

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI "F" BENCH, MUMBAI**

**[Coram: Pramod Kumar, VP and Amarjit Singh, JM]**

ITA No. 6159 & 6160/Mum/2018  
Assessment year: 2008-09 & 2009-10

**Deputy Commissioner of Income Tax** .....Appellant  
**(TDS) 2(3)**  
*Mumbai*

**Vs**

**M/s. Vodafone India Ltd** .....Respondent  
*Peninsula Corporate Park,*  
*Ganpatao Kadam Marg, Lower Parel,*  
*Mumbai 400013*  
*[TAN: AMUMH5332B]*

**Appearances by**

**ShishirDhamija**for the appellant  
**NinadPatade**for the respondent

Date of concluding the hearing : February 04<sup>th</sup>, 2020  
Date of pronouncement : July 13<sup>th</sup>, 2020

**ORDER**

**Per Pramod Kumar, VP:**

By way of these appeals, the Assessing Officer has challenged correctness of the order dated 14<sup>th</sup> August 2018, passed by the learned CIT(A)-60, Mumbai for the assessment years 2008-09 and 2009-10

2. Grievances raised by the Assessing Officer are as follows:

**1. (a) "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in holding that interconnection usages charges (IUC) is not in the nature of Fees for Technical Services and hence not liable for TDS under section 194J of the I.T. Act 1961?"**

**(b) "On the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating the factual and legal matrix brought out by the AO in the order passed**

*u/s 201(1)/201(1A) r.w.s.254 of the Act, wherein the AO has relied on the examination of Technical expert wherein it confirmed that was interconnectivity /roaming charges are in the nature of technical service as there exists human intervention."*

*2. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary at the time of hearing of the case or thereafter.*

*3. The order of the CIT(A) being erroneous be set aside and Ld. A.O's order be restored.*

3. Even though the issues raised in this appeal are admittedly covered by the decision of coordinate bench dated 28<sup>th</sup>February 2019, in assessee's own cases in ITA No. 2195 & 2196/Ahd/2016for the assessment years2008-09 and 2009-10. We however see no reasons to take any view of the matter then the view taken by the coordinate bench in the aforesaid decision wherein the coordinate bench has inter alia observed as follows:-

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

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

*"We have heard Mr. K.V. Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied two decisions of the*

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

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

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

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

*12. As such, even if we consider the observations made by the Apex Court in the case of Bharti Cellular Limited, supra, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as technical services" or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and*

*does not require any human intervention. Coupled with the aspect that the tribunal has relied upon the decision of the Delhi High Court for taking support of its view.*

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

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

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

*"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, ld CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross examination made by M/s Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013 and also various judgments given by the ITAT Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance capacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd. in the case of i-GATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the ldCIT(A) and assessee's appeal is allowed on this ground also."*

*9. The Hon'ble High Court of Karnataka in the matter of CIT(TDS)-vs-M/s. Vodafone South Ltd. also had taken the same view in favour of the assessee. While doing so, the judgment passed by the Hon'ble Jurisdictional High Court in the*

*matter of Vodafone Essar Gujarat Ltd-vs-ACIT(TDS) was also taken into consideration. The relevant portion of the said judgment is as follows:*

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

*We find from the order passed by the Learned CIT(A) that all the judgments as discussed hereinabove were considered by the Learned CIT(A) while allowing the claim of the applicant in deleting the demand of Rs.71,30,810/- & Rs.38,07,820/- raised u/s 194J for A.Y. 2008-09 & 2009-10 respectively with the conclusion that the roaming charges paid by the appellant to other telecom companies are not covered under ‘fee for technical service’ and such payments are out of the purview of TDS provision of 194J of the Act. We find no infirmity in the order passed by the Learned CIT(A). We, therefore, do not hesitate to confirm the same. Therefore, revenue’s appeal is devoid of any merit and hence dismissed.*

5. Learned representative has also fairly agreed that the issues raised on this appeal are squarely covered by the aforesaid decision. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench.

6. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of this appeal was concluded on 04th February 2020, these orders are being pronounced today on 13<sup>th</sup> day of July, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

*(5) The pronouncement may be in any of the following manners :—*

*(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.*

*(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.*

*(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances*

**of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.**

7. Quite clearly, “ordinarily” the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”.** In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

8. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption

in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **“In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”**. Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **“It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**, and also observed that **“arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”**. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure...”. The term *‘force majeure’* has been defined in Black's Law Dictionary, as **‘an event or effect that can be neither anticipated nor controlled’** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an “ordinary” period.

9. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time

when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **“while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”**. The extraordinary steps taken suomotu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words “ordinarily”, in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

10. In the result, the appeal filed by the Revenue stands dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

**Sd/-**  
**Amarjit Singh**  
(Judicial Member)

**Sd/-**  
**Pramod Kumar**  
(Vice President)

**Mumbai, dated the 13<sup>th</sup> day of July, 2020**

*Nishant Verma, Sr. SP*

*Copies to:*

(1)	<i>The Applicant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

*By order*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Mumbai benches, Mumbai*