IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA Nos.648 to 651/Bang/2014
(Assessment years: 2009-10 to 2012-13)

M/s.Idea Cellular Ltd.
Idea Tower, 75, Civil Station,
Richmond Road,
Bangalore-560025. … Appellant
PAN:BLRM01952G

Vs.

Asst.Commissioner of Income-tax(TDS),
Circle 18(1),
Bangalore. … Respondent

AND

ITA Nos.758 to 761/Bang/2014
(Assessment years: 2009-10 to 2012-13)
(by the Revenue)

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Assessee by: Shri Ronak G Doshi, CA.
Revenue by: Shri Sunil Kumar Agarwala, JCIT(DR)

Date of hearing : 10/09/2015.
Date of pronouncement: 06/11/2015.

O R D E R

Per BENCH :

These are set of four cross appeals directed against the composite order dated 25/11/2013 of the CIT(A)-V, Bangalore, arising from the orders passed u/s 201(1) and 201(1A) of the

Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] for the assessment years 2009-10 to 2012-13.

2. The assessee is a telecom operator providing cellular services in the State of Karnataka. A survey u/s 133A was conducted at the business premises of the assessee on 15/12/2010 to verify the compliance of TDS provisions. The Assessing Officer (AO) noted that the assessee has not deducted TDS on discount/commission allowed to distributors u/s 194H and inter-operator/national roaming charges u/s 194J of the Act. The AO found that in case of pre-paid services, subscriber identity module (SIM) and recharge vouchers are sold through a network of distributors and agents who remit the sale proceeds back to the assessee after retaining discount portion of the amount. The AO was of the view that this discount represents income earned by the distributor and the nature of which in its very substance and effect is commission. The AO held that roaming costs paid to other telecom/mobile operators was fee for technical service within the meaning of sec.194J and that the assessee failed to deduct tax on such payments. Accordingly, AO treated the assessee as 'assessee in default' under the provisions of sec.194H and 194J thereby worked out the amounts of tax deductable on discount allowed to the distributors, retailers and the payment towards inter-operator roaming charges. Year-wise details of payments and the deductable amount of TDS has been

computed by the AO and which has been reproduced by the CIT(A) in para.1.2 of the impugned order as under:

AY	Roaming charges S.194J	Discount allowed S.194H	Amount payable u/s 201(1)/ 201(1A) on roaming charges	Amount payable u/s 201(1)/ 201(1A) on discount	Total TDS
2009-10	30122073	199169552	4878690	31917293	36795983
2010-11	133104942	196896554	1735139	25587837	27322976
2011-12	21686807	254018113	2538840	29740086	32278926
2012-13	12462617	151471425	1342861	16429447	17772308

3. Aggrieved by the action of the AO, assessee filed appeals before the CIT(A). Since common issues were involved in all the appeals, therefore, the CIT(A) disposed of the appeals for four years by the impugned composite order. The CIT(A) has given partial relief to the assessee in respect of roaming charges paid to other operator/service provider only to the extent of the alleged payment to international telecom operator for providing telecom services to roaming customers of the assessee. As regards other payment on account of discount/commission as well as roaming service provided by the domestic operators, the CIT(A) confirmed the action of the AO. Thus both the assessee as well as the revenue are aggrieved by the impugned order of the CIT(A) and filed cross appeals. Common grounds are raised by the revenue well as by the assessee in all the four assessment years.

4. The grounds raised by the revenue are as under:

1. ñThe CIT (A) has failed to appreciate the fact that the assessee neither produced any evidence nor made a claim before the AO that certain amount of roaming charges was paid to International operators.

2. The CIT (A) has erred in not appreciating the fact that the assessee was liable to prove that the payments were made to the international telecom operators,

3. The CIT (A) has erred in allowing relief to the assessee without bringing out facts to establish payments to international operators.

4. The CIT(A) has erred in not appreciating the fact that it has been judicially held that till date of filing of returns, interest burden is fastened to the deductor.

For these and other grounds that may be raised during the course of appeal.ò

5. The grounds raised by the assessee are as under:

GROUND NO. I: PRINCIPLE OF NATURAL JUSTICE:

1. On the facts and in circumstances of the case and in law, the CIT(A) erred in dismissing the appeal without giving a fair and reasonable opportunity of hearing to the Appellant and thereby violating the principles of natural justice.

2. The Appellant prays that it be held that the order passed by the CIT(A) be quashed/annulled.

GROUND NO. II: ORDER BARRED BY LIMITATION:

1. On the facts and in circumstances of the case and in

law, the Learned CIT(A) erred in confirming the order passed by the Assistant Commissioner of Income Tax (TDS), Circle 18(1), Bangalore ("the TDS Officer") u/s 201 after the expiry of two years from the end of the financial year in which e-TDS statement is filed.

2. The Appellant prays that the order u/s 201(I) for the discount allowed to Distributors and roaming charges paid to telecom operators during first three quarters of F.Y 2008-09.

WITHOUT PREJUDICE TO GROUND NO. I AND II,

GROUND NO. III: NON-DEDUCTION OF TAX AT SOURCE ("TDS") UNDER SECTION 194H OF THE ACT ON DISCOUNT ALLOWED TO THE PRE-PAID DISTIBUTORS ("the Distributors"):

1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in confirming the order passed by the TDS Officer under section 201(1)/201(1A) of the Act by treating "discount" offered by the Appellant to the Distributors as "commission" and thereby treating the Appellant as an "assessee in default" under section 201(1) r. w. s. 194H of the Act.

2. The Appellant most humbly prays that the discount allowed to the Distributors be held as not liable to TDS under section 194H of the Act as the relationship between the Appellant and its Distributors is on Principal-to-Principal basis and, thus, the demand raised in the impugned order in respect of the alleged failure to deduct tax under section 194H of the Act be deleted.

WITHOUT PREJUDICE TO GROUND NO. I, II, AND III: GROUND NO. IV:

1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in confirming the observations of the TDS Officer by treating the Appellant as an "assessee in default" under section 201(1) of the

Act, without appreciating that it is a settled legal position that, if TDS machinery fails, the Appellant cannot be treated as an "assessee in default" under section 201(1) of the Act.

2. The Appellant thus prays that in the absence of any "payment or credit" to the Distributors, the Appellant should not be treated as an -assessee in default" under section 201 r.w.s. 194H of the Act.

WITHOUT PREJUDICE TO GROUNDS I AND II,

GROUND NO. V: NON DEDUCTION OF TI)S UNDER SECTION 194J OF THE ACT ON PAYMENT OF ROAMING CHARGES TO THE OTHER TELECOM OPERATORS ("OTOs"):

1. On the facts and circumstances of the case and in law, the Learned CIT(A) erred in not adjudicating the plea of the Appellant that the payment made for the use of standard facility does not amounts to 'fees for technical services' as defined *in Explanation 2* to section 9(i)(vii) of the Act.

2. The Appellant prays that the payment made for use of standard facility does not amounts to fees for technical services' and hence, the Appellant is not required to deduct tax on roaming charges paid to the OTOs under section 194J of the Act and consequently, it be held that the Appellant cannot be an "assessee in default" under section 201 (1) r.w.s. 194J of the Act.

WITHOUT PREJUDICE TO ABOVE GROUNDS:

GROUND NO. VI: LEVY OF INTEREST UNDER SECTION 201(1A) OF THE ACT:

1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in confirming the order of the TDS Officer in holding the Appellant as "assessee in

default" under section 20 1(1) of the Act and thereby levying the interest under section 201(IA) of the Act.

2. The Appellant prays that the interest levied under section 201(IA) of the Act be deleted or be appropriately reduced.

GROUND NO. VII: GENERAL:

The appellant craves leave to add to/alter and/or amend all or any of the foregoing grounds of appeal.ò

6. First we take up the grounds raised by the assessee. At the time of hearing, the learned AR of the assessee has stated that the assessee does not press ground No.I and the same may be dismissed as not pressed. The learned departmental representative has no objection if the ground No.I of the assessee is dismissed. Accordingly, ground No.I of the assessee's appeals is dismissed as not pressed.

7. Ground III and IV regarding treating the discount allowed to the distributors as commission and thereby holding the assessee as the assessee in default u/s 201 r.w.s. 194H.

8. We have heard the learned AR of the assessee as well as the learned departmental representative and considered the relevant material on record. The learned AR of the assessee has submitted that this issue is covered by the judgment of the Hon'ble jurisdictional High Court in the case of *Bharti Airtel Ltd. Vodafone Essar South Ltd. & others vs. DCIT* reported in 372 ITR

33. The learned AR of the assessee has pointed out that the Hon'ble jurisdictional High Court, after considering the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Idea Cellular Ltd*.(assessee's own case) reported in 325 ITR 148 has held that though the service cannot be sold and be rendered only however, the right to service can be sold. Thus, Hon'ble jurisdictional High Court held that what is sold by the assessee to distributors is right to service. Once the distributor pays for service and the service provider supplies SIM card or recharge coupon, the distributor acquires a right to demand service. The learned AR of the assessee pointed out that the Hon'ble jurisdictional High Court has further held that income accrued to the distributors only when they sell this right to service and not when they purchase this right to service. Thus, learned AR of the assessee has submitted that once it is held that right to service can be sold then the relationship between the assessee and the distributor would be that of principal to principal and not a principal and agent.

9. On the other hand, learned departmental representative has submitted that an identical issue has been decided against the assessee in the assessee's own case by the Hon'ble Delhi High Court reported in 325 ITR 148 therefore, the decision of the Hon'ble Delhi High Court in the assessee's own case is a binding precedent. He further submitted that apart from the decision of the Hon'ble Delhi High Court in the assessee's own case, the

decision of the Hon'ble Bombay High Court in the case of *CIT vs. Qatar Airways* (323 ITR 253) as well as the decision of the Hon'ble Calcutta High Court in the case of Bharati Airtel vs. CIT (354 ITR 507) the issue has been decided against the assessee.

In rebuttal, the learned AR of the assessee has submitted that all these decisions are prior to the decision of the Hon'ble jurisdictional High Court in the case of *Bharti Airtel, Vodafone Essar South Ltd. & others* (supra) and therefore, once the issue is covered by the judgment of the Hon'ble jurisdictional High Court, then this Tribunal is bound to follow the same. He has further pointed out that this Tribunal has followed the judgment of the Hon'ble jurisdictional High Court in the case of Bharati Airtel,Vodafone (supra) in a series of decisions. He has relied upon the decision dated 12/6/2015 of the Jaipur bench of the Tribunal in the case of *Bharti Airtel* in ITA No.656/2010 as well as the decision dated 22/5/2015 in the case of *Idea Cellular Ltd. vs. ITO, i*n ITA Nos.356 to 359/2012 and 326 to 329/JP/2012. He has further submitted that the Ahmedabad bench of the Tribunal in the case of *Vodafone Essar Gujarat Ltd. vs. ACIT* in ITA 389/Ahd/2011 vide its decision dated 7/7/2015 has also decided the issue in favour of the assessee by following the judgment of the Hon'ble jurisdictional High Court.

10. We have considered the rival submissions as well as the relevant material on record. There is no dispute that initially, the

issue was decided against the assessee by the Hon'ble Delhi High Court in the decision reported in 325 ITR 148 by holding that service can be rendered and cannot be sold and therefore, the payment to distributors, who are acting as a link in the chain of service provider, cannot be a discount but the same is in the nature of commission. However, subsequently, the Hon'ble jurisdictional High Court in its decision reported in 372 ITR 33 (supra) has distinguished the finding of the Hon'ble Delhi High Court and held in paragraphs 56 to 65 as under:

> "56. In the Idea Cellular Limited's case, 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 and 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.
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> 57. Similar is the view expressed by the Kerala High Court in the Vodafone Essar Cellular Limited's case, 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. It 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 sub-distributors 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 price at which they sell the products to the distributors but the products are sold 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.

60. The following illustration makes the point clear:

> On delivery of the prepaid card, the assessee raises invoices and updates the accounts. In the first instance, sale is accounted for Rs.100/-, which is the first account and Rs.80/- is the second account and the third account is Rs.20/-. It shows that the sales is for Rs.100/-, commission is given at Rs.20/- to the distributors and net value is Rs.80/-. The assessee's sale is accounted at the gross value of Rs.100/- and thereafter, the commission paid at Rs.20/-is accounted. Therefore, in those circumstances of the case, the essence of the contract of the assessee and distributor is that of service and therefore, Section 194H of the Act is attracted.

61. However, in the first instance, if the assessee accounted for only Rs.80/- and on payment of Rs.80/-, he hands over the prepaid card prescribing the MRP as Rs.100/-, then at the time of sale, the assessee is not making any payment. Consequently, the distributor is not earning any income. This discount of Rs.20/- if not reflected anywhere in the books of accounts, in such circumstances, Section 194H of the Act is not attracted.

62. In the appeals before us, the assessees sell prepaid cards/vouchers to the distributors. At the time of the assessee selling these pre-paid cards for a consideration to the distributor, the distributor does not earn any income. In fact, rather than earning income, distributors incur expenditure for the purchase of prepaid cards. Only after the resale of those prepaid cards, distributors would derive income. At the time of the assessee selling these pre-paid cards, he is not in possession of any income belonging to the distributor. Therefore, the question of any income accruing or arising to the distributor at the point of time of sale of prepaid card by the assessee to the distributor does not arise. The condition precedent for attracting Section 194H of the Act is that there should be

an income payable by the assessee to the distributor. In other words the income accrued or belonging to the distributor should be in the hands of the assessees. Then out of that income, the assessee has to deduct income tax thereon at the rate of 10% and then pay the remaining portion of the income to the distributor. In this context it is pertinent to mention that the assessee sells SIM cards to the distributor and allows a discount of Rs.20/-, that Rs.20/- does not represent the income at the hands of the distributor because the distributor in turn may sell the SIM cards to a sub-distributor who in turn may sell the SIM cards to the retailer and it is the retailer who sells it to the customer. The profit earned by the distributor, sub-distributor and the retailer would be dependent on the agreement between them and all of them have to share Rs.20/- which is allowed as discount by the assessee to the distributor. There is no relationship between the assessee and the sub-distributor as well as the retailer. However, under the terms of the agreement, several obligations flow in so far as the services to be rendered by the assessee to the customer is concerned and, therefore, it cannot be said that there exists a relationship of principal and agent. In the facts of the case, we are satisfied that, it is a sale of right to service. The relationship between the assessee and the distributor is that of principal to principal and, therefore, when the assessee sells the SIM cards to the distributor, he is not paying any commission; by such sale no income accrues in the hands of the distributor and he is not under any obligation to pay any tax as no income is generated in his hands. The deduction of income tax at source being a vicarious responsibility, when there is no primary responsibility, the assessee has no obligation to deduct TDS. Once it is held that the right to service can be sold then the relationship between the assessee and the distributor would be that of principal and principal and not principal and agent. The terms of the agreement set out supra in unmistakable terms demonstrate that the relationship between the assessee and the distributor is not that of principal and agent but it is that of principal to principal.

63. It was contended by the revenue that, in the event of the assessee deducting the amount and paying into the department, ultimately if the dealer is not liable to tax it is always open to him to seek for refund of the tax and, therefore, it cannot be said that Section 194H is not attracted to the case on hand. As stated earlier, on a proper construction of Section 194H and keeping in mind

the object with which Chapter XVII is introduced, the person paying should be in possession of an income which is chargeable to tax under the Act and which belongs to the payee. A statutory obligation is cast on the payer to deduct the tax at source and remit the same to the Department. If the payee is not in possession of the net income which is chargeable to tax, the question of payer deducting any tax does not arise. As held by the Apex Court in Bhavani Cotton Mills Limited's case, if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage will not make the original levy valid.

64. In the case of Vodafone, it is necessary to look into the accounts before granting any relief to them as set out above. They have accounted the entire price of the prepaid card at Rs.100/- in their books of accounts and showing the discount of Rs.20/- to the dealer. Only if they are showing Rs.80/- as the sale price and not reflecting in their accounts a credit of Rs.20/- to the distributor, then there is no liability to deduct tax under Section 194H of the Act. This exercise has to be done by the assessing authority before granting any relief. The same exercise can be done even in respect of other assessees also.

65. In the light of the aforesaid discussions, we are of the view that the order passed by the authorities holding that Section 194H of the Act is attracted to the facts of the case is unsustainable. Therefore, the substantial question of law is answered in favour of the assessee and against the Revenue. Hence, we pass the following order:

O R D E R

1. Appeals are allowed.

2. The impugned orders passed by the authorities are hereby set aside.

3. The matter is remitted back to the assessing authority only to find out how the books are maintained and how the sale price and the sale discount is treated and whether the sale discount is reflected in their books. If the accounts are not

reflected as set out above, in para 60, Section 194H of the Act is not attracted.

Ordered accordingly."

11. We further note that the Jaipur bench of the Tribunal in the assessee's own case vide order dated 22/5/2015 has decided the issue in favour of the assessee by following the judgment of the Hon'ble jurisdictional High Court. The judgment of the Hon'ble jurisdictional High Court is a binding precedent for the Bangalore benches of the Tribunal and therefore, by following the judgment of the Hon'ble jurisdictional High Court, this issue is set aside to the record of the AO for fresh consideration in the light of the direction of the Hon'ble jurisdictional High Court in the case of *Bharti Airtel Ltd. & others* (supra)

12. Ground No.V regarding non-deduction of tax at source u/s 194J on roaming charges paid to other telecom operators by treating the same as fee for technical services. We have heard the learned AR of the assessee as well as the learned departmental representative and considered the relevant material on record. The learned AR of the assessee submitted that these charges paid for roaming connectivity by the other operators to the assessee's subscriber cannot be treated as fee for technical services as there is no human intervention in providing such roaming services by the telecom operators. In support of his contention, he has relied upon the following judgments:

i) *Bharti Hexacom Ltd. vs. ITO(TDS-II)* – ITA No.656/JP/2010 dt.12/06/2015 – Trib. Jaipur

ii) *M/s.Dishent Wireless Ltd. vs. DCIT* – ITA Nos.320 to 329/MDS/2014 dt.20/07/2015 – Trib. Chennai

iii) *Idea Cellular Ltd. vs. ITO (TDS)* – ITA Nos.94-96/JP/2013 and 917/JP/2012 dt.24/07/2015 – Trib. Jaipur)

On the other hand, learned departmental representative has submitted that the AO has considered the statement of the expert in respect of the nature of services provided by the operator for roaming facility to the roaming subscriber of the other service provider. He has relied upon the orders of the authorities below.

13. We have considered the rival submissions as well as the relevant material on record. It is pertinent to note that the issue was initially decided by the Hon'ble Delhi High Court in the case of *CIT vs. Bharti cellular Ltd.* (175 Taxman 573) whereby the Hon'ble High Court held that the roaming charges paid by the operator to other operator is not in the nature of fee for technical services (FTS). The revenue carried the matter to the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of *CIT vs. Bharati Cellular Ltd.*(193 Taxman 97) has observed that the issue can be decided after the expert's opinion on the point whether any human intervention is required for providing inter-connected roaming services by other cellular operators. The relevant observations of the Hon'ble Supreme Court in para.7 to 10 are as under:

"7. The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the interconnect agreement enables M/s Bharti Cellular Ltd. to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the "capacity" of each service provider fixed when interconnect agreements are arrived at ? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity" ? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasize that these types of matters cannot be decided without any technical assistance available on record.

8. There is one more aspect that requires to be gone into. It is the contention of respondent No. 1 herein that interconnect agreement between, let us say, M/s Bharti Cellular Ltd. and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to respondent No. 1, s. 194J of the Act is not attracted in the case of "revenue sharing contract". According to respondent No. 1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under s. 194J of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal.

9. In short, the above aspects need reconsideration by the AO. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to

> recur, particularly, in matters of contracts between Indian companies and multinational corporations, we are of the view that the cases herein are required to be remitted to the AO(TDS).
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> **10.** Accordingly, we are directing the AO(TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court. Liberty is also given to respondent No. 1 to examine its expert and to adduce any other evidence.

Thus, the Hon'ble Supreme Court directed the AO in each of the cases to examine the technical expert from the side of the department and to decide the matter. Though the AO, while deciding the issue has considered the statement of the expert who was examined in the case of Bharti *Cellular*, however, we note that in the case of *Bharti Hexacom Ltd.* (supra), Jaipur Bench of this Tribunal has decided this issue by giving a finding that no intervention is required for providing the roaming facility to the other operators/subscribers. We further note that in the case of *Idea Cellular Ltd. vs. ITO* (supra) Jaipur bench of the Tribunal again considered an identical issue in paras.2 to 4 as under:

> "2. The ld. Counsel for the assessee at the outset contends that the issues in question is squarely covered by the Hon'ble ITAT, Jaipur Bench decision in the case of M/s Bharti Hexacom Limited Vs. ITO (TDS)-II, Jaipur in ITA No. 656/JP/2010 order dated 12/06/2015, which 3 ITA 94 to 96/JP/2013 & 917/JP/2012 - Idea Cellular Ltd. Vs. ITO(TDS) has considered the issue about the payment of roaming charges to telecom operators in great details and

held that such payment does not amount to fee for technical services and not liable for TDS u/s 194J. The Hon'ble ITAT has held as under:-

> "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 4 ITA 94 to 96/JP/2013 & 917/JP/2012_ Idea Cellular Ltd. Vs. ITO(TDS) 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.

It is contended that the facts, circumstances and issues of appeals in question are similar to M/s Bharti Hexacom Limited judgment (supra).

3. The ld DR is heard, who supported the order of the Assessing Officer.

4. We have heard the rival contentions of both the parties and perused the material available on the record. The issue about levy of TDS U/s 194J on the roaming charges paid by the telecom operators to service providers and applicability of Section 194J has been considered in detail by this very Bench in the case of M/s Bharti Hexacom Limited (supra). After considering the issues in detail, it has been held that there is no human intervention involved in providing these services, therefore, roaming charges paid by the assessee do not amount to fee for technical services U/s 194J of the Act read with Section 91(vii). Following our own judgment, we are upholding the order of the ld CIT(A) holding that the assessee is not liable for TDS u/s 194J, interest thereon and consequently not being the assessee in default. The orders of ld. CIT(A) are uphold."

Thus it is clear that the Jaipur bench has given a finding of fact that no intervention is required for providing roaming facility and consequently the roaming charges paid by the assessee to other service providers cannot be treated as fees for technical services. Accordingly, following the orders of the co-ordinate bench, we are of the view that the assessee cannot be held as the assessee in default for non deduction of tax at source on the roaming charges paid to other service provider. This ground of the assessee is allowed.

14. Ground No.IV regarding levy of interest u/s 201(1A) of the Act. This ground is consequential in nature. We have already

decided the issue on merits and accordingly levy of interest u/s 201(1A) is depending on the outcome of the other issue and no separate adjudication is required.

15. Ground No.II is regarding validity of the order passed u/s 201(1). Since we have decided the other issues on merits in favour of the assessee, therefore, the issue raised in Ground No.II becomes academic in nature and therefore, we do not propose to go into the issue raised in ground No.II. Accordingly, the same is dismissed.

16. The revenue has raised the only ground regarding international roaming charges paid by the assessee which is common to the main issue of roaming charges paid by the assessee as raised in ground No.V of the assessee's appeal. In view of our finding on this issue that roaming charges cannot be treated as fees for technical services, the ground raised by the revenue stands dismissed.

17. In the result, the appeals of the assessee are allowed in part and the appeals of the revenue are dismissed.

Pronounced in the open court on 06th November, 2015.

sd/-	sd/-
(Jason P Boaz)	**(Vijay Pal Rao)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

eksrinivasulu,sps

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore