IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

BEFORE SH. M. BALAGANESH, ACCOUNTANT MEMBER
AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER

ITA No.1057/Del/2018
Assessment Year: 2012-13

M/s Tata TeleservicesLimited New Delhi Taxation Department M/s Tata Teleservices Limited 2A, Old Ishwar Nahar Mathura Road New Delhi 110065	**Vs.**	**Assistant Commissioner Of Income Tax Circle 76(1) DistrictCentral Laxmi Nagar New Delhi 110092**
(APPELLANT)		**(RESPONDENT)**

Appellant by	**Ms Ananya Kapoor Advocate**
Respondent by	**Ms. Jaya Chaudhary CIT DR**

Date of hearing:	14/10/2024
Date of Pronouncement:	11/12/2024

ORDER

PER SUDHIR KUMAR, JM:

This appeal by the assessee isdirected against the order of the Commissioner of Income Tax (Appeal)-41 New Delhi [hereinafter referred to as "CIT(A)"] vide order dated 01.12.2017 pertaining to A.Y. 2012-13 pertaining to arises out of the

assessment order dated31.03.2014 under section 201/201(1A) of the Income Tax Act, 1961 [hereinafter referred as 'the Act'].

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

1. That the order of the ld. Assessing Officer is bad in law and void ab initio.

i. That on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in summarily rejecting the ground of the Appellant that the Assessment order passed is bad in law and void ab –initio.

ii. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the order of the Ld. Assessing Officer of treating the Appellant as assessee in default' in view of the provisions of section 201(1) read with Section 191 of the Act and the judgment of Jagran Prakashan Limited Vs DCIT (TDS) (21 Taxman.com 489) (All HC) as there is no finding by the learned Assessing Officer with respect to the failure of deductees to pay tax directly, which is a jurisdictional pre-requisite.

Ground No. 2 That the Ld. CIT(A) grossly erred in confirming the order of the Ld. Assessing Officer ('AO') wherein the Appellant was held liable to deduct tax at source under Section 194H from the discounts allowed to its distributors on sale of starter kits and recharge vouchers (RCVs) under Section 194H of the Income-tax Act 1961('IT Act.)

i. That the Ld. CIT (A) grossly erred in not appreciating that the provisions of Section 194H of the Act would apply only at the time of payment/credit to payee's account and that the discount allowed is not payment/credit made to the Channel partners account;

ii. That the Ld. CIT (A) grossly erred in not appreciating that Section 194H would not apply as the discount allowed does not qualify as income chargeable to tax under the Act in the hands of the payee in the facts and circumstances of present case;

iii. That the Ld. CIT (A) erroneously confirmed the classification of the discount given by the Applicant to its Channel Partners at the time of sale of Starter Kits and RCVs as commission/brokerage;

iv. That the Ld. CIT (A) completely erred in not appreciating that the Hon'ble Karnataka High Court in Bharti Airtel Lid. vs. CIT, Anr., (2015) 372 ITR 33 (Karn) while considering an identical issue in the facts of the Appellant has inter alia held that 'right to service can be sold' and as such the supply of SIM cards and recharge vouchers can be on the basis of principal to principal and in the facts of the case, there would not be a relationship of agency. Similar view has been taken by the Rajasthan High Court in the case of the Appellant itself in M/s Hindustan Coco-Cola Beverages v. CIT, III Jaipur. (2017) 87 taxmann.com 295 (Rajasthan).

That the Ld. CIT (A) completely failed to appreciate that the goods sold to its channel partners have been accepted as a valid "sale" transaction by the Sales Tax/VAT authorities and hence the same could not be considered differently by the Tax Authorities;

vi. That the Ld. CIT (A) completely failed to appreciate that discounts allowed on bulk sale of SUKs, RCVs by the Appellant to the distributors do not attract the provisions of Section 1941H. In furtherance of the same, he failed to appreciate that the channel partners purchase Appellant's

products in bulk and generate income from further sale of these products to their retailers/customers, these discount allowed to the channel partners cannot be equated as income in the hands of the distributors;

vii. That the Ld. CIT (A) failed to appreciate the decision of the Hon'ble Supreme Court in the case of CIT vs Ahmedabad Stamp Vendors Association (2012) 348 ITR 378 wherein the Hon'ble Court affirmed the decision of the Hon'ble Gujarat High Court in Ahmedabad Stamp vendors Association vs. Union of India, [2002] 257 ITR 202 (Guj.) wherein it is held that a P2P relation exists when a distributor sells products acquired at a discount and in such a transaction the provisions of Section 194H are not attracted. That the decision of the Hon'ble Supreme Court is squarely applicable in the case of the Appellant following an identical model,

viii. It is stated that the Appellant had duly deducted tax under Section 194H with respect to payments made distributors of postpaid SIM cards for valid activation of postpaid connections. The CIT(A) appeal has failed to appreciate the distinction between prepaid distribution model where SIM cards are sold to be distributor and

postpaid distribution model wherein the distributors model wherein the distributors assist in rendering of postpaid services.

3. Ground No.3 That the Ld. CIT(A) grossly erred in confirming that the Appellant is an 'assessee in default' for alleged non deduction of tax at source under the provisions of Section 194J of the Act on interconnect usage charges ('IUC') paid b the Appellant to other telecom operators:

i. That the Ld. CIT(A) has erred in not appreciating that this Hon'ble Tribunal has decided the issue of deduction of tax at source on Inter-Connect Usage Charges ('IUC') which a telecom operator pays to another in the case of Bharti Airtel Vs. ITO (TDS) [2016] 60 Taxman.Com 223 (Delhi Trib.). Further, the decisions of the Bangalore and Jaipur Tribunal in favour of the assessee have been affirmed respectively by the Hon'ble Karnataka High Court in CIT Vs. Bangalore v. Vodafone South Ltd. [2016] 60 TAxmann.com 223 (Delhi Trib.). Further, the decisions of the Bangalore and Jaipur Tribunal in favour of the aessee have been affirmed respectively by the Hon'ble Karnataka High Court in CIT v. Vodafone South Ltd. [2016] 72

taxmnan.com 347 (Kar) and the Hon'ble Rajasthan High Courts M/s. Hindustan Coco-cola Beverages v. Jaipur [2017] 87 taxmnan.com 295 (Rajasthan).

ii. That the Ld. CIT(A) completely failed to appreciate that there is no human intervention while concluding a successful call, for which alone payment was made by the Appellant to other operator;

iii. That the Ld. CIT(A) completely failed to appreciate the fact that no human intervention of the nature of managerial or consultancy services in any case was involved in providing interconnect usage charges;

iv. That the Ld. CIT(A) completely failed to appreciate that there was no use of equipment by the Appellant of the other operator and therefore, the payment made by the Appellant to the other operators would not be regarded as 'Fee for Technical services'.

v. That the Ld. CIT(A) completely failed in appreciating that the payment for interconnection was for use by the other operator of a standard facility;

4. GROUND 4: That the Ld. CIT (A) erred in not appreciating the decision in CIT vs. Bharti Cellular Ltd., [2010] 193 Taxman 97 (SC), and concluding that the Appellant was liable to deduct tax at source under section 1943.

5. GROUND 5: That the Ld. CIT (A) failed to appreciate that the order under Section 201 read with Section 201 (1A) of the Act passed by the Ld. AO is in violation of the principles of natural justice by not providing the Appellant reasonable opportunity when expressly asked for

i. That the Ld. CIT (A) failed to appreciate the Ld. AO passed the under Section 201 read with Section 201 (1A) without providing the Appellant a copy of the independent expert opinion obtained by the Department on Roaming in case of Appellant Company and consequent cross-examination of department experts.

ii. That the Ld. CIT (A) failed to appreciate the Ld. AO that the order under Section 201 read with Section 201 (1A) is passed in violation of the principles of natural justice.

6. GROUND 6: That no TDS demand can be raised under section 201(1) of the Act.

i. That on the facts and circumstances of the case and in law, the order of the learned TDS Officer, as upheld by learned CIT(A), is bad in law in so far as it seeks to recover tax demand under section 201 of the Act in contradiction to the settled principle that the payer cannot be held liable for payment of the tax demand in cases involving non-deduction of

tax at source and only interest liability under section 201(1A) of the Act, if any, can be levied in such cases.

ii. Without prejudice to Ground No 6.1 above, on the facts and circumstances of the case and in law, the learned CIT (A) has erred in upholding the action of the learned TDS Officer in raising demand under section 201(1) of the Act even though taxes would have been paid on income earned by the payees (being other telecom operators) on the IUC payments received by them from the Appellant. Such actionof the learned TDS Officer has resulted in double recovery of taxes, which is against the rules of taxation principles.

On the facts and circumstances of the case and in law, the learned CIT (A) has erred in ignoring the ruling of the Mumbai Bench of this Hon'ble Tribunal in the case of Vodafone Essar Limited (ITA Nos. 6058, 6059, 6060/Mum/2009), wherein, this Hon'ble Tribunal directed the assessing officer to invoke his powers under the Act and verify payment of taxes by the payees from the respective Assessing Officers assessing the payees with the help of the PANs of the payee furnished by the Appellant.

7. GROUND 7: That the Ld. CIT (A) grossly erred in confirming the levy of interest under section 201(1A) of the Act;

i. That the Ld. CIT (A) erred in levying interest under Section 201(1A) as no demand under Section 194H and Section 1943 is sustainable against the Appellant.

ii. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the learned TDS Officer in charging interest under Section 201(1A) of the Act.

That without prejudice to the above it is submitted that as per the decision of the Hon'ble Supreme Court of India in Hindustan Coca Cola Beverage (P.) Ltd. vs. Commissioner of Income-tax, [2007] 163 TAXMAN 355 (SC) in the present facts and circumstances as the tax on IUC payments have already been paid by the payees/ deductee-assessee the Appellant will only be liable to pay interest till the date of payment of taxes by the payees/deductee-assessee.

8. GROUND 8: That the Ld. CIT (A) has erred in confirming the initiation of penalty proceedings under section 271(1)(C) of the Act.

i. That on the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.paid by the payees/ deductee-assessee the Appellant will only be liable to pay

interest till the date of payment of taxes by the payees/deductee-assessee.

8. GROUND 8: That the Ld. CIT (A) has erred in confirming the initiation of penalty proceedings under section 271(1)(C) of the Act.

1. That on the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

9. GROUND 9: That the Ld. CIT (A) grossly erred in not considering the contentions and grounds raised by the Appellant

Each of the grounds or sub-grounds are in the alternative and is without prejudice to each other.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

3. The brief facts of the case are that the assessee is a limited company registered under the companies Act, 1996, engaged in the business of providing telecommunication services across the

country, including Delhi in terms of the license granted by the Department of Telecommunication Government of India. To provide telecommunication services amongst others tata teleservices sells service products such as Recharge coupon Vouchers (RCVs) and starter kits. RCVs are the pre-paid vouchers used for selling talk time to the pre-paid subscribers. The starter kits are the new connections containing "Removable userIdentityModuleRUIM cards) or subscribers Identity Module (SIM Cards)for providing the telecommunication connection. For selling service products the company enters into a channel partner agreement with the distributors who are also known as channel partners. On the upfront sale of the services products discount is offered to the channel partners to the extent of the difference between the Maximum retail price and the distributor's sale price. On this discount no TDS provisions as per Act was made by the company. A notice was issued u/s201(1) of the Act to examine whether the assessee company had duly deducted TDS as required to be made on element of discount granted on account of sale of SIM cards /recharge vouchers/ talk time. The assessing officer was of the view that TDS should have been deducted u/194H of the Act. Secondly the assessing company has not deducted tax u/s 194J on roaming charges paid to the various operators. The assessee company has filed the detailed submission on the basis of facts

and judicial pronouncements which did not satisfy the AO and addition on both the heads were made.

Aggrieved the order of the assessing officer the assessee company has filed the appeal before the Ld.CIT(A) who vide his order dated 01-12-2017dismissed the appeal against which the assessee is in appeal before us.

4. The Ld CIT(A) has observed in his order as under :-

6. I have considered the facts and circumstances of the case, submission of the appellant and the perused the order of the AO. I find that so far as invoking section 194H is concerned, on identical facts, the Hon'ble Delhi High Court has decided this issue in the case of CIT – XVII vs. Idea Cellular Ltd. reported in (2010) 189 Taxman 118 (Delhi)/[2010] 325 ITR 148 (Delhi) / [2010] 230 CTR 43 (Delhi) in which the Hon'ble court has held :-

Section 194H of the Income-tax Act, 1961 Deduction of tax at source Commission or brokerage etc. Assessment years 2003-04 and 2004-05- Assessee company was engaged in business of providing cellular telephone network through a card called Subscriber Identification Module (SIM) - Pre-paid or post-paid connections were provided to subscribers through distributors called Pre-paid Market Associates (PMAS) appointed by assessee Assessee offered discount

on pre-paid calling services to its distributors As per agreement, at all times pre-paid SIM card recharge coupons were owned by assessee; maximum price of SIM cards/recharge coupons was decided by assessee; and PMAs had to comply with all requirements of assessee in respect of invoicing and accounts, maintenance of brand image and providing monthly sale reports and other information relating to business Minimum performance targets for distributors were also set by assessee which reserved right to terminate agreement unilaterally - Ultimate agreement was entered into between subscribers and assessee creating legal relationship between them Whether, on facts, relationship between assessee and its distributors was Whether, on facts, relationship between assessee and its distributors was that of principal and agent and, consequently, amount of discount offered by assessee to its distributors was in nature of commission liable to tax deduction at source under section 194H-Held, yes"

6.1 Following the above decision, the demand raised by the AO under section 194H is confirmed.

6.2 So far as invoking section 194) is concerned, on perusal of the facts, it is clear that the appellant had received technical services in lieu of getting roaming services from

the net work of another operators through an automated process undertaken by a series of highly advanced telecom network equipment but the same requires constant human intervention to make the process of roaming services effectively operational, thereby, I am of the considered view that the services rendered by the other operators with regard to roaming facility was the technical services for which provision of section 1941 are applicable, therefore, the AO had rightly invoked section 194J of the IT Act in this regard.

6.3 Further, the appellant has not filed any details of the persons concerned (deduction u/s 194H & 194J) with reference to proviso to section 201 of the I.T. Act for verification.

5. We have the bothparties and perused the materials available on record.

6. The ld AR has submitted that the issue is now squarely covered in favour of the assessee by the judgment of the of the Hon'ble Supreme Court in case of Bharti Cellular Ltd, vs ACIT Circle civil Appeal No 7257 of 2011& the Hon'ble Delhi High Court in case of Tata Teleservices Limited vs Income Tax Officer

& Others ITA 512/2018. Reliance has also placed on the following judgments;

1. *Hon'ble Supreme Court in Bharti Cellular Limited Vs. ACIT Civil Appeal No.7257./2011 (SC)*
2. *Hon'ble Delhi High Court in M/s. Tata Teleservices Ltd. Vs. Income Tax Officer ITA No.512/513/518/519/538 of 2018 (Delhi)*
3. *Hon'ble Delhi High Court in CIT (TDS) 2 vs M/s. Tata Teleservices Ltd. (2022) [ITA 1417/208 (Delhi)*
4. *Hon'ble Karnataka High Court in CIT vs. Vodafone South Ltd. (2016) [241 taxman 497] (Karnataka)*
5. *Hon'ble Supreme Court in CIT vs. Vegetable Products Ltd. (1973) [88 ITR 192]*
6. *Hon'ble Mumbai Tribunal special bench in Narang Overseas (P) Ltd. vs. ACIT Central Circle 36 (2008_ [111 ITD 1 (Mumbai) (SB)]*
7. *Hon'ble Delhi Tribunal in ACIT, Circle 78 (1) vs. Vodafone Idea Ltd. (2024) [ITA no.3328 to 3332/Del/2015]*
8. *Hon'ble Delhi Tribunal ACIT, Circle 78 (1) vs. Vodafone Idea Ltd. (2024) [ITA 137/Del/2021]*
9. *Hon'ble Delhi Tribunal in Unitech Wireless (Tamil Nadu) (P) Ltd. vs. ACIT 142 taxmann.com 154 (Delhi-Trib.)*

7. At the outset, the ld DR vehemently supported the order of the lower authorities. The Ld. DR has relied on the following judgments as under;

