IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI
BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER
I.T.A .No.-5732/DEL/2012 (A.Y 2009-10)

DCIT Circle-2(1) New Delhi **(APPELLANT)**	vs	Bharti Hexacom Ltd. Bharti Crescent 1, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi AABCH1766P **(RESPONDENT)**

I.T.A .No.-5980/DEL/2012 (A.Y 2009-10)

Bharti Hexacom Ltd. Bharti Crescent 1, Nelson Mandela Road, Vasant Kunj, Phase-II New Delhi AABCH1766P **(APPELLANT)**	vs	ACIT Circle-2(1) New Delhi **(RESPONDENT)**

Appellant by	**Sh. Sanjay Jain, CIT DR.**
Respondent by	**Sh. Anil Bhalla, CA**

Date of Hearing	**09.08.2016**
Date of Pronouncement	**08.11.2016**

ORDER

PER SUCHITRA KAMBLE, JM

ITA No. 5732/Del/2012 is filed by the Department and ITA No. 5980/Del/2012 is filed by the assessee against the order dated 28/09/2012 passed by CIT (A)-V, New Delhi for A.Y 2009-10.

2. The assessee was carrying out the business of cellular phone and land line service and its associated value added service for the relevant Assessment Year 2009-10. The Assessing Officer completed the assessment at an income of Rs. 373,50,77,083/- against the returned income of 'Nil' after making following additions/disallowances:

(1)	Amortization of license fee and Sepctrum charges u/s 35ABB of the Act	149,06,33,990/-
(2)	Disallowance of free airtime to Distributors u/s 40(a)(ia)	107,94,10,100/-
(3)	Disallowance of roaming charges Paid u/s 40(a)(ia)	11,95,70,267/-
(4)	Lease rental paid to IBM	6,23,19,912/-

3. Being aggrieved with the said actions of the Assessing Officer, the assessee filed appeal before the CIT(A). The CIT (A) partly allowed the appeal of the assessee. Therefore, the assessee as well as the Revenue filed present appeals.

4. The Ld. AR submitted that Ground No. 1 of the Revenue's appeal relating to applicability of Section 35ABB to license fee and spectrum charges amounting to Rs. 149,06,33,990/- is covered by the decision of the ITAT Delhi Bench in assessee's own case in respect of A.Y. 2008-09 (ITA No. 2795/DEL/2012 dated

21.04.2016) wherein the Hon'ble Delhi High Court's decision in assessee's own case was followed for A.Y. 2004-05. The Hon'ble Delhi High Court held that the expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable upto 31st July, 1999 should be treated as capital expenditure and licence fee on revenue sharing basis after 15th August, 1999 should be treated as revenue expenditure. Thus capital expenditure is qualified for deduction as per Section 35ABB of the Act in the said case as per the finding of the Hon'ble High Court. Thus the said issue is decided in favour of the assessee by the Hon'ble Delhi High Court. Besides this for A.Y. 2003-04, 2004-2005, 2006-07 and 2007-08 also the said issue is decided in favour of the assessee by the ITAT.

5. The Ld. AR submitted that ground no. 2 of the Revenue's appeal relating to addition on account of lease rent paid to IBM that of Rs. 6,23,19,912/- is also covered in favour of the assessee by the decision of the ITAT Delhi Bench in assessee's own case for A.Y. 2008-09(ITA No. 2795/Del/2012 dated 21.04.2016) wherein the Tribunal held that the service cum lease agreement between the assessee and IBM as well as Nortel clearly lays liability on IBM and substance of the transaction suggests that the beneficial ownership remained with IBM and not with assessee and therefore the assessee had rightly claimed the entire lease rent paid by it to IBM.

6. In respect of the Assessee's appeal, the Ld. AR submitted that Ground No. 1 to 1.4 of the appeal is related to applicability of

Section 194H of the Act to discount allowed to distributors on the sale of prepaid cards which carry "Right to Use of Airtime". The Assessing Officer made disallowance of Rs. 107,94,10,000/- u/s 40(a)(ia) of the Act. The said issue is covered in favour of the assessee by the decision of the ITAT Delhi Bench in assessee's own case for A.Y. 2008-09(ITA No. 2795/Del/2012 dated 21.04.2016) and A.Y. 2006-07 as well wherein the Tribunal held that though the Hon'ble Jurisdictional High Court is against the assessee on the issue of applicability of provisions of Section 194H of the Act, but in assessee's own case for A.Y. 2008-09, ITAT, Jaipur Bench (A.Y. 2004-05 to 2009-10) as well as Gauhati Bench (A.Y. 2006-07 to 2010-11) held that the assessee is not in default u/s 201 of the Act on account of non-deduction of TDS u/s 194H in regard to discount allowed to distributors on prepaid cards. The view beneficial to the assessee was taken and accordingly assessee's appeal was allowed by deleting the addition u/s 40(a)(ia) of the Act. Thus, the Ld. AR submitted that no tax was determined as deductible under Chapter XVIIB and computational provisions of Section 40(a)(ia) cannot operate if machinery provisions of Chapter XVII-B – Section 201 read with Section 194H of the Act are not applicable.

7. Ground No. 2 to 2.4 of the assessee's appeal, the Ld. AR submitted that the same is related to applicability of Section 194J of the Act to the payment made by the assessee company for roaming charges to other telecom service providers for Rs. 11,95,70,267/-. The Ld. AR submitted that this issue is also covered in favour of the assessee by the decision in case of the ITAT

Delhi Bench in assessee's own case for A.Y. 2008-09 (ITA No. 2795/Del/2012 dated 21.04.2016 and A.Y. 2006-07 as well wherein the Tribunal held that since Jaipur Bench of Tribunal has held for A.Y. 2008-09 that provisions of Section 194J are not applicable, the appeal of the assessee was allowed. The Ld. AR submitted that addition u/s. 40(a)(ia) of the Act has been deleted as the assessee has been held not to be in default u/s 201 of the Act in respect of applicability of Section 194J of the Act. In assessee's own case for A.Y. 2008-09, ITAT, Jaipur Bench (A.Y. 2004-05 to 2009-10) as well as Gauhati Bench (A.Y. 2006-07 to 2010-11) held that the assessee is not in default u/s 201 of the Act on account of non-deduction of TDS u/s 194J in regard to roaming charges to other telecom service providers. Thus no tax was determined as deductible under Chapter XVII-B. The Computational provisions of Section 40(a)(ia) of the Act cannot operate if machinery provisions of Chapter XVII-B - Section 201 read with section 194J of the Act are not applicable.

8. The Ld. DR could not submit any argument contrary to these facts and the legal position.

9. We have heard both the sides and gone through the orders passed by the ITAT New Delhi Bench, Jaipur Bench and Gauhati Bench as well as Hon'ble Jurisdictional High Court in case of assessee for various assessment years.

9.1 Ground No. 1 of the Revenue's appeal, the issue in the present assessment year is that an amount of Rs. 214,23,97,00/- was

debited as payment towards license fee and spectrum charges. The license fee paid under Section 35ABB conferred a right on the telecom operators to operate telephony services for a number of years. Under Section 35ABB the fee was held to be capital and allowable in an appropriate proportion over the number of years. From 01.07.1999 the whole scheme of payment was changed and license fee was directly linked with the annual revenue generated by the telecom operators. The payment is annual. The licence will get revoked in case of non payment of licence fee. As per settled law, any expenditure which does not create an asset and which is paid for the specific year and not for years is not capital expenditure but revenue expenditure. The Hon'ble Delhi High Court held as follows:

> *"47. In view of the aforesaid findings, the substantial question mentioned above in item Nos. 1 to 9 is answered in the following manner:*
>
> *(i) The expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable upto 31st July, 1999 should be treated as capital expenditure and licnence fee on revenue sharing basis after 15th August, 1999 should be treated as revenue expenditure.*
>
> *(ii) Capital expenditure will qualify for deduction as per Section 35ABB of the Act."*

In respect of Revenue's appeal, the first issue is against the Revenue, as Capital expenditure is qualified for deduction as per

Section 35ABB of the Act as per the finding of the Hon'ble Jurisdictional High Court as discussed above. The same is also followed in assessee's own case for Assessment Year 2008-09 – ITA 2795/Del/2012 as well as for Assessment Year 2003-04 & 2004-05 – ITA Nos. 150 & 4552/DEL/2007.

9.2 The second issue in revenue's appeal is regarding addition on account of lease rent paid to IBM to the extent of Rs. 6,23,19,912/-. The same is also in favour of the assessee as per the Tribunal's order in assessee's own case for A.Y. 2008-09 wherein it is held that the service cum lease agreement between the assessee and IBM as well as Nortel clearly lays liability on IBM and substance of the transaction suggests that the beneficial ownership remained with IBM and not with assessee and therefore the assessee had rightly claimed the entire lease rent paid by it to IBM. The facts are identical in the present Assessment Year 2009-10.

9.3 In respect of Assessee's appeal, Ground No. 1 to 1.4 regarding to applicability of Section 194H of the Act to discount allowed to distributors on the sale of prepaid cards which carry "Right to Use of Airtime" and disallowance to that extent for Rs. 1,07,94,10,000/- by the AO. Addition under Section 40(a)(ia) has to be deleted as the assessee was not in default under Section 201 of the Act in respect of applicability of Section 194H of the Act. The Assessee company was carrying out telecom business in the Rajasthan Circle and NESA. The Jaipur Bench of ITAT held that the assessee is not in default in Assessment Year 2004-05 to 2008-09 and Assessment

Year 2009-10 – ITA No. 656/JP/2010 (which is the present Assessment Year). The Jaipur Bench of ITAT recorded a finding in para 6 (ITA No. 656/JP/2010) as follows:

"6. We have heard the rival contentions of both the parties and perused the material avialble on the record. Recently this bench has decided similar issue in the case of Tata Tele Services, which is identical to the assessee's case. The facts of the case has been demonstrated by the AR that the assessee was issuing bill on net amount on MRP has been fixed on prepaid card sold. The assessee has not transferred any income to the distributor but the distributor was allowed to avail the airtime to the extent of MRP price. In books of account, the assessee had credited these receipts on net basis. The finding on the case of Tata Tele Services is reproduced as under:

2.23. We find merit in the contention of ld. Counsel that there is no jurisdictional high Court judgment on this issue. Hon'ble Karnataka High Court judgment is elaborate, detailed, considers the previous Delhi and Kerala High Court judgment against the assessee and is latest comprehensive adjudication on the issue. Even if it is held that there exist divergence of judicial opinion a view favourable to the assessee is to be adopted as held by Hon'ble Supreme Court in Vegetable Products Ltd. and Vatika township case (supra). From this angle also in these facts and circumstances Hon'ble Karnataka High

Court judgment is applicable to the assessee's case. Respectfully following the same we hold that:

a. The relationship between assessee and its distributors qua the sale of impugned products is on principal to principal basis; the consideration received by assessee is sale price simpliciter.

b. There is no relationship of Principal and agent between assessee and distributors as held by authorizes below their orders are reversed.

c. Looking at the transaction being of Sale/Purchase and relationship being of principal to principal the discount does not amount to commission in terms of sec. 194H, the same is not applicable to these transactions. Therefore, assessee cannot be held in default; impugned demand raised applying sec. 194H is quashed. Assessee's grounds are allowed.

By respectfully following our own decision on similar fact, we reverse the order of the ld CIT (A) and allow the appeal of the assessee on this ground.

Similarly in the case of Bharti Hexacom Limited, ITAT Guwahati Bench has held that assessee to be not in default u/s 194H of the Act. Thus no tax was determined as deductible under Chapter XVII-B. Computational provisions of Section 40(a)(ia) cannot operate if machinery provisions of Chapter XVII-B – Section 201 read with Section 194H of the Act are not applicable.

9.4 In respect of Ground No. 2 to 2.4 of the assessee's appeal as regards to applicability of Section 194J of the Act to the Payment made by the assessee company for roaming charges to other telecom service providers to the extent of Rs. 11,95,70,267/-. The Jaipur Bench of ITAT recorded a finding in para 11 (ITA No. 656/JP/2010) as follows:

"11. We have heard the rival contentions of both the parties and perused the material available on the record. After going through the order of the Assessing Officer, ld 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 Ahmadabad Bench in the case of Canara Bank on MICR and Pune Bench decision on Data Link Services. We find that for installation/setting up/repairing/servicing/maintenance capacity 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 i-Gate 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 Ld. CIT(A) and Assessee's appeal is allowed on this ground also."

9.5 Once the order u/s 201(1) of the Act is set aside then the issue related to Section 40(a) (ia) of the Act does not sustain. Thus the disallowance under Section 40(a)(ia) of the Act in respect of free airtime to distributors and roaming charges by the Assessing Officer does not sustain in light of the order passed by the ITAT, Jaipur Bench and Gauhati Bench in assessee's own case. All the issues in both appeals that of Revenue and assessee are covered as discussed hereinabove.

10. In result, the appeal of the Revenue is dismissed and the appeal of the assessee is allowed.

The order is pronounced in the open court on 08th of November, 2016.

Sd/-	**Sd/-**
(G. D. AGRAWAL)	**(SUCHITRA KAMBLE)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 08/11/2016

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	09.08.2016	PS
2.	Draft placed before author	09.08.2016	PS
3.	Draft proposed & placed before the second member	.2016	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	08.11.2016	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	08.11.2016	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		