IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI

BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 7001/DEL/2018 (A.Y. 2014-15)

AT & T Global Network Services (India) Private Limited Mohan Dev House, Tolstoy Marg, New Delhi - 110001 **(APPELLANT)**	Vs.	Additional Commissioner of Income Tax Special Range-1 New Delhi **(RESPONDENT)**

Appellant by	**Sh. Kanchun Kaushal, AR**
Respondent by	**Sh. Sanjay I. Bara, CIT-DR**

Date of Hearing	**15.07.2019**
Date of Pronouncement	**18.07.2019**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed against the order dated 28.09.2018 passed by Additional Commissioner of Income Tax, Special Bench-1, New Delhi u/s 144C read with section 143(3) of the Income Tax Act, 1961 for assessment year 2014-15.

2. The grounds of appeal are as under:-

"1. TP adjustment with respect to receipt of Intra-Group Services
That on the facts and circumstances of the case, and in law, the Ld. AO (following the directions of the Ld. DRP), erred on facts and in law in enhancing the income of the Appellant by INR 20,39,45,028/- holding that the international transaction pertaining to receipt of intra-group services do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961

('the Act'), and in doing so have grossly erred in:

1.1 Disregarding the judicial pronouncement/ finding of the Hon'ble ITAT in Appellant's own case for AY 2009-10, AY 2010-11 and AY 2011-12 wherein the Hon'ble ITAT has concluded the mentioned issue in favour of the Appellant.

1.2 Rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to availing of intra-group services from its AEs on a standalone basis;

1.3 Arbitrarily applying Comparable Uncontrollled Price ('CUP') method as the most appropriate method as against Transactional Net Margin Method ("TNMM') applied by the Appellant in its Transfer Pricing documentation;

1.4 Disregarding the elaborate documentary evidence submitted as part of assessment proceedings to erroneously assume that 'no benefit' hasd been conferred upon the Appellant from the international transactions pertaining to availing of intra-group services and thereafter re-determining the ALP of the said transaction as 'NIL';

1.5 disregarding the receipt of services by the Appellant from its AEs which is contrary to the facts of the present year as well as to the stand taken by the Ld.TPO in prior year despite no change in the nature of services involved. Further, the Ld. TPO erred in contending that the services received are duplicative and stewardship in nature, ignoring the documentation and evidences submitted by the Appellant; which contradicts his own contention that the services have actually not been received;

1.6 arbitrarily challenging the veracity of the contractual service agreement disregarding the actual conduct of the Appellant in the availing of intra-group services from AEs basis the elaborate documentary evidences submitted as part of assessment proceedings.

2. TP adjustment with respect to payment of royalty

That on the facts and circumstances of the case, and in law, the Ld. AO (following the directions of the Ld. DRP), erred on facts and in law in enhancing the income of the Appellant by INR 8,37,43,883/- and holding that the international transaction pertaining to payment of royalty does not satisfy the arm's length principle envisaged under the Act, and in doing so have grossly erred in:

2.1. *rejecting the combined transaction approach of benchmarking adopted by the Appellant in its TP documentation (i.e. aggregating payment of royalty, availing of intra-group services with provision of network support services) and proceeding to determine the arm's length price of international transaction pertaining to payment of royalty from its AEs on a standalone basis bv rejecting TNMM as the most appropriate method;*

2.2. *holding that the Appellant did not receive tangible benefit in lieu of the payment of royalty thereby challenging the commercial wisdom of the Appellant in making payment for royalty and passing the order in contrast with the recent judicial pronouncements in this regard;*

2.3. *erroneously holding that the Appellant is incurring losses at the net level and that as per the facts of the case of the Appellant, no independent partv would have made a payment for royalty;*

2.4. *disregarding the judicial pronouncement/ finding of the Hon'ble 1TAT in Appellant's own case for the AY 2009-10 and merely placing reliance on past year orders passed by the DRP;*

2.5. *arbitrarily rejecting the supplementary analysis using Comparable Uncontrolled Price ('CUP') method to benchmark the payment of royalty transaction submitted by the Appellant without giving any cogent reasons;*

2.6. *undertaking fresh benchmarking analysis using Royaltvstat database and selecting agreements which are not comparable to the royalty payment made by the Appellant to its AEs.*

2.7. *not providing the detailed search process alongwith backup documentation such as accept-reject matrix to provide Appellant an opportunity to evaluate the appropriateness of the benchmarking analysis.*

3. <u>Disallowance of circuit accruals</u>

3.1 On the facts, in circumstances of the case and in law, the Ld. AO /DRP erred in making a disallowance of Rs. 61,11,589 on account of circuit accruals created towards bandwidth and last mile services availed by the Appellant company, ignoring that the accruals were based on a reasonable and scientific basis.

3.2 On the facts, in circumstances of the case and in law, the Ld. AO failed to appreciate that the Appellant follows mercantile system of accounting and accrues circuit charges on scientific basis.

3.3 On the facts, in 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 circuit accruals for the subject financial year.

3.4 On the facts, in circumstances of the case and in law, the Ld. AO/DRP erred in not appreciating that the Appellatn produced evidences to the extent of more than 98% for utilization/reversal of circuit accruals done in subsequent years and no adverse finding has been given by the Ld. AO/DRP on the same.

3.5 Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilized.

3.6 On the facts, in circumstances of the case and in law, the Ld. AO/ DRP erred in ignoring that the aforesaid disallowance of circuit accruals has been deleted by the Hon'ble ITAT in Appellant's own case for assessment years 2009-10, 2010-11 and 2011-12.]

4. <u>Disallowance of year-end accruals</u>

4.1 On the facts, in circumstances of the case and in law, the Ld. AO/DRP erred in making a disallowance of Rs. 8,94,42,969 on account of year-end accruals representing accruals created towards normal business expenditure incurred by the Appellant ignoring that the accruals were based on a reasonable basis.

4.2 On the facts, in 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.

4.3 On the facts, in 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 77% for utilization/reversal made in subsequent years and no adverse finding has been given by Ld. AO/DRP on the same.

4.4 Without prejudice to the above, on the facts and circumstances of the case, the Ld. AO grossly erred in making excess disallowance of Rs. 61,11,859. The Ld. AO erred in computing the disallowance at Rs. 8,94,42,969 instad of Rs. 8,33,31,110 (i.e. total accrual of Rs. 37,43,09,016 less details submitted of Rs. 24,97,62,018 less additional evidences of Rs. 4,12,15,888)

4.5 Without prejudice to the above, on the facts, in circumstances of the case and in law, where any disallowance is made in respect of the aforesaid accruals for the year under consideration, deduction in respect of the disallowed amount should be allowed in the subsequent year(s) in which such accruals were reversed or utilized.

Therefore, any disallowance on account of year-end accrual is unjustified.

5. <u>Disallowance of Support Service Expenditure</u>

5.1 On the facts, in circumstances of the case and in law, the Ld. AO/DRP erred in disallowing the legitimate business expenditure being in the nature of support service expenses of Rs. 8,25,71,385 paid to AT&T Communication Services India Private Limited ('ACSI').

5.2 On the facts, in circumstances of the case and in law, the Lei. AO/DRP erred in not taking cognizance of the submissions made by Appellant and the documentary and circumstantial evidence/ proof produced by the Appellant, which duly substantiate that support services were rendered by ACSI to the Appellant company.

5.3 On the facts, in circumstances of the case and in law, the Ld.AO/DRP erred in ignoring that the aforesaid disallowance on account of support service expenditure has been deleted by the Hon'ble 1TAT for assessment years 2009-10, 2010-11 and 2011-12.

6. ***Disallowance of annual revenue share based license fee***

6.1. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in disallowing an amount of Rs. 57,74,87,020 (being disallowance of Rs. 62,56,10,938 in AY 2014-15 less credit of Rs. 4,81,23,918 for AY 2014-15) under the head licence fees debited to Profit & Loss Account by holding that annual license fee is not allowable as a revenue expenditure and it should be amortised under section 35ABB of the Act.*

6.2. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in not following the judgment of the Hon'ble jurisdictional Delhi High Court in the case of Bharti Hexacom Ltd. [2014] 265 CTR 130 (Delhi) wherein it was held that annual revenue share based license fee paid by the telecom operators is revenue expenditure, allowable under section 37(1) of the Act and not a capital expenditure amortizable under section 35ABB of the Act.*

6.3. *On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in ignoring that the aforesaid disallowance has been deleted by the Hon'ble ITAT in Appellant's own case for assessment year 2010-11.*

7. Disallowance of Lease line charges on account of non-deduction of tax at source

7.*1 On the facts, in the circumstances of the case and in law, the Ld. AO/DRP erred in making disallowance under section 40(a)(i) of the Act on account of non-deduction of tax at source on lease line expenses of Rs 12,66,08,117 incurred by Appellant, completely ignoring the fact that the impugned payments were made to resident parties.*

8. Disallowance of foreign exchange loss

8.1 On the facts, in the circumstances of the case and in law, the Ld. AO grossly erred in making disallowance of Rs. 1,29,47,531 on account of foreign exchange loss arising on revenue account.

9. Non-grant of credit for taxes deducted at source

9.1 On the facts, in the circumstances of the case and in law, the Ld. AO erred in not granting credit of taxes deducted at source to the Appellant.

10. Levy of interest under section 234B and 234C of the Act

10.1 On the facts in the circumstances of the case and in law, the Ld. AO erred in incorrectly charging interest under section 234B and 234C of the Act.

11. Initiation of penalty proceedings

11.1 On the facts, in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act against the Appellant on account of the above adjustments made in the impugned final assessment order.

All above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

3. The assessee company was incorporated in India on 25.10.2005 with an objective to provide telecommunication services in India and has obtained International Long Distance (ILD), National Long Distance (NLD) and Internet Service Provider (ISP) license from the Department of Telecommunication (DoT). Pursuant to the NLD/ILD licenses granted by the DoT, AGNS commenced International and National Long Distance services during F.Y. 2007-08 i.e. A.Y. 2008-09. The assessee 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 as per the terms and conditions in the respective licenses. The assessee company filed return of income on 28.11.2014 declaring an income of Rs. 2,76,72,33,820/- under normal provisions of the Income Tax Act, 1961. The case was selected for scrutiny. Notice u/s 143(2) of the Act was issued on 01.09.2016. Subsequently, notice u/s 142(1) of the Act along with questionnaire was issued on 01.09.2016. Fresh notice u/s 142(1) was issued on 11.07.2017. In compliance thereto CA of the Assessee company attended the assessment proceedings from time to time and filed necessary details which was examined and place on record by the Assessing Officer. During the previous year under consideration the assessee entered into international transactions with associated enterprises within the meaning of Section 92B of the Act. The details of said transactions were mentioned in Form No. 3CEB filed by the assessee. The case was referred to the Transfer Pricing Officer as per provisions of Section 92CA(1) of the Act after taking statutory approval from the Commissioner of Income Tax for computation of arm's length price in relation to the international transactions. Subsequently, an order u/s 92CA(3) of the Act was passed by Transfer Pricing Officer (TPO) on 25.10.2017 wherein an adjustment of Rs. 28,76,88,911/- attributable to difference in arm's length price of the international transactions entered by the assessee with associated

enterprises has been made.

S.No.	Nature of international transaction	ALP determined by taxpayer (Rs.)	ALP determined by this office (Rs.)	Adjustment u/s. 92CA(Rs.)
1.	Intra Group Service	20,39,45,028	Nil	20,39,45,028
2.	Payment of royalty	29,12,83,073	20,75,39,190	8,37,43,883/-
Total				28,76,88,911/-

The Assessing Officer accordingly enhance the income of the assessee by 28,76,88,911/-. Against the draft order the assessee company filed objection before DRP. The DRP vide its order dated 20.08.2018 disposed of the objections. The DRP rejected the objections filed by the assessee against transfer pricing adjustment proposed in the draft assessment order. Thus, the assessing officer made addition of Rs. 28,76,88,911/- on account of arm's length price determined by the TPO. The Assessing Officer further made addition of Rs. 61,11,589/- on account of circuit accruals. The Assessing Officer made addition of Rs. 8,94,42,969/- on account of other than circuit accruals. The assessing officer made disallowance of Rs. 8,25,71,385/- in respect of support service expenditure. The Assessing Officer also made disallowance of Rs. 57,74,87,020/- in respect of license fee. The Assessing Officer also made addition of Rs. 12,66,08,117/- towards lease line expenses. The Assessing Officer finally made disallowance of Rs. 1,29,47,531/- on account of foreign exchange loss. Thus, the Assessing Officer assessed income of Rs. 3,85,335,887/-.

4. As regards Ground Nos. 1 to 1.6 relating to transfer pricing adjustment relating to intra group services, the Ld. AR submitted that the said issue has been decided by the Tribunal in assessee's own case for Assessment Year 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. The Tribunal discussed

the facts, material, and evidences in detail and upheld that the assessee satisfied the need, benefit and rendition days. The Tribunal upheld TNMM to be the most appropriate method.

5. The Ld. DR relied upon the order of the TPO, DRP and assessing officer.

6. We have heard both the parties and perused all the relevant material available on record. The Tribunal in assessment year 2013-14 held as under :-

"10. We have considered the rival arguments and perused the orders of the Assessing Officer/TPO/DRP. We find the assessee, in the instant case, has benchmarked the cost paid by the assessee for GCSC services using combined transaction approach and using TNMM method as the most appropriate method with Operating Profit/Operating Cost as profit level indicator. Since the OP/TC was 23.15% which was significantly higher than the arithmetic mean of OP/TC of 6.35% earned by comparable companies, the assessee considered the transaction to be at arm's length. We find the TPO rejected the aggregation approach adopted by the assessee under TNMM and adopted CUP as the most appropriate method in the absence of comparable data. The TPO further held that the assessee was not able to prove the receipt of the benefits and demonstrate the arm's length nature. The TPO accordingly determined the ALP of the aforesaid services at nil on ad hoc basis which has been upheld by the DRP.

11. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2009-10 wherein the Tribunal, after considering the facts, material evidences, etc., held that the assessee satisfies the need benefit and rendition test. The Tribunal also upheld the TNMM to be the most appropriate method. The relevant observations of the Tribunal from para 49 onwards read as under:-

"49. On appreciation of the above facts it is apparent that looking at the nature of the business of the assessee and the kind of industry the assessee operates in, the assessee has justified that such services are

required. It is not the case of the ld TPO that assessee is having this services therefore they are duplicative in nature or are in nature of shareholders' services. It is pertinent to note that requirement of the services should be judged from the viewpoint of the appellant as a businessperson. We agree with the argument of the assessee that if the network related problems prevent the customers from using its services, the assessee is bound to suffer reputational damage and potential loss to business. Addressing the customer's problems promptly and by a specialized team (which may be an AE) should satisfy the benefit test, as the assessee received an economic benefit to maintain its business operation. Therefore in this regard we are of the view that assessee has substantiated that these services are required by it for its business sustainability. The only allegation which TPO / DRP made was that the assessee has not been able to substantiate need test by way of appropriate documentation and held that the assessee should have availed these services from an independent third party in India rather than from its AE. After going through the fact and submissions placed on record we are of the view that the assessee has satisfied the need/benefit test for availing these services from its AE. Regarding the rendition of the services by the AE, the appellant submitted before the TPO, the copy of inter-company agreements, tickets processed by GCSC, sample list of project assignment on which GCSC team assisted the assessee, list of deals on which GSE presales team assisted the assessee. The assessee also explained the allocation key with details of teams spread across different countries, copies of invoices etc. For the purposes of substantiating the services rendered by the assessee it has submitted the details of all the service rendered by the AE to the assessee as in the paper book same are placed on sample basis. Therefore, assessee has placed substantial material evidencing the receipt of the services. Regarding the receipt of the services from AE, the assessee can be asked to maintain and produce the evidence of receipt of services, which a businessperson keeps and

maintains regarding services related from the third party. The burden cannot be higher on the assessee for evidencing the receipt of services of higher level merely because the services have been rendered by its AE. Against these evidence placed by the assessee before the lower authorities ld. DRP has merely stated that assessee has not been able to provide sufficient evidence and that the AE has provided such services to the assessee. We failed to understand what _sufficient evidence' was and what was lacking in the case of the assessee. We could not find any instances placed where the TPO / DRP held that the evidence placed by the assessee are not substantiated by rendition of service by the AE. The assessee has also relied on the Hon'ble Delhi Tribunal in the case of GE Money Financial Services Pvt Ltd. Vs ACIT in ITA No. 5882/Del-2010 and TNS India Pvt. Ltd. V. ACIT: (2014) 32 ITR (Trib.) 44 (Hyd.)whereby on similar facts the Hon'ble Delhi Tribunal has rejected the plea of the Revenue and has held that for receipt of services, rendering of services must be seen from the view point of the assessee and further assessee cannot be asked to keep and maintain evidences of services rendered by AE higher than which is expected from a businessman receiving services from an unrelated provider. Respectfully the following the decision of the coordinate the bench we are of the view that the assessee has justified the receipt of the services and satisfied the rendition test. Regarding the benefit test, the assessee submitted that owing to the nature of industry it operates in it requires specialized knowledge and experience in order to provide seamless services to customers. It has inherent risks and advantages that can be effectively harnessed only through sharing of resources and efficiencies that are inbuilt in-scale. Accordingly, availability of support in terms of strategy, data usage and administration is essential and indispensable for the assessee in order to achieve cost efficiency and normal functioning of its business operations. For this reason, the assessee is availing such essential services from its AEs. For this purpose, the assessee had entered into an agreement with its AE. These functions

or services, if not availed from the AEs, would have to be undertaken by the assessee itself. However, due to very nature of network connectivity services and in order to achieve better economies of scale and synergies, these functions are centralized within the AE of the assessee which renders such services. It is, therefore, clear that such services confer a benefit on the assessee. While examining the arm's length nature of the impugned international transaction, the learned TPO has applied cost-benefits test and attempted to map the benefits received against payment made for such services. While he has concurred with the assessee's contentions regarding receipt of benefits in respect of several services, for certain other services, he has erroneously believed that no benefits have been received and re-determined the ALP on that basis, without appreciating that the same have benefitted the assessee and accordingly, warrant a payment.

50. The assessee has also argued that the TPO is only empowered to determine the ALP of international transaction. It was argued that there is no legal requirement or mandate for any taxpayer to necessarily undertake a cost-benefits analysis and a mere absence of such analysis should not necessarily lead to a pre-conceived notion that no benefits have been received by the assessee and should not form a basis to disallow the said payment. We also hasten to add that that for determination of ALP , the benefit to the user must arise otherwise, it fails the basic test of determining ALP. If there is no benefit to the user naturally nobody would pay for the services and hence ALP of such transaction is always Nil because they are worthless. Such is not the case here. To support its contention, the assessee has relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) Pvt Ltd. (ITA 475/ 2012), wherein, it was held that the authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether the tax payer derives a benefit from the service. The Hon'ble Delhi High Court has opined that the determination of benefit to the tax payer is not in

the domain of the TPO. In this regard, the Appellant also placed reliance on the following judicial precedents to bring home the point that the benefit test needs to be satisfied from the view point of assessee and business prudence :

a. Ericsson India Private Limited vs Dy CIT [ITA No. 5141/Del/2011 (Delhi ITAT)]

b. CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi)

c. Hive Communication Pvt. Ltd. (ITA No.306/2011)

d. Commissioner of Income Tax vs. Cushman and Wakefield (India) P. Ltd. (269 CTR 16) (Del.)

51. The above decisions unanimously holds that in reaching the conclusion that whether an independent entity would have paid for such services neither the revenue nor the court must question the commercial wisdom of the assessee or replace its own assessment of the commercial viability of the transaction. The judicial precedents also stipulate that the duty of the Ld. TPO is restricted to determine the ALP of the international transaction and that he cannot replace his views with the views of the assessee. Respectfully following the binding precedent cited above we are of the view that benefit test for determination of Arms length Price is to be viewed from the perspective of the assessee and businessman and not from the perspective of revenue. In this case appellant has demonstrated the benefit which it is expected to derive from the various services rendered by its AE and ld. TPO has erred in replacing with its own judgment of the benefit derived by the assessee, we reject this approach.

52. However for determination of arms Length pricing, the assessee has adopted TNMM as the most appropriate method. The TPO has rejected TNMM as the most appropriate method and applied the CUP method. For this TPO has not given any reasoning. In fact, TPO and DRP has not brought out any data on record for bench marking of intra group transaction and treating the value of services as NIL by applying the CUP method which is against the basic principles of TP regulations. Data

availability s the life line of any method adopted in comparability analysis. If there is no data available in that particulars method then comparability analysis under that method fails. In a scenario where no data is available to apply the direct methods, one has to resort to residuary methods for benchmarking a transaction / group of transaction such as 'TNMM'. Considering all these factors the Appellant adopted TNMM to benchmark the transaction. In the absence of any justification by DRP/TPO for application of CUP, we justify the use of TNMM as the most appropriate method.

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 ld TPO may examine them and decide the issue with respect to those services in accordance with law. With respect to the method as the ld 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.

12. Since the assessee in the impugned assessment year has only entered into agreement for one service only, namely global customer service centre, therefore, following the decision of the Tribunal in assessee's own case for the assessment year 2009-10 which has been followed by the Tribunal in assessee's own case for assessment years 2010-11 and 2011-12 and in absence of any distinguishable features brought before us by the Revenue, we hold that the addition made by the Assessing Officer/TPO and upheld by the DRP is not sustainable. We accordingly set aside the order of the

Assessing Officer/TPO and direct them to delete the addition. The transfer pricing grounds raised by the assessee are accordingly allowed."

In the present assessment year , the assessee company provided network connectivity services to customers of its AEs, For rendering services, the assessee availed support services from AEs for which it entered into a Services Agreement dated 01.07.2011 with Interwise Asia Pacific Pte Ltd. As per the said agreement, Interwise Asia Pacific Pte Ltd. shall render the aforesaid services to the assessee on cost plus markup. During the year under consideration, out of the many services for which it had entered into agreement, only one service namely Global Customer Services Center was availed. The assessee submitted the list of the tickets processed along with nature of problem resolved and the relevant evidence was also submitted before the Assessing Officer. Thus, the facts are identical in the present Assessment year as well to that of earlier Assessment Years i.e. 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. Since the issue is identical in the present assessment year by assessee's own order, Ground Nos. 1 to 1.6 are allowed.

7. As regards Ground Nos. 2 to 2.7 relating to transfer pricing adjustment with respect to payment of royalty, the Ld. AR submitted that the same is partially covered in favour of the assessee in assessment year 2009-10 wherein Tribunal directed TPO not to question on benefit and to compute ALP. The Ld. AR further submitted that fresh bench marking analysis was undertaken by the TPO, wherein royalty rate was determined at 2.85% instead of 4% of sales. The Ld. AR further submitted that non-comparable royalty agreement has been contested before this Tribunal in this particular year by the assessee. The Ld. AR further submitted that the direction given in Assessment Year 2009-10 were followed by the Tribunal in Assessment Years 2010-11 and 2013-14.

8. The Ld. DR relied upon the order of TPO, DRP and assessing Officer.

9. We have heard both the parties and perused all the relevant material available on record. The Tribunal in Assessment Year 2013-14 held as under :-

"60. Ground of appeal No.1 to 1.06 relates to transfer pricing adjustment relating to intra group services. After hearing both the sides we find that the above grounds relating to intra group services are identical to Ground of appeal No.1 to 1.7 in ITA No.5535/Del/2016. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds by the assessee are allowed. So far as the TP adjustment on account of payment of Royalty is concerned, as per ground of appeal No.1.7 to 1.10 we find, the Tribunal in assessee's own case for A.Y. 2009-10 has observed as under:-

"65. We therefore accept the plea of assessee and hold that the ld TPO is only duty bound to determine the ALP of the royalty payments.

66. With respect to analysis under CUP method by the ld TPO, we fully agree with him in rejecting internal CUP as it pertains to related party transactions which are between its fellow AEs. We also agree with him in rejecting external CUP data as the assessee has not submitted any data regarding similarity in terms and conditions of the royalty agreements. He also rightly held that even from the limited data submitted are for different industries/ geographical location /duration and amounts. No analysis of the royalty agreements between the various parties and the accompanying circumstances and conditions therein has been done by assessee. We also agree that even a minor difference in royalty agreement may have a significant effect on the royalty rates.

67. According to us the royalty payments needs to be tested on the basis of factum and quantum both aspects. It also needs to be looked at the functions to be performed by the parties for royalty payments. It also nees to be looked in to nature of the use of the intangibles which are covered in License Agreement with AT&T Corp, pursuant to which it was granted the right to use licensed marks in marketing material for publicity, advertising,

signs, product brochures, instruction manuals and in other form of advertising. These intangibles, which are licensed to AGNS India, are key value drivers for the business and benefit it by enabling it to expand its presence in the marketplace. What would be the duration of payments of such license royalty is also determinative of the factor of the payments as it cannot also continue for an indefinite period. It may also happen that India brand because o consumer may become bigger than AE's brand.

68. As the assessee has adopted the TNMM which is crude method of benchmarking royalty payments and Ld TPO has disregarded the transaction only on the benefit analysis and has also rejected the CUP benchmarking of the assessee , we are of the view that this issue needs to be set aside to the file of the ld TPO to determine the ALP of the royalty payments afresh after examining the method, comparability and then ALP afresh. Assessee is also directed to support its ALP determination afresh after submitting the detailed answer to all the questions raised by the ld TPO in para no 9 of his order except the benefit test. Hence this ground no 8 of the appeal is allowed with above directions."

60.1 Respectfully following the decision of the Tribunal, we hold that the TPO cannot apply benefit test and is only required to determine the ALP of the royalty payment. Accordingly, we restore the issue to the file of the TPO to determine the ALP of the Royalty payment in accordance with the law and after giving due opportunity of being heard to the assessee. We hold and direct accordingly. These grounds of appeal No.1.7 to 1.10 are allowed for statistical purposes."

In the present Assessment Year, it is observed that the benefit test cannot be applied to determine the ALP of international transaction. The TPO only has to examine as to whether the payment based on the agreement adheres to the arm's length principle or not. Thus, the issue is identical therefore we direct the TPO to determine ALP of the royalty payment in accordance with law. Needless to say the assessee be given opportunity of

hearing by following principles of natural justice. Ground nos. 2 to 2.7 partly allowed for statistical purposes.

10. As regards Ground Nos. 3 to 3.6 relating to disallowance on account of circuit accruals, the Ld. AR submitted that the same is covered in assessee's favour vide order passed in Assessment Year 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 as well as 2008-09.

11. The Ld. DR relied upon the orders of TPO/DRP/AO.

12. We have heard both the parties and perused all the relevant material available on record. The Tribunal in Assessment Year 2013-14 held as under :-

"17. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Assessing Officer made a disallowance of Rs.40,02,308/- on account of circuit accruals credited towards band width and last mile services availed by the assessee on the ground that the assessee did not file the requisite supporting documents. It is the submission of the ld. counsel for the assessee that the assessee follows mercantile system of accounting and accrues circuit charges on scientific basis. It is also his submission that as per the accounting standards notified u/s 145(2) of the Act, the assessee is required to make provision for circuit accruals for the subject financial year. It is also his submission that the assessee has provided evidence to the extent of almost 98% of the expenses represented by year end circuit accruals for utilization/reversal of circuit accruals made in subsequent year and no adverse finding has been given by the Assessing Officer/DRP. We find merit in the arguments advanced by the ld. counsel for the assessee. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2009-10. We find the Tribunal has discussed the issue at para 34 and 35 of the order and held that the circuit accruals are credited on scientific basis and thus needs to be allowed in the year of creation on accrual basis. The relevant observation in the order of the Tribunal reads as under:-

"34. We have carefully considered the rival contentions and perused the order of the ld TPO/ AO/ DRP . The assessee has explained the basis of creating the provisions for circuit accruals, which is calculated automatically and scientifically by the software. As submitted assessee has been followed this basis on a global basis. As explained by the appellant, the process is scientific in a way that as and when a request for new circuits is placed by the customer to appellant, the request is created in favour of third party vendor who in turn is required to provide service. Such requests are converted into orders by the Customer Access Provisioning Team who act as primary interface with the vendors with regard to ordering and delivery of the circuits. Order is placed with the vendor to deliver circuit at a particular address and at a particular time. Accordingly, vendor delivers the circuit (along with necessary hardware and software). Post such delivery, the order gets close and the inventory of circuit usage is recorded in GAIM(Global Access Inventory management system) . GAIM contains various details relating to the circuit, such as Circuit ID number, activation date, tariff codes (rental, usage, one time charge), expected monthly cost, location of circuit, etc. Once the order is closed, the liability to pay the vendor arises. Invoice received by the vendor are entered into GAIM manually or uploaded from electronic files. Thereafter, invoices are validated in GAIM before payment. During invoice validation, GAIM automatically compares the invoice/bill data to the circuit inventory and expected costs. As GAIM works on calendar year basis i.e. from January to December, the accruals for the period starting from January to March are excluded / added on proportionate basis. Assessee further explained that the validation process also identifies any discrepancies which have to be resolved via the dispute management process before the invoice can be approved for payment. The validation checks include:

- *Circuit ID exists in inventory for vendor;*

- *Invoice date is after circuit activation date;*
- *Service period is before circuit cease date;*
- *Invoice tariff code matches order tariff code*
- *Invoice cost is not varying more than USD 100 vis-à-vis the expected cost*
- *Invoice number is unique for vendor*

The invoices for which validation is completed with no discrepancies or for which the discrepancies identified, the same are logged / resolved via dispute management process, are approved for payment. The assessee also explained the logic used by GAIM to calculate the Circuit Accrual for both active and ceased circuits taking into account the activation date and the cease date i.e. no accruals will be posted prior to the activation date or after the cease date. For the current and prior period GAIM will look at each tariff code for each circuit to determine if there is any invoice cost and circuit accruals are booked accordingly. Prior year expenses are tracked each month and matched against the prior year accrual balance brought forward manually. Accordingly, only the current year accrual balances are booked in the profit and loss account.

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 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."

18. Since the facts of the instant case are identical to the facts of the case decided by the tribunal in assessee's own case for assessment year 2009-10 which has been followed in subsequent assessment years i.e., assessment year 2010-11 and 2011-12, therefore, in absence of any contrary material brought to our notice, we hold that the Assessing Officer is not justified in making addition on account of circuit accruals. We, therefore, direct the Assessing Officer to delete the addition. The ground raised by the assessee on this issue is accordingly allowed."

In the present Assessment Year also the assessee is following the same method of accruing circuit charges. Since the year-end circuit accruals created by the assessee represent accruals towards normal business expenditure incurred by the assessee for the relevant assessment year and recorded in

accordance with the matching principle, deduction in respect therefore should be allowed. The assessee company produced documentary evidence of utilization/reversal of the expenses represented by year-end circuit accruals, which shows that even the balance accruals have also been created on a reasonable basis and hence, no disallowance in this regard can be made against the assessee. Thus, the issue is identical to the earlier Assessment Years and therefore Ground Nos. 3 to 3.6 are allowed.

13. As regards Ground Nos. 4 to 4.5 relating to disallowance on account of year end accruals, the Ld. AR submitted that the issue is squarely covered in favour of the assessee vide Tribunal order in Assessment Years 2010-11, 2011-12, 2012-13 and 2013-14 as well as squarely covered by the order of the Tribunal in assessee's sister concern for Assessment Year 2010-11.

14. The Ld. DR relied upon the order of TPO/ DRP/ AO.

15. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 2012-13 held as under:-

"24. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Assessing Officer in the instant case, disallowed an amount of Rs.1.39 crores on account of non-submission of supporting documents relating to the year ending provisions of outstandings. It is the submission of the ld. counsel for the assessee that when the assessee follows mercantile system of accounting and accounts all its expenses pertaining to the year in accordance with the matching principle and was able to substantiate with evidence to the satisfaction of the Assessing Officer in case of more than 95% of the expenses represented by year end accruals, therefore, no disallowance is called for. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2010-11. We find the Tribunal vide ITA No.1059/Del/2015, order dated

18th September, 2017, has discussed the issue and deleted the addition by observing as under:-

"16. We have carefully considered the rival contentions and also perused the facts of the case. The assessee has explained the basis of creating the provisions for year-end accruals. As explained by the appellant, we note that the assessee has been creating the provision on any year on year basis in accordance with the mercantile system of accounting otherwise correct expenditure would not be captured as per the matching principle. The assessee has 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. We also find that the lower authorities allowed the entire claim of expenditure in the next year when such reversals are made. Thus, this practice of disallowing the claim of year end accrual in the year of creation and allowing it in the next year is nothing but a timing difference. It also proves that the AO is not disputing the claim of expenses rather just deferring the claim to next year. Hence, in accordance with the mercantile provisions it should be allowed in the year of creation itself."

25. We find the above decision has again been followed by the Tribunal in assessee's own case for assessment year 2011-12. Since the facts of the impugned assessment year are identical to the facts of the case decided by the Tribunal in assessee's own case for assessment year 2010-11 and 2011-12, therefore, respectfully following the decision of the Tribunal in assessee's own case for preceding three assessment years, we hold that the disallowance made by the Assessing Officer is not justified. Accordingly, the same is directed to be deleted. The ground raised by the assessee is accordingly allowed."

In the present Assessment Year also the assessee company is following the mercantile system of accounting and since the year end accruals created by the

assessee represent accruals towards normal business expenditure incurred by the assessee for the financial year relevant to the present assessment year, deduction in respect thereof has to be allowed to the assessee. The facts are identical in the present Assessment year as well to that of earlier Assessment Year which is decided by the Tribunal in A,Y. 2010-11. Therefore, Ground Nos. 4 to 4.5 are allowed.

16. As regards Ground Nos. 5 to 5.3 relating to disallowance on account of support services, the Ld. AR submitted that the issue is squarely covered in favour of the assessee vide Tribunal's order for assessment year 2009-10, 2010-11 and 2013-14.

17. The Ld. DR relied upon the order of the TPO, DRP and Assessing Officer.

18. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 2013-14 held as under :-

"30. After hearing both the sides, we find the assessee has incurred support service expenditure of Rs.11,87,48,765/- paid to its group company i.e., AT&T Communication Services India Pvt. Ltd. (ACSI) for support services rendered by it. The Assessing Officer disallowed the support services charges of Rs.11.87 crores on account of non-submission of supporting documents. We find identical issue was decided by the Tribunal in assessee's own case for assessment year 2009-10 in ITA No.2538/Del/2014, order dated 18.09.2017. We find the Tribunal has discussed the issue at para 75 and 76 of the order and the appeal of the Revenue has been dismissed by observing 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 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) (SC)

ii. CIT v. Sales Magnesite (P) Ltd [1995) 214 ITR 1

iii. Binodiram Balchand vs. Commissioner of Income Tax (48 1TR 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 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.

31. Since the assessee had not submitted the requisite details before the Assessing Officer, therefore, we restore this issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to submit the details and decide the issue in the light of the decision of the Tribunal for A.Y. 2009-10 as reproduced above. This ground by the assessee is accordingly allowed for statistical purposes."

In the present assessment year also AT&T Communication Services India Pvt. Ltd. (ACSI) which is a group company of the assessee and the assessee company entered into support service agreement, and activities performed by ACSI under support service agreement are essential and integral part. Support services cost of Rs. 8.25 crores which was allocated by ACSI to the assessee towards support services rendered by the ACSI to assessee company. The assessee company submitted all the invoices and the related evidences before the Assessing Officer. But the same was not taken into account by the Assessing Officer. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer by giving opportunity of hearing to the assessee by following principles of natural justice. Thus, Ground Nos. 6 to 6.3 are partly allowed for statistical purpose.

19. As regards Ground Nos. 6 to 6.3 relating to disallowance on account of annual share based license fee, the Ld. AR submitted that the issue is squarely covered by the Tribunal's order in assessment year 2010-11, 2012-13 and 2013-14.

20. The Ld. DR relied upon the order of the TPO, DRP and assessing officer.

21. We have heard both the parties and perused all the relevant material

available on record. The Tribunal in A.Y. 2012-13 and 2013-14 held as under :-

"35. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find identical issued had come up before the Tribunal in assessee's own case for assessment year 2010-11. We find the Tribunal in ITA No.1059/Del/2015, order dated 18th September, 2017, has discussed the issue and allowed the claim of the assessee by observing as under:-

> *"21. We have carefully considered the rival contentions and also perused the facts of the case as well as the decisions relied upon by the appellant. We agree with the contention of the assessee that the expense of Rs. 24,55,13,201/- incurred towards revenue share based license fee for maintenance and usage of telecom license payable to Department of Telecom is a recurring fee paid by the license holder on periodic basis towards maintenance and use of the license and the benefit of the same does not extend beyond the close of the year. Further, it is also relevant to note here benefit of the revenue share based license fees paid during one financial year cannot be extended to the subsequent financial year, for which license fee is to be paid separately upon the adjusted gross revenues of such subsequent year. Therefore, payment of the aforesaid annual fee cannot be said to confer any right of an enduring nature upon appellant. We are convinced that the appellant's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Bharti Hexacom Limited [2014] 265 CTR 130 (Delhi) other case laws relied upon by the appellant as cited above. The Ld. DR could not controvert that how this issue is not squarely covered by the decision of the jurisdictional High Court.It is also important to note that in the immediately succeeding year on same facts, the DRP has allowed the claim of the licence fees on revenue basis u/s 37(1) of the Act. In view of the above facts and respectfully following the decision of the Hon'ble jurisdictional High Court we allow the claim of the assessee. In the result the ground No. 4 of the appeal is allowed."*

36. Merely because the Revenue has filed SLP against the order of the Delhi High Court, the same cannot, in our opinion, be a ground to take a contrary view than the view taken by the Hon'ble High Court unless and until

the same is reversed or stayed by the Hon'ble Apex Court. Therefore, respectfully following the decision of the Tribunal in assessee's own case for assessment year 2010-11, the disallowance made by the Assessing Officer on account of annual revenue share based licence fee is deleted. The ground raised by the assessee is accordingly allowed."

It is pertinent to note here that the annual revenue share based license fee incurred by the assessee is a business expenditure allowable u/s 37 of the Income Tax Act, 1961. This expenditure was incurred by the assessee company towards maintenance and usage of the telecom license, and not for acquiring a right to operate telecommunication services and thus would not attract the provisions of Section 35ABB of the Act. The assessee's case is squarely covered by the decision of Hon'ble Delhi High Court in the case of CIT vs. Bharti Hexacom Limited [2014] 265 CTR 130 (Delhi) other case laws relied upon by the appellant as cited above. The Ld. DR also could not controvert that how this issue is not squarely covered by the decision of the jurisdictional High Court. It is also important to note that in one of the preceding year on same facts, the DRP allowed the claim of the licence fees on revenue basis u/s 37(1) of the Act. Thus, the issue is identical and therefore Ground Nos. 6 to 6.3 are allowed.

22. As regards Ground No. 7.1 relating to disallowance on account of non-deduction of tax on lease line expenses, the Ld. AR submitted that the issue is squarely covered in favour of assessee vide Tribunal's order in assessment year 2012-13 and 2013-14.

23. The Ld. DR relied upon the orders of TPO, DRP and Assessing Officer.

24. We have heard both the parties and perused all the relevant material available on record. The Tribunal for A.Y. 2012-13 held as under :-

"42. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the Assessing Officer disallowed an amount of Rs.6,50,79,639/- paid by the assessee on account of leaseline expenses which were paid to other telecom operators for provision of telecom connectivity service required for transmission of data on the ground that the assessee failed to deduct tax at source as per the provisions of section 194I of the Act. It is the submission of the ld. counsel for the assessee that the leaseline charges are paid to the telecom service provider for faster connectivity service through dedicated leaseline and, therefore, such payment has been made for availing the facility of connectivity services from vendors required for transmission of data and is not for use of any asset involved in provision of such facility covered u/s 194I of the IT Act. It is also the submission of the ld. counsel for the assessee that the assessee was neither in possession nor control of the equipments which were used for providing internet and communication facilities and, therefore, there was a clear absence of the element of leasing of equipments and, therefore, the provisions of section 194I cannot be applied. We find merit in the above argument of the ld. counsel. We find identical issue had come up before the coordinate Bench of the Tribunal in the case of Global One India (P) Ltd.(supra). We find the Tribunal at para 9 to 11 of the order has decided the issue in favour of the assessee by observing as under:-

> *"9. The Ld. Counsel for the assessee submitted that the A.O. disallowed payments made for lease lines, as the assessee has not deducted tax at source u/s 40(A)(i)(a). The A.O. disallowed the same by holding that lease lines were, technically speaking, equipment and payment for taking these lines on lease, is covered u/s 194-I and that the assessee himself has described the payment has been made towards lease lines. The Ld. Counsel relied on the decision of the Delhi high court in the case of Asia Satellite Tele Communication Co. 332 ITR 340(Del)C and submitted that*

the issue is covered in his favour. He relied on the decision of the Mumbai Tribunal in the case of "Vodafone S.R.Ltd." 135 TTJ 182 and submitted that such payments are not for the use of equipment and, therefore, not liable to TDS u/s 194-I.

9.1. On the additional ground of deduction u/s 80 IA(iv), he submitted that any disallowances made by the A.O. would go to increase the income and consequently the assessee would be eligible for deduction u/s 80 IA on such increased profits. He relied on the order in the case of "Gem Plus Jewellery India Pvt. Ltd." (2011) reported in 330 ITR 175 (Bom) in support of his contentions. For levy of interest u/s 234C, he recorded that such interest is levied only on returned income and not on assessed income.

9.2. In reply, the Ld.D.R., though not leaving his ground, submitted that he relies on the order of the A.O. and the reasoning thereof for disallowance made u/s 40A(i)(a) of the Act.

9.3. On the additional grounds the Ld.D.R. submitted that the A.O. may be directed to examine the same, if the Tribunal chose to admit these grounds.

10. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record and orders of the authorities below, case laws cited, we hold as follows.

11. We first take up corporate tax issues which is ground no.5 for the A.Y. 2007-08. The assessee is a licensed internet provider. During the year it procured, domestic half circuit facility to its customers from Telecom Service Providers like BSNL, MTNL, and international half circuit facility from Flag, Atlantic, at France. These are standard facilities provided for transmission of data by those organisations. The issue is whether tax should be deducted at source u/s 194 I from payments made for use of such standard facilities. The Hon'ble Delhi High Court, in the case of Asia Satellite vs. CIT, reported in 332 ITR 340 and the Hon'ble Madras High Court, in the case of Skycell Communications Ltd. vs. DCIT, reported in 351 ITR 53 (Madras) have adjudicated the issue in favour of the assessee.

Respectfully following the same, we hold that payments made towards use of standard facility, when the lessee is not having any domain or control or possessory rights over such facility, cannot be categorized as use of assets for the purpose of the Act.

11.1. Respectfully following the order of the Jurisdictional High Court on this issue, we allow this ground of appeal of the assessee. In the result ground no.5 for the A.Y. 2007-08 is allowed."

42.1 We find Mumbai Bench of the Tribunal in the case of Alok Industries Ltd. (supra) has also decided an identical issue in favour of the assessee by observing as under:-

"16. We have considered the submissions of the parties and perused the materials on record. Undisputedly, the assessee has paid the amount in question to Sify Ltd. towards use of internet/lease license charges. As could be seen, in a number of judicial precedents, some of which have been cited before us, it has been held that payment made towards broadband/lease line charges is not in the nature of royalty so as to attract the provisions of section 194J. Since, the services rendered are not in the nature of technical service as envisaged u/s. 194J, the ld. CIT(A) has attempted to rope in the payment u/s. 194I by referring to the definition of 'process' as provided under Explanation (6) to section 9(1)(vi). However, the said amendment was made by Finance Act, 2012 w.r.e.f. 01.6.1976. Thus, as per existing provision, when the assessee made the payment there was no liability to deduct tax at source by treating it as royalty. The amendment made with retrospective effect cannot fasten liability on the assessee. That being the case assessee cannot be treated as assessee in default. The decisions relied upon by the ld. AR support this view. As far as the observation of the ld. CIT(A) that the payment made otherwise is covered u/s. 194I, we must observe in case of Hero Moto Corp. Ltd. (supra)and Global India (supra), the tribunal has held that the broadband/lease line facilities provided by the service provider for transmission of data does not come in the category of payment made

towards rent for equipment, plant and machinery. Therefore, respectfully following the decisions of the ITAT, we set aside the order of the ld. CIT(A) on this issue. Grounds raised are allowed."

43. We find the Hon'ble Karnataka High Court in the case of Vodafone South Ltd. (supra), while deciding an identical issue, has observed as under:-

"8. We have heard Mr.K.V.Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied upon two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to the other service provider can be said as 'technical services'; one was the decision of the Apex Court in the case of Commissioner of Income-tax, Delhi vs. Bharti Cellular Limited, reported at [2010] 193 Taxman 97 (SC); and the another was the decision of the Apex Court in the case of Commissioner of Income-tax-4, Mumbai vs. Kotak Securities Limited, reported at [2016] 67 taxmann.com 356 (SC) and it was submitted that if the observations made by the Apex Court in the above referred decisions are considered, the decision of the Tribunal would be unsustainable and consequently, the questions may arise for consideration before this Court in the present appeals.

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

10. In the another decision of the Apex Court, in the case of Kotak Securities Limited, the matter was pertaining to the charges of the Stock Exchange and the Apex Court, ultimately, found that no TDS on such payment was deductible under Section 194J of the Act. But the learned Counsel for the appellants – Revenue attempted to contend that in

paragraphs 7 and 8 of the above referred decision of the Apex Court, it has been observed that if a distinguishable and identifiable service is provided, then it can be said as a "technical services". Therefore, he submitted that in the present case, roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".

11. In our view, the contention is not only misconceived, but is on non existent premise, because the subject matter of the present appeals is not roaming services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

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

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

14. In view of the above, we do not find that any substantial question of law would arise for consideration. Hence, the appeals are dismissed."

44. The various other decisions relied on by the ld. counsel for the assessee also support its case. In view of the above discussion, we hold that the assessee is not liable for withholding tax u/s 194I of the Act on account of payment of leaseline charges to other telecom operators for provision of

telecom connectivity services required for transmission of data. Accordingly the Assessing Officer is directed to delete the disallowance. The ground raised by the assessee on this issue is accordingly allowed."

It is pertinent to note that the lease line charges were paid to the telecom service provider for faster connectivity services through dedicated lease line. As such the payment had been made for availing facility of connectivity services from vendors required for transmission of data and is not for use of any asset involved in provision of such facility covered under Section 194I of the Act. The assessee company is not in possession as well as not in control of the equipments which were used for providing internet and communication facilities, therefore, there was a clear absence of the element of leasing of equipments, as a fall out of which the applicability of the provisions of Section 194I stood excluded. Thus, the nature of payment is not at all related to any equipment, therefore, assessee is not require to deduct tax at source under the statutory provisions of Section 194I of the Act. This issue is identical and covered in favour of the assessee, in A.Y. 2012-13 and 2013-14. Accordingly the Assessing Officer is directed to delete this addition. Ground No. 7.1 is allowed.

25. As regards ground no. 8 relating to disallowance on account of notional foreign exchange loss, the Ld. AR submitted that the Tribunal statistically allowed the ground in assessment year 2012-13 having exactly similar facts with the direction to the Assessing Officer to verify the documents filed before the Tribunal during the course of hearing. The Ld. AR submitted that the said direction was followed for Assessment Year 2013-14 by the Tribunal.

26. The Ld. DR relied upon the orders of TPO, DRP and Assessing Officer.

27. We have heard both the parties and perused all the relevant material available on record. The Tribunal in A.Y. 2013-14 held as under :-

"55. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the Assessing Officer disallowed the foreign exchange fluctuation loss of Rs.4,80,06,052/- on the ground that the assessee failed to demonstrate the genuineness of the loss. We find the DRP also upheld the action of the Assessing Officer and the Assessing Officer, in the final order, has disallowed the same. It is the submission of the ld. counsel for the assessee that the additional evidences filed now will substantiate the genuineness of the loss. Considering the totality of the facts of the case and in the interest of justice, we admit the additional evidences filed before the Bench at the time of hearing and restore the issue to the file of the Assessing Officer with a direction to go through the same and decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. Ground of appeal No.9 of the assessee is accordingly allowed for statistical purposes."

In the present year, the assessee company has given break up of foreign exchange loss of Rs. 1.29 crores which is claimed in return of income as a tax deductible expense. The loss is on account of exchange fluctuation in debtors, creditors, and other items which are revenue in nature. Therefore, such loss is allowable expenditure u/s 37(1) of the Act. But the Assessing officer has not taken into account the submissions and the evidences provided by the Assessee during the assessment proceedings. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing. Ground No. 8 is allowed.

28. As regards to Ground No. 9, the Assessing Officer is directed to grant credit of taxes deducted at source to the assessee after verifying the same. This issue is remanded back to the file of the Assessing Officer. The Assessee be given opportunity of hearing by following principles of natural justice. Ground

No. 9 is partly allowed for statistical purpose.

29. As regards to Ground Nos. 10 and 11 are consequential, hence at this juncture are not adjudicated upon.

30. In result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 18th JULY, 2019.

Sd/- Sd/-

(N. K. BILLAIYA) **(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 18/07/2019
Binita

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	15.07.2019
Date on which the typed draft is placed before the dictating Member	16.07.2019
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	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	