

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ITA No. 401 of 2015 (O&M)

Date of Decision: 09.10.2018

Pr. Commissioner of Income Tax, Panchkula

.....Appellant

Versus

M/s Uttar Haryana Bijli Vitran Nigam Ltd.

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL, JUDGE
HON'BLE MR. JUSTICE AVNEESH JHINGAL, JUDGE

Present: Mr. Yogesh Putney, Senior Standing counsel
for the appellant.

Mr. K.L. Goyal, Senior Advocate with
Mr. Umang Goyal, Advocate
for the respondent.

AVNEESH JHINGAL, J.

The revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') against the order dated 15.07.2015 of the Income Tax Appellate Tribunal, Division Bench, Chandigarh (for short 'the Tribunal') passed in ITA No. 452/CHD/2014. The assessment year involved is 2008-09.

2. Notice of motion was issued to consider the following substantial question of law:

"Whether on the facts and circumstances of the case, the ld. ITAT was justified in deleting dis-allowance of Rs.371,52,15,673/- made by the Assessing Officer under Section 40(a) (ia) of the Income Tax Act, 1961 on account of non-deduction of TDS on the payment of wheeling charges and the SLDC charges to the HVPNL?"

3. The brief facts necessary for adjudication of the controversy

involved are that respondent-M/s Uttar Haryana Bijli Vitran Nigam Ltd. is a company under the Companies Act, 1956, which is engaged in the distribution of power in the State of Haryana. It purchases electricity from M/s Haryana Power Generation Corporation Limited, Panchkula (HPGCL) and distributes the same to the consumers. The electricity from the source i.e. generation point to the consumers is transmitted through the transmission network of Haryana Vidyut Prasaran Nigam Ltd. (HVPNL). The rates of purchase and supply of electricity are fixed by the Haryana Electricity Regulatory Commission (HERC). Thus, the electricity purchased from HPGCL is transmitted through the distribution points of HVPNL. Respondent makes payment for transmission of electricity to HVPNL on the rates fixed by the HERC. The respondent is thus rendering "technical services" and is earning income within the meaning of Section 9(1) (vii) of the Act and as such duty bound to deduct tax at source. The assessee is making payment to HVPNL on account of transmission charges called 'wheeling charges' and State Load Dispatch Centre charges (SLDC). According to the Assessing officer, the assessee should have deducted TDS on wheeling charges and SLDC paid by it to HVPNL. Since the assessee had not deducted TDS from the payments made by it to HVPNL, the Assessing Officer passed order dated 10.12.2010; dis-allowing expenses claimed by the respondent-assessee for wheeling and SLDC charges paid to HVPNL for the assessment year 2008-09. Aggrieved of the assessment order, the respondent filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 14.02.2014 the appeal was partly allowed but dis-allowance of the expenses claimed by respondent on wheeling and SLDC charges was set aside.

Tribunal vide order dated 15.07.2015 following the earlier orders in the case of assessee for the assessment years 2006-07 and 2007-08 and relying upon decision of Jaipur Bench of the Tribunal in the case of ***Jaipur Vidyut Vitran Nigam Limited Vs. ITO*** in ITA Nos.127 to 131/JP/2009 dated 30.04.2009, dismissed the appeal. It was held that there was no liability of the respondent to deduct tax at source on transmission/wheeling charges and SLDC charges under Section 194-J of the Act. Hence, the present appeal by the revenue.

5. Learned counsel for the revenue submitted that identical question has been decided by this Court in ITA No. 652 of 2010 decided on 08.05.2014. In the said ITA, the orders of the lower authorities were set aside and the matter was remanded back to the Assessing Officer for decision afresh in the light of the observation of the Supreme Court in the case of **CIT, Delhi Vs. Bharti Cellular Limited** (2011) 330 ITR 239. The relevant portion of the order is extracted below:

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 (supra)**. 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.

6. Considering decisions referred above, the order of lower authorities with regard to dis-allowance of expenses claimed of Wheeling and SLDC charges are set aside. The matter is remanded back to the A.O. to decide the said issue afresh in view of the observations in ITA No. 652 of 2010.

7. The substantial question of law is decided accordingly. The appeal is disposed of accordingly.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

09.10.2018
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Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No