

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ B ” BENCH, AHMEDABAD

सर्वश्री महावीर प्रसाद, न्यायिक सदस्य एवं मनीष बोरड, लेखा सदस्य के समक्ष ।
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER And
SHRI, MANISH BORAD, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. Nos. 1317 & 1318/AHD/2016
(निर्धारण वर्ष / Assessment Year : 2011-12 & 2012-13)

The Dy. CIT, TDS Circle, Ahmedabad.	बनाम/ Vs.	M/s. Vodafone West Ltd., (Formerly known as Vodafone Essar Gujarat Ltd.), Vodafone House, Corporate Road, Ahmedabad – 380 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACF 1190 P		

Cross Objection No.89/AHD/2016
(arising out of I.T.A. No.1317/AHD/2016)
(निर्धारण वर्ष / Assessment Year : 2011-12)

Dy. CIT, TDS Circle, Navjivan Building, Ahmedabad – 380 014	बनाम/ Vs.	Vodafone Mobile Services Ltd., (Formerly known as VODAFONE WEST Limited) Vodafone House, B. Wing, 4 th floor, Corporate Road, Prahladnagar, Ahmedabad – 380 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACS 4457 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by :	Shri M.S.A. Khan, CIT-D.R.
Assessee by :	Shri S.N. Soparkar, A.R.

सुनवाई की तारीख / Date of Hearing	21/02/2018
घोषणा की तारीख /Date of Pronouncement	04/04/2018

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आदेश / O R D E R

PER MAHAVIR PRASAD, JUDICIAL MEMBER :

These are two appeals by the revenue alongwith cross objection by the revenue against the order of the Commissioner of Income Tax (Appeals)-8, Ahmedabad, dated 02/03/2016 for Assessment Year (AY) 2011-12 & 2012-13.

2. Since both appeals have common grounds and assessee is same therefore, for the sake of convenience, we would like to dispose of both appeals by way of a common order. In these appeals following Grounds have taken:

“1. *The Ld. CIT(A) has erred on facts and in law in deleting the demand raised u/s.201(1)/201(1) of the IT Act on non deduction of TDS of Rs.9,04,74,072/- (Including interest u/s.201(1A) of the Act) for A.Y. 2011-12 & Rs. 9,90,67,994/- (including interest u/s.201(1A) of the Act) for A.Y. 2012-13 on the discount offered to pre-paid distributors. In spite of the fact that the provisions of section 194H of the IT Act apply to the assessee.*

2. *The Ld.CIT(A) has erred on facts and in law in deleting the demand raised u/s.201(1)/201(1) of the IT Act on roaming charges paid to other telecom companies of Rs.11,09,12,301/- (including interest u/s.201(1A) of the Act) for A.Y. 2011-12 & Rs.11,03,21,623/- (including interest u/s.201(1A) of the Act) for A.Y.2012-13 by applying provisions of section 194J of the IT Act apply to the assessee.”*

3. The relevant facts as culled out from the materials on record are as under:-

The assessee company Vodafone West Ltd is in the business of telecom operations and providing telecom services.

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3.1 In this case, a survey u/s.133A of the Act was carried out on 26.08.2008 and during the course of survey it was found that the assessee has not deducted TDS on commission paid to pre paid distributors u/s.194H and roaming charges (fees for technical services) u/s.194 of the Act). The Assessing Officer passed the order u/s.201(1)/ 201(1A) of the Act on 08.03.2010 treating the assessee as "assessee in default" for not deducting TDS and hence not depositing it as per law.

3.2 In this regard, an expert opinion was taken on the issue of "treatment of roaming charges as fees for technical services liable for TDS u/s.194J of the Act", in the form of statement u/s.131 of the Act of Shri Rajiv Kushwah, Director, TERM Cell, Gujarat, Department of Telecommunications on 11.03.2014.

3.3 On the basis of the statement a show cause notice was issued to the assessee (along with a copy of the expert opinion). An opportunity to cross examine the expert was given by the Id. AO but assessee failed to avail the opportunity of cross examination of the expert in this regard.

3.4 It was observed by the A.O. that the assessee was not deducting TDS u/s.194] (fees for technical services) on the "IUC charges" paid by the assessee company, and treated assessee as "assessee in default" u/s.201(1)/201(1A) of the Act. After going through the various appellate stages, the Hon'ble Supreme Court issued directions to the A.O. to take an expert opinion in the matter to determine the human intervention w.r.t. the said payments. The AO took expert opinion in the

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matter, which was cross examined by the assessee. In this regard, the Assessing Officer finalized the assessment proceedings based on the "expert opinion and its cross examination" in which the "IUC charges" were held to have been paid as "fees for technical services" liable for TDS u/s.194J of the Act. In this regard, it is pertinent to mention here that the telecom operators such as Bharti Airtel Ltd and Idea Cellular Ltd including the assessee, have taken cognizance of this fact and have started deducting TDS u/s.194J (@10%) on the payments made for "IUC charges". Considering the fact that the interconnect/port access form a subset of the "roaming services" provided by the "home network" to the "in roamer subscriber" of the "visiting network" (as discussed above), and the assessee recognizes the payments made in that regard (IUC charges) as FTS liable for TDS u/s.194J, the roaming services fall under the definition of "Fees for Technical services" liable for TDS u/s.194J of the Act.

3.5 Apart from the above said assessee has sold pre-paid vouchers of various face values to its distributors at lower rate than its face value. The value of the commission paid by the assessee to the distributor by subtracting the price/value at which the vouchers were sold to its distributors from the M.R.P. value of such coupons has been furnished by the assessee in its submission dated 26.03.2014. The value arrived at and provided by the assessee of such commission is Rs.77,93,41,990/-. It was observed by the Id. AO that no tax has been deducted u/s.194H of the I.T.Act on above payment.

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3.6 In this regard the assessee has stated that since there is no "Principal-Agent" relationship between the assessee and the distributors, hence the assessee has treated the amount paid to pre paid distributors as "discount" and not as commission. The assessee has mentioned the agreement entered in F.Y.2007-08 between the distributors in this regard, according to which there is "principal- principal" relationship between the two.

3.7 Assessee further stated that since no actual payment has been paid to the distributor, hence, provision of Section 194H are not applicable.

3.8 But Id. AO was not satisfied with the contention of the assessee and made an addition of Rs.20,13,87,000/-.

4. Against the said order assessee preferred first statutory appeal before the Id. CIT(A) who partly allowed the appeal of the assessee.

5. Now matter is before us.

6. We have gone through the relevant record and impugned order. In this case, during the course of TDS proceeding, Id. TDS officer required the assessee to show-cause why roaming charges paid to other telecom company should not be treated as 'fees for technical services' requiring deduction of tax at source in accordance with provisions of section 194J of the Act.

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7. Assessee's contention was that roaming means an arrangement whereby a subscriber of cellular phone uses cellular services outside the home network. Thus, the subscriber who is not 'roaming', gets services from his home operator, while a subscriber who is 'roaming' will get services from both, the host operator and the home operator. The host operator, of course, charges the home operator for providing telecom services to the subscriber of the later and vice-versa. Based on the usage, the host operator would invoice the home operator, which the home operator would recover from his own subscriber.

8. Roaming services are provided by telecom operators are in the nature of use of standard facilities, which do not require any human interface. Further, since the roaming charges are not paid for rendering managerial, technical or consultancy services, said services cannot be construed as fees for technical series as defined under provisions of section 194J of the Act. Therefore, the assessee is not required to deduct tax at source on such roaming charges.

9. As regard to applicability of provisions of section 194H of the Act on the discount offered to pre-paid distributors is concerned. Ld. AR stated that arrangement between the appellant and its prepaid distributors was on a 'principal to principal basis', wherein the Appellant sold its pre-paid talk time to its distributors, at a discount and the distributors in turn sold the same to the retailers. Retailers thereafter sold the same to the ultimate consumers. Accordingly, it was stated that the assessee accounted for revenues on the basis of the sale proceeds realized i.e.

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price at which the pre-paid talk time was sold to the distributor. Therefore, the appellant neither booked nor paid any commission to its prepaid distributors and hence, the question of deducting tax at source on the same did not arise.

10. Ld. AR further stated that in order to attract the provisions of section 194H of the Act, the relationship of ‘agency’ between the parties is a pre-requisite.

11. Provision of section 194H of the Act is applicable when the person is responsible for making a payment. The assessee did not make any payment to the distributors but instead sold pre-paid talk time to them at a discount to their market price and hence, provision of Section 194H are not applicable.

12. In support of its contention, ld. AR cited an order of co-ordinate bench in assessee’s own case in ITA No.1634 & 1635/Ahd/2014 for assessment year 2008-09 & 2009-10 on the issue of section 194J and 194H of the Act co-ordinate bench held as under:

“We find in this factual backdrop that the very issue had arisen in assessee’s case itself in assessment year 2009-10 involving Revenue’s and assessee’s cross appeals ITA Nos. 909 & 944/Ahd/2014 decided on 17.11.2016 as decided in the following manner:

"21. We have heard rival submissions. We put up a specific query to Revenue as to whether there is any direct evidence pinpointing human intervention element in assessee's roaming facilities availed from its payees. No material is quoted in response to our query except page 71 of the assessment order.

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Meaning thereby that there is only an inference that the assessee must have paid for the impugned roaming charges involving human intervention component. This case file reveals that this tribunal's Kolkata bench in ITA No.1864/Kol/2012 Vodafone East Ltd. (assessee's sister concern) vs. ACIT decided on 15.09.2015 examines all fine points in case of identical roaming charges in cellular telephony parlance to conclude that the same are not liable for TDS deduction."

13. With regard to TDS deduction on assessee's pre-paid voucher is concerned. Co-ordinate Bench held as under:

"It emerges that the instant issue in assessee's former appeal has been rendered academic since a co-ordinate bench accepted its corresponding ground raised in ITA No.386/Ahd/2011 decided on 07.07,2015 preferred against the CIT(A)'s order dated 31/12/2010(supra). It is further evident that the said ratio very well applies in assessee's corresponding second substantive ground in latter assessment year as under:

"7. We find that what is sold by the assessee is airtime, whether through the physical vouchers or through the electronic transfer of refill/recharge value, to its distributors. It is this transaction which is subject matter of different perceptions, so far as tax withholding obligations of the seller are concerned, of the parties before us, As a matter of fact, the assessment order itself states that the assessee has sold the "pre-paid vouchers, of various face value, to its distributors, at a rate lower than its face value ", and that "the difference (between the face value and the price at which is sold) is nothing but commission on which no tax has been deducted". The short issue that we are required to adjudicate in this appeal is whether the provisions of section 194H will come into play in respect of the difference between the price at which the airtime is thus sold to the distributors and its recommended retail price to the end consumers.

8. This issue is no longer res Integra. As the same business model, with no or peripheral variations, has been followed by almost all the operators in the mobile telecommunication industry, this issue has been subject matter before various forums, and more importantly, before various Hon'ble High

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Courts. Learned Representatives fairly agree that the above issue in appeal is subject matter of difference of opinion by various Hon'ble non-jurisdictional High Courts and that we do not have the benefit of guidance by Hon'ble jurisdictional High Court.

9. *This issue is covered, in favour of the assessee, by Hon'ble Karnataka High Court's common judgement in the cases of Bharti Airtel Limited, Tata Teleservices Limited and Voadfone South Limited, reported as Bharti Airtel Limited vs. DCJT [(2015) 372 ITR 33 (Kar)]”*

14. Ld. AR also cited an order of co-ordinate bench in assessee's own case in ITA No.386/Ahd/2011 for Asst Year 2008-09. Co-ordinate Bench has held that assessee is not liable to deduct tax u/s.194H and 194J. Therefore, assessee is not in default for such TDS.

15. On the principle of consistency and respectfully following the order of co-ordinate bench and in our considered opinion ld. CIT(A) has passed a detailed and reasoned order. Therefore, we are not incline to interfere in the order passed by the ld. CIT(A).

16. In the result, both the appeals are dismissed.

17. So far as CO No.89/Ahd/2016 is concerned. Assessee does not wish to press and same is dismissed as not pressed.

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18. In the result, both the appeals are dismissed and Cross Objection is also dismissed as not pressed.

This Order pronounced in Open Court on	04/04/2018
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Sd/-
मनीष बोरड
(लेखा सदस्य)
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
महावीर प्रसाद
(न्यायिक सदस्य)
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad; Dated 04/03/2018

Priti Yadav, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-8, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad