THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.10.2008

\+ **I.T.A. 1120/2007**

COMMISSIONER OF INCOME TAX ….Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

\+ **I.T.A. 697/2008**

COMMISSIONER OF INCOME TAX (TDS) …Petitioner

Versus

ESCOTEL MOBILE COMMUNICATIONS LIMITED …Respondent

WITH

\+ **I.T.A. 1177/2007**

COMMISSIONER OF INCOME TAX XVII …Petitioner

Versus

HUTCHISON ESSAR TELECOM LTD …Respondent

WITH

\+ **I.T.A.1020/2008**

COMMISSIONER OF INCOME TAX …Petitioner

Versus

ESCOTEL MOBILE COMMUNICATIONS …. Respondent

WITH

\+ **I.T.A. 698/2008**

COMMISSIONER OF INCOME TAX …Petitioner

Versus

ESCOTEL MOBILE COMMUNICATIONS LIMITED …Respondent.

WITH

\+ ITA 1154/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

\+ I.T.A. 1155/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

\+ I.T.A. 1129/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

\+ I.T.A1159/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

+ I.T.A. 1135/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

+ I.T.A. 1171/2007

COMMISSIONER OF INCOME TAX ... Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

WITH

+ I.T.A. 1121/2007

COMMISSIONER OF INCOME TAX ….Petitioner

- Versus –

BHARTI CELLULAR LTD ...Respondent

Advocates who appeared in this case:

For the Appellant	Mrs Premlata Bansal in ITA 1120/07, 1020/08, 697/08 and 698/2008, 1121/07, 1171/07, 1135/07, 1159/07, 1129/07, 1155/07, 1154/07 Ms Rashmi Chopra in ITA 1177/2007
For the Respondent	Mr Tarun Sharma in ITA 1177/2007, 1145/07. Mr Kanan Kapur in ITA 1120/2007, 1121/07. 1171/07, 1159/07, 1129/07, 1155/07, 1154/07 None for respondents in ITA 1020/08, 697/08, 698/08.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKHDHER.

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. In all these appeals under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'), the following substantial questions of law have been framed:-

(a) Whether the payments made by the assessee to the MTNL/other companies for the services provided through interconnect/port/access/toll were liable for tax deduction at source in view of the provisions of section 194J of the Act?

(b) Whether the Ld. ITAT erred in holding that the payment for use of services for MTNL/other companies via the interconnect/port/access/toll by the assessee would not fall within the purview of payments as provided for under section 194J of the Act, so as to be eligible for tax deduction at source?

2. The facts in all these appeals are similar. The respondents/assessees in these appeals are companies engaged in the business of providing cellular telephone facilities to their subscribers. The assessees/respondents had been granted licences by the Department of Telecommunication for operating in their respective specified circles. The assessees are required to set up their own equipments and necessary infrastructure for operating and maintaining their networks. The licences granted to the assessees stipulated that the Department of Telecommunication/MTNL/BSNL would continue to operate in the service areas for which the licences were issued. In respect of subscribers which fell within the specified circles of the assessees, the calls would be handled exclusively

through the assessees' own networks. However, where calls were to be made by subscribers of one network to another network, such calls are necessarily to be routed through MTNL/BSNL. The inter connection between the two networks is provided by MTNL/BSNL at interconnection points known as Ports. For the purposes of providing this interconnection, the assessees have entered into agreements with MTNL/BSNL etc. The agreements are regulated by the Telecom Regulatory Authority of India (TRAI). Under these agreements, the assessees/respondents are required to pay interconnection, access charges and port charges. As per the policy document of TRAI, interconnection has been understood to mean the commercial and technical arrangements under which service providers connect their equipments, networks and services to enable their customers to have access to the customers, services and networks of other service providers. Interconnection charges are paid by the interconnection seeker to the interconnection provider.

3. The manner in which this system works can be explained by examples.

Example 1: Assume that subscriber "A" of Airtel intends to call subscriber "X" of MTNL within New Delhi. Subscriber "A's call which originates within the circle of Airtel would have to be handed over (through interconnection) to MTNL's network so as to reach subscriber "X". In such a case, while Airtel would recover the

normal call charges from its subscriber "A", it would have to pay a part of it to MTNL for its inter-connect usage charges.

Example 2: Assume that subscriber "A" of IDEA in Maharashtra wants to make a call to subscriber "B" of Airtel at New Delhi. The call would originate within the IDEA network in Maharashtra and would have to be inter-connected with BSNL (being the national long distance service provider) which would carry the call to the Airtel Delhi network and after interconnection would be transferred to the subscriber "B" of Airtel, Delhi. In such a case, following the principle of the inter-connect seeker paying the charges to the inter-connect provider, Airtel - Delhi would raise an invoice for inter-connect charges on BSNL which, in turn, would raise an invoice on IDEA (Maharashtra) for the national long distance inter-connect charges. IDEA (Maharashtra) would recover the normal call charges from its subscriber "A" and make the payment to BSNL as per the invoice for the national long distance inter-connect charges. BSNL, in turn, would make the payment to Airtel (Delhi) for the local inter-connect charges.

4. From the above examples, it is clear that MTNL/BSNL or other companies providing the interconnection access/ports are entitled to charge those networks which seek such interconnection/port access facility for completing their calls. The questions which have been framed in these appeals are related to the nature of these charges. According to the Revenue, the said

interconnect/port access charges are liable for tax deduction at source in view of the provisions of Section 194J of the said Act and that these interconnect/port access charges are in the nature of fees for technical services.

5. In the present appeals, it is the case of the Revenue that the assessees were liable to deduct tax at source when they made the payments in respect of the inter-connect/port access charges. It was contended before us that the non-deduction/short deduction under section 201 (1) of the said Act is not required to be made good by the assessee inasmuch as MTNL/BSNL/other companies who would have been the deductees, have already declared receipts of the payments made by the assessees in their respective returns of income tax and have paid the entire tax. The learned counsel for the Appellant however, contended that the respondents/assessees were liable to pay interest under section 201 (1A) of the said Act, as they had not deducted tax at source which they were liable to deduct under section 194J in respect of the payments made by them to MTNL/BSNL/other companies for inter-connect/port access charges as the same were fees for technical services. According to the learned counsel, the provision of the interconnect/port access facility was itself a service. According to her, the agreement between the parties themselves described the arrangement as providing telecommunication services. It was then contended that since the services were of a technical nature in the sense that it was connected

with the use of machinery involving expertise, skill and technical knowledge, the charges paid by the respondents/assessees were nothing but fees for technical services.

6. On the other hand, the counsel appearing on behalf of the respondents submitted that the payments made by the respondents to MTNL/other companies in respect of interconnect/port/access charges were not covered within the expression "fees for technical services" as used in section 194J of the said Act. They submitted that their case was clearly covered by the decision of the Madras High Court in the case of ***Skycell Communications Ltd. and Another v. Deputy Commissioner of Income–tax and others: [2001] 251 ITR 53 (Mad),*** wherein the payment made by a subscriber to the provider of cellular mobile facility was held not to amount to fees for technical services within the meaning of Section 194J read with Section 9 (1) (vii), Explanation 2 of the said Act. It was contended that the mere collection of a fee for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for "technical services." It was also contended that unless and until, there is an element of human interface, the facility of interconnection/port access cannot be regarded as a technical service. Reliance were also placed on an earlier decision of this Court in the case of ***J.K. (Bombay) Ltd v Central BVoard of Direct Taxes and Anr*** : ***(1979) 118 ITR 312,*** which has considered the expression "technical service" within the

context of Section 80-O. It was contended that in the said decision, it was pointed out that "technical service" has two components. The first is the use of tools and the second being the application of human reason to the properties of matter and energy. It was, therefore, contended that unless and until the element of human interface was present, the facility provided by the MTNL/other companies could not be regarded as a "technical service".

7. It was also contended that since the expression "fee for technical service" as appearing in Section 194J, is to be construed in the same manner as given in Explanation 2 of Section 9 (1) (vii) of the said Act, the entire expression "managerial, technical or consultancy services" would have to be considered. Thus, the word "technical" would take colour from the words "managerial" and "consultancy" and cannot be considered in the general or wider sense. Since both managerial and consultancy services, by their very nature, involve a human element, the technical services which are relevant for the purpose of Section 194J would be those technical services which involve human interface/element.

8. It was also contended on behalf of the respondents that the entire process of making a call and switching the call from one network to the other is done automatically on the basis of machines without the provisions of any service by human beings. Therefore, it was submitted on behalf of the respondents, the interconnect/port

access facility cannot be regarded as a technical service. Consequently, the payments made for such interconnect/port access charges could not fall within the meaning of "fees for technical service" as used in Section 194J of the said Act.

9. In rejoinder, the learned counsel for the Appellant/Revenue submitted that the decision of the Madras High Court in the case of ***Skycell*** *(supra)* is clearly distinguishable. She submitted that in the case of ***Skycell*** *(supra)*, the payments which were under contemplation, were the payments by individual subscribers to their respective cellular mobile service providers, whereas in the present appeals, the payments in question are those made by the cellular mobile service providers to MTNL/other companies for interconnect/port access charges. Consequently, she submitted that the decision of the Tribunal in holding that the payments made to MTNL/other companies in respect of the interconnect/port access charges were outside the purview of Section 194J of the said Act, was not correct in law. She contended that the Tribunal, having followed the decision of the Madras High Court in the case of ***Skycell*** *(supra),* had erred in law inasmuch as that decision was clearly distinguishable.

10. Section 194J which relates to "fees for professional or technical services", so much as is relevant, reads as under:-

"194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(*a*) fees for professional services, or

(*b*) fees for technical services,

xxxx xxxx xxxx xxxx

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to five per cent of such sum as income-tax on income comprised therein :

xxxx xxxx xxxx xxxx

Explanation.—For the purposes of this section,—

(*a*) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;

(*b*) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (*vii*) of sub-section (1) of section 9;

xxx xxx xxx xxx"

11. It is apparent that in respect of fees for technical services tax is to be deducted at source at 5% (as it then was). It is also clear that the expression "fees for technical services" has the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of Section 9. The said Explanation 2 reads as under:-

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the

> rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

The aforesaid explanation makes it clear that "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any "managerial, technical or consultancy services" but does not include consideration for any construction, assembly, mining or like products in the country by the recipients or consideration which would be income of the recipients chargeable under the head "salaries". The said definition is in two parts. The first part is "means and includes" type of definition and the second part is "does not include" definition. In the present appeals we are not concerned with the second part. The entire focus is *on attracted to the first part and that, too, to the expression "consideration .... for the rendering of any managerial, technical for consultancy services."* It is only if the payments made by the respondents/assessees to MTNL/other companies in respect of interconnect/port access charges fall within the ambit of this expression that the said payments could be regarded as fees for technical services as contemplated under Section 194J of the said Act.

12. In ***Skycell*** *(supra)*, a learned single judge of the Madras High Court noted that installation and operatrion of sophisticated

equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee. It was also held that technical service referred to in Explanation 2 to Section 9 (1) (vii) contemplated the rendering of a "service" to the payer of the fee and that mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it did not amount to the fee having been received for technical services. We find ourselves to be in agreement with the views expressed by the learned single Judge of the Madras High Court in ***Skycell*** *(supra)*. However, we still have to deal with the submissions made by the learned counsel for the Appellants/Revenue that the payments that were considered in the case of ***Skycell*** *(supra)* were those made by a subscriber to the cellular mobile telephone facility provider and not by one cellular network provider to another. For this purpose, we must examine the appeals at hand *de hors* the decision of the Madras High Court in ***Skycell*** *(supra)*.

13. We have already pointed out that the expression "fees for technical services" as appearing in section 194J of the said Act has the same meaning as given to the expression in Explanation 2 to section 9 (1) (vii) of the said Act. In the said Explanation the expression "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and

succeeded by the word "consultancy". Since the expression "technical services" is in doubt and is unclear, the rule of *noscitur a sociis* is clearly applicable. The said rule is explained in Maxwell on The Interpretation of Statutes (Twelfth Edition) in the following words:-

> "Where two or more words which are susceptible of analogous meaning are coupled together, *noscitur a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

This would mean that the word "technical" would take colour from the words "managerial" and "consultancy", between which it is sandwiched. The word "managerial" has been defined in the Shorter Oxford English Dictionary, Fifth Edition as:-

> "of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization, business, establishment, etc."

The word "manager" has been defined, *inter alia*, as:-

> "a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization etc; a person controlling the activities of a person or team in sports, entertainment, etc."

It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has

a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

15. From the above discussion, it is apparent that both the words "managerial" and "consultancy" involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of *noscitur a sociis*, the word "technical" as appearing in Explanation 2 to Section 9 (1) (vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/other companies for

interconnection/port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in Explanation 2 to Section 9 (1) (vii) of the said Act. This is so because the expression "technical services" takes colour from the expressions "managerial services" and "consultancy services" which necessarily involve a human element or, what is now days fashionably called, human interface. In the facts of the present appeals, the services rendered qua interconnection/Port access do not involve any human interface and, therefore, the same cannot be regarded as "technical services" as contemplated under Section 194J of the said Act.

16. Since we have applied the rule of *noscitur a sociis*, it would be necessary to indicate that this rule or principle has been applied and accepted by the Supreme Court whenever the meaning of a word, which falls within a group of words, is unclear and the intention of the legislature is doubtful. In ***Godfrey Phillips India Ltd and Another v. State of U.P. and Others:*** ***(2005) 2 SCC 515***, a Constitution Bench of the Supreme Court was considering the meaning of the word "Luxuries" as appearing in Entry 62 of the List II of the VIIth Schedule to the Constitution which empowers the State Legislature to make laws with respect to "taxes on luxuries including taxes on entertainment, amusement, betting and gambling." The

Supreme Court was of the view that the general meaning of "luxury" had been explained or clarified and must be understood in a sense analogous to that of the less general words such as "entertainment", "amusements", "gambling" and "betting", which were clubbed with it. The Supreme Court, employing the said principle of *noscitur a sociis,* noted that this principle of interpretation had received the approval of the Supreme Court in an earlier decision in ***Rainbow Steels Ltd. v. CST:*** **(*1981) 2 SCC 141***. The Supreme Court also noted that earlier, indiscriminate application of this rule was doubted in the case of ***The State of Bombay v. The Hospital Mazdoor Sabha:*** ***AIR 1960 SC 610***. However, after referring to the said decision (***Hospital Mazdoor Sabha***), the Supreme Court in ***Godfrey Phillips India Ltd*** *(supra)* observed that they did not read the said decision as excluding the application of the principle of *noscitur a sociis* to the case before them inasmuch as it had been amply demonstrated that the word "luxury" in Entry 62 was doubtful and had been defined and construed in different senses. The Supreme Court further observed as under:-

> "81. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the *"societas"* to which the *"socii"* belong, are known. The risk may be present when there is no other factor except contiguity to suggest the *"societas"*. But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as "including" is sufficiently indicative of the *societas.* As we have said, the word "includes" in the present context indicates a commonality or shared features or attributes of the including word with the included."

17. In the appeals before us it is obvious that the meaning of the expression "technical services" by itself, is far from clear. It is also clear that the word "technical" has been used in the "society" of the words "managerial" and "consultancy". In such a situation, the rule would clearly apply and, therefore, the expression "technical services" would have to take colour from the expressions "managerial services" and "consultancy services."

18. To conclude the discussion on the application of the rule of *noscitur a sociis*, we think that a reference to the Supreme Court decision in the case of ***Stonecraft Enterprises v. Commissioner of Income Tax:*** ***(1999) 3 SCC 343*** would be apposite. In that case the Supreme Court was required to interpret the provisions of Section 80-HHC (2) (b) of the said Act relating to assessment years 1985-86, 1987-88 and 1988-89. In the said sub-section (2) (b) of Section 80-HHC, it was provided that the Section did not apply to the following goods or merchandise, namely:-

(i) mineral oil; and

(ii) minerals and ores.

The question that arose before the Supreme Court was whether granite fell within the meaning of the word "minerals". The contention of the assessee before the Supreme Court was that while Granite was a mineral in the general sense, it was not a mineral for the purposes of Section 80-HHC and, therefore, the deduction provided for therein was available to the assessee who was in the

business of exporting granite. The Supreme Court noted the arguments of the learned counsel for the assessee based upon the doctrine of *noscitur a sociis* that the word "minerals" in Section 80-HHC should be read in the context of the words "ores" which it was associated with and must draw colour therefrom. It was submitted that the word "minerals" must be read as referring only to such minerals as are extracted from ores and not others. While the Supreme Court agreed that the doctrine of *noscitur a sociis* was applicable, it held that the word "minerals", in sub-section (2) (b) of Section 80-HHC must be read in the context of both "mineral oil" and "ores" and not just "ores". The Supreme Court held that these three words taken together are intended to encompass all that may be extracted from the earth. Consequently, the Supreme Court held that all minerals extracted from the earth, granite included, must, therefore, be held to be covered by the provisions of sub-section (2) (b) of Section 80-HHC, and the exporter thereof was, therefore, disentitled to the benefit of that section.

19. From this decision, it is apparent that the Supreme Court employed the doctrine of *noscitur a sociis* and held that the word "minerals" took colour from the words "mineral oil which preceded it and the word "ores" which succeeded it. A somewhat similar situation has arisen in the present appeals where the word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Therefore, the word "technical" has to take colour

from the word “managerial” and “consultancy” and the three words taken together are intended to apply to those services which involve a human element. This concludes our discussion on the applicability of the principle of *noscitur a sociis*.

20. Before concluding we would also like to point out that the interconnect/port access facility is only a facility to use the gateway and the network of MTNL/other companies. MTNL or other companies do not provide any assistance or aid or help to the respondents/assessees in managing, operating, setting up their infrastructure and networks. No doubt, the facility of interconnection and port access provided by MTNL/other companies is `technical’ in the sense that it involves sophisticated technology. The facility may even be construed as a `service’ in the broader sense such as a `communication service’. But, when we are required to interpret the expression `technical service’, the individual meaning of the words `technical’ and `service’ have to be shed. And, only the meaning of the whole expression `technical services’ has to be seen. Moreover, the expression `technical service’ is not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expressions `managerial service’ and `consultancy service’ as appearing in Explanation 2 to section 9 (1) (vii) of the said Act. Considered in this light, the expression `technical service’ would have reference to only technical service

rendered by a human. It would not include any service provided by machines or robots.

21. Thus, it is clear, whether we follow the line of reasoning taken in ***Skycell*** *(supra)* or not, the result is the same. The interconnect charges/port access charges cannot be regarded as fees for technical services. Consequently, both the questions are answered against the Revenue and in favour of the assesses.

The appeals are dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED
(JUDGE)

RAJIV SHAKHDHER
(JUDGE)

October 31, 2008
J