

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI
BEFORE SHRI U.B.S. BEDI, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
I.T.A. No. 2576/Del/2011

A.Y. : 2007-08

M/s Bharti Hexacom Limited,
C/o J.C. Bhalla & Co.,
B-17, Maharani Bagh,
New Delhi – 110 070
(PAN: AAACH1766P)
(Appellant)

vs. Commissioner of Income Tax,
Delhi-I, Room No. 392-A,
CR Building, IP Estate, New Delhi –
110 002

(Respondent)

Assessee by : Sh. Anil Bhalla, CA
Department by : Mrs. Anuradha Misra, C.I.T. (D.R.)

ORDER

PER SHAMIM YAHYA: AM

This appeal by the Assessee is directed against the order of the Ld. Commissioner of Income Tax, Delhi-I dated 24.3.2011 pertaining to assessment year 2007-08.

2. The issue raised is that Ld. Commissioner of Income Tax, Delhi-I erred in passing the order u/s. 263 of the I.T. Act.

3. In this case Ld. Commissioner of Income Tax referred to the assessment proceedings u/s. 143(3) of the I.T. Act for A.Y. 2008-09 in the case of M/s Bharti Hexacom Ltd. wherein inter-alia following two additions were made :-

“i) Disallowance of free airtime to distributors u/s. 40(a)(ia) of the I.T. Act.

It was observed that assessee has provided free airtime to distributors at ₹ 54.29 crores in A.Y. 2008-09, which was in the nature of commission expenses. However, the assessee has not deducted TDS u/s. 194H of the I.T. Act. Hence, the same was disallowed u/s. 40A(ia) of the I.T. Act in the order u/s. 143(3) of the I.T. Act. This issue has also been adjudicated by Hon'ble Delhi High Court in the favour of revenue in the judgement of C.I.T. vs. Idea Cellular Ltd. (2010) TIOL 139, wherein the relationship between the assessee, who was telecom service provider like the assessee in the present case, and the distributors was held to be one of principal to agent and the claimed discounts were held as commission liable to TDS u/s. 194H of the I.T. Act.

- ii) Disallowance of roaming charges paid u/s. 40(a)(ia) of the I.T. Act.

During the A.Y. 2008-09, assessee has paid roaming charges and inter connection charges at ₹ 13.74 crores to various other operators. Since the payments were clearly and non-ambiguously in the nature of fee for technical services liable for deduction of TDS u/s. 194J of the I.T. Act. However, the assessee has not deducted TDS on the same and hence the payments were disallowed u/s. 40(a)(ia) of the I.T. Act."

4. Ld. Commissioner of Income Tax observed that the nature of business of the assessee is same for the A.Y. 2007-08 also and apparently it is clear from the assessment record that the assessee

had shown billing revenue net of discount to the distributors in the form of free airtime and no TDS had been deducted on the same u/s. 194H of the I.T. Act. Ld. Commissioner of Income Tax further observed that assessee had also paid roaming and interconnection charges but as per record, no TDS had been deducted on the same u/s. 194J of the I.T. Act. That the Assessing Officer in his order u/s. 143(3) of the I.T. Act dated 30.11.2009 had not made any disallowance on these two issues. Ld. Commissioner of Income Tax further observed that assessee has not shown these figures separately in the audited accounts and the tax implication on this issues will be huge. Ld. Commissioner of Income Tax gave a finding that prima-facie Assessing Officer had not made any proper enquiry/ investigation on these issues and the same were apparently not in focus that time. Thus, Ld. Commissioner of Income Tax (A) opined that assessment u/s. 143(3) Act dated 30.11.2009 appeared pre-judicial to the interest of revenue and erroneous to that extent. In this regard, show cause notice was issued to the assessee. In reply assessee contended that it was not liable for TDS u/s. 194H on free airtime distributors and section 194J on roaming charges and thereby no disallowance was called for. Considering the facts and response in this regard, Ld. Commissioner of Income Tax observed that following facts emerge in this case.

- a) Free airtime to distributors u/s. 40(a)(ia): The assessee was liable to deduct TDS on these payments u/s. 194H but has failed to do so. The issue has been settled by the jurisdictional High court in the favour of the Department as discussed at para no. 3. The Assessing Officer

has not examined this issue during the course of assessment proceedings for A.Y. 2007-08. The free airtime provided to distributors by the assessee is liable to be allowed as an expense u/s. 40(a)(ia) of the I.T. Act for failure of the assessee to comply with the provision of section 194H of the I.T. Act.

- b) Roaming charges paid: The assessee was liable to deduct TDS u/s. 194J on the roaming charges paid by it to the other telecom operators for allowing its subscribers to roam into other networks. These payments were in the nature of fee for technical services. Failure to comply with the provisions of Section 194J renders the deduction claimed on account of roaming charges to be disallowed u/s. 40(a)(ia). The Assessing Officer has not examined this issue in A.Y. 2007-08. In its arguments, the assessee has stated that there is no difference between the roaming and interconnection facility in so far as they both are a standard facility in which highly sophisticated machinery is used. However, the Assessing Officer in A.Y. 2008-09 has verified that while the assessee is drawing an analogy between roaming and interconnection charges, it has deducted TDS on inter connection charges while no TDS has been made of roaming. Thus, there is a

fundamental incoherence in the argument of the assessee.

4.1 In light of the above discussion, Ld. Commissioner of Income Tax held that order dated 30.11.2009 passed u/s. 143(3) of the act is set aside u/s. 263 of the I.T. Act, as the same is held to be prejudicial to the interest of revenue in the absence of proper enquiry / investigation on the issues discussed at preceding paras and to that extent. Ld. Commissioner of Income Tax concluded that Assessing Officer is directed to examine the case afresh in view of the above two issues and after giving proper opportunity to the assessee make a speaking order.

5. Against the above order the Assessee is in appeal before us.

6. We have heard the rival contentions in light of the material produced and precedent relied upon. The submission of the Id. Counsel of the assessee is summarized as under in his synopsis.

“The proposition that the application of provisions of Section 194H of the Act to business transaction of sale of prepaid card to distributors for onward selling to retailer and subsequent selling to end customer, was debatable and two views were possible consequently the application of Section 40(a)(ia) to the discount was debatable and subject to two views –

Similarly, there was no issue that roaming reimbursed by Home Service provider to other telecom service provides (Roaming Circle) on account of the subscriber of Home service provider using the telecom

service of roaming service provider. As explained such services are in para materia to normal calls made by subscriber on his home service provider network and therefore Section 194J was not applicable.

There is no cause of action of C.I.T. to introduce another view that provisions of section 194J are attracted to reimbursement of roaming and because tax had not been deducted therefore provisions of Section 40(a)(ia) will apply.

No prejudice has been caused to the revenue as there is no loss of tax.

The order is not erroneous as complete information and facts were available in the balance sheet and profit and loss account available with the Assessing Officer at the time of assessment and such information was apparent and obvious and can only lead to one conclusion that the Assessing Officer has considered these issues as has been done by him since assessment year 2001-02.

That two views were possible in the case of applicability of the provisions of Section 194H to the discounts enjoyed by the prepaid card distributor on the purchases of such cards from the appellant company.

There was no contrary view in regard to applicability of Section 194J to the transaction of reimbursement of roaming charges to other telecom service providers.

C.I.T. has not fulfilled his obligation of recording a detailed justification for holding that such charges were for payment of technical services.

Nor has the C.I.T. made an independent judgement on the applicability of provision of Section 194H.

The C.I.T. has not shown that the view taken by the Assessing Officer was not sustainable in law.

Order of C.I.T. u/s. 263 must be quashed.”

6.1 Ld. Counsel of the assessee further placed reliance on the catena of case laws including the following:-

- 331 ITR 192 C.I.T. vs. Hindustan Coca Cola Beverages Pvt. Ltd.
- 341 ITR 537 C.I.T. vs. Vikas Polymers
- 287 ITR 268 (Del.)C.I.T. vs. Aditya and Associates Pvt. Ltd.
- 259 ITR 502 (Guj.) Arvind Jewellers
- 295 ITR 282 (SC) Max India.
- 96 TTJ (jd.) 827 (2005) Metallizing Equipment vs. JCIT.
- (2010) 127 ITD 187 (Chennai) TM Sical Logistics Ltd. vs. ACIT
- 106 ITD 105 (Pun) TM Bagaria Vegetables.
- (2010) 123 ITD 620 (Del.) Idea Cellular Limited.

- 2012-TIOL-312-Hon'ble High Court-Del-ITAT Central Warehousing Corporation.
- (2010) 125 ITD 222 (Hyd.) Idea Cellular Limited.
- 2012-TIOL-804-HC –Del-ITAT DLF Ltd.
- (2012)-TIOL-195-HC –Del-ITAT DG Housing Projects Ltd.
- (2011) 12 taxmann.com 445 (Delhi) Kelvinator of India Ltd.
- (2010) 194 Taxman 175 (Delhi) Honda Siel Power Products Ltd.
- Copy of letter dated March 9, 2011 filed before C.I.T., Delhi-I, on 16.3.2011 for A.Y. 2006-07 u/s. 263 of the Act.

6.2 Ld. Departmental Representative on the other hand submitted that Assessing Officer has not made any enquiry/ investigation in this regard. Hence, it cannot be said that Assessing Officer has applied his mind on these issues. There is no discussion regarding the above issues in the assessment order, nor any enquiry has been raised by the Assessing Officer in this regard. Ld. Departmental Representative further stated that something that was of crucial significance has not been taken into account by the Assessing Officer or any question raised on the above subject. Ld. Departmental Representative further relied upon the following case laws :-

- i) 101 ITD 495 Arvee International vs. ACIT.
- ii) 67 ITR 84 Ram Pyari Devi Saraogi vs. C.I.T.

7. We have carefully consider the submissions and perused the records.

Disallowance of free airtime to distributors u/s. 40(a)(ia) of the I.T. Act.

It was observed that assessee was liable to TDS on these payments u/s. 194H but has failed to do so. The issue has been settled by the Hon'ble Jurisdictional High Court in the favour of revenue in the judgement of C.I.T. vs. Idea Cellular Ltd. (2010) TIOL 139. However, it is submission of the assessee's counsel that on these issues, there were case laws in favour of the assessee at that time. Hence, Assessing Officer has applied one of the two views possible. Hence, the order cannot be said to be erroneous and prejudicial to the interest of revenue. We find that this issues has not at all been examined by the Assessing Officer in the course of assessment proceedings for assessment year 2007-08. No reference thereof is there in the assessment order. Similarly, we find that Assessing Officer has not issued any query in this regard and not obtained necessary details. Hence, it cannot be said that Assessing Officer has applied one of the two views possible.

Roaming charges paid :- On this issue Revenue's contention is that assessee was liable to deduct TDS u/s. 194J on the roaming charges paid by it to the other telecom operators for allowing its subscribers to roam into other networks. These payments were in the nature of fee for technical services. That failure to comply with the provisions of Section 194J renders the deduction claimed on account of roaming charges to be disallowed u/s.

40(a)(ia). On this issue, Id. Counsel of the assessee accepted that there is no discussion by the Assessing Officer in the assessment order in this regard. However, he contended that Assessing Officer has applied his mind and not found any shortcomings. He also conceded that there is no enquiry in this regard made by the Assessing Officer. Ld. Counsel of the assessee further submitted that there is no difference between the roaming and interconnection facility in so far as they both are a standard facility in which highly sophisticated machinery is used. However, the Assessing Officer in A.Y. 2008-09 has verified that while the assessee is drawing an analogy between roaming and interconnection charges, it has deducted TDS on inter connection charges while no TDS has been made of roaming. It has further been noted by the Ld. Commissioner of Income Tax that failure to comply with the provisions of Section 194J renders the deduction claimed on account of roaming charges to be disallowed u/s. 40(a)(ia).

7.1 In this regard, we note that Id. Counsel of the assessee has further submitted that no prejudice has been caused to the revenue as there is no loss of tax. However, we do not find any cogency in the submission of the Id. Counsel of the assessee. That certain tax deductible at source have not been so deducted is clearly prejudice to the revenue. Hence, it cannot be said that there is no prejudice to the revenue.

7.2 Ld. Counsel of the assessee further submitted that the order is not erroneous as complete information and facts were available in the balance sheet and profit and loss account available with the Assessing Officer at the time of assessment and such information was apparent and obvious and can only lead to one conclusion that Assessing Officer has considered this issue. We find that the above submissions of the Id. Counsel of the assessee is also not sustainable. That something was available in the balance sheet, profit and loss account or books of accounts cannot lead to the conclusion that Assessing Officer has applied his mind. This is so because there is no discussion by the Assessing Officer on these subjects, nor Assessing Officer had made any enquiry on these subjects. Ld. Counsel of the assessee further submitted that the two views were possible in the case of applicability of the provision of section 194H to the discount enjoyed by the prepaid card distributors on the purchases of such cards from the assessee company. It has further been contended that there is no contrary view in regard to the applicability of Section 194J to the transaction of reimbursement of roaming chargers to other telecom service providers. As we have already found herein-above that these submissions of the Id. Counsel of the assessee do not have cogency. This is so because Assessing Officer has not made any discussion regarding these aspects in the assessment order, nor he has raised any query / enquiry in this regard.

7.3 As regards the case laws referred by the Id. Counsel of the assessee, we find that they are not supporting the case of the assessee. We further find that in 101 ITD 495 (Mum) in the case of Arvee International vs. ACIT, the ITAT, Mumbai has held that the

perusal of the assessment order passed by the Assessing Officer does not show any application of mind. It simply says in one line that loss returned by the assessee is accepted. It was held that no greater evidence is required than the mere reproduction of the aforesaid order from the assessment order to establish that it is a case where the Assessing Officer has mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. No evidence had been placed that the claim made by the assessee was objectively examined or considered by the Assessing Officer either on record or in the assessment order. It was because of such non consideration of the issues on the part of the Assessing Officer that the loss claimed by the assessee stood automatically allowed without any scrutiny. The assessment order was clearly erroneous as it was passed without proper examination or enquiry or verification or objective consideration of the claim made by the assessee. The Assessing Officer had completely omitted the issue in question from consideration and made the assessment in an arbitrary manner. His order was completely non-speaking order. It was a fit case for the Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the assessment order and directing the Assessing Officer to pass a fresh order, in

accordance with the law, after giving reasonable opportunity of hearing to the assessee.

7.4 We find that the above case law is clearly applicable to the facts of the present case. Assessing Officer has not made any discussion regarding the subjects raised by the Ld. Commissioner of Income Tax u/s. 263. The Assessing Officer has mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. Similarly, no evidence had been placed that the claim made by the assessee was objectively examined or considered by the Assessing Officer either on record or in the assessment order.

7.5 Furthermore, we find that Hon'ble Jurisdictional High Court in Gee Vee Enterprise vs. ACIT 99 ITR 375 has held that the Ld. Commissioner of Income Tax can regard the ITO's order as erroneous on the ground that in the circumstances of the case the ITO should have made further enquiries before accepting the statements made by the assessee in his return. We find that this case law is also applicable on the facts of this case Assessing Officer in this regard has not made any enquiry and has accepted the statements made by the assessee in his return.

7.6 In the background of the aforesaid discussions and precedents, we hold that the Assessing Officer has completely omitted the issue in

question from consideration and made the assessment in an arbitrary manner. Hence, we hold that it was a fit case for the Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the assessment order and directing the Assessing Officer to pass a fresh order, in view of the above two issues, after giving reasonable opportunity of hearing to the assessee and make a speaking order.

8. In the result, the appeal filed by the Assessee stands dismissed.

Order pronounced in the open court on 04/1/2013

Sd/-

[U.B.S. BEDI]
JUDICIAL MEMBER

Date 04/1/2013

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant 2. Respondent
5. DR, ITAT

Sd/-

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

3. CIT 4. CIT (A)

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches