

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No. 4882/DEL/2013
[A.Y 2008-09]

AT &T Global Network Services [India] Pvt Ltd, Vatika Triangle 3 rd Floor, Sushant Lok - I Block A, Gurgaon	Vs.	The Dy. C.I.T Circle - 2 (1) New Delhi
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PAN: AAFCA 8810 L

ITA No. 4870/DEL/2013
[A.Y 2008-09]

The Dy. C.I.T Circle 2(1) New Delhi	Vs.	AT &T Global Network Services [India] Pvt Ltd, Vatika Triangle 3 rd Floor, Sushant Lok - I Block A, Gurgaon
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PAN: AAFCA 8810 L

(Applicant)

(Respondent)

Assessee By : Shri Kanchan Kaushal, Adv
Ms. Chinu Bhasin, CA

Department By : Shri H.K. Choudhary, CIT-DR

Date of Hearing : 02.05.2019

Date of Pronouncement : 10.05.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two cross appeals by the assessee and revenue are preferred against the order dated 17.06.2013 framed u/s 143(3) r.w.s 144C (13) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] pertaining to assessment year 2008-09.

2. In the first round of litigation, the Tribunal held that the draft assessment order dated 09.08.2012, passed by the Assessing Officer u/s 144C of the Act r.w.s 143(3) of the Act was invalid as it was passed beyond the prescribed statutory period. Accordingly, final assessment order dated 17.06.2013 passed by the Assessing Officer on the directions of the DRP has been held to be void and invalid.

3. The matter travelled upto the Hon'ble High Court of Delhi and the following question of law was framed:

“Did the ITAT fall into error in interpretation of the proviso to Explanation - 1(iii) (sic [iv] to section 153 of the Income tax Act

in concluding that the search [sic draft] assessment framed in the present case was time barred?

4. The Hon'ble High Court of Delhi vide order dated 20.08.2018 held as under:

"16. Accordingly, the substantial question of law is answered in favour of the appellant revenue and against the respondent assessee. The draft assessment order was passed within the prescribed time and was barred of limitation.

17. We clarify that we have not expressed any opinion on merits of the assessment. An order of remanded is passed, observing the Tribunal would decide the appeal afresh on merits."

5. Pursuant to the directions of the Hon'ble High Court of Delhi [supra], the appeals were heard.

6. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on

record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

ITA No. 4882/DEL/2013 [Assessee's Appeal]

7. Briefly stated, the facts of the case are that AT&T Global Network Services (India) Private Limited (hereinafter referred to as the 'Assessee' or 'AGNSI') is a company incorporated in India on October 25, 2005 under the Companies Act, 1956. It is engaged in providing long distance telecommunication services and has obtained International Long Distance (ILD), National Long Distance (NLD) and Internet Service Provider (ISP) licenses from the Department of Telecommunications ('DoT'). The Company commenced commercial operations on April 7, 2007.

8. The Company has entered into service agreements with its customers in India for provision of end to end telecom connectivity services to such customers for transmission of data from source locations in India to destination locations within/ outside India. For the subject Assessment Year ('AY') under consideration, the Appellant

filed its original return of income on September 30, 2008 declaring income of Rs 36.35 crores.

9. For the relevant Assessment Year 2008-09, a Special Audit of the accounts of the appellant was ordered by the Assessing Officer.

10. A draft order of assessment was passed u/s 144C(1) on 09.08.2012 proposing an assessed income of Rs. 87.22 crores. Against the draft assessment order, the Company filed objections before the Hon'ble Dispute Resolution Panel - I ("the DRP") which was disposed of by the DRP vide directions dated 27.05.2013. Subsequently, the AO issued the final assessment order wherein he computed the total income of the Appellant at Rs.69.96 crores and raised a demand of Rs. 14.51 crores (including interest u/s 234B of Rs. 3.08 crores). A summary of the disallowances/ additions made by the Ld. AO are tabulated below:

Particulars	Amount in INR crores	Ground in Appeal
Returned Income	36.35	
Foreign Exchange Loss	0.01	
Transfer Pricing adjustment	22.91	11

Interest on ECBs	0.22	2
Non deduction of withholding tax on inter group charges	0.54	3
Infrastructure cost/Last Mile charges - Lack of supporting documents	3.08	4
Infrastructure cost/Last Mile charges- Non deduction of withholding tax	1.39	5
Infrastructure Cost/Last Mile Charges - Prior Period Expense	0.72	
Prior Period Expenditure	0.34	6
Capex claimed as revenue expenses	0.09	7
Interest Expenditure on short term loans	4.29	8
Total Additions	33.60	
Assessed Income	69.92	

10. Ground No. 1 becomes otiose in light of the judgment of the Hon'ble High Court of Delhi [supra].

11. Ground No. 2 relates to the disallowance of interest on External Commercial Borrowings [ECB].

12. Briefly stated, the facts of the case relating to this ground are that the assessee had entered into ECB loan facility agreement with its

holding company i.e. AT & T Global Network Holdings LLC to avail ECB's which were utilized for procurement of capital goods used by the appellant in its business operations.

13. During the Financial Year 2007-08, the appellant had availed ECB loans of Rs.14.61 crores. The interest cost to be capitalized attributable to such ECBs of Rs.14.61 crores was worked out by the special auditor at Rs. 15.13 lacs on the basis of the details furnished by the appellant.

14. The fact that the loan was used for making investments in the capital goods required for the expansion of the business is evidenced by the auditor's certificate and Form ECB-2 filed by appellant for the subject financial years. Further, there was an opening balance of ECBs of Rs. 6.17 crores in respect of which the details of assets purchased and their date of put to use were provided to the Special Auditor/ Ld. AO. The interest cost to be capitalized thereon was computed at Rs. 7.03 lacs.

15. The AO has disallowed the interest expense of Rs. 15.13 lacs incurred towards ECBs availed during the year by invoking the proviso to section 36(1)(iii) of the Act. The Ld. AO has observed that the ECBs have been utilized for acquisition of capital assets which have not been put to use, and thus the interest incurred till the date such assets have been put to use should be disallowed.

16. Further, the Ld. AO has disallowed interest expenses of Rs. 7.03 lacs on ECB availed during the preceding assessment year on the ground that assets acquired from the same were not put to use during the year under consideration. The Ld. AO while disallowing the above mentioned expenditure relied on the following case laws:

- Breeze Constructions (P.) Ltd vs ITO, Ward 3(1) ITA No. 4779 of 2011]
- Sheetal Drape vs ACIT 4(3), Mumbai [IT Appeal NO.1323 (MUM.) of 2012]

17. The Ld. AO has also alleged that acquisition of fixed assets during the year amounts to extension of business and in any case in view of the aforesaid judgements. The Hon'ble DRP after hearing the contentions of the appellant company held that it is not in agreement

with the propositions advanced by the appellant as it runs counter to the legislative intent. The fine distinction sought to be introduced between “expansion” and “extension” cannot be used to defeat the legislative intent.

18. Facts on record show that taking a leaf out of the observations of the Special Auditors, the Assessing Officer formed a belief that interest cost on external commercial borrowings for the period from the date of availment of loan till the date first put to use of the assets purchased out of it, shall be capitalised in the cost of the asset itself and the same shall not be allowed as revenue expenditure.

19. The assessee strongly objected to such observations and contended that the issue does not fall within the provisions of section 36(1)(iii) of the Act. Relying upon various decisions, the assessee objected to the disallowance of interest on ECB. Accordingly, an amount of Rs. 22,16,117/- was proposed to be disallowed.

20. Objections raised by the assessee before the DRP were dismissed and the DRP held that it is not in agreement with the propositions advanced by the assessee as it runs counter to the legislative intent.

The fine distinction sought to be introduced between 'expansion' and 'extension' cannot be used to defeat the legislative intent. Accordingly, the proposed disallowance was finally disallowed by the Assessing Officer.

21. Before us, the ld. counsel for the assessee placed strong reliance on the decision of the co-ordinate bench in assessee's own case in subsequent assessment year i.e. 2009-10, which was followed in assessment years 2010-11 and 2011-12.

22. Per contra, the ld. DR could not point out any distinguishing decision in favour of the Revenue.

23. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We find force in the contention of the ld. counsel for the assessee. The co-ordinate bench in ITA Nos. 2538/DEL/2014 and 2518/DEL/2015 for assessment year 2009-10 had the occasion to consider similar disallowance vide Ground no. 3 of the appeal of the assessee at para 13 of its order and at para 18, the Tribunal held as under:

"18. Undisputedly assessee is engaged in telecommunication business. It has commenced its business operation on April 07, 2007. The present situation deals with the case where in the assessee has purchased capital goods for its existing telecommunication business. The question that arises for consideration here is that whether the proviso to [Section 36\(1\)\(iii\)](#) which disallows the interest paid on acquisition of an asset for extension of existing business is applicable to the present case or not. In the present case, whether the assets were acquired for extension of business or not. The word —extension|| has not been defined in the [Income-tax Act, 1961](#) and one has to resort to the popular meaning of the term. The dictionary meaning of the word —extend|| is a part that is added to something to enlarge or prolong it, addition, add-on, adjunct, addendum, augmentation, supplement, appendage, appendix; annexe, supplementary etc. The assessee submitted that the assets have been acquired only in connection with its existing telecommunication business. In our view, there is a very thin line of demarcation between the term expansion and extension, which can be differentiated basis the facts and evidences brought on record. Neither the Ld AO or the Ld DRP has brought any evidence on facts to suggest that there was an extension of business during the year under consideration and the interest paid should be disallowed u/s 36(1)(iii) of the Act. Further, the assessee also distinguished the decisions relied upon by the lower

authorities on facts of the present case. While arriving at the above finding we also draw support from the decision of Hon'ble Supreme Court in the case of DCIT vs. Gujarat Alkalies & Chemicals Ltd. [2008] 299 ITR 85 (SC) cited by the Ld. AR wherein it was held that 'extension' implies starting of a new business activity. Keeping in view the above said meaning we are of the view that the telecom equipment purchased by the Appellant using the ECB loans was for continuation of the existing business 20 | P a g e AT & T Global Network Services (India) Pvt Ltd V DCIT ITA No 2538/Del/2014 (A) & ITA NO 2518/Del/2014 (D) A Y 2009-10 only and not for the extension of business. Hence, the said proviso to [Section 36\(1\)\(iii\)](#) does not apply to the facts of the present case. In the result, the ground No. 3 of the appeal of the assessee is allowed."

24. Respectfully following the findings of the co-ordinate bench [supra], we allow Ground No. 2 of the assessee's appeal.

25. Ground No. 3 relates to the disallowance of Inter-group charges u/s 40(a)(ia) of the Act.

26. Briefly stated, the facts of the case are that during the Financial Year 2007-08, the appellant has taken certain inter group services from

its group entity namely, AT&T CSI Inc. A brief description of the services received is summarized below:

- a. GCSC - Engaged in maintenance and fixing repairs or outages for customers of the appellant.
- b. Billing Support Services- The billing team is responsible for raising invoices for all the customers in the Asia Pacific region (excluding Japan). As part of raising the invoice, the AE's undertake various types of functions:
- c. Services delivery - Processing customer orders and handling service provisioning. Once the contract has been signed with the customer, the service delivery team is responsible for setting up and configuring the network. It is also responsible for testing the system. The key functions performed by the services delivery team is as under:
 - Ensuring all information is in place to start processing a customer order;
 - Project coordination for project implementation and site deployment,
 - Performing technical checks to ensure that systems run properly; and
 - Data maintenance and engineering.

- d. Network engineering - network planning and engineering activities including capacity management & capacity enhancement, provisioning & implementation, network operations, and network design & testing.
- e. GSE - pre-sale support services to various AT&T group companies in the Asia Pacific region. It is responsible for building customized solutions for customers and provides services like technical design, inputs on commercial (pricing) & legal/contractual aspects of the bid.
- f. Project Management Support: The AE's have project teams based in Australia, Hong Kong and Singapore to manage installation and deployment of sites across the Asia Pacific region. The project management team is engaged in general project management, monitoring of all implementation issues and addressing issues being faced by customers.
- g. The country services team is a cross-functional team providing in-country support for other functional teams. Support activities include pre-sales arrangements, contract management, service delivery, order updates, on-going communication with customers and life cycle management of AGN nodes.

h. IT team - Internal IT support function including helpdesk, internal network monitoring support and IT system and maintenance. The IT team provides the following services:

- Creation of email Ids for employees;
- Development and maintenance of online systems
- Assistance in troubleshooting;
- Setting up of conference calls including video conferences;
Maintenance of intranet;
- Addressing of any issues in sending of emails or problems faced while making calls
- Project management

27. The assessee company has incurred a sum of Rs. 22.91 crores towards such services and recorded the same as expenditure in the Profit and Loss account. However, TDS amounting to Rs. 2.36 crores was deducted @ 10.558 % on inter-group charges of Rs. 22.37 crores as was evidenced from the withholding tax statements.

28. The AO in Para 5.4 to 5.8 of the order (**Page 30 to 31**) has alleged that the claim of the assessee that 40(a)(i) is not applicable is

not sustainable because there is a non-deduction of withholding tax on expenses worth Rs. 54,06,328 and not short deduction.

29. The AO has held that the services received from ACSI were in the nature of services as defined under Article 12(4)(b) of the India- USA Tax Treaty ('DTAA') and were thus liable for tax withholding.

30. The DRP has affirmed the decision of the Ld. AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

31. The DRP has affirmed the decision of the AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

32. The Special Auditors in their Audit Report have worked out particulars of payments in respect of which no TDS was deducted u/s 40(a)(ia) of the Act. Consequently, an amount of Rs. 54,06,328/- was not to be allowed as expenditure.

33. The assessee was asked to show cause as to why expenditure of Rs. 5.40 lakhs claimed by it on account of inter-group charges should not be disallowed u/s 40(a)(ia) of the Act for non deduction of TDS.

34. In its reply dated 09.07.2012, the assessee strongly contended that the impugned payments are not subject to TDS u/s 195 of the Act. It was pointed out that the payments towards services rendered by AT & TCSI Inc to AT & T GNS are not chargeable to tax in the hands of AT & T CSI Inc in India and hence are not liable to tax deduction at source u/s 195 of the Act. It was brought to the notice of the Assessing Officer that taxes withheld at source by AT & T GNS from the aforesaid payments have been deducted purely on conservative basis and hence such payments or part thereof cannot be disallowed on account of short deduction of tax at source thereon. It was strongly contended that section 40(a)(ia) cannot be invoked in cases of short deduction at source.

35. The relevant submissions of the assessee read as under:

"As per the provisions of section 195 of the Act, any person responsible for paying to a non-resident, any sum chargeable to tax under the provisions of the Act is required to withhold taxes at the rates in force. Therefore, the requirement of withholding taxes is dependent on whether the amount paid to the non-resident is per se chargeable to tax in India or not. The aforesaid principle has also been unanimously upheld by the Indian judiciary in a number of judicial precedents; wherein it has been consistently held that withholding tax provisions, as provided under section 195 of the Act, are not applicable where payments made to a non-resident are not chargeable to tax in India. Reliance in this regard, amongst others, is placed on the following judicial precedents:

CE India Technology Centre Private Limited 327 ITR 453 (SC);

Transmission Corporation of A.P. Ltd 239 ITR 537 (SC);

EM LiMy & Company (312 ITR 225);

Ship Breaking Corporation (314 ITR 309)(SC);

Accordingly, in the instant case as well, it needs to be first established that inter-group charges paid by AT&T GNS to AT&T CSI Inc. are chargeable to tax in the hands of AT&T CSI Inc. in India.

Since AT&T CSI Inc. qualifies as a tax resident of US, taxability of the aforesaid payments in the hands of AT&T CSI Inc. in India

would be governed by the provisions of the double taxation avoidance agreement entered into between India and US (US tax treaty'). In this regard, since the payments represent fee for services rendered by AT&T CSI Inc. to AT&T GNS, in absence of a Permanent Establishment ('PE') of AT&T CSI Inc. in India and taxability of the same as business income of AT&T CSI Inc. in India, the same can at best qualify as Fee for Included Services ('FIS'), as defined under Article 12(4) of the US tax treaty.

* Article 12(4) of the US tax treaty defines FIS' as under:

'For purposes of this Article, 'Fees for Included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."

Since, the payments made by AT&T GNS to AT&T CSI Inc. are not ancillary and subsidiary to the application or enjoyment of the right/information/ property for which a payment as described

under para 3 of Article 12 is received (which covers payments in the nature of royalty), such payments do not fall within clause (a) of Article 12(4). Accordingly, for the aforesaid services to be taxed as FIS in India, it needs to be established that services rendered by AT&T CSI Inc. 'make available' technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design to AT&T GNS and thus fall within the purview of clause (b) of Article 12(4) of the India - US tax treaty.

The term 'make available' is explained in the Memorandum of Understanding to US tax treaty, wherein it has been clarified that any technical service which leads to transfer/ Imparting of technical knowledge, experience, skill, know-how, or processes to the recipient and which enables the recipient to apply the same on his own can be construed to 'make available' and would qualify as 'included services'. Where the recipient does not acquire any technical knowledge, experience, skill, know-how, or processes from the service provider, such a service would not qualify as FIS (as Use service itself serves as an end for the recipient). The aforesaid principle has been followed, amongst others, in the following judicial precedents:

Raymond Ltd 80 TTJ120;

C.E.S.C. Ltd 275 ITR 15;

McKJinsey and Co. 1m 284 FTR 227

** Thus, given the provisions of the US tax treaty and the aforesaid judicial precedents, it is clear that payments made by AT&T QMS*

towards services rendered by AT&T CSI inc. can be classified as FIS, and thus taxed/ in India, only when such services 'make available' technical knowledge, experience, skill, know-how, or processes to AT&T GNS. From the description of the services rendered by AT&T GNS inc. to AT&T GNS (as detailed above), it is clear that the services are standard services which do not make available any technical knowledge, experience, skill, know-how, or processes to AT&T GNS, which is capable of being used by AT&T GNS on its own, and hence, service costs paid by AT&T GNS to AT&T CSI Inc, towards such services do not qualify as FIS within the meaning of the term under Article 12(4) of the US tax treaty. Therefore, such payments are not chargeable to tax in the hands of AT&T CSI Inc. in India,

Resultantly, such payments, not being chargeable to tax in India, are not liable to tax deduction at source under section 195 of the Act and taxes withheld by AT&T GNS were deducted purely on a conservative basis. Therefore, in absence of any statutory obligation of AT&T GNS to deduct tax at source from, such payments, these payments cannot be disallowed under section 40(a)(1) of the Act on account of short deduction of tax at source thereon. This is clear from the provisions of section 40(a)(1) of the Act, which categorically states that only such expenses "on which, tax is deductible at source under Chapter XVII -S" are covered within the purview of section 40(a)(1) of the Act.

Thus, in view of the above discussion, since payments made to AT&T CSI Inc, are not chargeable to tax in the hands of AT&T CSI Inc.

In India, such expenses are not liable to tax deduction at source under the provisions of the Act and thus such expenses cannot be disallowed by invoking reverse provisions of section 40(a)(1) of the Act

No short deduction of tax at source

In this connection, we wish to submit that there was no short deduction on part of AT&T GNS and the aforesaid difference between the expenses debited to the profit and loss account and the amount reported in the withholding tax statements is only on account of difference between the foreign currency conversion rate used for recording the expenditure in the books of AT&T GNS and the rate used for reporting the expenditure in the withholding tax statement issued by AT&T GNS. The aforesaid fact is corroborated by invoice issued by AT&T CSI Inc, and the CA certificate obtained at the time of remittance of the amount to AT&T CSI Inc,

Invoice issued by AT&T CSI Inc. shows that service cost of US\$ 5,690,871.17 were charged by AT&T CSI Inc. from AT&T GNS towards services rendered by AT&T CSI Inc. for the subject financial year. The CA certificate duly evidences that remittance of US\$ 6,090,057.45 was made by AT&T GNS towards settlement of the above invoice after retaining Rs US\$ 600,813. 72 (by applying the withholding tax rate of 10.5575% on US\$ 5,690,871.17) towards taxes withheld at source. Thus, the aforesaid documents duly substantiate that taxes were deducted by AT&T GNS at the withholding tax rate of 10.5575% under section 195 of the Act

from remittances made to AT&T CSI Inc. and there was no short deduction on part of AT&T GNS. The difference between the expenses recognized in the financial statements of AT&T GNS and the amount reported in the withholding tax statements has thus arisen merely on account of difference in the conversion rate.

Section 40(a) (i) cannot be invoked in cases of short deduction of tax at source

Without prejudice to the fact that there is no short deduction at source from the aforesaid payments made to AT&T CSI Inc., we wish to submit provisions of section 40(a)(1) of the Act can be applied only to cases involving non deduction of tax at source and cannot be applied to cases involving mere short deduction of tax at source. The aforesaid fact is established from a plain reading of the provisions of section, relevant extract of which are reproduced as under:

'40(a)(i) any interest (not being Interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable —

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-8 and such tax has not been deducted or, after deduction, has not been paid during the previous year, or In the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200

The portion highlighted above clearly evidences that section 40(a)(i) of the Act can be invoked only in cases involving complete non-deduction of tax at source and do not have any relevance/ application to cases Involving short deduction of tax at source. Reliance in this regard is also placed on the following decisions:

Hon'ble Mumbai Tribunal in the case of Chandabhoy Jassobhoy in IT A No. 20/Mum/2010

Hon'ble Kolkata Tribunal In the case of M/s S.K. Tekriwal in ITA No. 135/Kol/2010

Hence, without prejudice to the contention that the aforesaid expenses are not at all liable to tax deduction at source under the Act, it is submitted that even wham it is held that taxes ham bean shon deducted by AT&T GNS no disallowance on account of such disallowance is warranted since section 40(a){i} of the Act covers cases Involving non deduction of tax at source and cannot be applied to cases involving short deduction of tax at source by the assessee"

36. The contention of the assessee did not find any favour with the Assessing Officer. The Assessing Officer was of the firm belief that the question is not of short deduction. Rather, it is on non-deduction of

withholding taxes on expenses worth Rs. 54,06,328/-. The case of short deduction is applicable when wrong rate of TDS has been applied. But in this case, the assessee has applied correct rate of tax but not deducted tax on Rs. 54,06,328/- and accordingly, the same was proposed to be added. After rejection of objections before the DRP, the Assessing Officer made addition of Rs. 54,06,328/-.

37. The ld. counsel for the assessee pointed out that when the amounts were remitted, there was decline in dollar rate which resulted into remittance of INR 223708145.69. It is the say of the ld. counsel for the assessee that tax has been deducted at source on the amount remitted in INR at the applicable rate of 10.5575%. The ld. counsel for the assessee pointed out that the gain of differences in the amount charged as expenses and the amount remitted has been shown as income in the subsequent assessment year.

38. Per contra, the ld. DR strongly contended that for the year under consideration, the assessee was to deduct tax at source on the full claim as expenditure and any reversal shown as income in subsequent years should be reversed to avoid double taxation.

39. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also considered Form No. 15CB exhibited at pages 1511 to 1512 of the paper book. The amount of remittance as mentioned in Column 2 is INR 223708145.69. The rate of TDS as mentioned at column 7 is at 10.5575%. The assessee's liability to deduct tax at source is on the amount paid or credited during the year under consideration. Since the assessee has captured entire expenditure in the year under consideration, the assessee ought to have deducted tax at source on the entire amount. We agree that it is not a case of short deduction of tax but it is case of no deduction tax. It is true that gains on forex fluctuation has been shown as income in the subsequent year, Therefore, in our considered opinion, addition of Rs. 54,06,328/- is upheld during the year under consideration. However, to avoid double taxation, in the interest of justice and fair play, we direct the Assessing Officer to reduce the income of the subsequent year by the same amount if found that the assessee has included the same in its income. Ground No. 3 is dismissed subject to the above findings.

40. Ground No. 4 relates to disallowance of Circuit Accruals.

41. Briefly stated, the facts of the case are that the assessee is During the Financial Year 2007-08, the appellant company incurred circuit charges aggregating to Rs. 146.23 crores (Rs. 101.85 crores towards infrastructure cost and Rs. 44.38 crores towards last mile charges for services provided by other telecom operators).

42. Infrastructure cost represents bandwidth charges paid to other telecom operators for provision of bandwidth required for transmission of data. Last mile charges represent charges paid to other telecom operators towards provision of telecom connectivity services over the last leg of communication i.e. from the customer's premises to point of presence of AGNS and vice-versa. For instance, a Multinational Corporation having its offices at different locations across India contracts with the appellant for providing connectivity between its offices at various locations. Each segment between offices at two different locations constitutes a circuit and has a unique circuit ID. The appellant is engaged to provide connectivity for all such circuits of the company/customers.

43. As part of the month-end accounting process, the appellant accrues expenses incurred up till the end of a particular month based on the liability incurred/crystallized and estimated expense based on the orders placed for various circuits. Such accruals thus include expenses incurred in relation to the services rendered during the relevant financial year, estimated on a reasonable and scientific basis, for which bills/invoices are not received during the year.

44. As a practice, accruals for a particular month are reversed in the succeeding month when fresh accruals for the period beginning from the start of the year till such month are made. All the payments made against the aforesaid accruals are accounted for in an account namely prepaid circuit ledgers and later on reduced from the circuits accrual account at the end of the month.

45. At the very outset, the ld. counsel for the assessee stated that this issue has been decided by the Tribunal in assessment year 2009-10 which was followed in assessment years 2010-11 and 2011-12.

46. The ld. DR supporting the findings of the lower authorities, fairly conceded that the issue has been decided by the Tribunal in subsequent years in favour of the assessee.

47. We find force in the contention of the ld. counsel for the assessee. A similar issue was decided by the co-ordinate bench in ITA No. 2538/DEL/2014 and 2518/DEL/2015 for assessment year 2009-10 and vide Ground no. 6 of the appeal at para 30 of its order and at para 35, the Tribunal held as under:

"35. We find that the process explained is entirely automated process which captures the details vis-à-vis each circuit, amount to be booked against each circuit and the accrual to be created. Further, assessee has been creating the provision on an year on year basis in accordance with the mercantile system of accounting in accordance with accounting standard issued by the ICAI otherwise correct expenditure would not be captured as per the matching principle. The assessee has also demonstrated through evidences that the provision so created is either reversed or expensed off in the subsequent year. The assessee has also been able to submit evidences for most of the reversals before the lower authorities. It is also not the claim of the revenue that the amount of provisioning made by the assessee is incorrect or not based on proper

documentation and estimations. We also find that the lower authorities allow the entire claim of 38 | Page AT & T Global Network Services (India) Pvt Ltd V DCIT ITA No 2538/Del/2014 (A) & ITA NO 2518/Del/2014 (D) A Y 2009-10 expenditure in the next year when such reversals are made. Thus, we are of the view that this practice of disallowing the claim of circuit accrual in the year of creation and allowing it in the next year is nothing but a timing difference. The fact that the expenses are allowed in the subsequent year also proves that the lower authorities have not disputed the incurrence of such expenses. Hence, in accordance with the mercantile provisions it should be allowed in the year of creation itself. The assessee has also drawn reference to the principles laid down by the Hon'ble Apex Court in the case of M/s Rotork Controls India (P) Ltd (314 ITR 62) and M/s Bharat Earth Movers (245 ITR

428). According to us the provision for circuit accruals is made in compliance of accounting standards issued by the Institute of Chartered Accountants of India and also on a proper scientific basis backed by documentation. Therefore , we hold that the circuit accruals are created on scientific basis and thus needs to be allowed in the year of creation on accrual basis. In the result the ground No. 6 of the appeal is allowed."

48. Respectfully following the findings of the co-ordinate bench, Ground No. 4 is allowed.

49. Ground No. 5 relates to disallowance of Circuit Accruals.

50. Briefly stated, the facts of the case are that the circuit charges are incurred towards infrastructure cost and last mile charges for services provided by other telecom operators. Broadly, circuit charges are classified into following two categories:

- a) Infrastructure cost
- b) Last mile charges

51. During the course of assessment proceedings, as per the Audit Report of Special Auditors, the Assessing Officer noticed that total infrastructure cost of Rs. 1,01,84,71,616.80 and total last mile charges of Rs. 44,37,73,313.00 were incurred by the assessee during the year. The Assessing Officer also noticed that the Special Auditors have observed and reported that withholding tax on expenditure worth Rs. 1,38,84,736/- was not deducted at source. Therefore, the Assessing Officer was of the opinion that as the tax has not been deducted on the expenses, amount of Rs. 1,38,84,736/- is not allowable as

deduction for the relevant year. Accordingly, show cause notice was issued to the assessee.

52. The assessee, in its reply dated 19.07.2012, submitted as under:

"At the very outset we wish to submit that we in the process Of verifying the correctness of the correctness of the observations made by the special auditor with respect to short deduction of tax at source from infrastructure cost and last mile charges incurred by AT&T GNS and shall shortly submit our reply on this aspect Without prejudice to the above, we wish to submit as follows;

Infrastructure Cost/Last mile charges am not covered within the withholding tax provisions contained under the Act.

At the very outset, we wish to submit that payments towards infrastructure cost and last mile charges do not fall within the purview of the withholding tax provisions contained under the Act and thus not liable to tax deduction at source under any provisions of the Act Taxes withheld at source by AT&T GNS, under section 194J of the Act from the aforesaid payments have been deducted purely on a conservative basis and hence,

such payments or part thereof cannot be disallowed on account of short deduction of tax at source thereon.

As submitted earlier, infrastructure cost represents bandwidth charges paid/ payable to other telecom operators for provision of telecom connectivity required for transmission of data. Further, last mile charges represent charges paid to other telecom operators towards provision of telecom connectivity services over last leg of the communication channel (i.e. from the customer's premises to point of presence of AT&T GNS and vice versa).

None of the aforesaid charges qualify as Fee for Technical Services ('FTS') for the purposes of the Act and hence, do not fall within the purview of section 194J of the Act.

- Section 194J of the Act inter-alia provides that any person responsible for paying any sum to a resident by way of FTS shall deduct tax at source at the time of credit of such sum to the account of the payee or at the time of payment thereof, whichever is earlier.

Further, as per section 9 of the Act, FTS has been defined to mean "any consideration (Including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries'.

- In absence of specific meanings of the terms 'technical', 'managerial' and 'consultancy' in the Act, reliance can be placed.

The Black's Law Dictionary defines the word technical as "belonging or peculiar to an art or profession '

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

Black's Law Dictionary defines the term 'manager" as "one who has charge of corporation and control of its business, or its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and Independent judgment".

Further, the term "consultancy" as per the Black's Law dictionary has been defined as an "act of consulting or conferring; Deliberation of persons on some subject A conference between the counsel engaged in a case, to discuss its questions or arrange the method of conducting it.

In the present case, infrastructure cost and last mile charges are paid by AT&T GNS for provision of telecom connectivity services, which) are standard automated services and require no human interaction or skill. Accordingly, such charges are not paid for rendering any managerial, technical or consultancy services and hence, do not fail under the category of 'FTS' for the purposes of the Act. Therefore, AT&T GNS is not under a statutory obligation to deduct, tax at source on such infrastructure cost/last mile charges.

Reliance in this regard is placed on the decision of the Hon'ble jurisdictional Delhi High Court in the case of Bharti Cellular Ltd and others 175 Taxman 573 wherein, with respect to inter-connectivity charges payable by a telecom operator to another, it was held that for a payment in the nature of Inter-connectivity charges to qualify as FTS as mentioned in Section 194J of the Act, human involvement is necessary as the word 'technical' would take color from its words 'managerial and

'consultancy' based on the nosolius soeils principle.

On Department's appeal to the Supreme Court (CM Appeal No,689 of 2010) In the aforesaid decision, the Supreme Court has referred back the matter to the tax authorities to examine the extent of human involvement Therefore, the principles upheld by the Delhi High Court with respect to involvement of human intervention for a particular service to qualify as FTS have also been accepted by the Hon'ble' Supreme Court

Reliance this regard is also placed on the following judicial precedents:

Skycell Communications Vs DCIT 251 ITR 3 {Madras High Court), wherein the Hon'ble Madras High Court held that the payments made to a cellular service provider were not FTS since 'the person who subscribes to a cellular subscription merely obtains a standard facility to enable him to communicate over a cellular network. The fact that the telephone operator has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber does not make it a provision of a technical services to the subscriber, It has been observed that 'technical*'

service referred to in section 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a 'Tee" for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services, CIT v Estel Communications (P) Ltd (2009) (217 cm 192) (Delhi), wherein the Hon'ble Madras High Court held that mere use sophisticated equipment will not make a fee for technical service when it is simple sale and purchase of internet bandwidth.

Pacific internet (India) Ltd. Ltd v Income Tax Office 319 ITR 179 (Mumbai Tribunal) wherein the, Hon'ble Mumbai Tribunal has held as under:

".....the assessed has availed the bandwidth services and other Infrastructure for providing the Internet access to its customers. These are standard facilities availed by the assessee. Moreover in our opinion the assessee's case is covered by the decision of the Hon'ble Delhi High Court in the case of Estel Communications (P) Ltd. (Supra). We therefore hold that the payment made by the assessee company to VSNL, MTNL and other concerns for the availing the services of bandwidth network infrastructure cannot be said to technical services within

the meaning of Section 194J of the Act, read with Explanation 2 to clause (vii) of section 9(1) of the Act

Wipro Ltd. Vs ITO 80 TTJ 191 (Bangalore Tribunal);

HPCL Infotel Limited vs ITO 99 TTJ 440 (Chandigarh

Tribunal); Idea Cellular Limited vs CIT 313 ITR 55

(Delhi Tribunal),

It is thus clear that bandwidth charges and last mile charges, being charges paid by AT&T GNS to other telecom operators for provision of telecom connectivity services, do not qualify as FTS for the purposes of the Act and hence, are not subject to tax deduction at source under section 194J of the Act and taxes withheld by AT&T GNS were deducted purely on a conservative basis. Therefore, in absence of any statutory obligation of AT&T GNS to deduct tax at source from such payments, these payments cannot be disallowed under section 40(a)(ia) of the Act on account of short deduction of tax at source thereon. This is clear from the provisions of section 40(a)(ia) of the Act, which categorically states that only such expenses "on which tax is deductible at source under Chapter XVII-B" are covered within the purview of section 40(a)(ia) of the Act.

Section 40(a)(ia) cannot be invoked in cases of short deduction of tax at source

Without prejudice to the above, we wish to submit provisions of section 40(a)(ia) of the Act can be applied only to cases involving non deduction of tax at source and cannot be applied to cases involving mere short deduction of tax at source. The aforesaid fact is established from a plain reading of the provisions of section, relevant extract of which are reproduced as under:

"40(a) (ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.'

The portion highlighted above clearly evidences that section 40(a)(i) of the Act can be invoked only in cases involving complete non-deduction of tax at source and do not have any relevance application to cases involving short deduction of tax at source. Reliance in this regard is also placed on

the following decisions:

Hon'ble Mumbai Tribunal in the case of Chandabhoy Jassobhoy In ITA No.20/MumJ2Q1Q

Hon'ble Kolkata Tribunal in the case of M/s BJT Tekriwal in ITA No. 135/Kol/2010

Hence, without prejudice to the contention that the aforesaid expenses are not at all liable to tax deduction at source under the Act, X is submitted that even where it is held that taxes have been short deducted by AT&T GNS (the special auditor has itself stated that out of total expense of Rs. 146,22 crores, taxes have been correctly withheld from Rs, 144,82 crores) no disallowance on account of such short deduction is warranted since section 40(a)(ia,) of the Act covers cases involving non deduction of tax at source and cannot be applied to cases involving short deduction of tax at source by these assessee's"

53. The claim of the assessee did not find any favour with the Assessing Officer who was of the belief that the case laws relied upon by the assessee are not applicable in the instant case as the facts of

the case laws relied upon by the assessee are altogether different from the facts of the instant case. The Assessing Officer observed that the assessee itself submitted that out of expenditure worth Rs. 146.22 crores, taxes have been correctly withheld on expenses worth Rs. 144.82 crores. This clearly states that provisions of Chapter XVIB are applicable to the captioned expenditure and tax should have been withheld at the applicable rates on the same. The Assessing Officer further rubbished the contention of the assessee that the case is of short deduction of tax at source and following the directions of the DRP, addition of Rs. 1,38,84,736/- was made.

54. Before us, the Id. AR explained the factual matrix as per the chart Annexed to this order as Annexure A.

55. A perusal of the aforementioned chart shows that on some occasion, the assessee has deducted tax at source on higher amount than it was required. It can be seen that the total expenses booked are at Rs. 146.22 crores and the amount on which tax was deducted as per TDS return included service tax is Rs. 150 crores and after excluding the services tax it is Rs. 142.25 crores. In our considered opinion, no disallowance on account of short deduction is warranted

since section 40(a)(ia) of the Act covers cases involving non deduction of tax at source and cannot be applied to cases involving short deduction at source by the assessee.

56. Our view is fortified by the decision of the co-ordinate bench at Mumbai in the case of Dish TV India Ltd in ITA Nos. 3061 & 3062/MUM/2017 and others. The relevant findings of the co-ordinate bench reads as under:

"15. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that in both the cases the assessee was of the opinion that tax had to be deducted under [section 194C](#)@2% but the Revenue was of the view that tax has to be deducted under [section 194J](#) @10%. Therefore, the AO applied provisions of [Section 40\(a\)\(ia\)](#) and made 8 ITA 3061, 3062, 3691&3602/Mum/2017 M/s. Dish TV India Ltd. the disallowance in respect of both the expenditures. Before us the learned D.R. relied on the decision of the Hon'ble Kerala High Court in the case of [CIT vs. PVS Memorial Hospital Ltd.](#) 60 taxmann.com 69 copy of which was placed before us in which it was held that deduction under a wrong provisions of the law will not save an assessee from [section 40\(a\)\(ia\)](#), i.e. where the tax was deductible under [section](#)

[194J](#) but was actually deducted under [section 194C](#), such a deduction would not meet the requirements of [section 40\(a\)\(ia\)](#). We noted that prior to this decision the Hon'ble Calcutta High Court in the case of [CIT vs. S.K. Tekriwal](#) 361 ITR 432 vide order dated 3rd December, 2014 taken a view by which the Hon'ble High Court dismissed the appeal of the Revenue against the order of the Tribunal by holding that where tax was deducted by the assessee, though under a bona fide wrong impression under wrong provisions, the provisions of [Section 40\(a\)\(ia\)](#) could not be invoked and if there was any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be an assessee in default under [section 201](#) but no disallowance could be made invoking the provisions of [Section 40\(a\)\(ia\)](#). The said decision of the Hon'ble Calcutta High Court has not been referred to before the Hon'ble Kerala High Court and the Kerala High Court, therefore, did not consider the decision of the Calcutta High Court. This Tribunal in the case of [CIT vs. Shri Zubin J. Gandevia](#) in ITA No. 3357/Mum/2014 vide order dated 1st February, 2016 had the occasion to consider the binding nature of both the decisions and ultimately under para 8 of its order held as under: -

"8. Before us the Ld. Counsel has pointed out that there is a divergent view also taken by the Hon'ble Kerala High Court in the case of P V M Memorial Hospital (supra). But such a decision may not have a persuasive value as it is quite a trite law that if there are two conflicting decisions of non- Hon'ble Jurisdictional High Courts, then the decision in favour of the assessee should be taken. We agree with such a contention raised by the assessee that, if there are two conflicting decisions and in absence of any Hon'ble Jurisdictional High Court, decision one favourable to the assessee should be preferred and this proposition has been long back settled by the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra).

Thus, we hold that, no disallowance under [section 40\(a\)\(ia\)](#) should be made on short deduction of tax under different or wrong provision of the section."

Similarly, Visakhapatnam Bench of this Tribunal in the case of [P.S.R. Associates vs. ACIT](#) in ITA No. 345/Viz/2013 vide order dated 6th January, 2016 had also an occasion to consider both the decisions of Hon'ble Calcutta High Court as well as that of Hon'ble Kerala High Court on the same

issue and ultimately under paras 10 & 11 of its order held as under: -

"10. The Departmental Representative relied upon the Hon'ble Kerala High Court judgment in the case of M/s. P.V.S. Memorial Hospital Ltd. (supra) and argued that the provisions of [section 40\(a\)\(ia\)](#) is applicable even for short deduction of TDS. The Hon'ble Kerala High Court has upheld the disallowance of expenditure under sec. 40(a)(ia) of the Act, for short deduction of TDS. With due respect to the Hon'ble Kerala High Court, we prefer to follow the judgment referred by the Authorized Representative of the assessee in the case of S.K. Tekriwal (supra), for the reason that when there are two reasonable constructions are possible on similar issue i.e. one in favour of the assessee and another in favour of the Revenue, the decision in favour of the assessee should be followed as held by the Hon'ble Supreme Court in the case of [CIT vs. Vegetable Products Ltd.](#) (1973) 88 ITR 192.

11. Considering the facts and circumstances of the case and also applying the ratio of the Hon'ble Calcutta High Court judgment in the case of S.K. Tekriwal (supra), we are of the opinion that the CIT(A) rightly deleted the addition made under sec. 40(a)(ia) of the

Act. In the present case on hand, the assessee has deducted TDS and deposited the same with the Central Govt. account as prescribed under the Act. The allegation of the A.O. is that the assessee failed to deduct TDS under appropriate provisions of the Act. Therefore, we are of the view that the provisions of sec. 40(a)(ia) of the Act is applicable, in case there is a failure on the part of the assessee to deduct TDS and remit the same to the government account. There is nothing in the said section to treat inter alia that the assessee is defaulter where there is shortfall in deduction of TDS. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under the various TDS provisions, the assessee can be declared to be an assessee in default under sec. 201 of the Act and no disallowance can be made by invoking the provisions of sec. 40(a)(ia) of the Act. Therefore, we do not find any error or infirmity in the CIT(A)'s order, hence, we inclined to uphold the order of the CIT(A) and reject the ground raised by the Revenue."

16. No contrary decision of this Tribunal or of the Hon'ble Jurisdictional High Court or Hon'ble Supreme Court was placed before us. We, therefore, are bound to follow the

decision of the Coordinate Bench. Therefore, we do not find any infirmity or illegality in the order of the CIT(A) in holding that provisions of [Section 40\(a\)\(ia\)](#) will not be applicable in the case of the assessee as there is nothing in the section to treat the assessee as defaulter where there is shortfall in deduction of TDS. We, therefore, affirm the CIT(A) and dismiss the grounds taken by the Revenue in both the appeals."

57. It can be seen that while deciding the issue in favour of the assessee, the co-ordinate bench has considered the contrary decision of the Hon'ble Kerala High Court in the case of PVS Memorial Hospital Ltd 60 Taxmann.com 69. Respectfully following the findings of the co-ordinate bench [supra], we direct the Assessing Officer to delete the addition of Rs. 1,38,84,736/-. Thus, Ground No. 5 is allowed.

58. Ground No. 6 being disallowance of prior period expenses of Rs. 34.43 lakhs has not been pressed and the same is dismissed as not pressed.

59. Ground No. 7 relates to the addition of Rs. 9.43 lakhs being disallowance of expenses of capital nature.

60. Facts on record reveal that out of expenditure worth Rs. 3,32,57,309/- incurred on account of repair and maintenance of buildings, plant and machinery and others, the following expenditure being capital in nature has been disallowed by the Assessing Officer:

i)	ESR Building	Rs.	2,300.00
ii)	Furniture and office equipment	Rs.	4,54,620.00
iii)	Furniture and office equipments	Rs.	50,000.00
iv)	Computer Hardware and peripherals	Rs.	62,482.00
v)	Computer Hardware and peripherals	Rs.	46,280.00

61. It is also noticed that the assessee has suo moto disallowed Rs. 1,08,762/-.

62. Before us, the ld. AR pleaded that if the amount is considered as capital expenditure, then the assessee should be allowed depreciation as per eligible rate of depreciation.

63. Per contra, the ld. DR did not raise any objection to this except pointing out that suo moto disallowance of Rs. 1,08,762/- needs to be verified by the Assessing Officer.

64. We, accordingly, direct the Assessing Officer to allow depreciation on the addition of Rs. 9.43 lakhs considered as capital expenditure after verifying suo moto disallowance of Rs. 1,089,726/- as claimed by the assessee. Accordingly, Ground No. 7 is treated as allowed for statistical purposes.

65. Ground No. 8 relates to disallowance on interest on short term loans.

66. At the very outset, the ld. AR contended that the issue has been decided in favour of the assessee by the Tribunal in A.Y 2009-10 which was followed in subsequent A.Ys 2010-11 and 2011-12.

67. The ld. DR fairly conceded to this.

68. We find force in the contention of the ld. AR. The contentions are similar to the contentions as raised in support of Ground no. 2 [supra]. Similar was the situation in A.Y. 2009-10 and the relevant findings of the co-ordinate bench read as under:

"27. The contentions of AR are similar to as raised in support of ground no. 3 above regarding disallowance of interest on External commercial borrowings. Therefore for the sake of brevity, the contentions have not been reproduced here.

28. Before us, the Id. DR relied upon finding of the lower authorities.

29. Since in Ground No. 3 above, we have already held that there has been no extension of existing business, the proviso to [Section 27](#) | Page AT & T Global Network Services (India) Pvt Ltd V DCIT ITA No 2538/Del/2014 (A) & ITA NO 2518/Del/2014 (D) A Y 2009-10 36(1)(iii) is not applicable in the facts of the present case. Hence, the above finding would squarely apply to the present ground also. In the result the said ground no 5 of the appeal of the assessee is allowed."

69. Respectfully following the findings of the co-ordinate bench, Ground No. 8 raised by the assessee is allowed.

70. Ground No. 9 relates to deduction in respect of foreign exchange fluctuation gain.

71. Facts show that the assessee has claimed deduction of Rs. 35,82,075/- towards unrealised foreign exchange fluctuation gain on capital account arising during the year under consideration. The assessee's claim was based upon the specific recommendation of the Special Auditors to this effect. The Assessing Officer refused to allow deduction of Rs. 35.82 lakhs as unrealised foreign exchange fluctuation loss of revenue account. When this objection was raised before the DRP, the same was dismissed by the DRP by holding that the assessee has not produced evidence to support the claim except to refer the issue to the Special Auditors.

72. Before us, the ld. AR drew our attention to the detailed submissions made before the lower authorities.

73. Per contra, the ld. DR strongly supported the findings of the Assessing Officer.

74. We have given a thoughtful consideration to the orders of the authorities below. Forex gain on account of ECBs and interest payable thereon was aggregating to Rs. 66,60,903/- as per the following details:

S.No.	Particular	Nature of Item	Gain / (Loss) in Rs.
1	Restatement of Inter Co. Long Term	Capital	70,226
2	Restatement of Long Term Interest	Capital	(9,525)
3	Restatement of Inter Co. Long Term	Capital	64,35,810
4	Restatement of Long Term Interest	Capital	1,64,392
Net Unrealized Gain on ECB and Interest Payable			66,60,903

75. From the above, it is evident that unrealised gain of Rs. 66.60 lakhs earned by the assessee on account of reinstatement of ECB is a non taxable capital receipt. Further, forex fluctuation loss of Rs. 35,82,075/- is on account of revenue nature transaction i.e. on account receivable.

76. In our considered opinion, this fact needs further verification and, therefore, we deem it fit to restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to examine the issue afresh in light of the observations of the Special Auditors and forex gain on gross basis. Accordingly, Ground No. 9 is allowed for statistical purposes.

77. Ground No. 10 relates to disallowance of prior period expenses.

78. At the very outset, the ld. AR stated that in A.Y 2009-10, the Assessing Officer has disallowed expenses amounting to Rs. 5.63 lakhs holding that the same pertains to F.Y. 2007-08 relevant to A.Y 2008-09 as invoices for such expenses were received in F.Y. 2008-09 i.e. A.Y 2009-10, the same were claimed in A.Y 2009-10 which was disallowed by the Assessing Officer in 2009-10. It is the say of the ld. AR that since expenditure pertains to A.Y 2008-09, the Assessing Officer should be directed to allow the same in the year under consideration.

79. To this, the ld. DR stated that the same needs to be verified.

80. We have given a thoughtful consideration to the orders of the authorities below. We, accordingly, direct the Assessing Officer to examine the claim of the assessee in the light of the findings given in A.Y 2009-10 and if the same is found to be disallowed in A.Y 2009-10, it has to be allowed in A.Y 2008-09. Ground No. 10 is allowed for statistical purposes.

81. Ground No. 11 relates to disallowance of inter company charges on account of TP adjustment.

82. At the very outset, the ld. AR stated that this issue has been decided in favour of the assessee and against the revenue by the Tribunal in A.Y 2009-10 which was subsequently followed in A.Ys 2010-11 and 2011-12.

83. The ld. DR could not bring any distinguishing decision in favour of the Revenue.

84. We find force in the contention of the ld. AR. The Tribunal in ITA Nos. 2538/DEL/2014 and 2518/DEL/2015 considered similar TP adjustment vide Ground No. 8 of that appeal at para at 37 of its order. The relevant findings of the co-ordinate bench read as under:

"53. In view of the above findings, we hold that for intra group services (where the evidences have been furnished), the assessee has satisfied the need, benefit and rendition test. However we would also like to mention that out of seven services the assessee has not furnished evidences for following three services namely- country services, information technology, project management. In the absence of any evidences, the test of necessity, need and rendition cannot be commented upon and the assessee is given an opportunity to furnish the evidences for these three services before the AO/TPO for necessary

verification. The Id TPO may examine them and decide the issue with respect to those services in accordance with law. With respect to the method as the Id TPO has not examined the comparability analysis under the TNMM method of Intra Group services, he must examine the comparability analysis of IGS (intra Group Services) and determine ALP."

85. The Id. DR pointed out that the Tribunal has observed that out of seven services, the assessee has not furnished evidence for three services, namely, country services, information technology and project management. Therefore, to this extent, the matter should be restored to the file of the Assessing Officer/TPO for necessary verification.

86. We find that the co-ordinate bench in its decision has already given such directions to the Assessing Officer/TPO. Respectfully following the same, we direct the Assessing Officer/TPO to examine the issue relating to the three services mentioned elsewhere and decide the issue with respect to those services in accordance with law. Ground No. 11 is treated as allowed for statistical purposes.

87. In the result, the appeal of the assessee is partly allowed for statistical purposes.

ITA No. 4870/DEL/2013 [Revenue's Appeal]

88. Substantive grievance of the Revenue read as under:

"1. On the facts and circumstances of the case Hon'ble DRP has erred in deleting the /addition of Rs. 5,70.05,616/- without considering the facts that assessee has failed to produce invoices to the Special Auditor for verification.

2. Whether on the facts and circumstances of the case, Hon'ble DRP has erred in deleting the additions of Rs. 15,62,17,913/- on account of no supporting invoices of expenses and also failed to explain party-wise details before the Assessing Officer and Special Auditor.

3. Hon'ble DRP has erred in deleting the addition of Rs. 1.94.88100/- on account of non-deduction of TDS treating that BSNL is also treating as ADC part and parcel of IUC for levy of service tax."

89. Brief facts relating to Ground No. 1 are that the Assessing Officer noticed that the assessee has incurred support service expenditure of Rs. 5,70,05,616/- paid to its group company AT & T Communication Services India Pvt. Ltd [ACSI] for support services rendered by it. Since the assessee company commenced its business operations during A.Y. 2008-09 and did not have its own support service functions such as tax, legal, finance, HR etc, which are necessary and imperative for any business organization to carry on its business. Such service business expenditure was paid to its group company ACSI.

90. The Assessing Officer was of the opinion that agreement filed by the assessee for support services cannot be relied upon as it has been signed on 30.1.2007 but dated 1.4.2007 and, as such, its authenticity is doubtful. Further, as per the terms of the agreement, billing has to be done on monthly basis but the invoice is raised for the period 01.4.2007 till 30.11.2007 and no monthly invoices were raised till November 2007. Taking a leaf out of this, the Assessing Officer was of the opinion that it is an afterthought just to transfer some expenses from ACSI to the assessee. The Assessing Officer further observed that apart from the invoices and agreement, the assessee has not been able to provide any evidence to substantiate that support services were

provided by ACSI to the assessee. Accordingly, the support services expenditure of Rs. 5.70 crores was proposed to be disallowed.

91. The assessee raised objections before the DRP and reiterated its contentions.

92. After considering the facts and submissions, the DRP observed that the Assessing Officer has not demonstrated that the services were not rendered by ACSI. The DRP was further of the opinion that the Assessing Officer has simply raised some suspicion, whereas the assessee has demonstrated that the services were received and accordingly, directed the Assessing Officer to delete the proposed disallowance.

93. Before us, the Id. DR once again stated that no invoices were produced before the Assessing Officer or the Special Auditors and strongly supported the findings of the Assessing Officer in the draft order.

94. The Id. AR reiterated what has been stated before the lower authorities.

95. We have given a thoughtful consideration to the orders of the authorities below. We are of the considered opinion and as observed by the DRP also, the assessee company has successfully demonstrated that the services were received from ACSI. The Assessing Officer has simply raised some suspicion but nowhere the Assessing Officer has pointed out that the services were never received from ACSI. We find that at the time when the assessee commenced its operations, ACSI was already in operation for more than 10 years and was having fully developed support services functions. Accordingly, since such functions were already housed in ACSI, the assessee entered into a support services agreement with ACSI for provisions of the aforesaid support services to the assessee.

96. At this point, it would not be out of place to mention that both, ACSI and the assessee are profit making entities and there was no tax incentive for the parties to deflate revenues earned by the assessee. Moreover, by transferring the cost from ACSI to the assessee, no added tax advantage is being availed by the assessee. We find that on identical set of facts, in assessee's own case in A.Y 2009-10 the co-ordinate bench in ITA No. 2538/DEL/2014 and 2518/DEL/2015 had the

occasion to consider similar issue vide Ground no. 1 of that appeal and at para 75 of its order held as under:

"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 88 | P a g e AT & T Global Network Services (India) Pvt Ltd V DCIT ITA No 2538/Del/2014 (A) & ITA NO 2518/Del/2014 (D) A Y 2009-10 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 a businessman should be examined from the perspective of the business person and no third party, 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 1) (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 89 | P a g e AT & T Global Network Services (India) Pvt Ltd V DCIT ITA No 2538/Del/2014 (A) & ITA NO 2518/Del/2014 (D) A Y 2009-10 the Department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the Id DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed."

97. Respectfully following the findings of the co-ordinate bench, Ground No. 1 is dismissed.

98. Ground No. 2 relates to the deletion of addition of Rs. 15,62,17,913/- on account of no supporting invoices of expenses.

99. The grievance of the Revenue is identical to the grievance considered by us in assessee's appeal qua Ground Nos. 4 and 5 of that appeal considered hereinabove.

100. Since the DRP has given part relief, both the assessee and the Revenue are in appeal before us. For our detailed discussion in assessee's appeal while deciding Ground nos. 4 and 5, Ground No. 2 is dismissed.

101. Ground No. 3 relates to the deletion of addition of Rs. 1,94,88,100/- on account of non deduction of TDS.

102. Facts on record show that the assessee has claimed expenditure of Rs. 1,9488,100/- as Access Deficit Charges [ADC] paid to BSNL. ADC was payable by all the telecom operators to BSNL and levy of the same

was governed by section 36 r.w.s 11 of the Telecom Regulatory Authority of India [TRAI] Act. 1997. The same is computed @ 0.75% of the Adjusted Gross Revenue [AGR] to cover the excess cost incurred by BSNL over the revenues earned from provision of access to fixed line networks.

103. We find that levy of ADC has been abolished in September 2008. After examining the details, the Assessing Officer was of the opinion that the payments towards ADC made to BSNL are similar in nature to the last mile charges and infrastructure charges and would thus constitute fees for use of technical services. The Assessing Officer noticed that the assessee is deducting withholding taxes on last mile and infrastructure charges u/s 194J of the Act. Therefore, the assessee should have deducted tax on ADC payment as well. Accordingly, disallowance of Rs. 1.94 crores was proposed by the Assessing Officer.

104. The assessee raised objection before the DRP and claimed that ADC paid by the assessee was in the nature of subsidy paid by the assessee to BSNL towards compensation of excess cost incurred for laying down telecom networks in rural areas and not in the nature of

services rendered by BSNL. It was pointed out that the assessee was not eligible to receive any additional services on account of payment of ADC and even after abolition of ADC, other services continue to be rendered by BSNL and service charges in respect thereof continue to be paid by the assessee. It was further brought to the notice of the DRP that even the Special Auditors have concluded that ADC does not arise out of any legal right. Rather, it arises out of smoothening the transition process during the competition.

105. After considering the facts and detailed submissions, the DRP observed that this levy [ADC] is not for any services rendered by the BSNL is correct. The DRP further observed that this is levy imposed by TRAI in May 2003 and discontinued from 2008. It was intended to substitute fixed line telephony and development of telephone network in rural areas. Accordingly, the DRP directed the Assessing Officer to delete the addition of Rs. 1,94,88,100/-.

106. Before us, the Id. DR strongly supported the draft assessment order and contended that the ADC is part of the service because BSNL has laid down the infrastructure facilities and the assessee is paying ADC for the services received from BSNL.

107. Per contra, the ld. AR reiterated what has been stated before the lower authorities.

108. We have given a thoughtful consideration to the orders of the authorities below. We find that TRAI had issued notification No. 409-5/2003/FUNCTION dated 29.10.2003 u/s 36 read with clauses (ii), (iii) and (iv) of subsection (b) of section 11 of the TRAI Act, 1997 as amended by TRAI [Amendment] Act, 2000 and with Notification, both the ADC and IUC regimes were introduced. The purpose of this Notification was to fix the terms and conditions of interconnectivity between service providers to ensure effective interconnection between different service providers and to regulate arrangements amongst service providers of sharing their revenue derived from providing telecommunication services. We are of the considered view that the ADC paid by the assessee to BSNL is not out of any contractual obligation but due to Notification issued by the Regulatory Authority TRAI. Therefore, in our considered opinion, ADC is not for any service rendered by BSNL. We, therefore, decline to interfere with the findings of the DRP. Ground No. 3 is dismissed.

109. To sum up, in the result, the appeal of assessee in ITA No. 4882/DEL/2013 is partly allowed for statistical purposes whereas the appeal of the Revenue ITA No. 4870/DEL/2013 stands dismissed.

The order is pronounced in the open court on 10.05.2019.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 10th May, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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Date on which the typed draft is placed before the dictating Member	
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	
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