1. *Unitech Wireless (Tamil Nadu) Pvt. Ltd. Vs. ACIT ITA No.2355/Del/2015 ITA No.2356/Del/2015*
2. *ACIT Vs. Unitech Wireless ITA No.2925/Del/2015 ITA No.2926/Del/2015*
3. *High Court of Madras in the case of Commissioner of Income-tax v. Dishnet Wireless Ltd. [2024] 165 taxmnan.com 416 (Madras)*
4. *Supreme Court of India in the case of Commissioner of Income –tax, Delhi v. Bharti Cellular Ltd [2010] 193 Taxman (SC).*

8. In view of the above foregoing discussion, we think it proper to set aside the appeal in the light of the decisions, referred supra. We order accordingly.

9. Ground No 2;-This issue relates that whether the assessee would be under a legal obligation to deduct tax at source u/s 194H of the Act from the discounts allowed to its distributors on sale of starter kits and recharge vouchers?The Hon'ble Supreme Court in case of Bharti Cellular Ltd, vs ACIT Circle civil Appeal No 7257 of 2011 held as under :-

41. Thus, the term 'agent' denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term 'agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, incidentally, also affect the legal position of his principal in other ways. This can be ascertained by referring to and examining the indicia mentioned in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to Section 194-H of the Act.

42. In view of the aforesaid discussion, we hold that the assessees would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from

the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors. Section 194-H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeals filed by the assessee – cellular mobile service providers, challenging the judgments of the High Courts of Delhi and Calcutta are allowed and these judgments are set aside. The appeals filed by the Revenue challenging the judgments of High Courts of Rajasthan, Karnataka and Bombay are dismissed. There would be no orders as to cost. Pending applications, if any, shall stand disposed of.

10. In the case of Tata Teleservices Limited vs Income Tax officer & ANR ITA 512/2018 Hon'ble Delhi High Court held that;

1. The instant appeals raise the following common questions of law:

"Whether Income Tax Appellate Tribunal fell into error in its interpretation of Section 194-H of the Income Tax Act, 1961 in the facts and circumstances of the case?"

2. Undisputedly the aforesaid questions stands answered in favour of the assessee in light of the judgment rendered by the Supreme Court in Bharti Cellular Ltd. v. CIT [2024 SCC OnLine SC 198].

3. While dealing with the same, the Court had in Bharti Cellular held as follows:

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 16/04/2024 at 21:27:11 " 39. Coming back to the legal position of a distributor, it is to be generally regarded as different from that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as sui generis, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacturer, i.e., a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services.

There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely

regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement.

Franchise agreements are extremely detailed and complex. They may relate to distribution franchises, service franchises and production franchises. Notwithstanding the strict restrictions placed on the franchisees--which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices--the relationship may in a given case be that of an independent contractor. The facts of each case and the authority given by the "principal" to the franchisees matter and are determinative.

40. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the

purpose of creating contractual relations with the third persons. An independent contractor is not required to render the accounts of the business, as it belongs to him and not his employer.

41. Thus, the term "agent" denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 16/04/2024 at 21:27:12 independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term "agent" should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, incidentally, also affect the legal position of his principal in other ways. This can be ascertained by referring to and examining the indicia

mentioned in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to section 194H of the Act.

42. In view of the aforesaid discussion, we hold that the assessees would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from the third parties/customers, or while selling/transferring the prepaid coupons or starter-kits to the distributors. Section 194H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeals filed by the assessee - cellular mobile service providers, challenging the judgments of the High Courts of Delhi and Calcutta are allowed and these judgments are set aside. The appeals filed by the Revenue challenging the judgments of the High Courts of Rajasthan, Karnataka and Bombay are dismissed. There would be no orders as to cost. Pending applications, if any, shall stand disposed of."

4. In view of the aforesaid, we allow the instant appeals and set aside the orders of the Income Tax Appellate Tribunal ["ITAT"] dated 15 March 2018, insofar as the issue of Section 194H is concerned.

11. Respectfully following the ratio laid down by the Hon'ble Apex Court and Hon'ble High Court we hold that no TDS u/s 194H is deductible in case of discounts allowed to the distributors on sale of starter Kits and recharge vouchers. Ground no2 is decided in favour of the assessee.

12. Ground no.3 whether the assessee in default for non - deduction of tax at source under the provisions of section 194J of the Acton inter connect usage charges paid by the assessee to the other telecom operators?

13. The Ld counsel for assessee has submitted that roaming process between participating entities is fully automatic and does not require any human intervention. On the contrary ld DR has submitted that human intervention by skilled technical personnel is an integral and unavoidable part of roaming services provided by the other entity and these services could not be rendered effectively without continuous human coordination, Ld D R has relied on the following pronouncement;

1) *The Hon'ble Madras High Court in the case of Commissioner of Income Tax Vs. Dishnet Wireless Ltd. [2024] 165 taxmann.com 416 (Madras) (copy enclosed) has observed as under :-*

Section 194J, read with section 201, of the Income-tax Act, 1961 - Deduction of tax at source - Fees for technical or professional services (Roaming charges) - Assessment year 2007-08 to 2011-12 Assessee-company, engaged in business of providing pre-paid telecommunication services, entered into roaming agreements with other telecom operators to facilitate its subscribers in availing roaming facilities when they travel outside home network area - During year, assessee made substantial payments as roaming charges to other operators without deducting any tax at source Assessing Officer noted that roaming charges paid by assessee constituted fees for technical services rendered by payee-telecom operators, thereby attracting provisions of section 194J which mandates deduction of tax at source On appeal, assessee contended that its own National GSM Roaming Agreement did not require human intervention and roaming services were automated processes and, hence roaming charges did not qualify as fees for technical services - It was noted that human intervention by skilled technical personnel was an integral and unavoidable part of roaming services provided by host telecom operators to assessee and these services could not be rendered effectively or efficiently without continuous human monitoring, coordination, troubleshooting, and expertise - Whether, thus, roaming services involved human intervention and technical expertise at various levels and, consequently, charges paid by

assessee for such services constituted fees for technical services under section 194J as provision lucidly spells out that consideration can also be in one lump sum - Held, yes [Paras 18, 19 and 20] [In favour of revenue]

2. SUPREME COURT OF INDIA in the case of Commissioner of Income-tax, Delhi v. Bharti Cellular Ltd [2010] 193 Taxman 97 (SC) has observed as under :-

Section 194J of the Income-tax Act, 1961- Deduction of tax at source - Fees for technical/professional services - Assessee was a cellular service provider - It had an interconnect agreement with BSNL/MTNL under which it paid interconnect/access/port charges to BSNL/MTNL Question that arose for consideration was whether TDS was deductible by assessee on interconnect/access/port charges paid to BSNL/MTNL - Whether in absence of any expert evidence from department to show how mutual intervention was involved in technical operations by which assessee was given facility by BSNL/MTNL for interconnection, matter could not be decided - Held, yes Whether, therefore, Assessing Officer was to be directed to decide matter after examining a technical expert from side of department Held, yes [Matter remanded]

14. The Hon'ble Apex Court observed that human intervention is essential for any fee/charges to get covered under the definition of fees for technical services' as defined in Explanation 2 to clause (vii) of section 9(1) of the Act. However, since no expert opinion was available on record whether any 'human intervention is involved in the provision of interconnect services. The Hon'ble Supreme Court remanded the matter back to the office of the learned TDS office for seeking expert opinion on this aspect and thereafter for fresh adjudication on this matter basis such facts. The roaming process between participating entities is fully automatic and does not require any human intervention. We do not find that the above aforesaid decision would be help of the revenue.

14. In the case of Commissioner of Income Tax (TDS) -2 vs M/S TATA Teleservices Ltd,the jurisdictional Hon'ble Delhi High Court held as under :-

> *1. Present appeal has been filed raising the following question of law:- "Whether the ITAT was correct in holding that no TDS under Section 194J of the Income Tax Act was required to be deducted by the assessee on payment of interconnect user charges as it could not be categorized as fee for technical services?"*
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> *2. Admittedly the Karnataka High Court in Commissioner of Income Tax, TDS, Bangalore vs. Vodafone South Ltd.,*

2016 (72) taxmann.com 347 (Karnataka) has decided the aforesaid issue in favour of the respondent assessee. However, learned counsel for the appellant-revenue states that the Bombay High Court has admitted the similar question of law for consideration.

3. Learned predecessor Division Bench vide order dated 22nd March, 2021 had opined that as no Special Leave Petition has been filed against the judgment of the Karnataka High Court, the said view would be binding on the appellant-revenue. Learned predecessor Division Bench had directed the counsel for the appellant-revenue to obtain necessary instructions from the CBDT as to the way forward.

4. Mr. Zoheb Hossain, learned standing counsel for the revenue has handed over a letter dated 21st April, 2022 written by JDIT(OSD)(L&R), New Delhi addressed to the Commissioner of the Income Tax, High Court Cell (Judicial), New Delhi. The said letter is taken on record. The said letter reads as under :- "To, The Commissioner of Income Tax (Judicial), High Court Cell, Delhi Respected Sir, Sub: Urgent Instructions required in the case of Commissioner of Income Tax (TDS-2) vs M/s Tata Teleservices Ltd. [ITA No. 1417/2018]- regarding. Kindly refer to your e-mail dated 11th April 2022 on the above-mentioned subject. In this regard, I am directed to convey that SLP in the case of CIT (TDS), Bangalore vs. Vodafone

South Ltd. (2016) 72 Taxmann.com 347 (Kar) has not been approved by Board for the following reason:
"As it has been repeatedly established in various cases, involving the issue of liability of deduction of TDS us 194J for payments to other telecom companies for interconnect charges/access/port charges for reaming and data link that no human intervention was involved in the interconnect whether it was for data link or roaming, the charges paid could not be held to be in the nature of fees for technical services for the purposes of section 9(1) and section 194J of the Act." In view of above, SLP in the case of CIT (TDS), Bangalore vs. Vodafone South Ltd. (2016) was not filed. This is for your kind information and the needful."

5. Learned counsel for the respondent emphasises that JDIT(OSD)(L&R) functions under the Directorate, L&R, CBDT. Therefore, he contends that the decision to accept the decision of the Karnataka High court in Vodafone South Ltd. (supra) was taken at the highest level of the appellant-revenue. He further states that the Bombay High Court was not aware of the aforesaid judgment of the Karnataka High court when it admitted the questions of law as alleged by learned counsel for the appellant. 6. Learned counsel for the respondent further contends that the appellant-revenue having taken a conscious decision to

accept the judgment of the Karnataka High Court cannot be permitted to take the opposite stand in the present case. In support of his submission, he relies upon the following judgments:-

A. Birla Corporation Ltd. vs. Commissioner of Central Excise, (2005) 6 SCC 95

"5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd.(supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."

B. Commissioner of Central Excise, Navi Mumbai vs. Amar Bitumen & Allied Products Private Limited & Ors., (2010) 13 SCC 76 "5. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept the judgment/order on the same question in the case of one assessee and question its correctness in the

case of some other assesses. Revenue cannot pick and choose……"

7. Admittedly, the Karnataka High Court and various Tax Tribunals have taken the view that there is no human intervention involved in providing the interconnect services whether it be for data link or roaming. 8. The Supreme Court in Berger Paints India Ltd. vs. Commissioner of Income Tax, (2004) 135 Taxman 586 has held that if the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correctness in the case of other assessee without just cause.

9. Keeping in view the aforesaid mandate of law and the letter dated 21st April, 2022, this Court is of the view that the appellant-revenue has consciously elected not to challenge the aforesaid judgment of the Karnataka High Court, which hold that no TDS is required to be deducted by the assessee on payment of interconnect user charges as it cannot be categorized as fee for technical services.

10. Consequently, this Court is of the view that it is not open to the revenue to challenge the correctness of the finding rendered by the Karnataka High Court in Vodafone South Ltd. (supra) in the case of other asseesees without just cause. Accordingly, no substantial question of law

arises for consideration in the present appeal and the same is dismissed.

15. In the case of Commissioner of Income Tax TDS Bangalore vs Vodafone South Ltd [2016]72 TAXMANN.COM 347 Karnataka theHon'ble High Court held as under :-

"11. We have heard the rival contentions of both the parties and perused the material available on record. After going through the order of the Assessing Officer, Id CIT(A); submissions of the assessee as well as going through the process of providing roaming services; examination of technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd.; thereafter cross examination made by M/s. Bharti Cellular Ltd.; also opinion of Hon'ble the then Chief Justice of India Mr. S.H.Kapadia dated 03.09.2013 and also various judgments given by the ITAT Ahmedabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find thatforinstallation/setting up/repairing/servicing/maintenancecapacity augmentation are require human intervention but after completing this process mere interconnection between the operators is automatic and does not require any human intervention. The term Inter Connecting User Charges (IUC) also signifies charges for connecting two entities. The Coordinate Bench also considered the Hon'ble Supreme

Court decision in the case of Bharti Cellular Ltd. in the case of in IGATE Computer System Ltd. and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in Section 194J read with Section 9(1)(vii) read with Explanation-2 of the Act. In case before us, the assessee has paid roaming charges i.e. IUC Charges to various operators at Rs. 10,18,92,350/-. Respectfully following above judicial precedents, we hold that these charges are not fees for rendering any technical services as envisaged in Section 194J of the Act. Therefore, we reverse the order of the Id CIT (A) and assessee's appeal is allowed on this ground also.

14. Reading of the above order clearly show that fact - situation was essentially similar to the one here inthe case of the assessee. Assessee was also treated as one in default for failure to deduct tax at source on roaming charges paid to other distributors. Therefore the coordinate bench of the Tribunal in the case of Bharti Hexacom Ltd. (supra) would squarely apply. We also find that the said decision has been followed Ground 3 is allowed.

16. In its ground No.4, assessee is aggrieved on the levy of interest u/s. 201 (1A) of the Act. This is a consequential ground. We have already held that assessee is not at default for deduction of tax on roaming charges and interest levied on

the assessee on such amount u/s. 201(1A) of the Act, stands deleted. However, in so far as interest u/s. 201(1A) of the Act in relation to discounts/ commission on prepaid sim cards and talk time is concerned, we have remitted the issue back to the file of the AO for consideration afresh in accordance with the judgment of Hon'ble Jurisdictional High Court in the case of Bharti Airtel Ltd. (supra). AO is directed to revise the levy of interest accordingly. Ground nO.4 of the assessee is partly allowed for statistical purpose.

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

8. We have heard Mr. K.V. Aravind, the learned counsel appearing for the appellants- Revenue in all the appeals. The learned Counsel relied upon two decisions of the Apex Court for canvassing the contention that the roaming charges paid by the assessee to other services provider

can be said as 'technical services'; one was the decision of the Apex Court in the case of CIT v. Bharti Cellular Ltd. [2010] 193 Taxman 97/[2011] 330 ITR 239 (SC); and the another was the decision of the Apex Court in the case of CIT v. Kotak Securities Ltd. [2016] 67 taxman.com 356/239 Taxman 139/383 ITR 1 (SC) and it was submitted if the observations made by the Apex Court in the above referred decision are considered, the decision of the Tribunal would be unsustainable and consequently, the questions may arise for consideration before this Court in the present appeals.

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

we do not find that the aforesaid decision in the case of Bharti Cellular Ltd. would be of any help to the appellants - Revenue.

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

11. In our view, the contention is not only misconceived, but is on non existent premise, because the subject matter of the present appeals is not roaming services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service

provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

12. As such, even if we consider the observations made by the Apex Court in the case of Bharti Cellular Ltd.supra, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as "technical services" or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. Coupled with the aspect that the Tribunal has relied upon the decision of the Delhi High Court for taking support of its view.

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

14. In view of the above, we do not find that any substantial question of law would arise for consideration. Hence, the appeals are dismissed.

17. Respectfully following the ratio laid down by the Hon'ble Jurisdictional Delhi High Court and Hon'ble Karnataka High Court we hold that no TDS u/s 194J is deductible in case of roaming charges paid.

18. From the above discussion, the grounds raised by the assessee are allowed. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 11.12.2024.

Sd/-	**sd/-**
(M. BALAGANESH)	**(SUDHIR KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

*Mohan Lal *
Date:-.11.12.2024

Copy forwarded to:

1.Appellant

2.Respondent

3.CIT

4.CIT(Appeals)`

5.DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI