

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, PRESIDENT AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No.7131/Del/2019
Assessment Year: 2015-16**

M/s. AT&T Communication Services (India) Ltd., Vatika Triangle, 3 rd Floor, Sushant Lok-I, Block A, Gurgaon-122002	Vs.	ACIT, Circle-3(2), New Delhi.
PAN :AACCA8033E		
(Appellant)		(Respondent)

Assessee by	Shri Rishabh Malhotra, Adv.
Respondent by	Shri Anand Kumar Kedia, CIT-DR

Date of hearing	19.10.2022
Date of pronouncement	26 .12.2022

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

This is an appeal by the assessee against final assessment order dated 26.7.2018 passed under Section 143(3) read with section 144C (13) of the Income-Tax Act, 1961 pertaining to assessment year 2015-

16, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. In ground no.1, the assessee has challenged the disallowance of year end accruals amounting to Rs.37,42,442.

3. Briefly the facts are, the assessee is a resident corporate entity.

As observed by the Assessing Officer, the assessee has three business segments, as under:

- i) Liaison and Support Services;
- ii) Managed and Network Services;
- iii) Trading of Network Equipments;

4. In the assessment year under dispute, the assessee filed its return of income on 30.11.2015. In course of assessment proceedings, the Assessing Officer called upon the assessee to provide the details of year end accruals along with invoices/reversal of the same. Further, he called upon the assessee to show-cause why the balance amount of accruals to the extent invoices not raised or reversed should not be disallowed. In response to the query raised by the Assessing Officer, the assessee furnished the details. After verifying the details the Assessing Officer accepted year end accruals of Rs.540,70,28,286. As regards the balance amount of Rs.37,42,442, the Assessing Officer

observed that the assessee does not have the invoices, hence there is no basis of recording the year end accruals. Accordingly, he disallowed the same. The disallowance so made was upheld by learned DRP.

5. Before us, it is a common point between the parties that the issue has been consistently decided by the Tribunal in favour of the assessee in preceding assessment years.

6. Having considered the submissions of the parties and perused materials on record, we find, this is a recurring issue between the assessee and the revenue from past assessment years. While deciding the issue for the first time in assessment year 2010-11, the Tribunal had deleted the disallowance. The said view was reiterated by the Tribunal in assessment years 2008-09, 2011-12, 12-13 and 14-15. In the latest order passed for the assessment year 2014-15 in ITA No. 6703/Del/2018 dated 28.03.2019, the Tribunal has held as under:

“7. We have heard both the parties and perused the material available on record. The issue in the present appeal is squarely covered in favour of the assessee by the Tribunal in assessee’s own case for Assessment Year 2010-11 and 2011-12. The Tribunal held in A.Y. 2010-11 as under:

“17. AO disallowed an amount of Rs. 56,15,035/- and added back the same to the income of the taxpayer on the

ground that the taxpayer does not have the basis of recording year end accrual. The ld. DRP approved the proposed addition on this account.

24. Hon'ble Supreme Court in case cited as Rotork Controls India (P) Ltd. (supra) decided the identical issue in favour of the taxpayer by returning the following findings :-

“ Held, reversing the decision of the High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective; that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price; in other words, the warranty stood attached to the sale price of the product. In this case the warranty provisions had to be recognized because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of the obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income-tax Act, 1961. The present value of a contingent liability, like the warranty expense, if Properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the 7 ITA No. 6703/Del/2018 contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced. A provision is a liability which can be measured only

by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not meet, no provision can be recognized. The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37.” 25. When undisputedly no mistake has been pointed out by the AO in the calculation nor it is the case of the AO that the taxpayer had not paid certain bills and the taxpayer is following mercantile system of accounting and the expenses are having element of estimation as well as scientific basis, keeping in view the past trend, the expenses are required to be allowed in the year of creation itself, particularly, when the Revenue authorities has allowed the entire claim of expenditure in the subsequent years. 26. So, following the law laid down by the Hon’ble Apex Court in Rotork Controls India (P) Ltd. (supra) and the decision rendered by the coordinate Bench of the Tribunal in AGNSI in ITA No. 1059/Del/2015 for AY 2010-11, we are of the considered view that when the taxpayer has worked out the liability by using a substantial degree of estimation by proving 95% of the invoices on the basis of historical trend, no disallowance can be made. So, we order to delete this addition.” In the present Assessment Year as well the Assessing Officer has not pointed out any mistake in the calculation nor there was case by the Revenue that

assessee has not paid certain bills. In fact during the financial year relevant to the said assessment year, the assessee had accounted all the expenses relatable to the subject Financial Year for which bills/invoices would 8 ITA No. 6703/Del/2018 have been received/paid after close of the Financial Year by way of year ending accruals. Thus, the issue is identical in the present assessment year as well, hence Ground No. 1 is allowed.”

7. Facts being identical, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we delete the disallowance. This ground is allowed.

8. In ground no.2, assessee has challenged addition of Rs.79,77,191 on account of mark up not charged on support service charges.

9. Briefly the facts are, in course of assessment proceeding, the Assessing Officer called upon the assessee to furnish the details of support service charges received from AT & T Global Network Services (AGNS).

10. After examining the details, the Assessing Officer called upon the assessee to explain as to why mark up on support service charges should not be applied. In reply, assessee submitted that the Tribunal has already decided the issue in favour of the assessee in assessment years 2010-11 and 2011-12. However, ignoring the submissions of the

assessee, the Assessing Officer added of Rs.2,35,16,517 as mark up on support service charges. While deciding the issue, learned DRP directed the Assessing Officer to delete the addition if no appeal is filed before the Hon'ble High Court against the order of the Tribunal. However, in the final assessment order, the Assessing Officer added the rectified amount of Rs.79,77,191.

11. Before us, it is a common point between the parties that the issue is squarely covered by a number of decisions in assessee's own case.

12. Having considered rival submissions, we find, this is a recurring issue between the parties since assessment year 2008-09 onwards. In the latest order passed for the assessment year 2014-15, supra, the Tribunal following its earlier decision has deleted the addition holding as under:

“10. We have heard both the parties and perused the material available on record. The Tribunal in A.Y. 2010-11 held as under: “14. Issue of non-charging of mark up on support services being built up to AGNSI has come up in the appeal for AGNSI for AY 2008-09 to AY 2011-12 wherein the Revenue has raised a ground that such support services expenditure should be disallowed in the books of account of AGNSI. 15. The coordinate Bench of the Tribunal in case of AGNSI for AY 2009-10 in ITA No.2538/Del/2014 upheld the decision rendered by the ld. DRP in favour of the assessee on identical issue by returning the following findings:- “75. We have carefully considered the

rival contentions and perused the facts of the case. The facts of the case as explained by the appellant are that, ACSI, a group company of appellant and an entity in operations for more than 10 years by then, was having developed support services functions. Accordingly, since such functions were already housed in ACSI, appellant entered into a support services agreement with ACSI for provision of the aforesaid support services to appellant. We have gone through the submission of the assessee and find that necessary evidences in the form of the support service agreement, invoices, the details of 9 ITA No. 6703/Del/2018 payments made and the bank statements evidencing the payment thereof have been furnished by the assessee to prove the genuineness of the expenses. We find that no evidence has been brought on record by the Department to dispute the said claim. Rather, the Department's claim is merely based on suspicion as also noted by the DRP while deleting the above disallowance. We also find that even otherwise, both ACSI and appellant are profit making entities and hence, there was no tax incentive for the parties to deflate the revenues earned by appellant. The decision was totally based on commercial considerations. By transferring the cost from ACSI to appellant no added tax advantage is being availed by appellant. We are also of the view that commercial expediency of a particular expenditure incurred by businessman should be examined from the perspective of the business person and no third part, including the tax authorities, is entitled to question the commercial reasoning/ justification of the expenditure so incurred. Reliance in this regard is placed on the following judicial precedents furnished by the assessee: i. CIT v. Panipat Woollen & General Mills Co Ltd (103 ITR 66) (Supreme Court) ii. CIT v. Sales Magnesite (P) Ltd [1995] 214 ITR 1 iii. Binodiram Balchand vs. Commissioner of Income Tax (48 ITR 548) iv. Calcutta Landing and Shipping Co Ltd vs. CIT (65 ITR 10 (Cal High Court) v. CIT vs B Dalmia Cement Ltd (254 ITR 377) 76. Respectfully following the principles laid down in the aforesaid judicial precedents, we find that where the appellant has actually incurred the aforesaid support services cost and no

evidence has been brought by the department to controvert the same, such expenditure cannot be disallowed merely on suspicion. We affirm the finding of the ld DRP on this issue. In view of the above, the appeal of the revenue on this ground is dismissed.” 16. So, in the instant case also, the Revenue has failed to controvert the invoices, the details of payment made and evidencing the payments thereof to dispute the genuineness of the expenses and the fact that the taxpayer as 10 ITA No. 6703/Del/2018 well as AGNSI are profit making entities and there was no tax incentives for the purpose to deflate the revenues earned by the taxpayer, the Revenue has based its decision on commercial consideration. Moreover, in case of both the resident parties, terms and conditions of the arrangement cannot be questioned by the Revenue unless specifically provided under the Act. In case of a contract by both the parties who are admittedly resident Indian entities, they make the law for themselves which cannot be interfered unless contract is unlawful or specially barred by the law of the land. Moreover by such a decision of not charging mark up by the taxpayer on support services charges billed to AGNSI, no loss of tax has been caused to Revenue. So, the findings of the TPO/DRP that the taxpayer is not only to cut charges but mark up also is not sustainable in the eyes of law. So, we order to delete the addition on account of not charging of mark up on support services charges billed to AGNSI.” In the present case also the assessee as well as AGNSI are profit making entities and there was no tax incentives earned by the assessee at any point of time. Thus, charging of mark up on support service charges which were billed to AGNSI was not correct on part of the Assessing Officer. Besides that, the issue is squarely covered in assessee’s own case for A.Y. 2010-11. Hence, Ground No. 2 is allowed.

13. There being no factual difference on the issue in the impugned assessment year, respectfully following the decision of the Tribunal in

assessee's own case as discussed above, we delete the addition. This ground is allowed.

14. In ground no.3, the assessee has challenged the addition of Rs.1,85,86,074 on account of non-deduction of TDS on reimbursement of salary.

14. Briefly the facts are, in course of assessment proceeding, Assessing Officer noticed that the assessee had paid salary to employees of AT & T World Personnel Inc. for employees seconded to the assessee. Whereas, the assessee has not deducted tax on such payments. Thus, the Assessing Officer called upon the assessee to explain why the payment made should not be disallowed. In reply, assessee submitted that identical issue has been decided in favour of the assessee by the Tribunal in assessment year 2011-12. However, rejecting the submissions of the assessee, the Assessing Officer disallowed an amount of Rs.1,85,86,074 alleging non-deduction of tax at source. While deciding the issue, learned DRP followed its directions in assessment year 2014-15 and confirmed the action of the Assessing Officer. However, the DRP directed the Assessing Officer to allow expenditure on which TDS has been made.

15. Before us, the parties have agreed that the issue is squarely covered by the decisions of the Tribunal in earlier assessment years.

16. Having considered the submissions of the parties, we find, while deciding identical issue in assessee's own case in assessment year 2014-15, supra, the Tribunal following its earlier decisions has held as under:

“13. We have heard both the parties and perused the material available on 11 ITA No. 6703/Del/2018 record. The Tribunal in A.Y. 2011-12 held as under:

“31. It can be seen from the above that so long as a payment to non-resident entity is in the nature of payment consisting of income chargeable under the head ‘Salaries’, the assessee does not have any tax withholding applications u/s 195 of the Act. In our considered view, the nature of income embedded in related payments is relevant for deciding whether or not section 195 will come into play. We have also gone through the agreements exhibited at pages 525-530 of the paper book and have also considered Form 16 which are placed on record on page 605 of the paper book. Considering the facts on record, it can be reasonably concluded that the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand. 32. In our considered view, the reliance on the decision of the Hon'ble High Court of Delhi in the case of Centrica (supra) by the Assessing Officer is misplaced inasmuch as the seconded employees of AWPS were not taking forward the business of AWPS in India, but, were effectively working under the control and supervision of the assessee

company and by no means can be said to be rendering services on behalf of AWPS. Whereas in the case of Centrica (supra), it was established only to provide services to the overseas entity to ensure that the services to be rendered to the overseas entities by the Indian vendor are properly coordinated. We are, therefore, of the considered view that reimbursement made by the appellant company cannot be classified as FTS/FIS under the provisions of the Act and Indo-US DTAA. It would not be out of place to mention here that total tax deducted by the assessee u/s 192 of the Act is Rs. 1,97,36,176/- which is much higher than the withholding tax sought to be levied by the Assessing Officer which comes to 10% of Rs. 4,17,56,851/-. Considering the facts in totality, we direct the Assessing Officer to delete the impugned addition. Ground No. 6 is allowed.” In the present year as well, the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject 12 ITA No. 6703/Del/2018 to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand. Thus, the issue is squarely covered by the order of the Tribunal in assessee’s own case. Hence, Ground No. 3 is allowed.”

17. Facts being identical, respectfully following the decision of the Co-ordinate Bench in assessee’s own case, as referred to above, we delete the addition. This ground is allowed.

18. In ground no.4, and additional ground no.9, the assessee has claimed refund for excess dividend distribution tax (DDT) paid. It is the case of the assessee that as per Article 10 of the tax-treaty between India and USA, rate of tax on dividend is 15%. Whereas, rate of DDT

under Section 115-O is 16.99% including surcharge and cess. Thus, according to the assessee, the DDT paid over and above the rate of tax on dividend provided under the tax treaty should be refunded.

19. Before us, learned counsels appearing for the parties submitted that identical issue is pending for consideration of Special Bench of the Tribunal, hence, issue may be restored back to the Assessing Officer to decide on the basis of the decision of the Special Bench or Hon'ble High Court.

20. Having considered the submission of the parties, we restore the issue to the Assessing Officer to abide by the decision to be rendered by the Special Bench or any other higher court on the issue. These grounds are allowed for statistical purposes.

21. Ground no.5 is not pressed, hence, dismissed.

22. In ground no.6, assessee has raised the issue of short credit of withholding tax.

23. Having considered the submissions of the parties, we direct the Assessing Officer to factually verify assessee's claim and thereafter grant credit of withholding tax in accordance with law.

24. Ground nos. 7 and 8, being consequential and pre-mature at this stage, are dismissed.

24. In the result, the appeal is partly allowed.

Order pronounced in the open court on 26th December, 2022.

Sd/-

**(G.S. PANNU)
PRESIDENT**

Dated:26th December, 2022.

Mohan Lal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

**(SAKTIJIT DEY)
JUDICIAL MEMBER**

Asst. Registrar, ITAT, New Delhi