

IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Appeal No.	Appellant	Respondent	Assessment Years
IT(IT)A Nos. 1160 & 1161/Bang/2015	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	The Deputy Director of Income Tax, (International Tax), Circle 1 (1), Bangalore.	2013-14 & 2014-15
IT(IT)A No. 2818/Bang/2017			2015-16
IT(IT)A No. 1367/Bang/2015	The Deputy Commissioner of Income Tax, (International Taxation), Circle 1 (1), Bangalore.	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	2013-14
IT(IT)A Nos. 1176 & 1177/Bang/2017	The Joint Commissioner of Income-tax (OSD), Circle – 2 (1), International Taxation, Bangalore.		2013-14 & 2014-15
IT(IT)A Nos. 1312 & 1313/Bang/2016	The Deputy Commissioner of Income Tax, (International Taxation), Circle 1 (1), Bangalore.	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	2013-14 & 2014-15
IT(IT)A No. 192/Bang/2018	The Joint Commissioner of Income-tax (OSD), Circle – 2 (1), International Taxation, Bangalore.	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	2015-16
IT(IT)A Nos. 2469 to 2473/Bang/2018	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	The Deputy Director of Income Tax, (International Tax), Circle 1 (1), Bangalore.	2008-09 to 2012-13
S.P. Nos. 286 & 287/Bang/2019 (in IT(IT)A Nos. 1160 & 1161/Bang/2015)	M/s. Vodafone Idea Ltd., Maruthi Infotech Centre, 11/1, 12/1, Koramangala Amar Jyoti Layout, Bangalore – 71. PAN: AABC5847L	The Deputy Director of Income Tax, (International Tax), Circle 1 (1), Bangalore.	2013-14 & 2014-15
S.P. No. 288/Bang/2019 (in IT(IT)A No. 2818/Bang/2017)			2015-16

Assessee by	:	Shri Salil Kapoor, Advocate, Ms. Soumya Singh, Advocate, Shri Ketan Ved, CA
Revenue by	:	Shri K.V. Aravind, Standing Counsel for Dept.
Date of hearing	:	13.11.2019
Date of Pronouncement	:	28.11.2019

ORDER

PER BENCH:

This is a bunch of 14 appeals and three stay petitions. It includes 8 appeals of the assessee for assessment years 2008 – 09 to 2015 – 16. Remaining 6 appeals are filed by the revenue. These six appeals include one duplicate appeal because for A. Ys. 2013 – 14 & 2014 – 15, the revenue earlier filed one appeal only i.e. ITA No. 1367/Bang/2015 but later filed two separate appeals in ITA No. 1176 & 1177/Bang/2017 and all three are heard together. These three appeals have arisen out of a combined rectification order dated 12.05.2015 passed by the AO for these two years. Remaining three appeals of the revenue are for A. Ys. 2013 – 14 to 2015 – 16.

2. All these appeals were heard together along with three Stay Petitions and all these are disposed of by this common order for convenience.
3. Relevant brief facts are that in the three appeals of the assessee for A. Ys. 2013 – 14 to 2015 – 16, the issue in dispute is about the liability of the assessee to deduct TDS from IUC/bandwidth Charges paid to foreign carriers. The department has held that these payments are taxable in the hands of the recipients both as Royalty as well as FTS and therefore, the assessee was liable to deduct TDS and since, the assessee has not done so, demand is raised u/s 201 (1) and 201 (1A).
4. In A.Ys. 2008 – 09 to 2012 – 13, the stand of the department was same but as per an earlier tribunal order in ITA Nos. 449 to 453/Bang/2013 dated 30.12.2014 as per Para 42, the tribunal decided the issue on one aspect against the assessee and held that the consideration paid by the assessee as IUC charges for alleged inter connect service falls within the ambit of

process Royalty and element of income was involved and therefore, the assessee was bound to deduct the TDS on such payment. But on the second aspect as to whether this payment is liable to tax or not in the hands of the recipients as FTS , as per Para 45, the tribunal remanded the matter back to CIT (A) for fresh adjudication because as per the earlier order which was before the tribunal, it was noted by the tribunal that the learned CIT (A) has not recorded any finding on this issue. Now in these five earlier years also, the assessee is in appeal before us as the learned CIT (A) has passed fresh order as per the direction of the tribunal.

5. Appealwise grounds are as under.

IT(IT)A No. 1160/Bang/2015:- (By Assessee -Assessment Year: 2013-14)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 250 of the Income Tax Act, 1961 ('Act'), confirming the allegation of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1 - Payments not liable to tax deduction at source

1.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on Interconnect Usage Charges ('IUC') and bandwidth payments made to foreign carriers.

2. Ground No. 2 - Payments cannot be taxed under two different provisions

2.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that IUC and bandwidth payments cannot be taxed as royalty and also as fee for technical services. since payment of a particular kind cannot be taxed under two different provisions.

3. Ground No. 3 - Non characterization of IUC and bandwidth payments as royalty

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that IUC and bandwidth payments made by the Appellant to the foreign carriers qualify as 'royalty' as defined in Explanation 2 to section 9(1) (vi) of the Act.

3.1.1 *The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers results in 'use of or 'transfer of right to use' the process belonging to the foreign carriers by the Appellant and hence, IUC and bandwidth payments qualify as a royalty under clause (i) and (iii) of Explanation 2 to section 9(1)(vi) of the Act.*

3.1.2 *The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers result in 'use of equipment belonging to the foreign carriers by the Appellant and hence, IUC and bandwidth payments qualify as royalty under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act.*

3.1.3 *The learned CIT(A) has erred in upholding the order of the learned Tax Officer treating the IUC and bandwidth payments as royalty under the amended provisions of section 9(1)(vi) of the Act, despite the fact that the amendments are unconstitutional and hence, cannot be relied upon in determining the characterization of these payments.*

3.2 *Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not appreciating that IUC and bandwidth payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as royalty under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vi)(b) of the Act.*

3.3 *On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments made by Appellant qualify as 'royalty' as defined under the applicable Double Taxation Avoidance Agreements ('DTAA') entered into between India and the country of residence of the foreign carriers.*

3.3.1 *The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of' the process belonging to such foreign carriers by the Appellant.*

3.3.2 *Without prejudice to ground 3.3.1 above, the learned CIT(A) has erred in not taking cognizance of the fact that there needs to be 'use of a secret process' for the payments to qualify as royalty for use of a process under the applicable DTAA's.*

3.3.3 *The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of the equipment belonging to such foreign carriers by the Appellant.*

3.4 *Without prejudice to ground 3.3 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that amendments made to section 9(1)(vi) of the Act, by way of insertion of*

Explanation 5 and 6 vide Finance Act, 2012, should be applicable and be read into the DTAAs and hence, the IUC and bandwidth payments made by the Appellant to the foreign carriers qualify as 'royalty' under the applicable DTAAs.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying upon the Madras High Court decisions in the case of Verizon Singapore Pte Ltd. 39 taxmann.com 70 and Poompuhar Shipping Corporation Ltd. 38 taxmann.com 150.

4. Ground No. 4 - Non characterization of IUC and bandwidth payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

4.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments qualify as FTS as defined under section 9(1)(vii) of the Act.

4.2 Without prejudice to ground 4.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that IUC and bandwidth payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

4.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments qualify as FTS/ FIS as defined under the respective DTAAs.

4.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not taking cognizance of the fact that provision of interconnect and bandwidth services does not involve 'human intervention' and hence, IUC and bandwidth payments do not qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAs.

4.5 On the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that provision of interconnect services and bandwidth is a standard facility and hence, IUC and bandwidth payments cannot be construed as FTS/ FIS either under the Act or under the applicable DTAAs.

4.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and bandwidth payments qualify as FTS/ FIS under the DTAAs, which contain a 'make available' clause in the definition of FTS/FIS.

4.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth consists of development and transfer of a technical plan or design by the foreign

carriers to the Appellant and hence, IUC and bandwidth payments qualify as FTS/ FIS under the respective DTAA's, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

4.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that where the DTAA's do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

4.9 On the facts and circumstances of the case and in law, the judgments relied upon by the learned CIT(A) have no application to the present case.

5. Ground No. 5 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

5.1 Without prejudice to Grounds 1 to 4 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

6. Ground No. 6 - Non-applicability of section 206AA of the Act

6.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that section 206AA overrides the provisions of the DTAA's and hence, should be applied even in case of payments made to foreign carriers, which are covered by the applicable DTAA's.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 1161/Bang/2015:- (By Assessee -Assessment Year: 2014-15)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 250 of the Income Tax Act, 1961 ('Act'), confirming the allegation of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be

considered independent of each other.

1. Ground No. 1 - Payments not liable to tax deduction at source

1.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 20 1 of the Act for non-deduction of tax at source under section 195 of the Act on Interconnect Usage Charges (IUC) and bandwidth payments made to foreign carriers.

2. Ground No. 2 - Payments cannot be taxed under two different provisions

2.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that IUC and bandwidth payments cannot be taxed as royalty and also as fee for technical services, since payment of a particular kind cannot be taxed under two different provisions.

3. Ground No. 3 - Non characterization of IUC and bandwidth payments as royalty

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that IUC and bandwidth payments made by the Appellant to the foreign carriers qualify as 'royalty' as defined in Explanation 2 to section 9(1)(vi) of the Act.

3.1.1 The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers results in 'use of or 'transfer of right to use' the process belonging to the foreign carriers by the Appellant and hence, IUC and bandwidth payments qualify as a royalty under clause (i) and (iii) of Explanation 2 to section 9(1)(vi) of the Act.

3.1.2 The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers result in 'use of' equipment belonging to the foreign carriers by the Appellant and hence, IUC and bandwidth payments qualify as royalty under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act.

3.1.3 The learned CIT(A) has erred in upholding the order of the learned Tax Officer treating the IUC and bandwidth payments as royalty under the amended provisions of section 9(1 Xvi) of the Act, despite the fact that the amendments are unconstitutional and hence, cannot be relied upon in determining the characterization of these payments.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer

has erred in not appreciating that IUC and bandwidth payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as royalty under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vi)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments made by Appellant qualify as 'royalty' as defined under the applicable Double Taxation Avoidance Agreements ('DTAA') entered into between India and the country of residence of the foreign carriers.

3.3.1 The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of the process belonging to such foreign carriers by the Appellant.

3.3.2 Without prejudice to ground 3.3.1 above, the learned CIT(A) has erred in not taking cognizance of the fact that there needs to be 'use of a secret process' for the payments to qualify as royalty for use of a process under the applicable DTAA's.

3.3.3 The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of the equipment belonging to such foreign carriers by the Appellant.

3.4 Without prejudice to ground 3.3 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that amendments made to section 9(1)(vi) of the Act, by way of insertion of Explanation 5 and 6 vide Finance Act, 2012, should be applicable and be read into the DTAA's and hence, the IUC and bandwidth payments made by the Appellant to the foreign carriers qualify as 'royalty' under the applicable DTAA's.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying upon the Madras High Court decisions in the case of Verizon Singapore Pte Ltd. 39 taxmann.com 70 and Poompuhar Shipping Corporation Ltd. 38 taxmann.com 150.

4. Ground No. 4 - Non characterization of IUC and bandwidth payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

4.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments qualify as FTS as defined under section 9(1)(vii) of the Act.

4.2 Without prejudice to ground 4.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that IUC and bandwidth payments are made in relation to the business carried on by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

4.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and bandwidth payments qualify as FTS/ FIS as defined under the respective DTAAAs.

4.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not taking cognizance of the fact that provision of interconnect and bandwidth services does not involve 'human intervention' and hence, IUC and bandwidth payments do not qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAAs.

4.5 On the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that provision of interconnect services and bandwidth is a standard facility and hence, IUC and bandwidth payments cannot be construed as FTS/ FIS either under the Act or under the applicable DTAAAs.

4.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and bandwidth payments qualify as FTS/ FIS under the DTAAAs, which contain a 'make available' clause in the definition of FTS/FIS.

4.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and bandwidth payments qualify as FTS/ FIS under the respective DTAAAs, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

4.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that where the DTAA's do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

4.9 On the facts and circumstances of the case and in law, the judgments relied upon by the learned CIT(A) have no application to the present case.

5. Ground No. 5 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

5.1 Without prejudice to Grounds 1 to 4 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

6. Ground No. 6 - Non-applicability of section 206AA of the Act

6.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that section 206AA overrides the provisions of the DTAA's and hence, should be applied even in case of payments made to foreign carriers, which are covered by the applicable DTAA's.

7. Ground No. 7 - Levy of higher rate of 25% under section 115A of the Act

7.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer applying a higher rate of 25% under section 115A of the Act even on payments covered by the DTAA's.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 2818/Bang/2017:- (By Assessee -Assessment Year: 2015-16)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 250 of the Income Tax Act, 1961 (Ace), partly confirming the order of the Deputy Commissioner

of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1- The impugned order passed by learned CIT(A) and also the order passed by the learned Tax Officer is bad in law and hence, void-ab-initio

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice Infotainment (CA 285 of 2014), the impugned order and also the order passed by the learned Tax Officer is 'bad in law' and 'void-ab-initio' since the same has been passed in the name of Vodafone South Limited which did not exist as on the date on which the orders were passed.

1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments are liable for tax withholding despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 -dated March 17, 2016), wherein it has been held that interconnect charges paid to foreign carriers are not subject to tax withholding under section 195 of the Act and which has not been challenged by the tax dept.

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on interconnect charges and bandwidth payments made to foreign carriers.

3. Ground No. 3- Non applicability of section 5(2) of the Act

3.1. On the facts and circumstances of the case and in law, the learned Tax Officer has erred in holding that interconnect charges and bandwidth payments made to the foreign carriers 'accrue or arise' in India, since such payments are made by a person resident in India (i.e. the Appellant), and hence, taxability thereof needs to be determined under section 5(2)(b) of the Act and not under section 9 of the Act.

3.2. On the facts and circumstances of the case and in law, the learned Tax Officer has erred in not following the order of the Hon'ble jurisdictional Bangalore Tribunal in the Appellant's own case (in ITA Nos 449 to 453/Bang/ 2013), wherein the above issue has been decided in favour of the Appellant.

4. Ground No. 4 - Payments cannot be taxed under two different

provisions

4.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating that interconnect charges and bandwidth payments cannot be taxed as royalty and also as fee for technical services, since payment of a particular kind cannot be taxed under two different provisions.

5. Ground No. 5- Non characterization of interconnect charges and bandwidth payments as royalty

5.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in merely relying upon the order of this Hon'ble Tribunal in the case of Appellant dated December 30, 2014 for earlier years without appreciating the fact that post the said decision, there have been many favourable decisions on this very issue and the position has changed.

5.2 Without prejudice to ground No. 5.1 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that interconnect charges and bandwidth payments made by the Appellant to the foreign carriers do not qualify as 'royalty' as defined in Explanation 2 to section 9(1)(vi) of the Act.

5.2.1 The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers results in 'use of or 'transfer of right to use' the process belonging to the foreign carriers by the Appellant and hence, interconnect charges and bandwidth payments qualify as a royalty under clause (i) and (iii) of Explanation 2 to section 9(1)(vi) of the Act.

5.2.2 The learned CIT(A) has erred in holding that provision of interconnect services and bandwidth by the foreign carriers results in 'use of' equipment belonging to the foreign carriers by the Appellant and hence, interconnect charges and bandwidth payments qualify as royalty under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act.

5.2.3 The learned CIT(A) has erred in upholding the order of the learned Tax Officer treating the interconnect charges and bandwidth payments as royalty under the amended provisions of section 9(1)(vi) of the Act, despite the fact that the amendments are unconstitutional and hence, cannot be relied upon in determining the characterization of these payments.

5.3 Without prejudice to ground 5.2 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not appreciating that interconnect charges and bandwidth

payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as royalty under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vi)(b) of the Act.

5.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that interconnect charges and bandwidth payments made by the Appellant qualify as 'royalty' as defined under the applicable Double Taxation Avoidance Agreements ('DTAA') entered into between India and the country of residence of the foreign carriers.

5.4.1 The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of the process belonging to such foreign carriers by the Appellant.

5.4.2 Without prejudice to ground 5.4.1 above, the learned CIT(A) has erred in not taking cognizance of the fact that there needs to be 'use of a secret process' for the payments to qualify as royalty for use of a process under the applicable DTAA's.

5.4.3 The learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that services provided by the foreign carriers to the Appellant involve 'use of the equipment belonging to such foreign carriers by the Appellant.

5.5 Without prejudice to ground 5.4 above, on the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that amendments made to section 9(1)(vi) of the Act, by way of insertion of Explanation 5 and 6 vide Finance Act, 2012, should be applicable and be read into the DTAA's and hence, the interconnect and bandwidth payments made by the Appellant to the foreign carriers qualify as 'royalty' under the applicable DTAA's.

6. Ground No. 6 - Non characterization of interconnect and bandwidth payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

6.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that interconnect and bandwidth payments qualify as FTS as defined under section 9(1)(vii) of the Act.

6.2 Without prejudice to ground 6.1 above, on the facts and

circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that interconnect and bandwidth payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(l)(vii)(b) of the Act.

6.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that interconnect and bandwidth payments qualify as FTS/ FIS as defined under the respective DTAAAs.

6.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not taking cognizance of the fact that provision of interconnect and bandwidth services does not involve 'human intervention' and hence, interconnect and bandwidth payments do not qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAAs.

6.5 On the facts and circumstances of the case and in law, the learned CIT(A)/ Tax Officer has erred in not holding that provision of interconnect services and bandwidth is a standard facility and hence, interconnect and bandwidth payments cannot be construed as FTS/ FIS either under the Act or under the applicable DTAAAs.

6.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, interconnect and bandwidth payments qualify as FTS/ FIS under the DTAAAs, which contain a 'make available' clause in the definition of FTS/FIS.

6.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and bandwidth consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, interconnect and bandwidth payments qualify as FTS/ FIS under the respective DTAAAs, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

6.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that where the DTAAAs do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

6.9 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as VMSL) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services'.

7. Ground No. 7 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

7.1 Without prejudice to Grounds 1 to 6 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 1367/Bang/2015:- (By Revenue -Assessment Year: 2013-14)

“1. The Ld. CIT(A)-I V has upheld the view of the AO that IUC and capacity transfer payment made by VSL accrue or arise in India and ought to be taxed in the source country, as it is the source country which provides the opportunity to generate such income or profits.

2. The Ld. CIT(A) has opined that having held the payments taxable as royalty u/s 9(1)(w) and FTS u/s.9(i)(vii), it is not open for him to adjudicate on the taxability of the same income under the other sections of the Income Tax Act, 1961.

3. The Ld. CIT(A) has opined that the 'other income' or the 'residuary income' clause of the DTAA 's is triggered only when the payments received by a non resident does not get covered by any other article of the DTAA.”

IT(IT)A No. 1176/Bang/2017:- (By Revenue -Assessment Year: 2013-14)

“6. The order of the learned Commissioner of Income Tax (Appeals)-12, Bengaluru is contrary to the law, facts and circumstances of the case.

7. The learned Commissioner of Income Tax (Appeals) -12, Bengaluru has erred in allowing appeal of the assessee on the issue of applicability of section 206 AA of IT Act on payments made to nonresident entities on the facts and circumstances of the case.

8. *The learned Commissioner of Income Tax (Appeals) -12, Bengaluru erred in allowing relief quoting the case of Bosch Ltd Vs ITO which dealt with grossing up issue u/s 195 which are not related to section 206 AA of IT Act.*

9. *The learned Commissioner of Income Tax (Appeals) -12, Bengaluru erred in not appreciating the 'non-obstante- provisions contained in section 206 AA of IT Act, which would have overriding effect over all provisions of Act, including the treaty.*

10. *For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) may be annulled and that of the AO be restored.”*

IT(IT)A No. 1177/Bang/2017:- (By Revenue -Assessment Year: 2014-15)

“1. *The order of the learned Commissioner of Income Tax (Appeals)-12, Bengaluru is contrary to the law, facts and circumstances of the case.*

2. *The learned Commissioner of Income Tax (Appeals) -12. Bengaluru has erred in allowing appeal of the assessee on the issue of applicability of section 206 AA of IT Act on payments made to nonresident entities on the facts and circumstances of the case.*

3. *The learned Commissioner of Income Tax (Appeals) -12, Bengaluru erred in allowing relief quoting the case of Bosch Ltd Vs ITO which dealt with grossing up issue u/s 195 which are not related to section 206 AA of IT Act.*

4. *The learned Commissioner of Income Tax (Appeals) -12, Bengaluru erred in not appreciating the 'non-obstante' provisions contained in section 206 AA of IT Act, which would have overriding effect over all provisions of Act, including the treaty.*

6. *For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) may be annulled and that of the AO be restored.”*

IT(IT)A No. 1312/Bang/2016:- (By Revenue -Assessment Year: 2013-14)

“1. *The Ld.CIT(A)-IV has upheld the view of the AO that IUC and capacity transfer payment made by VSL accrue or arise in India and ought to be taxed in the source country, as it is the source country which provides the opportunity to generate such income or profits.*

2. *The Ld. CIT(A) has opined that having held the payments taxable as royalty u/s 9(1)(vi) and FTS u/s.9(i)(vii), it is not open for him to adjudicate on the taxability of the same income under the other sections*

of the Income Tax Act, 1961.

3. The Ld.CIT(A) has opined that the 'other income' or the 'residuary income' clause of the DTAA 's is triggered only when the payments received by a non resident does not get covered by any other article of the DTAA.”

IT(IT)A No. 1313/Bang/2016:- (By Revenue -Assessment Year: 2014-15)

“1. The Ld.CIT(A)-IV has upheld the view of the AO that IUC and capacity transfer payment made by VSL accrue or arise in India and ought to be taxed in the source country, as it is the source country which provides the opportunity to generate such income or profits.

2. The Ld. CIT(A) has opined that having held the payments taxable as royalty u/s 9(1)(w) and FTS u/s.9(i)(vii), it is not open for him to adjudicate on the taxability of the same income under the other sections of the Income Tax Act, 1961.

3. The Ld. CIT(A) has opined that the 'other income ' or the 'residuary income' clause of the DTAA 's is triggered only when the payments received by a non resident does not get covered by any other article of the DTAA.”

IT(IT)A No. 192/Bang/2018:- (By Revenue -Assessment Year: 2015-16)

“1. For that in the facts and circumstances of the case, the order of the learned Commissioner of Income Tax (Appeals)-12, Bengaluru is contrary to the law and extant facts and circumstances of the case.

2. For that, the learned Commissioner of Income Tax erred in law as well as on facts, in not appreciating the order of the Assessing Officer in treating Interconnect Usage Charges (IUC) as "Other Income", in the given facts and circumstances of the case notwithstanding the fact that the Interconnect Usage Charges was already held as Royalty .

3. For that the Ld. CIT (Appeals) erred in law as well as on facts in holding that the 'other income' or the 'residuary income' clause of the DTAA is triggered only when the payments received by a non-resident does not get covered by any other article of the DTAA

4. For that the Ld. CIT (Appeals) erred in law as well as on facts in further holding that, once it is held that the nature of income is royalty both under the Act and the DTAA, there is no scope to invoke the residuary income article of the DTAA.

5. For that, the learned Commissioner of Income Tax erred in Jaw as well as on facts, in allowing the appeal of the assessee on the issue of applicability of section 206 AA of Income-tax Act, 1961, in respect of

payments made to nonresident entities, in the facts and circumstances of the case.

6. For that, the Ld. CIT (Appeals) erred in law as well as on facts in holding that, there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA, when the benefit of DTAA is available; despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section.

7. For that, the learned Commissioner of Income Tax erred in law as well as on facts, in allowing the appeal of the assessee, by wrongly/incorrectly placing reliance on the decision of the Hon'ble ITAT, Bangalore, in the case of Bosch Ltd Vs ITO which dealt with grossing up issue u/s 195 of the Income-tax Act, 1961 and not the issue relating to Section 206 AA of Income-tax Act.

8. For that, in the facts and circumstances of the case, the Ld. CIT (Appeals) erred in law as well as on facts in holding that, the tax payable by a UK tax resident on royalties / FTS earned from India cannot exceed 15% in view of Article 13(3) of India-UK Tax Treaty and accordingly that, the withholding tax liability of the taxpayer can also not exceed 15% of the Royalty / FTS amount.

9. For that, any other ground or grounds may be allowed to be taken up at the time of hearing.”

IT(IT)A No. 2469/Bang/2018:- (By Assessee-Assessment Year: 2008-09)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 254 read with section 250 of the Income Tax Act, 1961 ('Ace), confirming the order of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1- The impugned order passed by learned CIT(A) is bad in law and hence, void-ab-initio

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice Infotainment (CA 285 of 2014), the impugned order is 'bad in law' and 'void-ab-initio' since the same has been passed in the name of

'Vodafone South Limited' which did not exist as on the date on which the impugned order was passed.

*1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments towards Interconnect Usage Charges (IUC) qualify as Fee for Technical Services (*FTS)/ Fee for Included Services ('F.'S') despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 - dated March 17, 2016), wherein it has been specifically held that IUC paid to foreign carriers do not qualify as FTS/ FIS, which has not been challenged by the Revenue Department and thus, has been accepted.*

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on IUC and capacity transfer payments made to foreign carriers.

3. Ground No. 3 - Non characterization of interconnect and capacity transfer payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('RS')

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS as defined under section 9(1)(vii) of the Act.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ learned Tax Officer has erred in not holding that IUC and capacity transfer payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS/ FIS as defined under the respective Double Taxation Avoidance Agreements ('DTAAs').

3.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that provision of interconnect services and transfer of capacity involve 'human intervention' and hence, IUC and capacity transfer payments qualify as FTS/ FIS for the purposes of the

Act or the applicable DTAA.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the DTAA, which contain a 'make available' clause in the definition of FTS/FIS.

3.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the respective DTAA, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

3.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying on its orders passed for Financial Years 2012-13 and 2013-14, wherein it has been held that where the DTAA do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

3.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as Vodafone Mobile Services Limited) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services' and decision of the Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited, wherein it has been held that IUC payments made to foreign carriers do not qualify as FTS/ FIS.

4. Ground No. 4 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

4.1 Without prejudice to Grounds 1 to 3 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 2470/Bang/2018:- (By Assessee-Assessment Year: 2009-10)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 254 read with section 250 of the Income Tax Act, 1961 (‘Ace), confirming the order of the Deputy Director of Income Tax, International Tax. Circle 1(1), Bengaluru (‘learned Tax Officer’).

Each of the ground is referred to separately, which may kindly be considered independent of each other.

*1. Ground No. 1- The impugned order passed by learned CIT(A) is bad in law and hence,
void-ab-initio*

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice Infotainment (CA 285 of 2014), the impugned order is 'bad in law' and 'void-ab-initio' since the same has been passed in the name of 'Vodafone South Limited' which did not exist as on the date on which the impugned order was passed.

1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments towards Interconnect Usage Charges (IUC) qualify as Fee for Technical Services (‘FTS’)/ Fee for Included Services (‘FIS’) despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 - dated March 17, 2016), wherein it has been specifically held that IUC paid to foreign carriers do not qualify as FTS/ FIS, which has not been challenged by the Revenue Department and thus, has been accepted.

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an ‘assessee-in-default’ under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on IUC and capacity transfer payments made to foreign carriers.

3. Ground No. 3 - Non characterization of interconnect and capacity transfer payments as Fee for Technical Services (‘FTS’)/ Fee for

Included Services ('FIS')

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS as defined under section 9(1)(vii) of the Act.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ learned Tax Officer has erred in not holding that IUC and capacity transfer payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS/ FIS as defined under the respective Double Taxation Avoidance Agreements ('DTAAs').

3.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that provision of interconnect services and transfer of capacity involve 'human intervention' and hence, IUC and capacity transfer payments qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAs.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the DTAAs, which contain a 'make available' clause in the definition of FTS/FIS.

3.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the respective DTAAs, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

3.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying on its orders passed for Financial Years 2012-13 and 2013-14, wherein it has been held that where the DTAAs

do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

3.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as Vodafone Mobile Services Limited) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services' and decision of the Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited, wherein it has been held that IUC payments made to foreign carriers do not qualify as FTS/ FIS.

4. Ground No. 4 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

4.1 Without prejudice to Grounds 1 to 3 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 2471/Bang/2018:- (By Assessee-Assessment Year: 2010-11)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 254 read with section 250 of the Income Tax Act, 1961 ('Act'), confirming the order of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1- The impugned order passed by learned CIT(A) is bad in law and hence, void-ab-initio

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice

Infotainment (CA 285 of 2014), the impugned order is 'bad in law' and 'void-ab-initio' since the same has been passed in the name of 'Vodafone South Limited' which did not exist as on the date on which the impugned order was passed.

1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments towards Interconnect Usage Charges (IUC) qualify as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS') despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 - dated March 17, 2016), wherein it has been specifically held that IUC paid to foreign carriers do not qualify as FTS/ FIS, which has not been challenged by the Revenue Department and thus, has been accepted.

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on IUC and capacity transfer payments made to foreign carriers.

3. Ground No. 3 - Non characterization of interconnect and capacity transfer payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS as defined under section 9(1)(vii) of the Act.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ learned Tax Officer has erred in not holding that IUC and capacity transfer payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS/ FIS as defined under the respective Double Taxation Avoidance Agreements ('DTAAs').

3.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that provision of interconnect services and

transfer of capacity involve 'human intervention' and hence, IUC and capacity transfer payments qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAs.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the DTAAs, which contain a 'make available' clause in the definition of FTS/FIS.

3.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the respective DTAAs, which include payments made for the aforesaid activity within the ambit of FTS FIS.

3.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying on its orders passed for Financial Years 2012-13 and 2013-14, wherein it has been held that where the DTAAs do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

3.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as Vodafone Mobile Services Limited) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services' and decision of the Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited, wherein it has been held that IUC payments made to foreign carriers do not qualify as FTS/ FIS.

4. Ground No. 4 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

4.1 Without prejudice to Grounds 1 to 3 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and

only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 2472/Bang/2018:- (By Assessee-Assessment Year: 2011-12)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 254 read with section 250 of the Income Tax Act, 1961 (‘Ace), confirming the order of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru (‘learned Tax Officer’).

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1-The impugned order passed by learned CIT(A) is bad in law and hence, void-ab-initio

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice Infotainment (CA 285 of 2014), the impugned order is 'bad in law' and 'void-ab-initio' since the same has been passed in the name of 'Vodafone South Limited' which did not exist as on the date on which the impugned order was passed.

1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments towards Interconnect Usage Charges (IUC) qualify as Fee for Technical Services (‘FTS’)/ Fee for Included Services (‘RS’) despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 - dated March 17, 2016), wherein it has been specifically held that IUC paid to foreign carriers do not qualify as FTS/ FIS, which has not been challenged by the Revenue Department and thus, has been accepted.

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an ‘assessee-in-default’ under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on IUC and capacity transfer payments made to foreign carriers.

3. Ground No. 3 - Non characterization of interconnect and capacity

transfer payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS as defined under section 9(1)(vii) of the Act.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ learned Tax Officer has erred in not holding that IUC and capacity transfer payments are made in relation to the business carried on the by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS/ FIS as defined under the respective Double Taxation Avoidance Agreements ('DTAAs').

3.4 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that provision of interconnect services and transfer of capacity involve 'human intervention' and hence, IUC and capacity transfer payments qualify as FTS/ FIS for the purposes of the Act or the applicable DTAAs.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the. order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the DTAAs, which contain a 'make available' clause in the definition of FTS/FIS.

3.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the respective DTAAs, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

3.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying on its orders passed for Financial Years

2012-13 and 2013-14, wherein it has been held that where the DTAA's do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

3.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as Vodafone Mobile Services Limited) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services' and decision of the Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited, wherein it has been held that IUC payments made to foreign carriers do not qualify as FTS/ FIS.

4. Ground No. 4 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

4.1 Without prejudice to Grounds 1 to 3 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

IT(IT)A No. 2473/Bang/2018:- (By Assessee-Assessment Year: 2012-13)

“The Appellant respectfully submits that:

On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - 12, Bengaluru [learned CIT(A)] has erred in passing an order under section 254 read with section 250 of the Income Tax Act, 1961 (Vice), confirming the order of the Deputy Director of Income Tax, International Tax, Circle 1(1), Bengaluru ('learned Tax Officer').

Each of the ground is referred to separately, which may kindly be considered independent of each other.

1. Ground No. 1- The impugned order passed by learned CIT(A) is bid in law and hence, void-ab-initio

1.1 On the facts and circumstances of the case and in law, and in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs Spice

Infotainment (CA 285 of 2014), the impugned order is bad in law' and 'void-ab-initio' since the same has been passed in the name of 'Vodafone South Limited' which did not exist as on the date on which the impugned order was passed.

1.2 Without prejudice to ground No 1.1 above, the order passed by the learned CIT(A) is bad in law since the learned CIT(A) has held that payments towards Interconnect Usage Charges (IUC) qualify as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS') despite the favourable ruling of the Hon'ble Delhi Bench of the Tribunal in the case of Bharti Airtel Limited (178 TTJ 708 - dated March 17, 2016), wherein it has been specifically held that IUC paid to foreign carriers do not qualify as FTS/ FIS, which has not been challenged by the Revenue Department and thus, has been accepted.

2. Ground No. 2 - Payments not liable to tax deduction at source

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding the Appellant to be an 'assessee-in-default' under section 201 of the Act for non-deduction of tax at source under section 195 of the Act on IUC and capacity transfer payments made to foreign carriers.

3. Ground No. 3 - Non characterization of interconnect and capacity transfer payments as Fee for Technical Services ('FTS')/ Fee for Included Services ('FIS')

3.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS as defined under section 9(1)(vii) of the Act.

3.2 Without prejudice to ground 3.1 above, on the facts and circumstances of the case and in law, the learned CIT(A)/ learned Tax Officer has erred in not holding that IUC and capacity transfer payments are made in relation to the business carried on by the Appellant outside India and hence, even if construed as FTS under the Act, such payments cannot be taxed in India by virtue of section 9(1)(vii)(b) of the Act.

3.3 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that IUC and capacity transfer payments qualify as FTS/ FIS as defined under the respective Double Taxation Avoidance Agreements ('DTAAs').

3.4 On the facts and circumstances of the case and in law, the learned

CIT(A) has erred in holding that provision of interconnect services and transfer of capacity involve 'human intervention' and hence, IUC and capacity transfer payments qualify as FTS/ FIS for the purposes of the Act or the applicable DTAA.

3.5 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity 'make available' technical knowledge, skill, know-how, process etc. to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the DTAA, which contain a 'make available' clause in the definition of FTS/FIS.

3.6 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the order of the learned Tax Officer holding that provision of interconnect services and transfer of capacity consists of development and transfer of a technical plan or design by the foreign carriers to the Appellant and hence, IUC and capacity transfer payments qualify as FTS/ FIS under the respective DTAA, which include payments made for the aforesaid activity within the ambit of FTS/ FIS.

3.7 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in relying on its orders passed for Financial Years 2012-13 and 2013-14, wherein it has been held that where the DTAA do not have a clause governing taxability of FTS/ FIS, provisions of the Act apply, without appreciating the fact that in such cases, the relevant Article of the DTAA dealing with taxation of Business Profits is applicable.

3.8 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not following the binding decision of the Jurisdictional High Court in the case of Vodafone South Limited (now known as Vodafone Mobile Services Limited) (241 Taxmann 497), wherein the Hon'ble High Court has held that roaming charges (similar to carrier charges) paid to domestic telecom operators cannot be termed as 'technical services' and decision of the Hon'ble Delhi Tribunal in the case of Bharti Airtel Limited, wherein it has been held that IUC payments made to foreign carriers do not qualify as FTS/ FIS.

4. Ground No. 4 - Withholding tax liability under section 201 of the Act cannot be recovered from the Appellant

4.1 Without prejudice to Grounds 1 to 3 above, on the facts and circumstances of the case and in law, the learned Tax Officer has erred in raising tax demand under section 201 of the Act without taking cognizance of the fact that the payer cannot be held liable for payment

of the tax demand in cases involving non-deduction of tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

The Appellant craves leave to add, alter, amend or withdraw any of the above grounds at or before the hearing of the appeal.”

7. In course of hearing, it was submitted by the learned AR of the assessee that the issue involved in the appeals of the assessee is squarely covered in favour of the assessee by the tribunal order of Delhi Bench rendered in the case of Bharti Airtel Ltd. Vs. ITO as reported in 178 TTJ 708, copy available on pages 164 to 211 of the paper book. At this juncture, the bench observed that when on one issue i.e. Royalty, the tribunal order in assessee's own case is against the assessee than how the tribunal order in some other case can be followed. In reply, he submitted that in subsequent years i.e. A. Ys. 2012 – 13 to 2015 – 16 which are before the tribunal in the proceedings u/s 201 (1) and 201 (1A), the orders of DRP in assessment proceedings are submitted by him along with written submissions dated 29.09.2009 filed on 01.10.2019 and as per these orders, DRP has followed the tribunal order rendered in the case of Bharti Airtel Ltd. (Supra) and noted that no appeal is filed by the department before Hon'ble High court against this tribunal order and hence, the same has attained finality and held that no disallowance can be made u/s 40a (i) of I T Act on account of non-deduction of TDS on IUC and bandwidth charges paid to non-resident telecom operators. He also submitted that DRP in A. Y. 2012 – 13 directed to verify this aspect as to whether revenue has filed appeal against the tribunal order in case of Bharti Airtel Ltd. (Supra) and if it is found that appeal is filed by the revenue in High Court than the issue stands decided against the assessee but if it is found that no such appeal is filed that no disallowance should be made on that account and as per the final assessment order passed by the AO in that year, no such disallowance was made. He also pointed out that in reply to an E mail of the assessee, the AO has confirmed by an E mail that no such appeal is filed by the department before Hon'ble Delhi High Court in that case. He submitted that in assessee's own case, the department has accepted the claim of the assessee in

assessment proceedings that no TDS is to be deducted from payment of IUC and bandwidth charges paid to non-resident telecom operators, it cannot be held in the proceedings u/s 201 (1) that TDS has to be deducted from the same payment in same year.

8. In reply, it was submitted by the learned DR of the revenue that when in assessee's own case, the tribunal order is against the assessee on one aspect i.e. Royalty aspect, that tribunal order should be followed in preference to a tribunal order of Delhi Bench in the case of Bharti Airtel Ltd. (Supra). Regarding this contention of the learned AR of the assessee that DRP in assessment proceedings in assessee's own case in A. Y. 2012 – 13 to 2015 – 16 has decided this issue in favour of the assessee by following the tribunal order of Delhi Bench rendered in the case of Bharti Airtel Ltd. (Supra), he submitted that the tribunal order in assessee's own case for A. Ys. 2008 – 09 to 2012 – 13 was not brought to the notice of DRP and in these years, Revenue cannot file before the tribunal against the order of DRP and hence, as per these DRP orders, it cannot be said that the earlier tribunal order in assessee's own case which is challenged by the assessee before Hon'ble Karnataka High Court is not a good law and is not to be followed. He made several other arguments on this aspect but we will take note of these arguments if we come to the conclusion that the order of tribunal rendered in the case of Bharti Airtel Ltd. (Supra) has to be followed on both aspects i.e. Royalty and FTS aspects in spite of this that on the aspect of Royalty, the tribunal order in assessee's own case is against the assessee although on second aspect i.e. FTS aspect, the tribunal order in assessee's own case is not against the assessee.
9. We have considered the rival submissions. We find that as per the tribunal order of Delhi bench rendered in the case of Bharti Airtel Ltd. (Supra), on both aspects i.e. Royalty and FTS, the issue was decided in favour of the assessee but on one aspect i.e. Royalty aspect, the tribunal order in assessee's own case is against the assessee and this tribunal order is challenged by the assessee before Hon'ble Karnataka High Court and the appeal is pending

there. Hence, on this aspect, we prefer to follow the tribunal order in assessee's own case in preference to the tribunal order rendered in the case of Bharati Airtel Ltd. (Supra). Now, we deal with this contention of the learned AR of the assessee that in assessment proceedings in assessee's own case for A. Ys. 2012 – 13 to 2015 – 16, DRP has followed this tribunal order rendered in the case of Bharati Airtel Ltd. (Supra) and therefore, in the proceedings u/s 201 (1) also, this tribunal order should be followed. In our considered opinion, there is no merit in this argument because it is apparent that the earlier tribunal order in assessee's own case for A. Ys. 2008 – 09 to 2012 – 13 was not brought to the notice of DRP because even in A. Y. 2012 – 13 for which tribunal order in assessee's own case in the proceedings u/s 201 (1) is against the assessee on one aspect i.e. Royalty aspect, DRP has decided the issue in favour of the assessee and held that no TDS was required to be deducted. When on one aspect, the matter is decided against the assessee i.e. Royalty aspect in the present case, it cannot be held that no TDS is required to be deducted even if on some other aspect i.e. on FTS aspect in the present case, it is held that TDS is not required to be deducted on that aspect. Moreover, the department has not accepted this proposition because the AO in the draft assessment order decided the issue against the assessee and because of that, objection was raised by the assessee before DRP and revenue cannot file appeal before the tribunal against DRP directions in these years. Respectfully following the earlier tribunal order in assessee's own case, in A. Ys. 2013 – 14 to 2015 – 16 in assessee's appeals, we hold that the consideration paid by the assessee as IUC/Bandwidth charges for alleged inter connect service falls within the ambit of process Royalty and element of income was involved and therefore, the assessee was bound to deduct the TDS on such payment.

10. On the second aspect as to whether the consideration paid by the assessee as IUC/Bandwidth charges for alleged inter connect service falls within the ambit of FTS and element of income was involved or not, we find force in the submissions of the learned AR of the assessee that this issue is squarely

covered in favour of the assessee by the tribunal order of Delhi Bench rendered in the case of Bharti Airtel Ltd. Vs. ITO (Supra) because on this aspect, no adverse order could be pointed out by the learned DR of the revenue. Respectfully following this tribunal order of Delhi Bench rendered in the case of Bharti Airtel Ltd. Vs. ITO (Supra), this aspect is decided in favour of the assessee in these three years i.e. A. Ys. 2013 – 14 to 2015 – 16.

11. In remaining five appeals of the assessee for A. Ys. 2008 – 09 to 2012 – 13, the first aspect i.e. Royalty aspect is already decided by the tribunal against the assessee and in the present appeals, we are required to decide only the second aspect i.e. FTS aspect. On the same line as per which we decided this aspect in A. Y. 2013 – 14 to 2015 – 16 as per above para, in these five years also, this aspect is decided in favour of the assessee.
12. In the result, five appeals of the assessee for A. Ys. 2008 – 09 to 2012 – 13 are allowed and remaining three appeals of the assessee for A. Ys. 2013 – 14 to 2015 – 16 are partly allowed.
13. Since, the appeals of the assessee are disposed of, the Stay Petitions filed by the assessee do not survive and the same are dismissed but the revenue was directed in open court that till this tribunal order is pronounced, no coercive measures should be adopted. Otherwise also, during the pendency of the stay petitions, coercive measures cannot be taken by the revenue.
14. Now, we take up the appeals filed by the revenue. One appeal i.e. ITA No. 1367/Bang/2015 is a duplicate appeal and dismissed accordingly. In two appeals of the revenue in the proceedings u/s 154, the issue involved is about the applicability of section 206AA for higher TDS on payments made to non-residents where PAN of deductee is not provided. This issue was decided by CIT (A) in favour of the assessee by following a tribunal order rendered in the case of Infosys BPO Ltd., 154 ITD 816 and the order of the special bench of the tribunal rendered in the case of Nagarjuna Fertilisers and Chemical Ltd., 49 CCH 0053 HydTrib. No contrary decision was pointed out by the learned DR of the revenue and therefore, we decline to interfere in the order of CIT (A).

15. In the remaining three appeals of the revenue also, the issue involved is about the applicability of section 206AA for higher TDS on payments made to non-residents where PAN of deductee is not provided. This issue was decided by CIT (A) in favour of the assessee by following a tribunal order rendered in the case of Infosys BPO Ltd., 154 ITD 816 and the order of the special bench of the tribunal rendered in the case of Nagarjuna Fertilisers and Chemical Ltd., 49 CCH 0053 Hyd Trib. No contrary decision was pointed out by the learned DR of the revenue and therefore, we decline to interfere in the order of CIT (A).
16. In the result, all three Stay petitions are dismissed, five appeals of the assessee for A. Ys. 2008 – 09 to 2012 – 13 are allowed and remaining three appeals of the assessee for A. Ys. 2013 – 14 to 2015 – 16 are partly allowed and all six appeals of the revenue are dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 28th November, 2019.
/MS/

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.