IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A": HYDERABAD

BEFORE SHRI LALIET KUMAR, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA Nos. 1913, 1914, 1915, 1916, 1917, 1918 & 1919/Hyd/2019 A.Ys.: 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 & 2010-11		
Vodafone Idea Ltd., Hyderabad. PAN – AAACB 2100P	Vs.	Dy. Commissioner of Income-tax, Circle – 14(2), Hyderabad.
Assessee by:	Shri Ronak Doshi	
Revenue by:	Shri Rajendra Kumar(CIT-DR)	
Date of hearing:	25/04/2022	
Date of pronouncement:	05/05/2022	

O R D E R

PER BENCH.:

All these appeals of the Assessee are directed against the CIT(A) – 8, Hyderabad's common order dated 09/10/2019 involving proceedings u/s 201(1) and 201(1A) of the Income-tax Act, 1961 (in short 'the Act') for the AYs 2004-05 to 2010-11. As the facts and grounds are materially identical in all these appeals, they were clubbed and heard together and, therefore, a common order is passed for the sake of convenience.

2. The only grievance of the assessee in all these appeals is against the demand and interest raised u/s 201(1) & 201(1A) of the Act.

3. Briefly the facts of the case are that the appellant is a company engaged in the business of providing cellular mobile telephone services. In this case, a survey u/s.133A of the I.T.Act, 1961 was conducted on 13.10.2009. The assessee was requested by the AO to file details of expenditure incurred and TDS deducted under the various TDS sections. Accordingly, the assessee company filed the details of expenditure incurred and TDS deducted, and on the basis of the information filed by the assessee, the AO noticed Non-deduction of TDS on Auto Roaming Charges paid to other Telecom operators. Accordingly, orders u/s.201(1) & 201(IA) of the I.T. Act, 1961 were passed on by the AO, holding the assessee is liable for TDS u/s. 194J in respect of roaming charges for A.Y. 200405 to 2010-11. For the A. Y. 2010- 11 the assessee was also held liable for TDS u/s. 194H in respect of commission payments made to distribution on prepaid connections.

4. When the assessee preferred appeals before the CIT(A), the CIT(A) passed a combined order for all the AYs under consideration and confirmed the orders of AO.

5. Aggrieved by the order of CIT(A), the assessee is in appeals before the ITAT.

6. Before us, the ld. AR of the assessee filed written submissions, which are as under:

> *3.1. The Jurisdictional Andhra Pradesh High Court in CIT vs. J.D.Italia (141 ITR 948) held as under:*
>
> *"The distinction made by the Tribunal between interest received under a statutory provision and interest received otherwise than under a statutory provision llias unsustainable. But the more important question that arose in such cases was as to whether a particular sum could in truth and substance be called 'interest'. On this aspect, it had to be remembered that the name or label given by a party to a particular amount was not conclusive. Therefore, merely because the word 'interest' was used in the memorandum of compromise, it did not follow automatically that it was interest, ... "*
>
> *3.2. Thus, solely relying on binding decision, the order of CIT(A) should be reversed as nomenclature used in TRAI, Gal document for a transaction between telecom company and Gal cannot be conclusive to determine domestic roaming charges paid by one telecom company to another as royalty for IDS uis.194J of the Act.*
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> *3.3. Since, s.194J draws its meaning from Explanation 2 to section 9(1)(vi), one has to examine only statutory definition under the Income Tax Act, 1961.*
>
> *3.4. The AO alternatively held that when one telecom company pays roaming charges to another telecom company. it is paying for using equipment of other telecom company and hence royalty.*
>
> *3.5. The Appellant would like to submit as under:*

3.5.1. For all past years and before various Tribunal, High Court' and Supreme Court' as well, the Department had contested that roaming charges are 'fees for technical services'. When the High Court and Supreme Court adjudicated and held that it is not 'fees for technical services', now, it is too late for Department to alternatively contend that it is 'royalty' under the A(Jt. It is settled law that legislature cannot place same item as both "fees for technical services" and "royalty" and that too under same section of IDS ills. 194J of the Act.

3.5.2. Without prejudice, it is submitted that the payment is towards roaming services. not for use of a "earmarked equipment" and therefore, falls outside the ambit of section 194J read with Explanation 2(iva) to section 9(I)(vi) of the Act. For ease of reference same is reproduced as under:

"Explanation 2.-For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;"

3.5.3. The expression 'use' occurring in the relevant provision does not simply mean taking advantage of something or utilizing a facility provided by another through its own network. What is contemplated by the word 'use' is that the customer comes face to face with the equipment, operates it or controls its functioning in some manner, but, if he does nothing to or with the equipment (as in present case) and does not exercise any rights in relation thereto, it may be outside the definition of "royalty".

3.5.4. Hence, considering that the expressions 'use' and 'right to use' are followed by the words "equipment", it suggests that there must be some positive act of utilization, application or employment of the equipment by the recipient for some desired purpose on his own. If there is no such utilization or employment of any equipment by the service recipient in the course of obtaining the equipment, payments in respect thereof may not be chargeable to tax as 'royalty' .

3.5.5. Attention is also invited to Memorandum to Finance Bill 2001, which reveals the intention to insert clause (iva) to explanation 2 to section 9(1)(vi) was to cover income from the leasing of industrial, commercial or scientific equipment are falling outside the purview of Income Tax Act, and never rendering of service under the definition of royalty, it is proposed to include consideration for the use of, or the right to use, industrial, commercial or scientific under the definition of Royalty. Extract of the same is reproduced below for ease of reference.

"The definition of the term "royalty" as used in the Double Taxation Avoidance Agreements entered into by India includes inter alia payments "for the use of, or the right to use, industrial, commercial or scientific equipment". Presently, these payments are not included in the definition of royalty in the aforesaid Explanation. The result is that income (rom the leasing of industrial. commercial or scientific equipment becomes taxable in the source country as business income onlv. Consequently, there is no withholding tax on such payments as the taxpayer takes shelter under the definition of the term "royalty" as provided in the Income-tax Act since the same is more beneficial to him. !I is therefore, proposed to amend section 9 so as to widen the scope of the term "royalty" as provided in Explanation 2 of clause (vi) of sub-section (1) of section 9 so as to include in its ambit consideration for the use

of, or the right to use, industrial, commercial or scientific equipment.

3.5.6. Therefore, it is humbly submitted that in absence of leasing agreement between two telecom operators payment of roaming; charges being in the nature of service cannot fall within the ambit of equipment royalty.

3.5.7. In connection to the above, may the Appellant invites attention to the decision of the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Limited (126 STC 114) wherein in the context of the interpretation of the expression "the right to use", the Supreme Court has held that the expression should mean transfer of effective domain/control of an asset. Even the National GSM Roaming Agreement between the Appellant and Aircel Cellular (Page -1 to -32 of FPB) does not provide for any transfer of control of the equipment involved in the roaming facility to the Appellant. In fact, the definition of a "Roaming Subscriber" (Refer Page No.8 of FPB) in the agreement states that it shall mean a person or entity with valid subscription for national use issued by one of the parties and using a GSM Subscriber Identity Module (SIM) and who seeks GSM service in a geographic area outside the area served by his HPLMN Operator. The agreement between the parties is merely to the effect that if the Appellant's subscriber wants a roaming facility when he is outside the geographical area served by the Appellant, he can enjoy such facility because of the agreement or arrangement entered into between the Appellant and the other service provider. There is no term in the roaming; agreement which shows that the effective control or possession of the network of Aircel would be transferred to the Appellant during; the period for which the subscribers of the Appellant may use the roaming facility. i.e each party is responsible for its own network and for the provisions of services related to it. (Refer Page No.10 of PB defines 'Services' and 'Scope of Agreement' Para 5.1. & Services

Para 6.2). The Telecom Operators provide connecting, transit, and termination services to each other on a reciprocal basis and neither of the parties shall have any rights in the equipment or in the network of other parties (Refer Page No.16 of FPB Para 19.4- Intellectual Property) The charges under the Agreement are also levied for the services provided under the agreement, based on the actual call duration and number of calls successfully delivered to the other parties (Refer Page No.11 of FPB Para-S - Charging, Billing and Accounting). The Agreement are not for renting, hiring, letting or leasing out of any network elements or resources to the other parties. the Appellant merely delivers call that originates on its network to one of the inter connectional locations of the OTOs and OTOs carries and terminates the call on its network. The Appellant is nowhere concerned with the route, equipment, process or network elements used by OTOs in the course of rendering services. Therefore, roaming payments cannot be termed as equipment royalty under the provisions of the Act.

3.5.8. The Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. vs. Director of Income-tax (2011) (197 Taxman 263) wherein the High Court observed that the service charges received by Asia Satellite from its customers are not "royalty" because the said char es are not recovered for the use of an equipment or process as such the customer. Further, since in terms of clauses of agreements entered into between assessee and TV channels, control of satellite or transponder would always remain with assessee who had merely given access to a broadband available with transponder to particular customers. amount paid to assessee by its customers would not represent income by way of royalty within meaning of section 9(1).

3.5.9. Reliance is also placed on decision of Delhi High Court in New Skies Sattellite BV (382 ITR 114);

3.5.10. The Hon'ble Mumbai Tribunal in the case of Standard Chartered Bank vs. Deputy Director of Income-tax (International Taxation) - 2(1), Mumbai (11 taxmann.com 105) had observed as under:

"The meaning of the expression "use or right to use" as used in Article 12(3)(b) has to be first understood. In the case of ISRO Satellite Centre (ISAC) , In re (supra), the AAR had to decide whether the consideration paid by ISRO to Inmarsat Global of the UK. for leasing of the Inmarsat navigation transponder capacity, would be Royalty under the DTAA between India and UK. The Authority after looking into the nature of the agreement. ruled that by earmarking a space segment capacity of the transponder for use by the applicant, the applicant did not get possession (actual or constructive) of the equipment of Inmarsat Global of the U K.; nor did the applicant use any equipment of Inmarsat Global of the U K. The payment made by the applicant could not. therefore, be regarded as payment made for the use of the equipment of Inmarsat Global of the U K. This decision was followed by the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Ltd. (supra). In the case of Dell International Services (India) (P) Ltd., In re (supra) it was held the word "use" in relation to equipment occurring in clause (iva) was not to be understood ill the broad sense of availing of the benefit of an equipment. The context and collocation of the two expressions "use" and "right to use" followed by the word "equipment" indicated that there must be some positive act of utilization application or employment of. equipment or the desired purpose. If an advantage was taken from sophisticated equipment installed and provided by another, il could not be said that the recipient/customer "used" the equipment as such. The customer merely made use of the facility, though he did not himself use the equipment. What was contemplated by the word "use" in clause (iva) of Explanation 2 to section 9(1)(vi) was that the customer came face to

face with the equipment. operated it or controlled its functions in some manner. But if it did nothing to or with the equipment and did not exercise all possessory rights in relation thereto, it only made use of the facility created by the service provider who was the owner of the entire network and related equipment. There was no scope 10 invoke clause (iva) in such a case because the element of service predominated. The predominant features and underlying object of the agreement unerringly emphasized the concept of service. That even where an earmarked circuit was provided for offering the facility, unless there was material to establish that the circuit/equipment could be accessed and put to use by the customer by means of positive acts, it did not fall within the category of "royalty" in clause (iva) of Explanation 2 to section 9(l)(vi) of the Act. The ITAT Mumbai in the case of Kotak Mahindra Primus Ltd. (supra) has also taken a similar view".

3.5.11. Attention is also invited to section 65 of the Finance Act, 1994, which contains a series of .definitions for the purpose of levying Service Tax. Clause 105 of the section defines "taxable service" to mean any service provided or to be provided and this clause read with its subclause (zzzx), includes any service provided or to be provided to any person by the telegraph authority in relation to telecommunication service. Clause 109a of section 65 defines "telecommunication service" to mean service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electromagnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (I) of section 4 of the Indian Telegraph Act, 1885 and includes in clause (iii) thereof

"cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations". The provisions of section 65 of the Finance Act, 1994, referred to above show that the Legislature itself has looked upon the provision of cellular telephony as a service and this includes inbound and outbound roaming service both to and from national and international destinations.

3.5.12. Reliance is also placed on the Advance Ruling in the case of Dell International Services India (P.) Ltd., In Re(2008) (305 ITR 37). This decision seems to suggest that the user of any equipment should have some right over the equipment and further that there should be some dedicated machinery or equipment instead of a common infrastructure which can be used by various operators to provide services. It was also observed that there should be a right to exclusive possession or custody of the equipment and enjoyment thereof over a stipulated period of time in order that a payment can be said to be rent. But the more important observation in this order is as to the meaning and import of the word "use". It was held that the word "use" in relation to any equipment is not to be understood in the broad sense of availing of the benefit of an equipment, but it indicated that there must be some positive act of utilization, application or employment of the equipment for the desired purpose. It was held that if an advantage was taken from sophisticated equipment installed and provided by another, it could not be said that the customer used the equipment; it would be a case of a customer merely making use of the facility without himself using the equipment. It was necessary, according to the decision, that the customer came face to face with the equipment operated it or controlled its functions in some manner. But if the customer did nothing to or with the equipment and did not exercise

any possessory rights in relation thereto. it can only be said that he made use of the facility created by the service provider who was the owner of the entire network and related equipment. The question arose as to the nature of the monthly recurring charges paid by the assessee to BT. The Department's case was that the payment fell under section 9(1)(vi) of the Income Tax Act and was to be treated as royalty. The word "royalty" was defined in Explanation 2 below the section and clause (iva) of the Explanation stipulated that any consideration for the "use or right to use" any industrial, commercial or scientific equipment would be considered as royalty. The question which the AAR was required to consider was whether the assessee could be said to have paid the monthly recurring charges to BT for the "use" of any such equipment. It was in this context that the AAR opined that it cannot be called as a use of the equipment. Similar views have been taken in the case of Isro Satellite Centre (ISAC), In re (2008) (307 ITR 59) (AAR) and Cable and Wireless Networks India P. Ltd., In re (2009) (315 ITR 72) (AAR).

3.5.13. Attention is also invited to the judgment of the Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another vs. Union of India and Others (2006) (282 ITR 273) (SC). This judgment arose under the Service Tax and Sales Tax wherein one of the questions which arose for consideration was whether there was any transfer of a right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber. Referring to section 4 of the Telegraph Act, 1885, which gives exclusive privilege in respect of telecommunication and the power to l?:rant licenses to the Central Government, it was contended by the service providers that they provided only a service by the utilization of telegraph licensed to them for the benefit of the subscribers. The Supreme Court proceeded on the assumption that incorporeal rights may be goods for the purpose of levying Sales Tax and posed to itself the question whether the

electromagnetic waves through which the signals are transmitted can fulfill the criteria for being described as "goods". The Court held that the electromagnetic waves cannot be called goods. They were held to be merely the medium of communication; the waves are neither abstracted nor consumed, they are not delivered, stored or possessed, nor are they marketable. What was transmitted is not an electromagnetic wave but the signal through such means. The Supreme Court thereafter gave a more basic reason to hold that the electromagnetic waves cannot be considered as goods and it is this reason which is relevant for our purpose. At page 302 of the report it was held as under:

"A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain an)' right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc……. As for as the subscriber is concerned, no right to the use o(any other goods, incorporeal or corporeal, is given to him or her with the telephone connection".

3.5.14. These observations answer the question that even in the present case, the Appellant are not paying any roaming charges for use of any equipment of other telecom operators. Again, at page 306 of the report it was observed that providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. All these observations may have been made in the context of the question whether the electromagnetic waves were goods or not but one of the important strands underlining the reasoning of the Court was that the subscriber to the mobile telephone does not intend to use any portion of the equipment that is used in providing the service.

3.5.15. Th, Hon'ble Delhi Tribunal in Bharati Airtel Ltd. Vs. ITO (TDS) (2016) 178 ITJ 768 has held that Inter Connect Usage Charges ("IUC") (which is similar to roaming charges) paid by assessee to foreign telecom operators was neither FTS nor royalty under the Act and DTAA.

3.5.16. Furthe, Hon'ble Delhi Tribunal following its own order in Bharti Airtel (supra) in case of Bharat Sanchar Nigam Ltd. vs. ACIT (87 taxmann.com 152) (attached herewith as Annexure (G) has held as under:

The Appellant humbly submits that the process of domestic roaming and international roaming is similar and hence above decisions would directly apply in present case.

3.5.17. The Delhi Tribunal in Geo Connect Vs. DCIT and vice versa (88 Taxman.com 758) held under:

"Where assessee paid International Private Leased Circuit (IPLC) charges to two American Companies in view of fact that American company only agreed for rendering services of transmission of call data and its effective management and there was no agreement for use or right to use any industrial, commercial or scientific equipment or patentable process between non-resident and assessee for use of dedicated private bandwidth in underwater sea cable. consideration paid to American company would not fall under term 'royalty' under section 9(J)(vi).

3.5.18. Thus based on clear observation of Supreme Court in BSNL (at para 3.5.13), direct decisions of Delhi Benches of ITAT, the domestic roaming charges cannot be payment for royalty as use of scientific, commercial or technical equipment.

3.5.19. Lastly, though AO or DR has not argued on applicability of amendments made by Finance Act, 2012

with retrospective effect specifically, Explanation 5 and Explanation 6, it is settled law that Appellant cannot be held to be an 'Assessee in default' for withholding tax obligations in respect of those payments made prior to the amendment. In fact, for captioned assessment years, the provisions were not even on statute.

3.5.20. For tho above proposition, the appellant places reliance on the decision of the Hon'bIe, Bombay High Court in the case of CIT v. M/s. NGC Networks (India) Pvt. Ltd. (IT A No. 397 of 2015) has held that:

"In the present facts, the amendment by introduction of Explanation6 to Section 9(1)(vi) of the Act took place in the year 2012 with retrospective effect from 1976. This could not be have been contemplated by the Respondent when he made the payment which was subject to tax deduction at source under Section I94C of the Act during the subject Assessment Year, would require deduction under Section 194J of the Act due to some future amendment with retrospective effect ."

3.5.21. Recently. in the case of Engineering Analysis Centre of Excellence vs CIT 1(2021) 125 taxmann.com 42 (SC)], Hon'ble Supreme Court has. with respect to the obligations of a person under tax withholding requirements, observed that "It is thus clear that the "person" mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply (the law as it did not exist as the point of time when the obligations in question were being performed) the expanded definition of "royalty" inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute." It is in this context that Their Lordships also observed that "This question is answered by two latin maxims. lex non cogit ad impossibilia. i.e., the law does not demand the impossible and impotentia excusat legem. i.e., when there is a disability that makes it

impossible to obey the law, the alleged disobedience of the law is excused". For a person to perform the tax withholding obligations on the basis of an amendment in law which was enacted on a date later than the date on which tax withholding obligations were required to be performed, is expecting that person to do the impossible. When a law is nowhere even on the horizon, leave aside the statute, it is wholly impossible for any person to perform the obligations imposed by such a law.

3.5.22. In view of the above, the Appellant submits that it be held that Roaming Charges paid to OTOs are not Royalty u/s. 9(1)(vi) of the Act and hence, no tax is deductible u/s. 194J of the Act and .consequentially, the Appellant cannot be held as an 'assessee-in-default' u/s. 201 (1) of the Act.

GROUND NO II: NO RELIEF U/S. 201(1) OF THE ACT IGNORING THE FACT THAT THE DOMESTIC TELECOM OPERATORS HAVE INCLUDED THE SAME IN ITS ACCOUNTS AND APPROPRIATELY OFFERED IT FOR TAX BY FILING THEIR RETURN OF INCOME.

I. Facts in Brief:

1.I.1n this regard, the Appellant would like to submit that all the recipients of domestic roaming charges are deep corporate companies, the department can use its machinery to assess and . verify that whether they have included in the income in their hands.

2. Submissions:

2.1. In this regard, the revenue should have first ascertained whether the recipients had directly paid taxes u/s.191 of the Act before treating the Appellant as 'assessee in default' u/s. 201 of the Act. For this

proposition, the Appellant places reliance on the decision of Allahabad High Court in the case of Jagran Prakashan Ltd. vs. DCIT (345 ITR 288) and Kolkata High Tribunal in the case of Ramakrishna Vedanta Math vs. ITO (24 axmann.com 29).

Thus, the Appellant submits that following above decisions, the demand made u/s.201 be annulled or be directed to appropriately be reduced.

Ground No. III: LEVY OF INTEREST U/S 201(1A)

Submissions:

1.1 In view of the aforesaid submission of grounds mentioned above, the appellant most humbly submits that it had no liability to deduct tax at source, therefore, the issue of deposit of taxes and consequential interest u/s 201(1A) of the Act does not arise and hence to be deleted.

6.1 In addition to the above, the ld. AR of the assessee relied on the order of the coordinate bench of this Tribunal in assessee's own case for AYs 2011-12 & 2012-13 in ITA Nos. 84 & 85/Hyd/2020, vide order dated 23.12.2021 and the decision of coordinate bench of ITAT, Kolkata in ITA Nos. 1101/Kol/2005 and others in the case of Vodafone East Ltd., vide order dated 16/11/2016 for AYs 2002-03 and 2003-04. Copies of the above orders are available on record.

7. The ld. DR, on the other hand relied on the orders of revenue authorities and vehemently submitted that the that assessee is making payments to other telecom operators for

use of their spectrum which was allotted to them by the Govt. of India. He submitted that once allotted, the Telecom Operator becomes exclusive owner of that spectrum for the period of allotment. He, therefore, submitted that in whichever circle a telecom operator does not have a spectrum license, it has to connect with other telecom operators to offer its customer services in areas where it lacks spectrum, leading to roaming charges. Further, he submitted that since the telecom operator is the exclusive owner of the spectrum and the licensed area allotted to it, it is held the payment of roaming charges has rightly been characterized by the AO as royalty. He submitted that the assessee itself has deducted TDS on roaming charges paid to the other telecom operators in the subsequent years on its own, i.e. for FY 2016-17 TDS was deducted to the extent of Rs. 4,40,285/- on roaming charges paid to other telecom operations of Rs. 85,73,257/- and for FY 2015-16 TDS was deducted of Rs. 12,74,589/- on the roaming charges paid to other telecom operators of Rs. 1,49,21,934.86. He, therefore, submitted that the roaming charges paid by the assessee to the other telecom service providers needs to be treated as royalty payments within the meaning of clause (vi) of section 9(1) of the Act and accordingly, TDS needs to be deducted u/s 194J of the Act. He submitted that since the assessee has not deducted TDS, the lower authorities have rightly treated it as ‘assessee in default’.

8. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities and also gone through the written submissions filed by the assessee. Since the assessee not deducted TDS on auto roaming charges paid to other telecom operators, the AO raised demand u/s 201(1) & and interest u/s 201(1A) of the Act. The issue in dispute is squarely covered by various decisions as quoted supra in the written submissions filed by the assessee as well as the decisions of coordinate benches of ITAT cited supra.

8.1 The coordinate bench in assessee's own case for AYs 2011-12 and 2012-13 (supra), on similar issue, has held as under:

> *6. We find no merit in the Revenue's instant stand. It is made clear that section194J (1)(c) of the Act stipulating TDS deduction on royalty makes it clear in Explanation (ba) that "royalty" shall have the same meaning as in Explanation 2 clause (i) to (vi) of sub-section (1) of section 9 of the Act. The said latter provision defines royalty as follows :*
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> > *" Section 9(1)(vi) - Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—*
> >
> > *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
> >
> > *(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting [32][***] ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).”

There is no indication in the Assessing Officer’s TDS recovery order or in the CIT(A)’s findings as to whether the assessee's impugned payments made to the spectrum holder(s); as the case may be, satisfies any of the foregoing clauses defining royalty or not. All the assessees have availed is a standard facility without any custgomisation. The Revenue’s case is that the assessee fails to dispute the Govt. of India’s action collecting royalty qua spectrum (supra). We observe that the said stipulation between assessee's payee(s) and Govt. to this effect does not in any way mean that it itself has made any royalty payment to very payee(s) for utilizing/uplinking the spectrum in question. We thus rely on the Tribunal’s co-ordinate bench order (supra) that such interlinking of telecom services fails to specify the royalty element test in the very terms. The Revenue’s last argument invoking TDS mechanism going by the assessee suo moto deduction in Assessment Years 2015-16 and 2016-17 (supra) does not ipso facto attract the impugned statutory provisions. We lastly conclude that the specific definition prescribed by the legislature in the Act regarding payment of royalty would override the agreements and corresponding terminology employed between the Govt. of India, Telecom Department with

the corresponding spectrum allottees going by stricter interpretation as per hon'ble apex court's decision in Commissioner of Customs Vs. Dilip Kumar & Co. (2018) 9 SCC1 (SC). We accordingly proceed to decide the assessee's instant identical latter substantive ground in both these appeals against the department. Ordered accordingly.

8.2 The coordinate bench of ITAT, Kolkota in the case of Vodafone East Ltd. (supra), has observed as under:

"9. We have heard the rival submissions and perused the materials available on record. The facts with respect to various payments made by the assessee to other telecom operators remain undisputed and hence the same are not reiterated for the sake of brevity. The short point that arises for our consideration is as to whether the subject mentioned payments made by the assessee would fall within the ambit of tax deduction provisions either u/s 194C or u/s 194J of the Act. We find that this issue has been examined in detail by this tribunal in ITA No. 1864/Kol/2012 ; ITA No. 243/Kol/2014 and ITA No. 343/Kol/2014 for the Asst Years 2009-10 and 2010-11 vide order dated 15.9.2015 in assessee's own case, wherein it was held that :_

4.10 We have heard the rival submissions and perused the materials available on record. It would be pertinent to note here that roaming services are provided by other telecom operators by using their existing telecom network/infrastructure and no incremental investment is required to put up any additional network/infrastructure for provision of such roaming services. The aforesaid fact lends further support to the contention that roaming services are standard automated services, which are provided by other telecom operators to subscribers of VEL using the same network/infrastructure as is used by such operators for provision of telecommunication services to its own subscribers. Therefore, in essence, roaming services are

similar in nature to the telecom services provided by a telecom operator to its own subscribers and hence roaming charges would partake the same character \.j as the normal telecommunication charges paid by a subscriber to its service provider.

4.11 We are not in agreement with the arguments of the Learned DR that the word 'technical' used in Explanation 2 to Section 9(1)(vii) of the Act should take the same character of 'managerial' or 'consultancy' provided in the said section wherein human intervention is required and accordingly even for technical services, human intervention is definitely required. In this regard, the Hon 'ble Delhi High Court in the case of Bharti Cellular Ltd (supra) had held that since the entire process of making a call and switching the call from one network to the other is done automatically on the basis of machines and does not involve any human interface, the interconnect charges cannot be regarded as Fee for Technical Services (FTS) and hence would not fall in the ambit of section 1941 of the Act. We find that on further appeal by the revenue to the Honble Supreme Court in Bharti Cellular Ltd (supra), the Honble Apex Court had stated that "right from 1979 various judgements of the High Courts and Tribunal have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii) r. w. Explanation 2 comes in between the words "managerial and consultancy services". We find that the principles laid down by the Delhi High Court have been accepted by the Apex Court as such and the Apex Court has merely directed the TDS officer to carry out factual verification to determine the extent of human involvement. Based on this direction, the CBDT had also issued Instruction No. 5 of 2011 dated 30.3.2011 instructing the revenue authorities to seek opinion of technical experts in case of complex technical matters.

4.12 As per the directions of the Supreme Court in the case of Bharti Cellular Ltd. (supra), the TDS officer has been directed to obtain technical evidence from the experts in the telecom field with regard to the fact of existence of human intervention for the roaming services and accordingly the ACIT, Circle 51(1), New Delhi had recorded statementfrom Shri Tanay Krishna on 29.9.2010. The Learned AR has also filed prayer for receipt of additional evidence in terms of Rule 29 of ITAT Rules on 20.7.2015 containing the statements recorded from Shri Tanay Krishna on 29.9.2010 in the case of Vodafone Essar Mobile Services Ltd & cross examination by Vodafone Essar Mobile Services Ltd on 29.9.2010. This application under Rule 29 contains a prayer with reasons that these documents could not be filed before the lower authorities and that these documents are very crucial for the disposal of the case under appeal as the examination of the technical experts had taken place post the proceedings before the Assessing Officer and as per the directions of the Hon'ble Supreme Court, these statements were recorded in the case of the group company of the assessee. However, it is seen that the statement of Shri Tanay Krishna on 29.9.2010 have been relied upon by the Learned CIT(Appeals) vide page 29 of his order but the cross examination of Shri Tanay Krishna is not in records of the lower authorities. We find that the statement is very much relevant for the disposal of these appeals and are hereby admitted as additional evidence (in respect of cross examination statement of Shri Tanay Krishna on 29.9.2010) in terms of Rule 29 of ITAT Rules as they go into the root of the issue.

4.13 We find that this issue need not be set aside to the file of the Learned Assessing Officer for seeking fresh technical evidences from experts as the same had already been obtained in the case of the group company of the assessee and CBDT had also issued Instructions in this regard to seek evidences. Any technical evidence obtained in a case can be used in the case of another

assessee as long as the facts and circumstances involved are identical. In the instant case, the facts in the case of Vodafone Essar Mobile Services Ltd are identical with the facts of the assessee herein and also it happens to be the group company of the assessee .

4.14 Shri Tanay Krishna's statement-s-questions and answers - 4, 5, 6 & 16 are reproduced below :-

Question 4: Can you enlighten us about the functioning of the network system of the cellular operators at the time of receiving or providing inter-connect services to each other including installation, interconnectivity etc from the very beginning?

Ans. 4: As regards to interconnect to Gateway switches/MSC of two different operators are interconnected using any transport technology which involves wires as well as human interface for setting up. It involves different phases -

(i) Planning phase- where how much capacity required and how much traffic handlin, capacity is required on these basis hardware and software is determined.

(ii) Selection of vendor - is done to determine who will provide these services along wit, his consultancy.

(iii) Hardware and software is supplied by the vendor and it is customized to the need c the network as per the TEC specifications.

(iv) Installation as per vendor guidelines - it involves installation of both hardware an, software.

(v) Call configuration/provisioning of system - in this the operator has to configure an, make provision in data base as to how the calls will flow. This has to be done by , technically competent person.

(vi) Testing - it is exhaustive testing. The calls are tested on various modes (terminating loading etc) on network portion.

(a) Software by hardware testing - Stand alone testing

(b) Interconnect testing - it is done to test if it is compatible with 0: hardware/software. This testing employs technically qualified professionals (tested as per the agreed plan between services provider and vendor.

Question 5: In your expert opinion, does the system work automatically when network system of one cellular operator gets connected with the network system of other cellular operator?

Ans. 5: When a calls get connected by one operator to other, per se it is an automatic connection, but there can be instances when there is a problem in the call connect which may require resolution through human intervention.

Question 6: Hence there is no 100% automatic operation of this network. Can you explain what kind of human intervention is required?

Ans. 6: Yes as I said earlier it can't be 100% fully automated. There are several circumstances under which human intervention would be required. 1 would briefly tell you about each of such circumstances

(a) There could be a case where there is failure in physical hardware.

(b) There could be a problem due to software bug.

(c) There could be snapping of fibre optic cables.

In (a), (b), (c) above you are required intervention of teams of technical experts to remedy the situation.

Question 16: Please tell us the places or points or areas where human intervention with each other?

Ans. 16: As has been detailed in several answers that I have given earlier, one can broadly say that when there is an interconnection between two service providers, human intervention is constantly required for management of network/System, capacity enhancement and monitoring of system/network.

4.15 Cross examination proceedings of Shri Tanay Krishna - questions and answers - 3, (4,5,7,11 & 12 are reproduced below:- C

Q.3. What is the process of carriage of calls originating on network of one operator and terminating on the network of the other operator?

The callfrom one network to the other networkflows automatically, i.e. without any human intervention. Once a call originates, the call travels automatically. In establishment of a call, therein no human intervention i.e., once a subscriber dials and the call gets connected without any fault, then there is no human intervention. Intervention is required only when the call is not successful, i.e., the call fails due to any reason.

Q. 4. Is any human intervention involved in the entire process of carriage of call from one operator to another?

No, as stated above, no human intervention is required in the process of carriage of calls. However, human intervention is required at the inter-connect set-up stage (including configuration, installation, testing, etc.) and capacity enhancement, monitoring (including network monitoring), maintenance, fault identification,

repair and ensuring quality of service as per interconnect.

Q.5. From the perusal of your answer to Question 4 of your Statement, it appears that the phases described thereon are restricted to merely setting-up of the interconnect between the networks of the two operators and not during actual carriage of the call by one operator for the other. Please confirm.

Yes.

Q.7. From perusal of your answers to various questions posed to you by the Tax Department, you have mentioned that services of a technical expert are required for inter-connect arrangements. Please confirm whether such services are required for provision of inter-connect services. i.e .. carriage of calls from one network to another, or are primarily for fault detection and removal.

Please refer to answer to Question 4 of this cross examination.

Q.11. What is the extent of human involvement in provision of interconnect services. i.e., carriage of calls originating on network of one operator and termination the network of the other operator?

We have answered in question no 5.

Q.12. In answer to Question 21 of your Statement, you have stated that in cellular networks the level of human intervention is much higher and of sophisticated technical level. In this regard, do you agree that cellular networks are based on sophisticated technology and work on an automated mode? The human intervention as referred by you for network operations is limited to network monitoring and

maintenance and fault repair, rectification, enhancement, configuration, and set-up?

We agree that the telecom. networks are automated networks and do not require human intervention for carriage of calls. However, as stated in Question 4 of this cross examination, human intervention is required at the inter-connect set-up stage (including configuration, instalation, testing, etc) and capacity enhancement, monitoring (including network monitoring), maintenance, fault identification, repair and ensuring quality of service as per interconnect.

4.16 The next argument of Learned DR that roaming charges are paid for both interconnectivity and also for usage of transmission lines and human intervention is very much involved with regard to usage of transmission lines. We find that the human involvement is involved only when something goes wrong in the maintenance of transmission lines and for connectivity per se, human intervention is not involved. This issue could also be looked into from the angle of applicability of TDS provisions on Transmission Charges/wheeling charges paid by power generating companies. This issue had reached the corridors of various judicial forums and now has been put to rest by the following decisions:-

CIT (TDS) v. Maharashtra State Electricity Distribution Co. Ltd [20151 375 ITR 23/232 Taxman 373/58 taxmann.com 339 (Bom)

Auro Mira Biopower India (P.) Ltd. v. ITO TDS [2015] 55 taxmann.com 452/68 SOT 188 (Chennai-Tribunal)

Dy. CIT Vs. Delhi Transco Ltd. [2014] 52 taxmann.com 261 (Delhi – Trib.)

The various decisions cited supra have held that there will be no TDS on transmission charges and the same

analogy would apply with equal force in the case of transmission charges in telecom industry.

4.17 From the aforesaid statement recorded from technical experts pursuant to (';2 directions of the Supreme Court in Bharti Cellular Ltd. case (supra) which has beer heavily relied upon by the Learned CITA, we find that human intervention is required only for installation/setting up/ repairing /servicing maintenance capacity augmentation of the network. But after completing this process, mere interconnection between the operators while roaming, is done automatically and does not require any human intervention and accordingly cannot be construed as technical services. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets 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. Hence we have no hesitation to hold that the provision of roaming services do not require any human intervention and accordingly we hold that the payment of roaming charges does not fall under the ambit of TDS provisions u/s 1941 of the Act.

4.18 As far as the applicability of provisions of section 194C are concerned, we hold that the provisions of section 194C of the Act would become applicable only where some work (works contract) is being carried out and there is some human intervention involved in the carriage of such work. The term 'work' is defined in section 194C as follows:-

"Work shall include:

(a) Advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods or passengers by any mode of transport other than by railways;

(d) Catering;

(e) manufacturing or supplying a product according to the requirement 01' specification (of the customer by using material purchased from such customer. but does not include manufacturing or supplying a product according 10 the requirement or specification of a customer by using material purchased from a person, other than such customer. "

We hold that 194C is applicable only where any sum is paid for carrying out any work including supply of labour for carrying out any work. Thus, 'carrying out any work' is the substance for making the payment relating to such work, liable for deduction of tax at source u/s 194C of the Act. For carrying out any work, manpower is sine qua non and vithout manpower, it cannot be said that work has been carried out. Under section 194C each and every work/service is not covered, hence the nature of work done or service performed is required to be seen. Moreover, the term 'work' is defined in section 194C of FIe Act. The word 'work' in section 194C referred to and comprehends only the activities f workman. It is the physical force which has comprehended in the word 'work'. We moe already held that the payment of roaming charges does not require any human intervention. Hence in the absence of human intervention, the services rendered in the context of the impugned issue does not fall under the definition of 'work' as defined in section 194C and hence the provisions of section 194C are not applicable to the impugned issue.

9.1. We find that there is no dispute on the non-applicability of provisions of section 194T of the Act in the instant case, We also draw support of our finding

from the decision of Delhi Tribunal in the case of Bharti Airtel Limited & Anr vs ITO & Anr in ITA Nos. 3593 to 3596/Del/2012 and ITA Nos. 4076 to 4079/Del/2012 dated 17.3.2016 reported in (2016) 46 CCH 0304 DelTrib , wherein they have held that the subject mentioned payments do not fall under the ambit of 'fee for technical services' or under 'royalty' uls 194J of the Act.

9.2. We also draw support from the recent decision of the Hon'ble Karnataka High Court in the case of CIT, TDS Bangalore vs Vodafone South Ltd reported in (2016) 72 taxmann.com 347 (Karnataka) vide order dated 28.7.2016, wherein the head notes read as under:-

Section 194J, read with section 201 of the Income Tax Act, 1961 - Deduction of tax at source - Fees for professional or technical services (Roaming charges) Asessment Years 2005-06 to 2012-13 - Assessee was a mobile service provider company - Whether payment made by assessee to another mobile service provider company for utilization of roaming mobile data and connectivity could not be termed as technical service as roaming process between participating entities was fully automatic and did not require any human intervention and, therefore, no TDS was deductible - Held, yes (paras 12 & 13) [In favour of assessee].

9.3. Respectfully following the aforesaid decisions, we hold that there is no obligation to deduct tax at source for the assessee payer in terms of section 194C or 194J of the Act and hence the assessee cannot be treated as 'assessee in default' u/s 201 of the Act. Hence consequentially the interest u/s 201(1A) of the Act cannot be charged on the assessee in the instant case. Since we have decided the issue at the threshold level itself, the other grounds raised by the assessee in his cross appeal as well as in cross objections that the payee had considered these receipts in its returns and

hence the assessee should not be treated as assessee in default, becomes infructuous and we refrain to give our findings thereon. Accordingly, the grounds raised by the assessee in its cross appeal as well as in cross objections for the Asst Years 2002-03 and 2003-04 are allowed and that of the revenue are dismissed.

9.4. The decision rendered for Asst Year 2002-03 would apply with equal force Asst Year 2003-04 also as identical facts are involved except with variance in figures.

10. In the result, the appeals and cross objections of the assessee for the Asst Years 2002-03 and 2003-04 are allowed and appeals of the revenue are dismissed."

8.3 Respectfully following the aforesaid decisions, we hold that there is no obligation to deduct tax at source for the assessee payer in terms of section 194C or 194J of the Act and hence the assessee cannot be treated as 'assessee in default' u/s 201(1) of the Act. Hence consequentially the interest u/s 201(1A) of the Act cannot be charged on the assessee in the instant case. Accordingly, we set aside the common order passed by the Ld. CIT(A) in all the appeals under consideration and allow the grounds raised by the assessee in all the appeals under consideration. Since we have allowed the appeals of the assessee, ground Nos. 2 &3 raised by the assessee in all the appeals become infructuous.

9. In the result, all the appeals of the assessee are allowed in above terms. A copy of this common order be placed in the respective case files.

Pronounced in the open court on 5th May, 2022.

Sd/-	**Sd/-**
(LALIET KUMAR)	**(L. P. SAHU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 5th May, 2022.

kv

Copy to :

1	*Vodafone Idea Ltd., 6th Floor, Varun Tower II, Hyderabad.*
2	*DCIT, Circle – 14(2), 4th Floor, B-Block, IT Towers, AC Guards, Hyderabad.*
3	*CIT(A) – 8, Hyderabad*
4	*Pr. CIT(Central), Hyderabad.*
5	*ITAT, DR, Hyderabad.*
6	*Guard File.*