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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 58/2018**

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-2

..... Appellant

Through: Mr. Rahul Chaudhary and
Ms. Vibhooti Malhotra, Advocates.

versus

M/S.BHARTI BT INTERNET LTD.

..... Respondent

Through: Ms. Kavita Jha and Mr. Vaibhav
Kulkarni, Advocates.

AND

ITA 59/2018

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-2

..... Appellant

Through: Mr. Rahul Chaudhary and
Ms. Vibhooti Malhotra, Advocates.

versus

M/S.BHARTI BT INTERNET LTD.

..... Respondent

Through: Ms. Kavita Jha and Mr. Vaibhav
Kulkarni, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

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24.01.2018

CM No.2136/2018 in ITA 58/2018 *(for exemption)*

CM No.2137/2018 in ITA 59/2018 *(for exemption)*

Allowed subject to just exceptions.

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The Revenue in its appeal against an order of the Income Tax Appellate Tribunal (hereinafter referred to as the 'ITAT') challenges the decision with respect to the sum brought to tax under Section 40(a)(i) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

The question of law urged is whether the charges paid by the assessee to the MCI WorldCom Asia P. Limited (a non-resident overseas Singapore based entity) ought to have been subjected to tax deduction?

The Assessing Officer ('AO') had, upon consideration of the material placed, held in the assessment order that the sum of ₹ 59,40,081/- for the assessment year ('AY') 2001-02 and ₹ 64,28,065/- for the AY 2002-03 had to be subjected to deduction and brought to tax. The assessment order does not contain any reasons in support of the conclusions. The CIT(A) differed with the view of the AO and after analysing certain provisions of the master service agreement held that the amount was not liable to tax by relying upon the decision of this Court in the case of *Commissioner of Income Tax vs. Estel Communications (P) Ltd.*, 318 ITR 185 (Del.). In that decision, the question involved was payment of amounts on account of bandwidth allocation by overseas service provider. The Court notices that there was no privity of contract between the overseas service provider and the assessee's subscribers; the assessee had merely retailed the services. The Revenue's appeal was rejected by the

ITAT, which quoted from the decision of the Appellate Commissioner and analysed the judgment of this Court in the case of *C.I.T., Delhi vs. Bharti Cellular Ltd.*, 319 ITR 139 (Del.).

The Revenue urges that the impugned order is plainly in error because the judgment in the case of *Bharti Cellular Ltd.* (supra) was carried in appeal and the Supreme Court held that as to whether the income by way of amounts paid to the overseas entities or non-residents fulfils the character of “fee for technical services” (under Section 9(1)(vii) of the Act), is a fact dependent exercise. Counsel for the respondent-assessee submits that in the present case, the master service agreement clearly contemplates not merely inter connection charges that are payable but other payments too which include service payments. Therefore, it is stated that the ITAT fell into error in merely following the decision of Delhi High Court in *Bharti Cellular Ltd.* (supra), which was not approved in toto.

Counsel for the respondent-assessee submitted that the issue is no longer *res integra* and cannot be said to have not been covered by the decision in the case of *Bharti Cellular Ltd.* (supra). It is submitted that in the case of *Bharti Cellular Ltd's case* (supra) by the Supreme Court, the final ruling went in favour of the assessee and no appeal was preferred.

The decision in *Bharti Cellular Ltd's case* (supra) pertinently states as under:-

“6. The question basically involved in the lead case is:

whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to examine the meaning of the words "fees for technical services" under Section 194J read with clause (b) of the Explanation to [Section 194J](#) of the Income Tax Act, 1961, ['Act', for short] which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of [Section 9\(1\)](#) of the Act. Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in [Section 9\(1\)\(vii\)](#) read with Explanation 2 comes in between the words "managerial and consultancy services".

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."

In the present case the relevant provisions of the master service agreement have been extracted by the CIT(A). The relevant conditions state that "service" would mean "the specific telecommunication service rendered by WorldCom outside India to the customer and as identified in the relevant Service Order" (Clause 1.1). Service Equipment too is defined. Charges and payments are dealt with in the following manner:-

“Clause 4: Charges and Payment: Charges shall commence to accrue with respect to a Service as follows:

4.2.2 Activation charges shall accrue on the Acceptance Date and may be invoiced by WorldCom on or at any time thereafter.

4.2.3 Service Charges shall accrue from the relevant Acceptance Date and may be invoiced by WorldCom monthly in advance. Service provided for part of a month will be charged on a pro-rata basis.

"Activation Charges" shall mean the one time charge for the activation of a service payable.

"Call Charges" shall mean the charges payable by the customer to WorldCom for switched telecommunications/services.

"Charges" shall mean the Call Charges and/or Activation Charge and/or Service charges payable by the customer to WorldCom in respect of a service and as the same are set out in the relevant service order and revised from time to time.

"Service Charge" shall mean the monthly service charge for a data service payable.”

The agreement also places certain restrictions upon the re-sale of the services to the third parties which are provided by the MCI Worldcom Asia P. Limited. If these contractual conditions are taken into account, it is quite apparent that the nature of services in issue is not merely internal bandwidth connectivity but whole range of other services. The payments for these services are determined by relevant “service orders”, which are agreed to and refused from time to time.

In the present case, clearly the Revenue did not examine as to whether the services or any of them fulfil the character of “fee” so as to result in taxability of the payment in India, in terms of Section 9(1)(vii) of the Act.

In these circumstances, the Court is of the opinion that the impugned order cannot be sustained. It is hereby set aside. The matter is remitted to the Assessing Officer, who shall proceed to examine the materials before him and call for additional expert or technical advice, as is necessary, having regard to the declaration of law in the case of *Bharti Cellular Ltd.* (supra).

The appeals are allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 24, 2018

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