

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री आर.पी.तोलानी, न्यायिक सदस्य एवं श्री टी.आर.मीना, लेखा सदस्य के समक्ष
BEFORE: SHRI R.P. TOLANI, JM & SHRI T.R. MEENA, AM

आयकर अपील सं./ITA No. 656/JP/2010
निर्धारण वर्ष/Assessment Year : 2009-10 (F.Y. 2008-09)

M/s Bharti Hexacom Limited K-21, Malviya Marg, C-Scheme, Jaipur.	बनाम Vs.	Income Tax Officer (TDS)-II, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACH 1766 P		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Anil Bhalla &
Shri P.C. Parwal (CA)
राजस्व की ओर से/ Revenue by : Smt. Rolee Agarwal (CIT)

सुनवाई की तारीख/ Date of Hearing : 22/04/2015
उदघोषणा की तारीख/ Date of Pronouncement : 12/06/2015

आदेश/ ORDER

PER: T.R. MEENA, A.M.

This is an appeal filed by the assessee against the order dated 22/02/2010 passed by the learned CIT(A)-III, Jaipur for A.Y. 2009-10 (F.Y. 2008-09). The effective grounds of appeal are as under:-

"1 *The learned Assessing Officer (TDS) has erred both on facts and in law in applying the provisions of Section 194H of the Income Tax Act to the transaction of telephony conducted through prepaid*

vouchers. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

- 1.1) The learned Assessing Officer (TDS) has erred both on facts and in law in passing an order u/s 201(1) and holding the assessee company to be in default in respect of non-deduction of tax amounting to Rs. 55,00,794/- u/s 194H on the difference between the price at which the prepaid card is sold to the distributor and the price at which the end customer buys alleging the difference to be payment of commission. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.*
- 1.2) The learned Assessing Officer (TDS) has erred both on facts and in law in charging interest of Rs. 4,41,020/- u/s 201(1A) of the Act. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.*
- 2. The learned Assessing Officer (TDS) has erred both on facts and in law in applying the provision of Section 194J of the Income Tax Act to the transactions of roaming charges. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.*
- 2.1) The learned Assessing Officer (TDS) has erred both on facts and in law in passing an order u/s 201(1) and holding the assessee company to be in default in respect of non-deduction of tax amounting to Rs. 10,18,92,350/- u/s 194J on the amount paid to other telephony operators for roaming charges incurred by the appellant's subscribers on the network of such other telephone operators because such payment are*

not for technical services and do not fall within the provision of Section 194J of the Act. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

2.2) The learned Assessing Officer (TDS) has erred both on facts and in law in charging interest of Rs. 68,75,375/- u/s 201(1A) of the Act. The learned Commissioner of Income Tax (Appeals) has further erred both on facts and in law in upholding the action of the learned Assessing Officer.

3. The appellant craves leave to add, alter or amend the ground of appeal at a later stage."

2. The ground No. 1 of the appeal is against confirming the addition on transaction of prepaid card sold to distributor and price at which the end customer buys alleging the difference to be payment of commission. Liable to be deducted TDS U/s 194H of the Income Tax Act, 1961 (in short the Act) and deemed default U/s 201(1) and interest thereon U/s 201(1A) of the Act. The Id ITO(TDS) has observed that the assessee is engaged in the business of providing cellular mobile telephone services in Rajasthan under the brand name "AIRTEL". The assessee had marketed its product through the distributor network under two categories namely post paid products and prepaid products. Distributors dealing with postpaid products are called Airtel Channel Partners. The assessee treats them as agents and has deducted TDS in

respect of the amount of commission paid to these distributors. In the case of prepaid products, the distributors distribute Airtel's retail package products like prepaid SIM card, recharge coupons and mobile products. The assessee provided these services through them by supplying to them Starter Pack and Rechargeable Coupons, which is commonly known as "SIM card" and prepaid card. These SIM cards And rechargeable coupons are purchased by the distributors appointed by the assessee at a fixed rate which is below the market price of such SIM card and the same are further sold to the retailers by whom it is ultimately sold to the customers. In this regard, the assessee enters into an agreement with them. After examining the terms and conditions of the agreement entered with the assessee and the distributor, it is observed by the Assessing Officer that there is principal agent relationship between them. Therefore, the assessee was liable to deduct tax at source as per the provisions of Section 194H of the Act on commission paid to these distributors but the assessee had not deducted any tax at source on the plea that there is principal to principal relationship between them and also prepaid product and services were sold to the distributor at a discounted price and as such no commission was paid to them. The Id ITO(TDS) tabulated month

wise details of MRP and dealer price and difference between MRP and dealers price for the F.Y. 2008-08 on page 2 of the order. He calculated this to be for whole year at Rs. 4,85,48,685/-. The Id Assessing Officer analysed the Section 194H of the Act with reference to transaction of SIM card, prepaid card, MRP price and dealers price. The Id ITO(TDS) analysed the agreement made by the assessee with M/s Banty Telecom, Sadulpur, district- Churu (Raj). The agreement with M/s Banty Telecom and some of the clause has been reproduced by the Assessing Officer from page 4 to 14 of the Assessing Officer. He gave the show cause notice vide letter dated 29/1/2009 U/s 201(1) and 201(1A) of the Act, which was replied by the assessee vide letter dated 11/2/2009, which has been reproduced by the ITO(TDS) from page 14 to 17 of its order. After considering the assessee's reply, it has been held that as per clause 9.2 of the agreement, it is clear that there was a principal and agent relationship between them and the assessee was paying fixed commission to these distributors in garb of discount. The entire ownership relating to such new SIM card and prepaid card always vests with the assessee as evident from different clauses of such agreement. When services are sold on discount, there cannot be any restriction imposed by one principal on the other principal in regard to the manner

and the area of sales of such goods sold. In case of purchases on discount, there cannot be any restriction on the manner in which the stock purchased by one principal is kept by it. In the present case, the assessee company has got all the right to regularly monitor the operations of distributor, monitor or investigate the manner in which business operations are carried on by such distributor, which is absent in the case of sale on discount. The assessee company can direct the distributors about the manner in which such product would be sold in the market. Nomenclature given by the assessee as discount is nothing but commission paid by the assessee to distributor for service rendered by them. He further analysed the case laws cited by the assessee, which are as under:-

- (i) Ahmadabad Stamp Vendors Association (257 ITR 202).
- (ii) M.S. Hameed & Others vs. Director of State Lotteries and others (Kerala High Court) 249 ITR 186.
- (iii) Idea Cellular Limited dated 28/03/2008 in ITA Nos. 3031/Del/2005, 1857/Del/2006 and 2867/Del/2005.

The above cases are found to the Assessing Officer distinguishable. He further relied on the decision in the case of ACIT, Circle-57, Kolkata Vs. Bharti Cellular Limited (105 ITD 129) where the facts are identical to present case, it was held by the Hon'ble ITAT, Kolkata that the price difference i.e. net receipt by the distributor is commission in nature and

not discount. Failure by the assessee to deduct tax at source U/s 194H made him assessee in default and the A.O. was justified in making demand U/s 201(1) and interest U/s 201(1A). He further relied upon the decision of Hon'ble ITAT, Jaipur Bench in the case of Hindustan Coca Cola Beverages Pvt. Ltd. 97 ITD 105 wherein the Hon'ble Tribunal on observation of real relation of distributors with assessee company, held that it was principal to agent relationship. After considering the legal proposition on this issue, the Id ITO(TDS) held that price different between the MRP and dealers price are nothing but commission paid by the assessee to its distributors and hence the assessee was liable to deduct tax at source U/s 194H of the Act on the commission payment to its distributors. Since the assessee failed to deduct TDS, it is deemed default U/s 201(1) and 201(1A) of the Act. The Id ITO(TDS) calculated the payment U/s 201(1) U/s 194H at Rs. 55,00,794/- and interest thereon U/s 201(1A) at Rs. 4,41,020/-.

3. Being aggrieved by the order of the learned Assessing Officer, the assessee carried the matter before the learned CIT(A), who had confirmed the addition by observing as under:-

"2.3.1 I have carefully considered the facts of the case and submissions of Ld. AR. On perusal of the relevant

records, I find that the main issue involved in this ground of appeal is as to whether the relationship between the appellant company and the distributors of its prepaid products i.e. SIM Cards, Recharge Coupons, etc. was that of a principal to agent relationship or principal to principal relationship and whether the difference between the market price of those products and the discounted price, at which they were given to the distributors, was in the nature of commission and whether the appellant company was liable to make TDS u/s 194H of the IT Act in respect thereof. In this regard, I find that this issue is directly covered against the appellant company by the decision of Hon'ble ITAT, Cochin Bench in the case of M/s Vodafone Essar Cellular Ltd. Vs. ACIT (2010) 35 DTR (Coh)(Trib) 393 and by the recent decision of Hon'ble Delhi High Court in the case of CIT V/s Idea Cellular Ltd. (2010) 35 DTR (Del.) 219, in which the Hon'ble High Court has held that the discount offered by the assessee to the distributors on payments made by the latter for the SIM cards/recharge coupons, which are eventually sold to the subscribers at the listed price, is commission and it is subject to TDS under S. 194-H of the Act. In the said order, the Hon'ble High court has also approved the aforesaid decision of the Hon'ble Cochin Bench of the ITAT. Therefore, respectfully following the

aforementioned decisions of Hon'ble Delhi High Court and Hon'ble Tribunal, Cochin Bench, this issue is decided against the appellant. Accordingly, it is held that the appellant company was liable to make TDS u/s 194-H of the I.T. Act on the difference between the market price of the aforementioned prepaid products and the discounted price, at which they were given to the distributors."

Alternatively, the Id CIT(A) allowed the appeal by considering the Hon'ble Supreme Court decision in the case of M/s Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CIT 293 ITR 226 (SC) and Assessing Officer was directed to verify the recipient whether disclosed receipts in the income or not.

4. Now the assessee is in appeal before us. The Id AR of the assessee has argued that the assessee is a telecommunication service provider. It sells its products to distributors in bulk against prior payments such as prepaid start up packs and recharge coupon vouchers which has "right to use airtime" embedded in it. These are sold to various distributors on principal to principal basis at a discounted price as compared to MRP. There are different distributors who in turn sell on out right basis to retailers. The Id AR explained the nature of prepaid

product. The distributors sold its product to retailer and price is left to the retail chain as per competition and market forces. The prepaid product which gives a right to use airtime of a specified value, is to be taken as a good or merchandise capable of being transferred. The Hon'ble Gujarat High Court had described in case of Ahmadabad Stamp Vendors 257 ITR 202 (Guj). There also there is a right to utilize the value captured in the stamp for entering into and establishing a transaction/agreement. Such goods in the form of stamps cannot be sold further, but a prepaid product can be. In fact a prepaid product is better placed from the point of view of trading. The merchandise concept has changed because of technological advancement has been recognized by the Hon'ble Supreme Court in the matter of B Suresh 313 ITR 149 (SC). The Hon'ble Supreme Court has held in this case that beta-cam tape (cassette) was only a medium of transfer; that there was no sale of the film in beta-cam format and that the assessee had only transferred the right to use for a period of five years and since the title remained with the assessee, the impugned transaction fell outside section 80HHC. He further argued that difference between the two is getting blurred with globalization and cross border transaction with help of technology. In this context the right to use airtime and the promise

to prove airtime is a product or merchandise capable of being transferred from service provider to the distributor from the distributor to the retailer and from the retailer to the customer. The prepaid product is delivered on payment being received in advance from distributor or is received simultaneously with the supply of product. The risks and reward are that of the distributor and in case there is any loss, pilferage or damage the distributor would be responsible for such loss, pilferage or damage. This proves that the property in this case stands transferred. It is of no consequence that the service to be provided which is captured in the startup pack is to be delivered at a later stage. He also drawn our attention on sample of challan and invoice raised by the company on the distributors to show that a product or merchandise which has to right to use talk time upto a specified value has been sold. (PB 348-353). The Id AR further argued that the provisions of Section 194H is not applicable under this situation because firstly no income accrued to the distributors at the time when prepaid product is sold to distributors and secondly no commission has been paid or credited. He further argued that Id CIT(A) by following the Hon'ble Cochin Bench of ITAT decision in the case of Vodafone and of Hon'ble Delhi High court in the case of CIT Vs. Idea Cellular Limited (2010) 35 DTR (Del) 21.

Thereafter on this issue, the Hon'ble Kerala High Court as well as Hon'ble Kolkata High Court decided this issue but Hon'ble Karnataka High Court recently decided the case of Bharti Airtel Limited by considering all above cases of various High Courts and decided the case in favour of the assessee. Ld. AR further has drawn our attention on the decision of ITAT Jaipur Bench in the case of M/s Tata Tele Services Limited ITA No. 309/JP/2012, 502, 503, 504 & 505/JP/2011. In this decision on identical facts and issues the Hon'ble ITAT has held that the sale of prepaid products from the company to the distributor is actually a sale of right to service and the provisions of Section 194H of the Act do not apply. The Hon'ble ITAT held that in that case, the relationship is principal to principal basis because right to service had been sold. There was no income accrued to the distributor at the time of purchase of prepaid card. As per Section 194H there has to be an accrual of income before charging section can be applied. The Hon'ble Jaipur ITAT Bench also followed the principles that in case of divergence of judicial opinion, a view favour of the assessee is to be adopted as held by the Hon'ble Supreme Court in Vegetable Products Limited 88 ITR 192 and Vatika Township Pvt. Ltd. 367 ITR 456. He further drawn our attention

on decisions of Hon'ble Karnataka High court in the case of Bharti Airtel Ltd., therefore, he prayed to allow the appeal on this ground.

5. At the outset, the Id Sr. D.R. has vehemently supported the order of the Id CIT(A) and argued that the various Hon'ble High Courts have already held that prepaid card sold to the distributors include commission, which is liable to be deducted TDS U/s 194H of the Act.

6. We have heard the rival contentions of both the parties and perused the material available 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 Id. 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 authorities 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 Id CIT(A) and allow the appeal of the assessee on this ground.

7. Ground No. 2 of the appeal is against confirming the addition U/s 194J of the Act on not deducting TDS on roaming charges paid by the assessee being a fee for technical services. The Id ITO(TDS) observed that the assessee had paid roaming charges to other mobile operators. The assessee is providing GSM mobile services to its subscribers. The mobile subscribers of the company have been given the facilities of getting connected/avail of telecommunication facility, when they are not in the area being covered by the assessee company, through other mobile operators. To avail such services, the assessee company makes payment to other mobile operators, which is called roaming charges. During the financial year 2008-09, the assessee company paid roaming charges at Rs. 92,16,60,531/-. As per Id ITO(TDS), these services are liable to be deducted TDS U/s 194J as fees for technical services. The technical service is not defined in the Act but dictionary meaning of word "technical" as per Cambridge dictionary is knowledge, machines or methods used in science and industry.' The work technical is derived from the word technique which means 'a particular or a special way of doing something. He further described how roaming services is technical services, which is reproduced as under:-

"If the subscriber of Rajasthan Circle goes to Maharashtra when he reaches Maharashtra, the network of Maharashtra catches signals from his mobile and identifies IMSI (International Mobile subscriber Identity) of the Subscriber. The network of Maharashtra circle shall automatically find out from IMSI of the subscriber as to whether service provider of Maharashtra has a roaming agreement with service providers of Rajasthan circle or not. If yes, they only it shall send signals to service provider of Rajasthan to authenticate the subscriber. If there is no contract between service provider of Maharashtra and Rajasthan, roaming services shall not be allowed to the subscribers. This means that starting points for roaming services is essentially a contract between two services providers. The service providers of Rajasthan circle shall then authenticate the subscriber. The service provider of Rajasthan circle has the data of subscriber which will be sent to Maharashtra circle and date of Rajasthan subscriber shall be stored in the Visitor Location register of Maharashtra circle. This data enables the services provider of Maharashtra to verify various aspects such as whether subscriber enjoys the ISD facilities or not etc. After completing this aspect, the subscriber who has gone to Maharashtra can access than network and make outgoing calls. This process requires various instruments such as MSC (Mobile Switching Centre), VLR (Visitors

Location Register), Radio Network, Towers, BTS (Base Transmission Station), BSS (Base Sub Station) etc. Further, all incoming calls shall first go to Rajasthan service provider. The data available with Rajasthan circle shall identify that the subscriber is in Maharashtra and then call shall be diverted to the present location of the subscriber i.e. to Maharashtra.

The Id ITO(TDS) has further observed that the entire process of roaming is thus highly technical and can be executed only if there is a contract between two service providers. The entire system is being operated/managed by highly skilled professionals. A small technical fault can disturb the entire system. Therefore, highly technical persons are constantly monitoring the system.

The entire process depends on IMSI which is a unique number comprising of MCC (Mobile Country Code), MNC (Mobile Network Code) allotted by telecom ministry to service providers and MSIN which is SIM numbers. The entire system depends on IMSI which is based on the SIM card issued by the home service provider (Rajasthan Circle in above case) and MNC which is a unique code provided to home service provider by the ministry. Without this the roaming system cannot become operational. This makes it clear that roaming service is a technical service and the technical services are provided by one operator to another and not to the subscriber. Thus roaming service is a highly

technical service and therefore while making payments the assessee was required to deduct TDS which it had not done.

The ITO(TDS) gave reasonable opportunity of being heard to the assessee vide letter dated 29/01/2009, which has been replied by the assessee vide letter dated 11/02/2009 and 12/2/2009, which has been reproduced by the Assessing Officer on page 27 to 30 of the order. The Id ITO(TDS), therefore held as under:-

- (1) Roaming is not possible unless an agreement is entered into between the two service providers.*
- (2) Entire Roaming facility is based on IMSI which consists of MNC (Mobile Network Code a unique code allotted to assessee) and SIM which is also issued by the assessee.*
- (3) Roaming services is a highly technical service which is possible with the use of equipment such as MSC, VLR, Radio Network, Tower, BTS, BSS and highly advanced technology.*
- (4) It is a technical arrangement between the two telecom service providers to connect their equipments, network and services to enable their customers to have access of telecom network wherever they move.*

- (5) *All the necessary arrangements are being made by the Home Service provider to enable its subscriber to get connected in all other circles. The subscriber need not interact act for any roaming services with other service provider. It is the technology established between two service providers which executes roaming system.*
- (6) *The subscriber has to get roaming activated through Home Service Provider. Only then he can access the services of service provider of another circle.*
- (7) *Whenever the subscriber tries to access the network of service provider of other circle, service provider of other circle shall be authorized by the Home Service provider as per the agreement entered into between the two service providers. If there is no roaming agreement between two operators or if the home telecom operator does not authenticate, subscriber cannot enjoy roaming facility.*
- (8) *The subscriber does not require to change the SIM card but by using the SIM card of Home Service provide he can access other network.*
- (9) *As per the agreement the other service provider raises bill on the Home Service provider and only the Home Service provider is liable to pay the amount irrespective of payment made by subscriber. The subscriber and service provider of other circle are no way liable for any thing with each other.*

- (10) *If the subscriber does use SIM of Home Service provider he cannot access telecom operator of other circle unless he purchases new SIM card.*
- (11) *It is clear from the bills raised by telecom operator of other circles that they have changed service tax to assessee and the assessee has paid the same. This simply means that services were provided by one operator to other and not to customers directly. The Service Tax Act has also recognized roaming services as taxable services the Finance Bill, 2007.*
- (12) *The entire system is to be monitored/managed by the highly skilled technical. A small technical problem can disturb the connectivity of entire region. To avoid such eventuality the entire process is being monitored by skilled persons.*
- (13) *This clearly shows that the service provider of another region to whom roaming charges are paid is not providing services directly to ultimate customer but it is providing services to another telecom operator to facilitate its customers.*
- (14) *The provision of section 194J refers to "any sum" paid by the payer and does not distinguish between the payment made by someone on its behalf or its customer's behalf. Therefore, the plea of the assessee that the payment received by the assessee from the customers of the*

assessee and paid to other mobile company does not fall under TDS provision, is not tenable.

From the above, it is clear that Home Service Provider takes technical services of other telecom service provider to facilitate the subscriber to access telephone wherever he visits and therefore it is required to deduct TDS from the payments made to obtain these services."

The Id. ITO(TDS) considered the following decisions on which the assessee claimed that roaming charges is not covered U/s 194J of the Act.

- (i) Skycell Communication Ltd. 251 ITR 53 (Madras)
- (ii) Bharti Cellular Limited ITA No. 1120/2007)
- (iii) DCIT Vs. Parasrampuriah Synthetics Ltd. 20 SOT 248 (Delhi).
- (iv) ITO Vs. Moving Pictures Company India Ltd. 20 SOT 120 (Delhi).
- (v) Kotak Securities Ltd. Vs. Addl.CIT 25 SOT 440 (Mum).

The above case laws referred by the assessee were found distinguishable to the ITO(TDS). He further relied on the decision in the case of Canara Bank Vs. ITO 305 ITR (AT) 189 where the Hon'ble ITAT Ahmadabad Bench has distinguished the order of the Skycell

Communications Ltd. and held that clearing charges paid to SBI through MICR centre by rendering managerial service which falls within the definition of technical services and liable to be deducted TDS U/s 194J of the Act. He further considered the Hon'ble ITAT Ahmadabad observation that the definition of fees for technical services is very wide, which covers within its ambit any managerial, technical or consultancy services rendered by a person. The MICR facility provided by the SBI, which identified, read and cleared the cheque through its special kind of machines. Therefore, the same is fees for technical services. The service of this nature, in our opinion involves human skill as well as computerized machines. It is not automatic. In that sense it is no hiring/lasing or making available the technical equipment working on its own. But it is fully supported by services of personnel and requires human application of mind alongwith technical equipments. In the present case, the assessee used highly sophisticated machine, which was managed by the highly qualified technical staff which involves application of human mind. In view of the above finding, he held that roaming charges paid to the other telecom operator is a fee for technical services and liable to be deducted TDS U/s 194J of the Act. The ITO(TDS) rejected the assessee's request to apply the Hon'ble

Supreme Court decision in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. CIT (supra) as payees has not filed its return of income. Therefore, the benefit of Hon'ble Supreme Court decision cannot be given. Accordingly, he created the demand U/s 201(1) on roaming charges of Rs. 10,18,92,350/- and interest thereon U/s 201(1A) of the Act at Rs. 68,75,375/-.

8. Being aggrieved by the order of the Assessing Officer, the assessee carried the matter before the Id CIT(A), who had confirmed the order of the ITO(TDS) by observing as under:-

"3.3.1 I have carefully considered the facts of the case and contentions/arguments of both the sides and I find that the contention of Ld. A.R. regarding payment made on behalf of the subscriber of the appellant company is not tenable, as the appellant company had entered into a separate agreement with the roaming service provider and is, therefore, liable for payment of roaming charges on its own behalf, as per the terms and conditions of the agreement. Hence, whether, later on, it charges for roaming services from its customers or not, this fact is not relevant and does not exempt the appellant company from the liability of TDS. Further, I find that the Id. A.O. has correctly held that the roaming facility

provided by the other telecom service provider to the Home Service Provider (the appellant) to facilitate the subscribers of the appellant company, to access mobile services, wherever they visit, was a technical service. In this regard, I agree with the reasoning given, for the above finding by the Id. A.O., in para 3.5 of his order. which is already reproduced in earlier para of this order.

Further, it is observed that the Id. AR has again relied on the decision in the case of Skycell Communications Ltd. and the decision of Hon'ble Delhi High Court in assessee's own case. However, in this connection, I agree with the detailed observations of the Ld. A.O. given in para 3.6 of his order (on pages 33 and 34) that the facts of above two cases are different, as compared to the facts of the present case and hence, the decisions given in those cases are not applicable in the present case. Therefore, I find no merit in the submissions of the Id AR for the reasons discussed in the order of the Id A.O.

The Id CIT(A) confirmed the order of the ITO(TDS) U/s 194J of the Act but allowed the benefit of Hon'ble Supreme Court decision in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. CIT (supra).

9. Now the assessee is in appeal before us. The Id AR of the assessee has submitted that the revenues proposition is that though the roaming happens automatically but because equipment is used to render the roaming service, because technical manpower is needed to operate and maintain the technical equipment therefore, roaming per se is rendering of technical services and therefore, the amount paid for roaming is technical fee in terms of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act. The Id AR explained the roaming service and submitted that Hexacom subscriber in Jaipur travels of Mumbai switches on his mobile device after reaching Mumbai. Where the subscriber travels by land he automatically receives a message transferring to the roaming network on visiting another telecom, circle.

- * *Visiting network (e.g. Airtel in Mumbai) locates mobile device and identifies that it is not registered with its systems, i.e. VLR.*
- * *Visiting network automatically contacts home network of Hexacom subscriber, i.e. HLR and gets service information about roaming device using IMSI number-IMSI number is a unique subscriber identity number granted to the customer at the time of subscription.*

- * *Visiting network maintains temporary subscriber record for the said mobile device and provides an internal temporary phone number from backend system to the mobile device which is not visible to human.*
- * *Home network also updates its register to indicate that the mobile is on visitor network so that information sent to that device is correctly routed.*
- * *The Hexacom's subscriber in Mumbai, who is temporarily registered as Airtel's subscriber makes calls in Mumbai and the minutes are registered in his identity for which he has to pay through Hexacom Jaipur.*
- * *Alternatively, a called from Jaipur makes a call to Hexacom's subscriber which is routed to the home network of Hexacom subscriber in Jaipur.*
- * *Home network then forwards all incoming calls to the temporary phone number which terminates at the device of roaming, subscriber (in Mumbai) who is now using the services of the visiting network (i.e. Airtel):*
- * *The entire process above is automatic and does not involve any human intervention at any stage.*

Billing process

- * *Usage of roaming subscriber in visited network is captured in a file called TP, i.e. transferred account procedure for*

GSM/CIBER, i.e., cellular inter-carrier billing exchange record for.

- * TAP file contains details of calls made by subscriber, viz., location, calling party, time of call and duration, etc.*
- * TAP/CIBER files are rated as per tariffs charged by visiting network operator.*
- * Such TAP/CIBER file is transferred to home network of subscriber (i.e. to Hexacom).*
- * Home network (i.e. Hexacom) then bills these calls to the Hexacom's subscriber and pays roaming charges based on the TAP to the visited network operator (i.e. Airtel). The roaming operator charges as per the roaming agreement with Hexacom, whereas the subscriber is billed as per the tariff subscribed.*
- * The entire process is automatic.*

It is concluded that the above transaction flow that the service of providing airtime by visiting telecom circle is directly to the subscriber and not to Hexacom. The subscriber of Hexacom uses the network set up by the visiting circle and instead of amount being recovered from the roaming subscriber, the visiting circle sends the air minutes to be recovered from the roaming subscriber to the

Home circle for recovery from the subscriber who had visited the visiting circle.

Technical fees

- * *It is an accepted fact that technical service can be said to have been rendered if there is an involvement of human element or there have been use of cerebral faculties in the provision of technical services by the recipient of fee.*
- * *This is so because the word "technical" comes in between the words "managerial and consultancy services". Based upon the principles of "nositur a sociis" there has to be an element of manual intervention at the time when the service is being rendered.*
- * *Technical services should have a fact situation of imparting technical knowledge involving or concerning applied and industrial science.*

The Id AR further argued that finding of the Id CIT(A) are based on contract between two operators but contract has no relevancy on the nature of the service whether technical or otherwise. The Id CIT(A) partly accepted that roaming process is technical because it uses various instruments such as MSC (Mobile Switching Centre), VLR (Visitor Location Register), Radio network, towers, BTC etc. but the system is operated/managed by the Highly skilled professionals. The assessee's

argument was that the roaming service is managed automatically by machines and payment for roaming charges are not fees for technical services. In case of fault in a breakdown of a system, the professional people are required to monitor the telecom network to be in a robust condition in order to do business for self. This monitoring does not have any connection with roaming charges paid by the subscriber. If a telecom network breaks down there is no business and thus no payment. Existence of IMSI is only a facility to communicate and does not result the roaming services provided on a standard facilities to be a technical service. The whole roaming process is automatically and there is no human interference in it. The human interference is required to maintain the robust network only to ensure break down free service to the subscriber. The network owner has to maintain for itself, its network in robust condition. The technical support of the staff is required to maintain the equipment and gazettes but it is not a service for roaming facility provided to the subscriber. There is commercial arrangement to connect the technical networks basically to be able to do business. In fact DOT mandates that it should be so connected. There is no payment made for connecting the networks. Payments are made for calls which the roaming subscriber makes. If no calls are

made no payment is made in spite of the fact that the networks are inter connected. He further relied on the decision in the case of CIT Vs. Bharti Cellular Ltd. 319 ITR 139 (Del) wherein it has been held by the Hon'ble Delhi High Court that roaming services not involving human interference and is not technical services as contemplated under Explanation 2 to Section 9(1)(vii) of the Act and not liable for tax deduction at source U/s 194J of the Act. This view has been earlier held by the Hon'ble Madras High Court in the case of Skycell Communications Ltd. Vs. DCIT (2001) 251 ITR 53 (Mad) order dated 23/2/2001 wherein the Hon'ble High Court has held that provisions of Cellular mobile telephone facility to subscribe is not a technical service. Deduction of tax at source need not to be made from subscriptions U/s 194J of the Act. He further relied on the decision in the case of Jaipur Vidyut Vitran Limited Vs. DCIT (2009) 123 TTJ 888 (JP Trib) wherein it has been held that Section 194J would have application only when the technology or technical knowledge of person is made available to other and not where by using technical systems, services are rendered to others. Rendering of services by allowing use of technical system is different from charging fees for tendering technical services. The applicability of Section 194J would come into effect only when by

making payment of fee for technical services, assessee acquires certain skill/knowledge/intellect which can be further used by him for its own purpose/research. Where facility is provided by use of machine/robot or where sophisticated equipments are installed and operated with a view to earn income by allowing the customers to avail of the benefit by user of such equipment, the same does not result in the provision of technical service to the customer for a fee. Therefore, he argued that in roaming charges paid by the assessee to the other operators are not fees for technical services. The Id AR further relied on the decision in the case of iGATE Computer Systems Ltd. Vs. DCIT in ITA No. 1301 to 1303& 1616/PN/2013 for A.Y. 2007-08 to 2010-11 wherein the Hon'ble Pune Bench of ITAT had considered whether any human intervention is required for providing the data link services and are liable to be deducted TDS U/s 194J of the Act and held that payments made for utilizing such services was not in the nature of technical services governed by Section 194J of the Act. He further relied on the decision of ITAT Ahmadabad Bench in the case of Canara Bank Vs. ITO 305 ITR (AT) 189 wherein MICR charges paid to SBI held not to be covered U/s 194J read with Section 9(1)(vii) Explanation-2. He also relied on the decision of Hon'ble Bangalore ITAT in the case of Bangalore Electricity

Supply Co. Ltd. Vs. ITO(TDS) order dated 16/3/2012 2012(20) ITR (Trib) 265 wherein payment made by State Load Dispatch Center (SLDC) is held not liable to be deducted TDS U/s 194J of the Act. The Id AR further relied on the decision of Hon'ble Mumbai ITAT in the case of Maharashtra State Electricity Distribution Co. Ltd. 25 Taxman 164, Siemens Limited 30 Taxmann.com 200, ITAT Kolkata Bench decision in the case of Right Florists Pvt. Limited ITA No. 1336/Kol/2011 and ITA Delhi bench decision in the case of Delhi Transco Ltd. (ITA No. 755(Del)/2011 A.Y. 2005-06. He also relied on the decision in the case of DCIT Vs. Parasrampuria Synthetics Ltd. 20 SOT 248 (Delhi). The revenue filed appeal against the order of Hon'ble Delhi High Court in the case of Bharti Cellular Ltd. before the Hon'ble Supreme Court. The Hon'ble Supreme Court has held as under:-

"In cases requiring examination by technical experts, the Department ought not to proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with technological advancement, the Department ought to examine technical experts so that the matters could be disposed of expeditiously. Further, this would enable the appellate forum, including the Supreme Court, to decide the legal issues based on the factual foundation.

Held accordingly, remanding the matters for determination with technical assistance, that in these cases, in which a cellular provider under an agreement pays interconnect/access/port charges to BSNL/MTNL, the question whether the cellular provider has rendered technical services and has to deduct tax at source, depended on whether the charges were for technical services, and this involved determination of whether any human intervention was involved, which could not be determined without technical assistance.

Decision of the Delhi High Court in CIT v. BHARTI CELLULAR LTD. [\[2009\] 319 ITR 139](#) set aside and matter remanded to the Assessing Officer with directions.

After this decision, the Id Assessing Officer examined the technical expert of the C-DOT on 29/09/2010 in respect of IUC and which were cross examined on 04/10/2010 by M/s Bharti Cellular Limited, Delhi. The technical experts reexamined on 04/10/2010 on this issue and admitted that roaming services does not require any human intervention, it operates automatically. The Id AR also drawn our attention on independent opinion taken from Director CMAI, Ex-Director (C&M), BSNL, Ex-Member Telecom Commission on 24/12/2010 and admitted that whole interconnected uses process, no manual intervention is required. He further drawn our attention on page No. 651 to 652 for postpaid as well as prepaid roaming charges charged between the operators from Mr. Kapoor Singh Guliani. The appellant

also taken opinion from Former Chief Justice of India Mr. Kapadia on IUC post technical examination, cross examined and reexamination. Who also opined that Hon'ble Supreme Court decision dated 12/08/2010 is an order not judgment as the principle of law was not res-integra. The word technical services have got to be read in narrow since as held by the various Hon'ble High Courts and the Tribunal by applying principles of "nositur a sociis" particular because the word technical service in Section 9(1)(vii) read with Explanation-2 in between word managerial consultancy services. Finally he opined that such setting up/installation, repairing, servicing, maintenance are separate activities, they are back office functions and are require human intervention. But the roaming process between participating entities is fully automatic and does not require any human intervention. Accordingly, the interconnected uses charge will not attract the provisions of Section 194J read with Section 9(1)(vii) read with Explanation-2 thereto. Therefore, he prayed to delete the addition.

10. At the outset, the Id Sr. DR vehemently supported the order of the Id CIT(A).

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, 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 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 Id CIT(A) and assessee's appeal is allowed on this ground also.

12. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 12/06/2015.

Sd/-
(आर.पी.तोलानी)
(R.P.Tolani)
न्यायिक सदस्य / Judicial Member

Sd/-
(टी.आर.मीना)
(T.R. Meena)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12th June, 2015

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Bharti Hexacom Limited, Jaipur
2. प्रत्यर्थी / The Respondent- The ITO (TDS)-II, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 656/JP/2010)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar