IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DLEHI

BEFORE SHRI N.K. SAINI, HON'BLE VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. No.3369/Del/2015
Assessment Year: 2011-12

M/s Idea Cellular Ltd., **A-68, Sector -64, Noida.** **PAN: AAACB2100P**	**vs**	**Asstt. Commissioner of Income-tax,** **Circle 50(1), New Delhi.**
(Appellant)		(Respondent)

Assessee by: Shri Ronak Doshi, CA
Respondent by: Ms Ashima Ned, Sr. DR

Date of Hearing: 18.10.2018
Date of Pronouncement: 30 .10.2018

ORDER

PER NARASIMHA K. CHARY, JM

Challenging the order dated 18.3.2015 passed by the learned Commissioner of Income-tax (Appeals)-41, New Delhi {for short "CIT(A)}, the assessee preferred this appeal.

2. Brief facts of the case are that the assessee is engaged in the business of providing cellular mobile telephone services in the state of New Delhi and NCR. There was survey u/s 133A of the Income-tax Act, 1961 ("the Act") on 17.11.2011 to verify as to whether the assessee was discharging the TDS obligation on account of payments covered under various TDS related provisions of the Act, especially considering the decision of the Hon'ble jurisdictional High Court in assessee's own case on the issue of treating the cash discounts on pre-paid and postpaid sales as commission covered u/s 194H and also the treatment on account of payment towards IUC/Roaming charges covered u/s 194J of the Act. Notice dated 8.8.2012 was issued in respect of the TDS compliance verification u/s 201(1) and 201(1A) of the Act and ultimately learned AO fastened liability to the tune of Rs.75,31,637/- u/s 194H and Rs.1,44,333/- u/s 194J of the Act. Learned CIT(A) dismissed the appeal preferred by the assessee. Hence, the assessee is before us in this appeal challenging the action of the authorities below.

3. In so far as ground Nos. 1,2,3 & 5 are concerned, these relate to the non deduction of TDS u/s 194H of the Act on the discount allowed to the prepaid card distributors in respect of supply of SIM card/Recharge vouchers (SIM/RV) amounting to Rs.5,74,441/- and the consequential treatment of the assessee as assessee in default.

On this aspect, plea of the assessee is that the assessee supplies the prepaid SIM cards and Recharge vouchers to its distributors at a discounted price and distributors are free to re-supply to the retailers at any price subject to the maximum retail price and it is the distributors, who pass the discounted price to the assessee and there is no payment of any kind made by the assessee to the distributors in this transaction. Since the distributors are required to pay the assessee the discounted price of the product purchased by them in advance irrespective of the fact that whether such product purchased are in turn sold or remain unsold, there is no relationship of principal or agent and the distributors was not acting as an agent of the assessee, but as an independent contracting party. On this premise, it is submitted by the learned AR that in the absence of any principal agent relationship, Section 194 H of the Act has no application.

4. Per contra, the learned DR submitted that having considered the contentions of the assessee, the jurisdictional High Court in assessee's own case has reached a conclusion that the transactions between the assessee and the distributors, Section 194H is applicable. On this aspect, learned AR fairly submitted that the Hon'ble jurisdictional High Court in the case reported in 118 Taxman 118 reversed the decision of the Delhi Bench of the ITAT in assessee's

own case, and the decision of the Tribunal was favourable to the assessee.

5. It is, therefore, clear that in assessee's own case having considered the contentions on either side and the orders of the learned AO, first and second appellate authorities, the Hon'ble jurisdictional High Court reached a conclusion that to the transaction between the assessee and the distributors in respect of sale of the SIM/RV cards, provisions of Section 194H are applicable. In this set of circumstances, we find that this issue is squarely covered by the decision of the Hon'ble jurisdictional High Court and by respectfully following the same, we hold that the authorities below rightly concluded that the provisions of Section 194H are applicable to the facts of the case and there should have been tax deducted at source in respect of the said transaction.

6. Now coming to the contention of the assessee that the assessee cannot be branded as the assessee in default u/s 201(1) read with Section 194H of the Act in the absence of any evidence that the prepaid distributors have not offered for tax the discount availed by them from the appellant, we are of the considered opinion that it is a verifiable fact and learned AO has to verify whether the prepaid distributors have offered or not for tax the discount availed by them from the assessee. For this purpose, we set aside the

impugned order on this ground and remand the issue under Grounds 2, 3 and 5 to the learned AO for verification of the fact whether or not the prepaid distributors offered for tax the discount availed by them from the assessee.

7. Ground No.4 relates to the non deduction of the TDS u/s 194J of the Act on the payments of roaming charges of Rs.11,45,830/-. It is the submission of the Ld. AR that that there is no manual or human intervention during the process of transportation of calls between two networks and this is done automatically. He further submitted that human intervention is required only for installation of the network and installation of other necessary equipments/ infrastructure and also for maintaining, repairing and monitoring each operator or network so that they remain in a robust condition to provide faultless service to the customers. He, therefore, submitted that the purpose of payments in question cannot be categorized as for the Fee for technical services.

8. Ld. DR, however, while placing reliance on the orders of the authorities below on this aspect, argued that without human intervention, it is not possible to provide the facility and to attend the troubleshoots as and when required and without human intervention, it is not possible for the seamless transportation of the

calls between two networks, as such, it cannot be said that there is no human intervention at all.

9. We have gone through the decisions relied upon by the assessee. It is clear that pursuant to the decision of the Hon'ble Apex Court in CIT vs Bharati Cellular, 193 Taxman 197 (SC), by way of various other orders of High Courts and Tribunal, this issue was remanded to the learned AO for verification of the fact whether the process of carriage of call requires manual intervention or not, by examining technical experts from the side of the department, allowing opportunity to the assesses for cross examination. Due exercise was done by the learned AOs by examining the experts by affording opportunity to cross examine the assessees. Subsequently, various benches of the Tribunal have considered the issue based on the factual verification of the fact and all the Tribunals are unanimous in their view that there is no manual or human intervention during the process of transportation of calls between two networks and this is done automatically. It was further found that human intervention is required only for installation of the network and installation of other necessary equipments/ infrastructure and also for maintaining, repairing and monitoring each operator or network so that they remain in a robust condition to provide faultless service to the customers besides where the

network capacity has to be enhanced by telecom operators. The Tribunals have consistently found that such human intervention cannot be said to be for inter connection of a call.

10. We have gone through the decision of a coordinate bench of this Tribunal in Bharti Airtel Ltd. Vs ITO, TDS ward, New Delhi (2016) 67 Taxmann.com 223 (Delhi) wherein the Tribunal took the view that human intervention for providing certain services to put an equipment in place is different from the human intervention in the transportation of calls between two networks. Vide para 33 thereof the Tribunal held as follows:

> *33. All the Benches of the Tribunal are unanimous in their view on this issue. We see no reason whatsoever to deviate from these views. Hence consistent with the view taken in the above referred orders, we hold that the payment in question cannot be characterized as Fee for Technical Services u/s. 9(1)(vii) of the Act. There is no manual or human intervention during the process of transportation of calls between two networks. This is done automatically. Human intervention is required only for installation of the network and installation of other necessary equipments/ infrastructure. Human intervention is also necessary for maintaining, repairing and monitoring each operator or individual network, so that they remain in a robust condition to provide faultless services to the customers. Human ITA Nos. 3593 TO 3596/Del/2012 [Bharti Airtel Ltd. vs. ITO(TDS)] & ITA Nos. 4076 TO 4079/Del/2012 [ITO(TDS) vs. Bharti Airtel Ltd.] intervention is also required in case where the network capacity has to be enhanced by the telecom operators. Such human intervention cannot be said to be for inter-connection of a call.*

11. Further, it is brought to our notice that a coordinate bench of this Tribunal in assessee's own case in ITA Nos.852, 941 and 2382 of 2015 for 2010-11 and 2011-12 dealt with a similar issue vide para 9 and reached a conclusion that the payments in question shall not be recorded as payment towards fee for technical services and only such payments as are for services which are specialized, exclusive and utmost to users/consumers qualified as fee for technical services in terms of Explanation 2 to Section 9(1)(vii) so as to attract TDS u/s 194J. On this premise, in assessee's own case, a coordinate bench of this Tribunal held that in the absence of any human intervention during the actual roaming process, payment would not be fee for technical services and cannot be regarded as payments to Section 194J are applicable.

12. While respectfully following these decisions and especially one in assessee's own case for the immediately preceding year, we are of the considered opinion that this demand cannot be sustained and has to be deleted.

13. Now turning to Ground No.6 relating to interest levied u/s 201(1A) of the Act to the tune of Rs.18,16,946/-, it is needless to say that interest is consequential in nature and on the amount to be found chargeable on the verification of the fact as directed in the preceding paragraphs.

14. In the result, appeal of the assessee is allowed in part for statistical purposes.

Order pronounced in the Open Court on 30th October, 2018.

Sd/-	sd/-
(N.K. SAINI)	(K. NARASIMHA CHARY)
VICE PRESIDENT	JUDICIAL MEMBER

Dated: 30th October, 2018
'VJ'
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Asstt. Registrar

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