxpayer is not only to cut charges but mark up also is not sustainable in the eyes of law. So, we order to delete the addition on account of not charging of mark up on support services charges billed to AGNSI.”

In the present case also the assessee as well as AGNSI are profit making entities and there was no tax incentives earned by the assessee at any point of time. Thus, charging of mark up on support service charges which were billed to AGNSI was not correct on part of the Assessing Officer. Besides that, the issue is squarely covered in assessee's own case for A.Y. 2010-11. Hence, Ground No. 2 is allowed.

11. As regards Ground No.3, addition on account of non deduction of TDS on reimbursement of salary to AT & T World Personnel Services Inc. amounting to Rs. 2.11 crores. The Ld. AR submitted that this issue is also covered in assessee's own case for Assessment Year 2012-13 being ITA No. 354/Del/2017 order dated 31/10/2018.

12. The Ld. DR relied upon the order of the CIT(A) and the assessment order.

13. We have heard both the parties and perused the material available on

record. The Tribunal in A.Y. 2011-12 held as under:

“31. It can be seen from the above that so long as a payment to non-resident entity is in the nature of payment consisting of income chargeable under the head ‘Salaries’, the assessee does not have any tax withholding applications u/s 195 of the Act. In our considered view, the nature of income embedded in related payments is relevant for deciding whether or not section 195 will come into play. We have also gone through the agreements exhibited at pages 525-530 of the paper book and have also considered Form 16 which are placed on record on page 605 of the paper book. Considering the facts on record, it can be reasonably concluded that the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand.

32. In our considered view, the reliance on the decision of the Hon’ble High Court of Delhi in the case of Centrica (supra) by the Assessing Officer is misplaced inasmuch as the seconded employees of AWPS were not taking forward the business of AWPS in India, but, were effectively working under the control and supervision of the assessee company and by no means can be said to be rendering services on behalf of AWPS. Whereas in the case of Centrica (supra), it was established only to provide services to the overseas entity to ensure that the services to be rendered to the overseas entities by the Indian vendor are properly coordinated. We are, therefore, of the considered view that reimbursement made by the appellant company cannot be classified as FTS/FIS under the provisions of the Act and Indo-US DTAA. It would not be out of place to mention here that total tax deducted by the assessee u/s 192 of the Act is Rs. 1,97,36,176/- which is much higher than the withholding tax sought to be levied by the Assessing Officer which comes to 10% of Rs. 4,17,56,851/-. Considering the facts in totality, we direct the Assessing Officer to delete the impugned addition. Ground No. 6 is allowed.”

In the present year as well, the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject

to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand. Thus, the issue is squarely covered by the order of the Tribunal in assessee's own case. Hence, Ground No. 3 is allowed.

14. Since, the appeal is decided is on merit, the Stay Application does not survive. Hence, stay application is dismissed.

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

Order pronounced in the Open Court on 28th MARCH, 2019.

Sd/-

**(R. K. PANDA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 28/03/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	18.03.2019
Date on which the typed draft is placed before the dictating Member	19.03.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	28.03.2019
Date on which the final order is uploaded on the website of ITAT	28.03.2019
Date on which the file goes to the Bench Clerk	28.03.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	