

आयकर अपीलीय अधिकरण  
मुंबई पीठ "डी"  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D", MUMBAI  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री राजेशकुमार, लेखा सदस्य के समक्ष  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER  
आअसं. 3947/मुं/2017 (नि. व.2012-13)  
ITA NO. 3947/MUM/2017 (A.Y.2012-13)

Dy. Commissioner of Income Tax (TDS)-2(1),  
Room No.615, 6<sup>th</sup> Floor,  
Smt. K.G.Mittal Ayurvedic Hospital Bldg.,  
Charni Road (W), Mumbai 400 002.

..... अपीलार्थी /Appellant

बनाम Vs.

Reliance Communications Ltd.  
'H'Block, 1<sup>st</sup> Floor,  
1<sup>st</sup> Wing, Dhirubhai Ambani Knowledge City,  
Thane Belapur Road,  
Navi Mumbai – 400 710  
PAN: AAACR 2658E

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Akhtar H. Ansari

प्रतिवादी द्वारा/Respondent by : None.

सुनवाई की तिथि/ Date of hearing : 30/09/2020

घोषणा की तिथि/ Date of pronouncement : 08/10/2020

आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

This appeal by the Revenue is directed against the order of  
Commissioner of Income Tax(Appeals) -16, Mumbai (in short 'the CIT(A)')

dated 31/03/2017 in proceedings arising under sections 201(1)/201(1A) of the Income Tax Act, 1961 (herein after referred to as 'the Act').

2. The brief facts of the case as emanating from records are: The assessee/respondent is engaged in providing telecommunication services to its subscribers across the country. For providing uninterrupted services to its subscribers, the assessee pays roaming charges/interconnect usage charges to other telecom operators. In the present case the Assistant Commissioner of Income Tax (TDS) (in short 'ACIT-TDS') held that roaming/interconnect usage charges paid by the assessee to Reliance Telecom Ltd. are in the nature of 'fee for technical services', therefore, the assessee was required to deduct tax at source under section 194J of the Act, on such payments. Since, the assessee did not deduct tax at source on the said payments the assessee was held as 'assessee in default'. Consequently, the ACIT-TDS invoked the provisions of section 201(1) r.w.s. 201(1A) of the Act. The ACIT-TDS vide order dated 12/03/2014 fasten tax liability of Rs.4,24,07,479/- on account of withholding tax under section 194J and interest of Rs.57,05,216/- under section 201(1A) of the Act. Aggrieved against the aforesaid order the assessee filed appeal before CIT(A) .

3. The CIT(A) in the facts of the case following the decision rendered by Hon'ble Supreme Court of India in the case of CIT vs. Bharti Cellular Ltd., 330 ITR 239 (SC) and various other decisions viz.:

- (i) CIT vs. Vodafone South Ltd. [2016] 72 taxmann.com 347 (Karnataka HC);
- (ii) Bharati Airtel vs. ITO (TDS)[2016] 67 taxmann.com 223 (Del-Trib);
- (iii) Seimens Limited, 30 taxmann.com 200 (Mum Trib);

- (iv) Vodafone East Ltd vs. Addl. CIT [2015] 61 taxmann.com 263 (Kol Trib);
- (v) Idea-Cellular Ltd vs. CIT [2016] 65 taxmann.com 116 Pune;
- (vi) Dishnet Wireless Ltd. [2015] 60 taxmann.com 329 (Chennai-Trib); and
- (vii) Bharti Hexacom Ltd. vs. ITO in ITA 656/JP/2010 decided on 12.06.2015.

concluded that the payment made by the assessee/respondent to other telecom company for utilization of network cannot be termed as 'Technical Services' as access to the network during the calls is fully automatic and does not require any human intervention. Hence, such payments cannot be termed as 'fee for technical services'. Since, no Technical Services are involved the payments for such services cannot be termed as 'Fee for Technical Services'. Consequently, no TDS was deductible on such payments.

4. Against the findings of CIT(A), the Revenue is in appeal before the Tribunal, raising following grounds of appeal:-

*"(1) Grounds of appeal:*

- (a) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that "Roaming Charges" paid by the assessee to Reliance Telecom Ltd. (RTL) are not in the nature of 'Fees for Technical Services' and hence not liable for deduction of tax at source u/s 194J of the Income-tax Act, 1961.*
- (b) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not sustaining the 201(1) order regarding non deduction of TDS u/s 194J of the I.T. Act on payment of Roaming Charges and consequently deleting the levy of interest u/s 201(1A) of I. T. Act, 1961. In doing so, the Ld. CIT(A) has not appreciated that payment of interest u/s 201(1A) is mandatory in the event of default in payment of TDS amount.*
- (2) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary at the lime of the hearing of the case or thereafter.*
- (3) The order of the C1T(A) being erroneous be set aside and A.O.'s order be restored."*

5. Shri Akhtar H. Ansari, representing the Department vehemently defended the order of ACIT-TDS dated 12/03/14 passed under section 201(1)/201(1A) of the Act and prayed for reversing the finding of CIT(A). The Id. DR submitted that the assessee has failed to comply with TDS provisions u/s 194J of the Act in respect of payments made to other telecom operator i.e Reliance Telecom Ltd. for sharing its network.

6. We have heard the submissions made by Id. Departmental Representative and have examined the documents on record. We have also considered the decisions on which the CIT(A) has placed reliance while deciding the issue in favour of assessee.

The primary issue in the appeal is: Whether the roaming charges paid by the assessee to the other telecom service provider (Reliance Telecom Ltd.) are in the nature of 'Fee for technical Services' and hence, liable for deduction of tax at source under section 194J of the Act.

7. The issue was considered by the Hon'ble Supreme Court of India in the case of CIT vs. Bharti Cellular Ltd. (supra). The Hon'ble Apex Court restored the issue to the file of Assessing Officer for reconsideration after seeking the support of technical expert to ascertain if any human intervention is required in providing interconnect/roaming services.

8. Thereafter, the Hon'ble Karnataka High Court in the case of CIT vs. Vodafone South Ltd.(supra) decided in 2016, after considering the decision of Hon'ble Apex Court (rendered in August 2010) held that payment made by a mobile service provider to another mobile service provider for utilization of roaming mobile data and connectivity cannot be termed as technical service and therefore, no TDS was deductible u/s194J of the Act. The Hon'ble High

Court upholding the order of Tribunal observed that the Tribunal has examined the facts and came to the conclusion that payment made for roaming connectivity cannot be termed as “technical services”. The relevant extract of the judgement by the Hon’ble High Court reads as under:-

*“7. The aforesaid shows that the Tribunal by relying upon the decision of the Delhi High Court found that the fact situation are also the same and the payment made for roaming connectivity cannot be termed as "technical services" and, ultimately, it was found that the assessee could not be said as in default for non deduction of TDS at source on the roaming charges paid by it to the other service provider and the appeals are allowed to that extent. Under the circumstances, the present appeals before this Court.*

*8. We have heard Mr. K.V. Aravind, learned counsel appearing for the appellants - Revenue in all the appeals. The learned Counsel relied upon two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to the other service provider can be said as 'technical services'; one was the decision of the Apex Court in the case of CIT v. Bharti Cellular Ltd. [2010] 193 Taxman 97/[2011] 330 ITR 239 (SC); and the another was the decision of the Apex Court in the case of CIT v. Kotak Securities Ltd. [2016] 67 taxmann.com 356/239 Taxman 139/383 ITR 1 (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 Ltd. (supra) the Apex Court after having found that whether human intervention is required in utilizing roaming services by one telecom mobile service provider Company from another mobile service provider Company, is an aspect which may require further examination of the evidence and therefore, the matter was remanded back to the Assessing Officer. Further, in the impugned order of the Tribunal, after considering the above referred decision of Bharti Cellular. Limited, the Tribunal has further not only considered the opinion, but found that as per the said opinion the roaming process between participating entities is fully automatic and does not require any human intervention. Therefore, we do not find that the aforesaid decision in the case of Bharti Cellular Ltd. would be of any help to the appellants - Revenue.*

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

case, roaming services to be provided to a particular mobile subscriber by a mobile Company is a customize based service and therefore, distinguishable and separately identifiable and hence, it can be termed as "technical services".

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

**12.** As such, even if we consider the observations made by the Apex Court in the case of *Bharti Cellular Ltd.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."

**[Emphasized by us]**

9. We find that the Co-ordinate Bench of the Tribunal in a recent decision in ITA No.3964/Mum/2017 for A.Y 2008-09 and 3965/Mum/2017 for A.Y 2009-10 titled DCIT vs. Reliance Telecom Ltd. decided on 03/01/2019 in an identical set of facts upheld the order of CIT(A). The Assessing Officer had invoked the provisions of section 201(1)/201(1A) for non-deduction of tax at source on payment of roaming charges terming it as 'fee for technical services'. The CIT(A) reversed the findings of Assessing Officer and held that the payment for roaming charges are not akin to 'fee for technical services' and hence, the provisions of section 194J are not attracted. The Department assailed the findings of CIT(A) before the Tribunal in aforementioned appeals and the same

were dismissed. We observe that in above said appeals, grounds raised by the Department assailing the finding of CIT(A) are identical to grounds raised in the present appeal.

10. We would also like to place on record here that for identical reasons the provisions of section 201(1)/201(1A) of the Act were invoked in assessee's own case in AY 2010-11 and 2011-12. The issue travelled to the Tribunal in ITA No.2953/Mum/2014 and 2958/Mum/2014. The Tribunal decided the aforesaid appeals by the assessee vide order dated 11/4/2016. The Co-ordinate Bench after recording of extensive contentions raised by both the sides left the issue open by observing as under:

*"13. .... Here in this case, post Bharati Cellular Ltd., decision by the Supreme Court, whereby, AO was required to examine the technical experts cannot be held to be conclusive at this stage qua the concept of human involvement in the process of roaming, because in such cross examinations, as incorporated by the AO in the impugned order, there is inherent contradiction and if we go by the latest principle laid down by the Hon'ble Supreme Court in the case of Kotak Securities Ltd. (supra), then the whole test of constant human intervention and human interface fails in the case of roaming charges. However, we are not entering into the semantics of the controversy whether human involvement/intervention is there qua the payment of roaming charges. We are keeping this issue open and our observations made above are not final conclusion on this matter, because in the case of Vodafone Essar Mobile Services Ltd., which order has been quoted by the AO extensively has not stood scrutiny or concluded by any appellate authorities or any court, especially in light of any rebuttal which may come from the side of assessee. Thus, we are refraining from deciding the first issue before us."*

When the above order was passed by Tribunal, the Tribunal did not have the benefit of decision rendered by Hon'ble Karnataka High Court in the case of CIT vs. Vodafone South Ltd. (supra) as the said judgement is later in time. Post Vodafone South Ltd. (supra) various benches of the Tribunal have been consistently following the law laid down by Hon'ble Karnataka High Court.

11. Thus, in the light of the decisions discussed above, we hold that the roaming charges paid by the assessee are not in the nature of 'fee for technical services'. The Id. Departmental Representative has not brought before us any contrary decision. We find no infirmity in the impugned order. Accordingly, the same is upheld and ground No.1 (a) of the appeal is dismissed sans-merit.

12. In ground No.1(b) of the appeal, the Revenue has assailed deleting of interest levied under section 201(1A) of the Act. Since we have held that the roaming charges paid by the assessee to the other telecom service provider are not in the nature of 'fee for technical services' no TDS under section 194J is liable to be deducted. Once there is no liability for deducting tax at source, question of charging interest under section 201(1A) of the Act does not arise. As a corollary of our findings while addressing ground No.1(a), the ground No.1(b) is liable to be dismissed. We hold, accordingly.

13. The grounds No.2 and 3 of the appeal are general in nature and, hence, require no adjudication.

14. In the result, appeal of the Revenue is dismissed.

Order pronounced in open Court on **Thursday** the **08<sup>th</sup>** day of October, 2020.

Sd/-

(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 08/10/2020

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**

	Details	Date	Initials	Designation
1	Draft dictated on	21/09/2020		Sr.PS/PS
2	Draft Placed before author	21/09/2020		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			