

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.201 of 2011 (O&M)
Date of decision:6.11.2015**

Commissioner of Income Tax (TDS) Chandigarh

.....Appellant

Vs.

**The Accounts Officer, M/s Dakshin Haryana Bijli Vitran Nigam
Limited, Panchkula**

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE HARI PAL VERMA**

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

Present: Mr. Yogesh Putney, Advocate for the appellant-revenue.

Mr. Saurabh Kapoor, Advocate for the assessee.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.201 and 203 of 2011 as learned counsel for the parties are agreed that identical proposition of law is involved in both these appeals.

2. ITA No.201 of 2011 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 28.5.2010, Annexure 3, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A', Chandigarh (in short, "the Tribunal"). It was admitted on 19.9.2011 to consider following substantial questions of

law:-

“I) Whether the learned Tribunal has misread and misconstrued the statutory provisions of Income Tax Act, while making a mention of Explanation 2 to section 9(1)(viii) of I.T.Act, regarding term ‘technical service’ by using the word ‘human’ in violation of principle of interpretation of statutes?

ii) Whether on the facts and circumstances of the case, the learned ITAT was right in law in holding that the payments made by the assessee in form of transmission/wheeling and SLDC charges were not liable for deduction of tax at source under section 194J of the Income Tax Act?

iii) Whether on the facts and circumstances of the case, the learned ITAT was justified in law in holding that the respondent is not liable to pay interest under section 201(1-A) of the I.T.Act, 1961 because there was no tax liability on the income of the deductee?

3. The matter is no longer *res integra*. Identical matter has already been decided by this Court in ***Commissioner of Income Tax (TDS) Chandigarh vs. Dakshin Haryana Bijli Vitran Nigam Limited***, ITA No.652 of 2010, on 8.5.2014, wherein it was recorded as under:-

7. After giving our thoughtful consideration to the respective submissions of learned counsel for the parties, we are of the opinion that the issue arising in these appeals requires to be re-adjudicated by the Assessing Officer keeping in view the principles of law enunciated by the Apex Court in **Bharti Cellular Limited's case [(2011) 330 ITR 239]**. The Apex Court while discussing the scope of “technical service” had recorded as under:-

“7. The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has

no network in Nainital whereas it has a network in Delhi, the Interconnect Agreement enables M/s. Bharti Cellular Limited to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the “capacity” of each service provider fixed when Interconnect Agreements are arrived at? For example, we are informed that each service provider is allotted a certain “capacity”. On what basis such “capacity” is allotted and what happens if a situation arises where a service provider's “allotted capacity” gets exhausted and it wants, on an urgent basis, “additional capacity”? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasise that these types of matters cannot be decided without any technical assistance available on record.

8. There is one more aspect that requires to be gone into. It is the contention of Respondent No.1 herein that Interconnect Agreement between, let us say, M/s. Bharti Cellular Limited and BSNL in these cases is based on obligations and counter obligations, which is called a “revenue sharing contract”. According to Respondent No.1, Section 194J of the Act is not attracted in the case of “revenue sharing contract”. According to Respondent No.1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute “fees” under Section 194J of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal.

9. In short, the above aspects need reconsideration by the Assessing Officer. We make it clear that the assessee(s) is not

at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian Companies and Multinational Corporations, we are of the view that the cases herein are required to be remitted to the Assessing Officer (TDS).

10. Accordingly, we are directing the Assessing Officer (TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court. Liberty is also given to Respondent No.1 to examine its expert and to adduce any other evidence.”

8. The primary basis whereby the Apex Court had concluded services to be falling under 194J of the Act to be technical services that whether any human intervention was involved in the activity or not. The Apex Court observed that wherever there was human intervention requiring examination of technical data, the same would fall within the definition of technical services and in the absence thereof, the same would not partake the character of technical services. The Apex Court in that case had remitted the matter to the Assessing Officer to examine the technical expert and after examining him adjudicate the matter afresh. In the present case as well from the perusal of the orders of the authorities below, it is not discernible whether there was any intervention of the human element in the services provided to the assessee.

9. Accordingly, while setting aside the orders of the authorities below, the matter is remitted to the Assessing Officer to examine afresh in the light of the observations

made by the Apex Court in **Bharti Cellular Limited's case (supra)**, noted above. Further, the assessing authority shall also examine whether the Provisos inserted in Sections 201 (1) and 201(1A) by Finance Act, 2012 are applicable retrospectively, as urged by learned counsel for the assessee. Since the Tribunal had followed its order of the Jaipur Bench and in such circumstances, it cannot be said that any independent finding has been recorded regarding element of income in this case, therefore, it shall be open for the Assessing Officer to consider the element of income in the transaction as well before passing fresh order in accordance with law. The substantial questions of law stand decided accordingly.”

4. Learned counsel for the parties are agreed that the appeals may be disposed of in terms of the order dated 8.5.2014 passed in ITA No.652 of 2010. Ordered accordingly.

(Ajay Kumar Mittal)
Judge

November 06, 2015
‘gs’

(Hari Pal Verma)
Judge