INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 1989/Del/2017
(Assessment Year: 2008-09)

Bharat Sanchar Nigam Ltd, Taxation Section, First Floor, Bharat Sanchar Bhawan, Janpath, New Delhi-11001 (Appellant)	Vs.	ACIT, Circle-6(2), New Delhi (Respondent)

PAN:AABCB5576G

Assessee by :	Sh. Tarandeep Singh, Adv
Revenue by:	Sh. Sukesh Kumar Jain, CIT DR
Date of Hearing	15/02/2023
Date of pronouncement	20/02/2023

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The appeal has been preferred by the Assessee against the order dated 30.01.2017 of Ld. Commissioner of Income Tax (Appeals)-2, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 01293 & 10272/16-17 of CIT(A)-2 arising out of an appeal before it passed u/s 143(3)/148 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ld AO (hereinafter referred as the Ld. AO).

2. The assessee has raised the following grounds of appeal:-

"1. That on the facts and circumstances of the case and in law, the impugned order passed by the learned Commissioner of Income Tax (Appeals)-2, New Delhi ['learned CIT (A)] under Section 250 of the Income-tax Act, 1961 (Act), is a vitiated order having been passed in violation of principles of natural justice and is otherwise arbitrary and is thus bad in law and void ab-initio

Validity of re-opening of the assessment proceedings:

2. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the validity of the re-assessment proceedings under section 147 read with section 143(3) of the Act initiated by the learned Assistant Commissioner of Income-tax, Circle 6(2). New Delhi ('learned AO') without appreciating the facts involved in the case of the Appellant.

3. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in not observing that the present re-assessment proceedings are bad in law in the absence of any omission and/or failure on part of the Appellant to disclose fully and truly all the material facts leading to escapement of income chargeable to tax, without appreciating the fact tha the additions made and confirmed in the re-assessment order were specifically dealt with and analysed in depth during the course of the original assessment proceedings.

Addition on account of discount extended to distributors

4. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of Rs. 5,36,04,47,192, made by the learned AO under the provisions of Section 40(a) (la) of the Act by alleging that the relationship between the Appellant and its distributors/ franchises is that of principal agent and accordingly, the discounts extended by the Appellant to its distributors/ franchises are in the nature of 'commission', liable for deduction of taxes under Section 194H of the Act.

5. Without prejudice to the Ground 4 above, on the facts and circumstances of the case and in law, the learned CIT (A) has erred in not appreciating the fact that certain portion of the pre- paid sales of the Appellant are effected through its own 'Customer Service Centres and therefore, the discount offered on the portion of such sales cannot be treated as 'commission liable for deduction of tax at source under the provisions of Section 194H of the Act.

6. Without prejudice to the Grounds 4 to 5 above, the learned CIT (A) has erred in confirming the disallowance, without appreciating the fact that all distributors / franchisees are Indian residents and accordingly, no disallowance under Section 40(a)(ia) of the Act can be made, where conditions prescribed under second proviso to Section 40(a) (ia) of the Act inserted vide Finance Act, 2012 (curative in nature) are fulfilled.

Addition on account of IUC charges paid to foreign / non-resident telecom operators

7. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of Rs. 46,58,61,549 made by the learned AO under the provisions of Section 40(a) (ia) of the Act on account of alleged non-deduction of TDS on IUC /international roaming charges payable to Non-resident

Telecom Operators ('NTOS") by treating the same to be in the nature of 'royalty' under the provisions of Section 9(1)(vi) of the Act and the applicable Double Taxation Avoidance Agreements ('DTAA').

8. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the aforesaid disallowance by alternatively alleging the same to be in the nature of fees for technical services' under the provisions of Section 9(1)(vii) of the Act and the applicable DTAAS

9. That on the facts and circumstances of the case and in law, the learned CIT (A) has erred in confirming the aforesaid disallowance appreciating that the provisions of Section 40(a)(ia) are applicable only in case of payments made to residents.

Non grant of deduction under section 80-IA of the Act

10. That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in dismissing the ground raised by the Appellant on allowance of deduction under Section 80- IA of the Act by alleging that the Appellant has not claimed such deduction on the enhanced income in the requisite Form 10CCB without appreciating that the said ground is now academic as appropriate deduction has already been granted to the Appellant by the learned AO vide rectification of the re-assessment order passed for subject AY

Penalty proceedings under section 271(1)(c) of the Act

11. That on the facts and circumstances of the case and in law, the learned CIT (A) has erred in not directing the learned AO to drop the penalty proceedings under Section 271(1)(c) of the Act."

3. Heard and perused the record.

4. At the time of argument the ld AR submitted that the ground Nos. 2, 3 and 10 are not being pressed as other grounds are covered in favour of the assessee.

5. In regard to **ground Nos. 4 to 6** it can be observed that the ld CIT(A) in the impugned order while dealing with the issues sustained the addition, however, in the assessee's own case for Assessment Year 2007-08 in ITA No. 933/Del/2017 vide order dated 14.12.2022 the coordinate bench followed the decision of assessee's own case for Assessment Year 2009-10 and set aside the additions. Relevant paragraph is reproduced as under:-

12. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contention of the Counsel. This Tribunal in A.Y.2009-10 in ITA No.9120/Del/2017 has

considered a similar quarrel the relevant findings of the coordinate Bench read as under :-

> *7. Now coming to the merits of the case. In ground Nos.4 to 6 the appellant is aggrieved by the action of AO in making a disallowance u/s 40(a)(ia) of Rs.631,71,72,727/-. In this regard, it is noted by the Ld. AO that for the year under consideration in the profits and loss account appellant has shown income from prepaid services at a net figure after reducing a discount given by it to the distributors / franchisees of its prepaid Sim Card and Recharge Vouchers. During course of reassessment Ld. AO directed the appellant to submit as to why said discount should not be treated as a commission paid to distributors / franchisees on which tax was deductible as per provisions of section 194H of the Act. In reply it was submitted by the appellant that the distributor margin is in nature of "discount" and not "commission" which would triger applicability of section 194H. It was further submitted that the relationship between BSNL and Distributors / Franchisees was on principal to principal basis and hence TDS was not deductible. In support of its claim the appellant relied upon the decision of Karnataka High Court in the case of Bharti Airtel Ltd. reported in 372 ITR 33 (Kar). The Ld. AO, however, was not convinced by the submissions made by the appellant and in his order of assessment he rejected the claim of the assessee by, observing as under:-*
>
> *"The submissions of the assessee have been considered and are discussed here under :-*
>
> *The assessee's contention that that distributor margin is in the nature of 'discount and not commission which would attract section 194H is not acceptable since in subsequent years, the assessee itself had issued Circular (H. O. instruction No.772/13,11 & 771/14.3.11) directing deduction of tax in terms of section 194H on the discount given to distributors/ franchisees. In the submission filed on 17/3/2015 during the course of the assessment proceedings for A.Y.2012-13 the assessee contended that instructions had been issued to the field formations regarding strict adherence to TDS u/s. 194H on payment under discount scheme to adherence to TDS u/s. 194H on payment under discount scheme to Franchisees/ Distributors. The assessee had further submitted that any cases of non- compliance are duly reported by the Branch Tax Auditors u/s. 44AB and taken into account for voluntary disallowance u/s. 40 (a) (ia while framing the computation of income at the. central level. Thus the assessee itself accepted the factum and voluntarily deducted the TDS u/s 194H on the discount in the subsequent year. Thus, taking the cognizance of this fact and consistency, it is clear that for A.Y.2007-08, the assessee is under default for not deducting the TDS u/s 194H of the income tax act, 1961 on the discount offered to the franchisees / distributors.*

(ii) The decision of the Karnataka High Court cited above has not been accepted by the Department and SIP has been filed.

(iii) The above position is also vindicated by the decision of Hon'ble ITAT Delhi Bench in the assessee's own case in BSNL vs. 1T0 (TDS & Survey) in IT A No.258, 259 & 260/Del/2011. In that case, the AO (TDS) had raised demand u/s 201/201(1A) r.w.s. 194H of the LT. Act on the assessee. The ITAT referred to the following observation made by the Co-ordinate Bench in the case of ICICI Bank Limited vs. DCIT, 156 TTJ 569;

"...The onus is on the revenue to. demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery ' liability can invoked. Once all the details of the persons to whom payments have been made are on record, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income tax authorities to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld.

The provisions regarding interest in delay in depositing the taxes are set out in Section 201 (1). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned these provisions are set out in Section 201 (1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deduction. However the question of making the loss of revenue arise only when there is indeed a loss of revenue can be there only when recipient of income has not paid tax." to the effect

The ITAT observed that there is no finding by the AO to the effect that the embedded in the amounts in question. It held that for raising demand u/s. 201 / 201 (A) r.w.s 194H, the AO had to prove that the principal liability (of payment of tax by the distributor/ franchisees) remained undischarged and therefore sent the matter back to the file to the AO for reconsideration. Perusal of the above shows that, in fact, the wrong ITAT's order reaffirms that the assessee was under an obligation to deduct tax at source u/s. 194H in respect of the discount so allowed to the franchisees.

(iv) No evidence regarding sale effected through BSNL'S own Customers Services Centers (CSCs) has been furnished.

(v) As per the sales and Distribution Policy, 2006 of the assessee company, discount of 6.5% is prescribed for prepaid recharge coupons.

8.4 Further, the issue has been settled in favour of the Revenue by the jurisdictional High Court of Delhi in the case of Idea Cellular Limited (2010) 325 ITR 0148 wherein it was held that the relationship between the assessee, who was also a

telecom service provider like the assessee in the present case, and the distributors was one of Principal-to-Agent. It was further held that the discounts offered to distributors were in the nature of commission and thereby liable to TDS u/s. 194H of the Act.

8.5 In view of the above, it is held that as the assessee has failed to deduct tax at source, in terms of provisions of section 194H of the I.T. Act, 1961 from the discount given to the distributors / franchisees, the-same is disallowable u/s 40(a)(ia). During the course of assessment proceedings for A.Y.12-13, the assessee furnished copy of its Sales and Distribution Policy, 2006. As per this policy, discount of 6.5% is prescribed for prepaid recharge coupons."

8. Being aggrieved, appellant preferred an appeal before the Id. CIT(A). The first appellate authority examined the nature of relationship between the appellant and its franchisees by scrutinizing the franchisees agreement between the appellant and M/s. Happy Ezone Ltd. Ld. CIT(A) thereafter concluded in the impugned order as under :-

"4.4.22. The contention of the appellant that the Delhi High Court judgment in the case of Idea Cellular Ltd. 325 ITR 1.45 (Del) is not applicable to the present case, is also not acceptable as in view of analysis and discussions in the preceding paras by me. I hold that the facts of the present case are very much similar to that of the case of Idea Cellular.

4.4.23. After considering the arguments put forth by the appellant during appellate proceedings and after perusing the provision of the agreement, it leaves no doubt whatsoever that the relationship between BSNL and Franchisees is that of a principal and agent. I have also considered the judgment of Delhi, Kolkata & Kerala High Court in the case of Idea Cellular Ltd. 325 ITR 148 (Del), Bharti Cellular Ltd. vs. ACIT 244 CTR 185 (Cal) and Vodafone Esaar Cellular Ltd. vs. ACIT (2009) 317 ITR (AT) 234 (Cochin), I hold that the discounts allowed and incentives given by the appellant to its Franchisees on sale of its products is in nature of commission and the same attracts the provision of section 194H of the Act. During appellate proceedings the Id. AR has quoted the judgment of Karnataka High Court which is in favour of appellant It would be pertinent to state that the said judgment has not been accepted by Revenue and the judicial pronouncement has been contended before the Supreme Court The SLP proposed by Revenue has been admitted by the Apex Court which proves that the issue is alive and debatable. Considering all these facts, Ground No.3 is dismissed."

9. Aggrieved, the appellant is now in appeal before us. At the outset, it was submitted by the Id.AR that the decision of Hon'ble Delhi High Court in Idea Cellular (supra) is distinguishable both on facts and in law. In this regard, it was

submitted by Ld. AR that a true and correct appreciation of relationship between appellant and its distributors in the instant case demonstrates that the said relationship is principal to principal and not principal to agency. It was submitted by Ld. AR that the case are more akin to the decision of Hon'ble Karnataka High Court in the case of Bharti Airtel (supra).

xxxx

11. We have carefully considered the submissions made by the rival parties and the material available on record. It is-claimed by Ld CIT(DR) that the decision of Hon'ble Delhi High Court in case of Idea Cellular (supra) supports the contentions raised by the lower authorities. On the other hand, Ld AR claims that decision of Hon'ble Karnataka High Court in case of Bharti Airtel (supra) supports the claim made by the appellant. We have been addressed at length by both the sides. First moot issue to be decided is whether there is any variance in views expressed by both these High Court decisions. Hon'ble Jurisdictional High Court in case of Idea Cellular (supra) concluded that the relationship between parties in that case was principal to agent premised upon following reasoning:

"23. We, thus, come back to the central question, which is to be addressed viz., the nature of relationship. Reverting back to this aspect; in the present case, we are of the opinion that the legal relationship is established between the assessee and the ultimate consumer/subscriber, who is sold the SIM card by the agents further appointed by the PMAs with the consent of the assessee. It is created by:

(a) Activation of the said SIM card by the assessee in the name of the consumer/subscriber.

(b) Service provided by the assessee to the subscriber. Further, dealings between the subscribers and the assessee in relation to the said SIM card including any complaint, etc. for improper service/defect in service.

(c) Entering into the ultimate agreement between the subscriber and the assessee (Clause 15 of the Agreement).

It is to be borne in mind that the nature of service provided by the assessee to the ultimate consumers/subscribers, whether it is pre- paid or post-paid SIM card - remains the same, in the instant case, the SIM cards are prepaid, which are sold by the assessee to the consumers through the medium of PMAs. In the case of post paid SIM card transaction is entered into directly between directly between the assessee and the subscriber and the subscriber is sent hill periodically depending upon the user of the SIM card for the period in question, in both the cases, legal relationship is created between the subscriber and the assessee that too by entering into specific agreement between these, two parties. ...

24. In contrast, the legal position when the goods are sold by principal to its distributors creating 'principal and principal of relationship would be entirely different. On the sale of goods, the ownership passes between the manufacturer and the distributors. It is the responsibility of the distributor thereafter to sell those goods further to the consumers - the ultimate users. The principal/manufacturer does not come in picture at all. Of course, he may be liable for some action by the consumer because of defective goods, etc., which is the result of other enactments conferring certain rights on the consumer or common law rights in his favour as against the manufacturer. We may also point out that in its classic judgment in the case of Bharat Sanchar Nigam Ltd. v. Union of India AIR 2006 SC 1383, the Supreme Court held that electromagnetic waves or radio of frequencies are not goods and with the sale thereof Sales Tax Act is not attracted, though the decision was rendered in the context of liability of sales tax."

The vital fact which Hon'ble jurisdictional High Court has found relevant is that a legal relationship is established between the telephone service provider and the consumer i.e the subscriber to its products. Hon'ble Jurisdictional High Court has also followed the dictum of Hon'ble Apex Court in appellants' case i.e BSNL vs UOl reported in AIR 2006 SC 1383 to hold that this is not a case for sale of goods but a case of providing telephone services and hence there/ban be no sale of goods from the service provider to its distributor so as to create a principal to principal relationship.

11.1 Contrary to above view is the decision of Hon'ble Karnataka High Court (supra) which holds that a right to service can be sold. The relevant observations of the Hon'ble Karnataka High Court read as under:

"56. In the Idea Cellular Ltd. case (supra), the Delhi High Court proceeded on the footing that the assessee is providing the mobile phone service. It is the ultimate owner of the service system. The service is meant for public at large. They had appointed distributors to make available the pre-paid products to the public nod look after the documentation and other statutory requirements regarding the mobile phone connection and, therefore, the essence of service rendered by the distributor is not the sale of any product or goods and, therefore it was held that all the distributors are always acting for and on behalf of the assessee company.

57. Similar is the view expressed by the Kerala High Court in the Vodafone Essar Cellular Ltd.'s case (Supra), where it was held that the distributor is only rendering services to the assessee and the distributor commits the assessee to the subscribers to whom assessee is accountable under the service contract which is the subscriber connection arranged by the distributor for the assessee. In that context it was held that,

discount is nothing but a margin given by the assessee to the distributor at the time of delivery of SIM Cards or Recharge Coupons against advance payment made by the distributor.

58. In both the aforesaid cases, the Court proceeded on the basis that service cannot be sold. It has to be rendered. But, they did not go into the question whether right to service can be sold.

59. The telephone service is nothing but service. SIM cards, have no intrinsic sale value, ft is supplied to the customers for providing mobile services to them. The SIM card is in the nature of a key to the consumer to have access to the telephone network established and operated by the assessee-company on its own behalf. Since the SIM Card is only a device to have access to the mobile phone network, there is no question of passing of any ownership or title of the goods from the assessee-company to the distributor or from the distributor to the. ultimate consumer.. Therefore, the SIM card, on its own but without service would hardly have any value. A customer, who wants to have its service initially, has to purchase a sim- card. When he pays for the sim-card, he gets the mobile service activated. Service can only be rendered and cannot be sold. However, right to service can be sold. What is sold by the service provider to the distributor is the right to service. Once the distributor pays for the service, and the service provider, delivers the Sim Card or Recharge Coupons, the distributor acquires a right to demand service. Once such a right is acquired the distributor may use it by himself. He may also sell the right to subdistributors who in turn may sell it to retailers. It is a well-settled proposition that if the property in the goods is transferred and gets vested in the distributor at the time of the delivery then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent The seller may have fixed the MRP and the pace at which they sell the products to the distributors but the products are said and ownership vests and is transferred to the distributors. However, whoever ultimately sells the said right to customers is not entitled to charge more than the MRP. The income of these middlemen would be the difference in the sale price and the MRP, which they have to share as per the agreement between them. The said income accrues to them only when they sell this right to service and not when they purchase this right to service. The assessee is not concerned with quantum and time of accrual of income to the distributors by reselling the prepaid cards to the sub-distributors/retailers. As at the time of sale of prepaid card by the assessee to the distributor, income has not accrued or arisen to the distributor, there is no primary liability! to tax on the Distributor. In the absence of primary liability on the distributor at such point of time, there is no liability on the assessee to deduct tax at source. The difference between the sale price to retailer and the price

which the distributor pays to the assessee is his income from business. It cannot be categorized as commission. The sale is subject to conditions, and stipulations. This by itself does not show and establish principal and agent relationship."

Apparently, therefore, legalistically both the Hon'ble High Courts have expressed a divergent opinion in the matter. Since the appellant before us is from Delhi, we are obligated to follow the decision of Hon'ble jurisdictional High Court. Parties before us have also elaborated upon the fact that there is a distinction in terms and conditions of distribution agreement in the instant case and the facts as existing before both the Hon'ble High Courts above, however we find no reason to deliberate upon this aspect since on the legal aspect itself the decision of Hon'ble Delhi High Court which is the jurisdictional High Court is against the appellant. We are therefore compelled to hold that the discount on prepaid products offered by the appellant is in nature of "commission" which does attract rigors of section 194H.

12. The above finding given by us would however, not automatically act as an accomplished fact vis a vis the issue of disallowance u/s. 40 (a) (ia). There is however another aspect of the matter before us. Ld. AR argued that benefit of bonafitie cause be granted to the appellant since provisions of section 40(a)(ia) are penal in consequences. We find substantial merit in this alternative claim made by the appellant. We find that appellant deserves benefit of bonafide belief premised on the following facts;

(i) As is apparent this is an issue on which divergent views have been expressed by two different High Courts in our country. We have been apprised that the issue is also currently pending disposal before Hon'ble Apex Court.

(ii) In case of appellant itself for AY 2009-10 i.e the assessment year under consideration, Hyderabad Bench of ITAT (supra) has held as under:

"8. The Learned Departmental Representative relied upon the decision of the ITAT Kolkata Bench in the case of Asstt. CIT v. Bharti Cellular Ltd. 12007] 105 ITD 129 and Delhi High Court in the case of CIT v. Idea Cellular Ltd. [2010] 325 ITR 148/189 Taxman 118. Whereas this decision was already considered by the learned CIT(A) and having regard to the factual matrix of the ease, it was held that the assessee has followed a systematic method of accounting as given in AS-9, and therefore, it has to be treated as a trade discount only.

9. It is not in dispute that the assessee has riot deducted tax at source. As per third proviso to S.194H which is inserted by the Finance Act, 2007, no deduction need to be made on any commission or brokerage paid by BSNL to its Public Call Office franchisee, and this proviso was held to be clarificatory in nature by the Hon'ble Punjab and Haryana High Court in the

case of CIT v. Bharat Sanchar Nigam Ltd. [2013] 35 taxmann.com 260/216 Taxman 277. Having regard to the circumstances of the case, I notice that the assessee being public sector undertaking stands on a different footing and the view taken in the case of Idea Cellular Ltd. [supra] cannot be applied, since the relationship between the BSNL and the franchisee stands on a different footing and the same was recognized by the CBDT. In fact, the decision of Hon'ble Delhi High Court and other High Courts, on this point were considered by the Hon'ble Karnataka High Court in the case of Bharti Airtel Ltd. Vs. DY. CIT [2015] 372 ITR 33/228 Taxman 219 (Mag.)/ [2014] 52 taxmann.com 31 while holding that Section 194H is not applicable. Since no jurisdictional High Court decision is available as on date, the latest decision of is available as on date, the latest decision of Karnatka High Court, which considered and distinguished earlier rulings of other High Courts, deserves to be followed.

10. In fact, the first appellate authority has taken into consideration the circular issued by the corporate office of the BSNL dated 13.12.2007 and another circular dated 15.4.2008 while coming to the conclusion that the nature of the payment made by the assessee to its franchisee is trade discount only. Since the view taken by the learned CIT(A) is mainly based on the factual matrix of the case, I am of the firm view chat the order passed by the learned CIT(A) does not call for any interference."

(iii) Appellant also merits benefit of bonafide belief considering third proviso to section 194H which states as under:

"Commission or brokerage

194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque, or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five per cent:

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees."

We find merit in the submissions made by Ld AR that third proviso to section 194H will get attracted only when the nature of payment is "commission or brokerage", Parties before us agree that majorly the distribution of products by BSNL and MTNL takes place through public Call Office franshisees since this was an infrastructure existing with an infrastructure existing with them even before mobile telephone

services became popular. Moreover, as upheld by Hon'ble Punjab & Haryana High Court in the case of appellant itself (supra) that "..... the above extracts from the Board Circular would show that the amendment in the Section 194 H was brought about because, as admitted by the CBDT itself, very few of the recipients had a tax liability. " Even co-ordinate bench of Delhi ITAT in case of appellant vide order 18th November 2014 (supra) has held that "in any event, the issue also seems to be covered on merits, in favour of the assessee by decision of Hon'ble Punjab & Haryana High court in the case of CIT Vs. Bharat Sanchar Nigam Ltd....."

xxxx

Respectfully following the above decision rendered by a co-ordinate bench of this court we find that disallowance made u/s 40(a)(ia) is not sustainable in the instant: case. Grounds 4, 5 & 6 of the appeal are accordingly disposed of in favour of the assessee."

6. The ld DR could not controvert anything, on fact or law to distinguish. Accordingly, following the aforesaid findings in favour of the assessee in preceding and succeeding years, the issues are decided in favour of the assessee.

7. In regard to **Ground Nos. 7 to 9** again the matter of fact is that in assessee's own case for Assessment Year 2007-08 in ITA No. 933/Del/2017 vide order dated 14.12.2022 the coordinate bench order for Assessment Year 2009-10 was considered and the relevant portion of the order is reproduced as under:-

"16. A similar issue was considered and decided by the coordinate Bench in A.Y. 2009-10 (supra). The relevant findings read as under :-

13. The next issue in dispute pertains to disallowance u/s 40(a)(i) of the Act of Rs.57,78,92,080/-. In this regard in the order of assessment it is observed by the AO that during the year under consideration appellant made payments for 1UC Charges as under:

(i) Payment to foreign operators Rs.57,78,92,080/-

(ii) Payment to domestic operators Rs.3459,22,63,093/-

It is undisputed that qua payments made to domestic operators TDS has been deducted by the appellant. The dispute solely centers round the payments made to foreign operators. IUC charges are charges paid to other telecom

service providers for providing connectivity to and fro from locations where BSNL has no reach. The AO notes a sample sequence of carriage of international call from India to a location outside India as under :-

• A mobile subscriber in Chennai makes a call to a person in US, The call originates' on the network of the local telecom services provider in Chennai, which shall carry the call upto the limits of the Chennai telecom services area and at the point, shall hand over the call to the national long distance ('NLD) service provider.

• The NLD services provider carries the call upto ILD gateway of BSNL and hands over the call to BSNL

• The call is then carried by BSNL on its ILD network upto its ILD gatesway outside India (say US), where the call is handed over to a Non-resident Telecom Operator (NTO)for carriage of the call beyond the ILD gateway of BSNL outside India and termination of the same at the destination location outside India (last leg of the communication channel). In many cases, local services provider and NLD provider could be BSNL only. ”

xxxxx

“17. We have carefully considered the facts of the case and the material available on record and we find that the issue in dispute is directly covered by the decision of ITAT in case of Bharti Airtel Limited (supra), in that case coordinate bench of this court after deep 'examination of the issue i.e after considering and going through the process of providing roaming services; examination of technical experts and its cross examination and also opinion of Hon’ble the then Chief Justice of India Mr. S.H. Kapadia dated 03rd September 2013, has held that payment of IUC Charges is not “Fee for Technical Services" or "Royalty" within the meaning of its definition as per section 9(l)(vi) and 9(l)(vii) of the Act. While reaching the above conclusion the co-ordinate 9 (1) (vii) of the Act. While reaching the above, conclusion the co-ordinate bench also took into consideration retrospective amendments made to section 9 by Finance Act, 2012.

Relevant head notes of this decision as reported in (20160 67 taxmann.com 223 (Del) are reproduced below.

“"Section 9, read with sections 1941 and 195, of the Income-tax Act, 1961, 2 read with article 12 of Model OECD Convention - Income - Deemed to accrue ''or arise in India (Royalties and Fees for technical sendees) - Assessment years 2008-09 to 2011- 2012 - Assessee, as part of its International Long Distance (ILDJ Telecom Services business, was responsible for providing sendees to its subscribers in respect of calls originated/terminated outside India - For provisions of ILD sendees, assessee was required to obtain sendees of Foreign Telecom Operators (FTOs) - ILD Operators were in turn billed by FTOs in form of Interconnected Usage Charges(IUC). There was no manual or human intervention during process of transportation of calls between two networks - This was done automatically, with human intervention being required only for installation of network

which could not be said to be for inter-connection of a call - Assessee merely delivered calls that originated on its network to inter connection locations of FTO and FTO carried and terminated calls on its network - Whether thus payment of IUC by assessee to FTO in connection with its ILD telecom service business was neither FTS under section 9(1) (vii), nor royalty/process royalty under section 9(l)(vi) Held, yes - Whether ever retrospective amendment in domestic legislation , does not affect royalty, definition under DTAA, hence retrospective insertion of Explanations 5 & 6 to section 9(1)(vi) also could not have altered this position - Held, yes [Paras 33, 44, 55, 56& 72][In favour of assessee]

Section 9 of the Income-tax Act, 1961, read with section 5 and article 7 of Model OECD Convention - Income - Deemed to accrue or arise in India (Business Profits) - Assessment years 2008-09 to 2011- 2012 - Assessee made payment of Inter-connected Usage Charges(lUC) to Foreign Telecom Operators (FTOs) in connection with its ILD telecom service business - Payment in question did not accrue or arise to 'FTOs' in India - Entire business operations were carried out outside India by FTOs - FTOs also did not have any Permanent Establishment in India - Whether thus no income could be deemed to accrue or arise to ETO's in India and hence under article 7 also income could not be brought to tax in India -Held, yes – Whether further in absence of permanent establishment of FTOs in India, payment of 'IUC' to FTO could not be deemed to accrue or arise in India payment of 'IUC' to FTO could not be deemed to accrue or arise in India under any of clause of section 9 (1) read with section 5(2) – '

Held yes {paras 74 & 78} in favour of the assessee.

To the similar effect are other decisions cited by Ld. AR. The CIT (DR) has not been able to controvert the fact that the issue in dispute is no more resintegra considering the above binding precedents. Moreover, a perusal of sample agreement for payment of IUC charges between BSNL and Cable & Wireless UK in the instant case also clearly shows that a standard facility for availing interconnectivity services while roaming was availed by the appellant in the instance case. This does not require any human any human intervention. Respectfully following the above judicial precedents, we hold that payment for IUC charges is not chargeable to tax in India in the hands of the non-resident recipients and hence TDS was not deductible as per provisions of section 195 of the Act. Therefore, wereverse the order of the Ld. CTI(A) on this issue and decide the same in favour of the assessee. Accordingly, respective grounds Nos.7, 8 & 9 are allowed.
17. On finding parity of facts respectfully following the decision of the Coordinate Bench we direct the AO to delete the impugned disallowance. This ground is also allowed.

18. In the result, the appeal of the assessee is partly allowed."

8. The ld DR could not controvert anything, on fact or law to distinguish. Accordingly, following the aforesaid findings in favour of

the assessee in preceding and succeeding years, the issues are decided in favour of the assessee.

9. In the light of the aforesaid ground Nos. 4 to 9 are decided in favour of the assessee. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 20/02/2023.

-Sd/-	-Sd/-
(N. K. BILLAIYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20/02/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi