



Tax Case Appeal Nos.831, 832, 833, 836 and 838 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.05.2024

CORAM

THE HON'BLE Mr. JUSTICE **R. MAHADEVAN**

AND

THE HON'BLE **Mr. JUSTICE MOHAMMED SHAFFIQ**

Tax Case Appeal Nos.831, 832, 833, 836 and 838 of 2016

Commissioner of Income Tax,
Chennai.

.. Appellant in all T.C.As

Vs.

M/s.Dishnet Wireless Limited,
Spencer Plaza, 5th Floor,
769, Anna Salai,
Chennai - 600 002.
(PAN:AAACD5767E)

.. Respondent in all T.C.As

Tax Case Appeals filed under Section 260-A of the Income Tax Act, 1961 against the common order dated 20.07.2015 passed by the Income Tax Appellate Tribunal, Madras 'D' Bench, Chennai, in I.T.A.No.322/Mds/2014, I.T.A.No.323/Mds/2014, I.T.A.No.324/Mds/2014 and I.T.A.No.327/Mds/2014, I.T.A.No.329/Mds/2014 respectively.

For Appellant in
all TCAs

: Mr.B.Ramaswamy
Senior Standing Counsel for Income Tax

For Respondent in
all TCAs

: Mr.Vishnu Mohan



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COMMON JUDGMENT

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R. MAHADEVAN, J.

These tax case appeals are preferred by the appellant/Revenue, calling in question the correctness of the common order dated 20.07.2015 passed by the Income Tax Appellate Tribunal, Madras 'D' Bench, Chennai, in the respective I.T.A.No.322/Mds/2014, I.T.A.No.323/Mds/2014, I.T.A.No.324/Mds/2014, I.T.A.No.327/Mds/2014 and I.T.A.No.329/Mds/2014, by raising the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the proceedings under Sections 201(1) and 201(1A) cannot be sustained on the ground that the tax need not be deducted at source under Section 194J by the assessee while paying roaming charges to the telecom operators since roaming charges paid by the assessee is not a fee for technical services as no human intervention is required for providing the connection while roaming.

(ii) Alternatively, whether the Tribunal having held that the human intervention is necessary for maintenance of the telecom system that provides roaming facility, is the Tribunal right in concluding that such human intervention is not sufficient to treat the payment as fee for technical services mandating deduction of tax at source under Section 194J.



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2. The succinctly stated facts are as under:

2.1. The respondent/assessee is engaged in the business of providing pre-paid telecommunication services, including cellular service, data services, and mobile services, through various telecom networks across the country. As part of its business operations, the respondent enters into roaming agreements with other telecom service providers to facilitate its subscribers in availing roaming facilities when they travel outside the home network area. During the course of its business transactions, the respondent has made payments to other telecom operators in the form of roaming charges without deducting Tax at Source (TDS) under Section 194J of the Income Tax Act, 1961 (in short, "the Act"). The roaming charges represent the consideration paid by the respondent to the host operators for providing telecommunication services to its subscribers, while they are outside the home network coverage area. According to the respondent, the roaming services offered by the host operators are standard automated services and they do not classify the roaming charges paid to the host operators as fees for technical services and hence, there is no obligation to deduct tax at source under Section 194J of the Act.

2.2. While so, based on the inspection report and upon perusal of the books of accounts, the assessing officer passed separate orders under section



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201(1) / 201(1A) of the Act, for the assessment years from 2007-08 to 2011-12, after having found that the respondent had failed to deduct TDS on the roaming charges paid to other telecom operators. According to the assessing officer, the roaming charges paid by the respondent constituted fees for technical services rendered by the payee telecom operators, thereby attracting the provisions of Section 194J of the Act, which mandates deduction of tax at source.

2.3. Aggrieved by the assessment orders, the respondent filed appeals before the Commissioner of Income Tax (Appeals) (in short, "CIT(A)"). By a common order dated 30.12.2013, the CIT(A) confirmed the orders of the Assessing Officer, on the premise that human intervention is necessary and unavoidable in the process of providing roaming services by the other telecom operators to whom the respondent had paid the roaming charges. The relevant portion of the order is extracted below for ready reference:

" 8.3. Roaming charges:-

8.3.1 During the assessment year under reference, the appellant has booked Rs.49,26,563/- under the head 'Roaming charges', which was not considered for deducting tax. Similarly for other assessment years in appeal, the appellant booked amounts under "roaming charges". The amount booked under 'Roaming charges' has been paid by the appellant to sundry Telecom service operators for understanding what roaming charges mean, the appellant itself has defined 'Roaming' as follows viz., 'Roaming means an arrangement whereby a subscriber of a cellular phone uses cellular services outside the home network'. The subscriber of a service provider who is not 'roaming' gets services from his home operator, while a subscriber who is roaming will get services from both, the



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host operator and the home operator. The host operator charges the home operator for providing telecom services to the subscriber of the later. Roaming services are made available to a subscriber by the host operator by virtue of the roaming arrangement entered into by and between the home operator and the host operator for an agreed charges to be paid by the home operator to the host operator. Thus, in essence, roaming charges are payments being made by the appellant to the other sundry telecom operators as consideration for telecom services provided by the said other telecom operators to the subscribers of the appellant. The appellant calls roaming services offered by the host operators as "STANDARD AUTOMATED SERVICES". The appellant refuses to recognize the roaming charges paid to the host operators as "fees for technical services" and hence not considered same for deduction of tax as required by Section 194J. Whereas the assessing officer has treated the roaming charges as fees for technical services hereinafter called 'FTS' for the sake of brevity, and held that the appellant is liable to deduct tax on FTS. As the appellant failed to deduct tax on the FTS, the AO has declared the appellant as assessee in default and passed the impugned orders for the concerned assessment years. The appellant has argued that the roaming charges do not qualify for TDS as human intervention is not involved for rendering the roaming service. According to the appellant, roaming services are provided without the aid of human skills. Therefore, roaming services in the case are not technical services by human skills. In short, the appellant says that the charges paid for the technical services rendered by human beings alone would qualify as FTS and became eligible for deduction of tax.

8.3.2. Now in the context when the appellant refuses to recognize the roaming charges as FTS, it is to be analyzed to find out whether the roaming charges in question are subject to be taxed or not. The common sense will, without much difficulty and complexity, make it obviously clear that the roaming charges from subscribers will be liable to be taxed in the hands of the home operators as they constitute taxable income in their hands. As far as the host operator is concerned, it is an income received from the appellant and the same is taxable. The intention of TDS provisions is to expedite the collection of tax at the earliest point of time. When the amount viz., roaming charges becomes liable to



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be taxed when it reaches the hands of the payee, naturally the same amount will be liable for tax deduction (TDS) in the hands of the payer as well. It is to be noted that the payer deducts and pays the tax from the amount on behalf of the payee only before parting with the amount. Thus it is very much clear beyond doubt that the roaming charges are taxable and therefore tax is to be deducted by the giver as the same shall constitute taxable income in the hands of the payee, the moment it reaches him.

8.3.3. Without prejudicing what is stated in the above paragraph, the issue may be examined in the light of the definition for FTS as provided in the explanation to Section 9(1)(vii) of the I.T.Act, 1961 which reads as under:-

'For the purposes of this clause, fees for technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or life project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries".'

8.3.4. It may be noted that there is no mention about human intervention as a pre-condition in the above explanation. Whether there is involvement of human being or not, if the service is of technical steering then the consideration paid for such service shall qualify to be FTS. Even otherwise also the roaming service provided by the host operators to the appellant is effectively possible only when there is constant, 24 hrs, perennial and exclusive standby arrangement with the backing support of technically qualified persons is maintained in live and serviceable condition by the host operator. So the presence of human intervention in some form or other cannot be altogether eliminated. In the roaming service in question, there is always present "in-absentia human intervention", atleast in trouble free times. But when the trouble comes human intervention will come to play a major role along with technology. Therefore, in the case of roaming service, technology and technically qualified persons cannot



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be isolated.

8.3.5. Human intervention is bound to be there in the form of passive or dormant supervision even in trouble free times. A close scrutiny would be able to segregate two elements from the explanation 2 to Section 9(i)(vii) of the IT Act viz., (1) purely technical service without the association of personnel and (2) service of technical person (service with the association of technical person) either of which if rendered for a consideration, such consideration shall have all the characters of FTS. Therefore, the presence of human intervention is not a pre-condition for the consideration to qualify as FTS. In the light of the above discussions, I am of the considered view that the roaming charges paid by the appellant in this case shall by all means qualify to be characterised as FTS which is subject to tax deduction by the appellant, such FTS has been paid to the host operators in pursuance of a contract for service since the appellant failed to deduct tax from the roaming charges of Rs.49,26,563/- paid to sundry host operators, the AO has rightly held the appellant as assessee in default and passed the impugned order dated 27.03.2023. The above proposition is applicable to all the assessment years in question. Hence, I am not inclined to interfere with the orders of the AO in respect of all assessment years in appeal.

8.3.6. The ARs contended that the issue with regard to tax withholding obligation under Section 194J of the Act on telecom services has already been settled by the Jurisdictional High Court in the case of *M/s.Skycell Communications and Another Vs. DCIT 251 ITR 53*. It was also argued that it is a well settled legal position that the characterization of a payment must be done having regard to the dominant purpose/intention of the payment. Reliance was placed on the decision in the case of *CIT(TDS) Vs. Glenmark Pharmaceuticals Limited 324 ITR 199 (Bom.)*. The ARs also relied on the following case laws:-

1. *CIT Vs. Eskel Communications Pvt. Ltd., 217 CTR 102 (Delhi)*.
2. *Bharti Cellular Limited (2008) - TIOL - 557 (Delhi)*
3. *Siemens Limited Vs. CIT (TS-51-ITAT-2013) (Mumbai)*



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Tribunal).

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The appellant tried to argue that for classifying the services as FTS, human intervention is a must. All the contentions raised by the appellant and the case laws relied on are all taken care of in the discussion made above and are rejected."

2.4. Aggrieved by the aforesaid order passed by the CIT(A), the respondent filed appeals before the Income Tax Appellate Tribunal (in short, "the Tribunal").

2.5. The Tribunal, after considering the arguments advanced on both sides and the materials available on record, held that even though human intervention is necessary for routine maintenance of the system and machineries, it is not required for connecting roaming calls. Relying on the expert opinion obtained from the Sub-Divisional Engineer of BSNL, which clarified that human intervention is required for establishing the initial physical connectivity and configuration; and once the necessary configurations are completed, no human intervention is required for connecting roaming calls, the Tribunal further observed that when a subscriber travels outside the home network area, the call gets connected automatically without any human intervention due to the configuration of the software systems in the respective service providers' networks. Ultimately, the Tribunal concluded that since the roaming services are provided without direct human involvement, the roaming charges paid by the respondent cannot be considered as fees for technical services under Section 194J of the Act.



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Consequently, the Tribunal held that the levy under Section 201(1) and interest under Section 201(1A) cannot be sustained. For better appreciation, the relevant portion of the order passed by the Tribunal is extracted below:

"25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. We have gone through the judgment of Apex Court in Bharti Cellular Limited (supra), The Apex Court after examining the provisions of Section 9(1)(vii) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light of the above judgment of the Apex Court, the Department obtained an expert opinion from the Sub-Divisional S.P. Nos.324 to 333/Mds/15 Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required, as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical service. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to Question No.23:-

"Regarding roaming services as explained to question no.21. Regarding interconnectivity, initially human intervention is required for establishing the physical connectivity and also for doing the required configuration. Once it is working fine, no intervention is required. In case of any faults human intervention is required for taking necessary corrective actions."

In view of the above, once configuration was made, no human intervention is required for connecting the roaming calls. The subscriber can make and receive



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calls, access and receive data S.P. Nos.324 to 333/Mds/15 and other service without any human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for connecting roaming call, no human intervention is required except initial configuration in system. This Tribunal is of the considered opinion that human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls. Therefore, as held by the Apex Court in Bharti Cellular Limited (supra), the roaming connections are provided without any human intervention and therefore, no technical service is availed by the assessee. Therefore, TDS is not required to be made in respect of roaming charges paid to the other service providers. Accordingly, the orders of the lower authorities are set aside in respect of provision for site restoration expenditure and roaming charges. However, in respect of year-end provision, the issue is remitted back to the file of the Assessing Officer. The issue of limitation raised by the assessee for passing order under Sections 201(1) and 201(1A) is also remitted back to the file of the Assessing Officer.

26. In the result, appeals of the assessee are allowed for statistical purposes. Since the appeals are allowed, the stay petitions of the assessee become infructuous and dismissed."

2.6. Aggrieved by the order so passed by the Tribunal, the appellant/Revenue has filed the present tax case appeals.

3. The learned senior standing counsel for the appellant/Revenue would contend that the carriage of calls from one network to another network requires constant monitoring and human intervention by technical experts to ensure seamless roaming services without faults or consumer complaints. Taking note of



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the same, the Assessing Officer concluded that human intervention is necessary to execute the process of providing roaming services by other telecom operators to whom the assessee paid roaming charges, which was affirmed by the CIT(A). However, the Tribunal erred in holding that the roaming charges paid by the respondent / assessee to other telecom operators did not attract TDS under Section 194J of the Income Tax Act, on the ground that no human intervention is required for providing roaming connectivity.

4. The learned senior standing counsel would further contend that the assessee has violated the provision of Chapter XVII-B of the Act, filing of TDS statement in respect of deduction made out of the payments other than roaming charges, provisions etc., which fall under other sections of chapter XVII-B inviting the consequence of Section 201 of the Act. Roaming charges from one mobile operator to the other for providing local service whenever a customer goes into the alien network on the basis of pre-existing agreement. The object of the agreement was to obtain the benefit of the technical assistance for running the business. The fees are paid to the payee for rendering technical services with men and materials. This postulates that the contract for the supply of technical services for predetermined fees depending on the use of alien network on a time-sharing basis.



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5. The learned senior standing counsel would further point out that the roaming charges paid qualify as "fees for technical services" under Section 194J, necessitating TDS deduction by the assessee. Alternatively, it is submitted that even if human intervention is considered necessary only for maintenance of the telecom system providing roaming facility, such human involvement is sufficient to treat the roaming charges as fees for technical services attracting TDS under Section 194J. Adding further, the learned senior standing counsel relies upon the National GSM Roaming Agreement provided by the respondent itself, which acknowledges the need for human intervention in various aspects of roaming services, such as discussing impacts and taking necessary actions like testing or administrative activities upon any change, providing English-speaking customer care operators to assist roaming subscribers, exchanging roaming information and informing respective subscribers, addressing network faults through coordination between customer care services and technical experts, handling issues related to lost/stolen SIM cards or mobile equipment, and resolving billing inquiries through customer care services. It is submitted that whenever human intervention is involved, as established by the abovementioned clauses of the Roaming Agreement, it has to be considered a technical service under Section 9(1)(vii) of the Income Tax Act. Furthermore, the learned senior standing counsel highlights that the intention behind TDS provisions is to expedite tax collection at the earliest opportunity. Thus, when the amount of roaming charges becomes subject



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to taxation upon reaching the hands of the payee, it naturally follows that the same amount will be liable for TDS in the hands of the payer as well. Additionally, the learned senior standing counsel asserts that within roaming services, there is a continuous provision of technical expertise and human intervention, spanning 24 hours. Human skill and support are exclusively provided through standby agreements, backed by technically qualified personnel, maintained in operational condition by the host operator.

6. Finally, the learned senior standing counsel highlights that the legal position has been well-settled through various judicial precedents that the term "technical services" has a broad connotation, includes human intervention and professional services, and must be interpreted accordingly. The deduction of tax should occur at the time of crediting the sum to the payee's account or at the time of payment, whichever is earlier. The term 'professional services' includes services provided in various professions, such as the medical profession, and applies even when these services are rendered within a hospital setting. The learned senior standing counsel, reiterating Section 9(1)(vii) of the Income Tax Act, submits that whenever there is human intervention, it should be considered as both technical and human services. It is not limited to payments to individuals who are professionals themselves; it can also apply to corporate entities, like hospitals, offering services connected to the specified professions.



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7. In support of his contentions, the Learned Standing Council further relied upon the following decisions:

7.1 The learned senior standing counsel also referred to the decisions (a) **Prabhudas Damodar Kotecha Vs. Manhabala Jeram Damodar** (AIR 2013 SC 2959); **State of Bombay Vs. Hospital Mazdoor Sabha** (AIR 1960 SC 610); and **Rohit Pulp & Paper Mills Ltd. Vs. Collector of Central Excise, Baroda** (AIR 1991 SC 754) to drive home the principle that the principle of Noscitur a Sociis is not to be applied when the meaning of the words are clear and can be attributed wide meaning.

7.2. Interpretation of 'Technical Service':

7.2. (a) **M/s. Continental Construction Ltd Vs. Commissioner of Income Tax, Central** (AIR 1992 SC 803) : The word 'technical service' has a very broad connotation and it has been elsewhere in the statute also so widely as to comprehend professional service vide Section 9(1)(vii).

"27. But, even assuming that there could be some difference of opinion on the above issue, there can be no doubt at all that, under the contract, technical services were rendered by the assessee to the foreign Government. In our opinion, the attempt of Sri Ahuja to differentiate technical services rendered to the assessee by its employees and technicians from technical services rendered by the assessee to a foreign constituent and urge that the latter alone can qualify for relief under Section 80-O on the ground that the project in question was a turnkey project which has succeeded before the High Court, proceeds on an unduly narrow interpretation of the section. In our view, the assessee was undoubtedly rendering services to the foreign Government by executing the water



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supply project. These services were no doubt technical services, as they required specialised knowledge experience and skill for their proper execution. The argument seems to be that the services in the present case will not be covered by the section because there was no privity of contract between the employees of the assessee who contributed their technical skill and the foreign Government. We think this argument cannot be accepted. The assessee is a company and any technical services rendered by it can only be through the medium of its employees, skilled and unskilled, and, even if the contract had not related to a turnkey project, the assessee's employees would have been answerable only to the assessee and none else though, perhaps, in such an event, the other party to the contract may have retained a larger degree of control and supervision in the execution of the contract Even where the contractor is an individual or firm and not a company, a contract of this magnitude can be executed only through the medium of employees or other personnel engaged by the assessee. The facts that, physically speaking, it is only such employees that render services and that, so far as they are concerned, they render services only to their employer and not to the other contracting party are in no way inconsistent with, or repugnant to, the notion that, so far as the foreign Government is concerned, it looks only to the assessee for the rendering of the technical services under the contract. The High Court has pointed out that a person who manufactures a television set ordered by another cannot be said to render technical services to the latter. In our view, that analogy is not apposite in the context of a contract of the nature, magnitude and specialisation with which we are concerned. Where a person employs an architect or an engineer to construct a house or some other complicated type of structure such as a theatre, scientific laboratory or the like for him, it will not be incorrect to say that the engineer is, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks an opinion from him on some issue, the advice provided by the lawyer will be a piece of technical service provided by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law. Sri Ahuja tried to negative this line of thinking by urging that "professional services" have



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been brought within the scope of Section 80-O only by an amendment by the Finance (No. 2) Act, 1991 and that, too, w.e.f. 14-1992 which is proposing to substitute the word "technical or professional services" in place of the word "technical services" now used in the section. It seems to us that this amendment may be only of a clarificatory nature. The expression "technical services" has a very broad connotation and it has been elsewhere in the statute also so widely as to comprehend professional services : vide Section 9(1)(vii), referred to earlier. But we need not digress on this aspect for two reasons. Firstly, whatever may be the position regarding other "professional services", there can hardly be any doubt that services involving specialised knowledge experience and skill in the field of constructional operations are "technical services". The Board's guidelines, to which reference is made later, specifically say so. Secondly, the question whether "professional services" would be "technical services" or not has no impact on the point we are trying to make viz. that in order to say that a person is rendering such services to another, it is not necessary that the services should be rendered by the former personally and not through the medium of others. For the reasons discussed above, we have come to the conclusion that, under the contracts in question, the assessee had made available technical information to the foreign Government for use outside India and had also rendered technical services to the foreign Government outside India."

7.2. (b) Central Board of Direct Taxes Vs. Oberoi Hotels (India)

(P)Ltd. [(1998) 97 Taxman 453 (SC)]: 'Technical services' include professional services.

" 24. There is no gainsaying that running a well equipped modern hotel is no ordinary affair. One needs a great deal of expertise skill and technical knowledge for the purpose. If we examine the agreement, it provides for rendering of technical services and also professional services for obtaining of Hotel Soaltee, a foreign enterprise. CBDT fell into an error in considering particularly the clause in the agreement which provided for operation of the Hotel Soaltee by the respondent. The agreement has to be seen as a whole and so



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examined it is quite apparent that it provided for rendering of not only technical services for operating the hotel of the foreign enterprise but also providing for professional and other services in connection with operating of the hotel. Section 800 was enacted with the twin objects of encouraging the export of Indian technical know-how and augmentation of foreign exchange resources of the country. We have seen above that after the amendment of Section 800 by Finance (No. 2 Act of 1991) the words "technical or professional services" have been inserted in place of the words "technical services". But this Court in Continental Construction Ltd. case took the view that the amendment was only of clarificatory nature and the term "technical services" always included within it professional services as well. This Court has gone even to the extent that when a person consults the lawyer and seeks his opinion on certain issue the advice rendered by the lawyer would be a piece of technical service. Considering the scope of the agreement and the width of Section 800 we are of the opinion that the agreement provides for "information concerning industrial, commercial or scientific knowledge, experience or skill made available" by the respondent to the foreign enterprise for running of the Hotel Soaltee. Mr. Dave is right when he submits that in view of the judgment of this Court in Continental Construction Ltd. case Circular No. 187 dated December 23, 1975 of the CBDT may perhaps require certain changes so as it is in conformity with Section 800 of the Act. In J.K. (Bombay) Ltd. case Delhi High Court was of the view that remuneration obtained by running or managing a foreign company would be in the nature of profits while Section 800 deliberately restricted itself to income by way of royalty, commission or fees and included other types of remunerations. We do not think that this is a correct statement as the royalty, commission or fees can be in terms of percentage of profits earned by the foreign enterprise on account of services rendered by the Indian Company. It is substance of the case which matters and not the name. The view taken by the Bombay High Court in Godrej and Boyce Mfg. Co. Ltd. case MANU/MH/0271/1992: [1993] 203 ITR 947(Bom) commends to us. As it is more in consonance with the provision of Section 800 and the object which it seeks to achieve. Karnataka High Court in the case of HMT Ltd. MANU/KA/0141/1990 : [1991] 188 ITR 457(KAR) has rather taken a narrow view of the provision of Section 800. Applying the principles of law as laid down by



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Court in Continental Construction Ltd. case and the term "technical services" which included "professional services" and the nature of services agreed to be rendered by the respondent to the foreign enterprise we are of the view that CBDT was not right in not granting approval of the agreement to the respondent under Sections 800 of the Act. We have also seen the scope of circulars issued by the CBDT and had these are to be acted upon in various decisions of this Court. In the matter of the nature as in the present case and the legislative intention to give relief we have to draw interpretation to the term "technical services" which includes "professional services" as well. Basic purpose of Section 800 is the spread by an Indian assessee of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill of the assessee for use outside India and it that process to receive income to augment the foreign exchange resources of the country. The assessee can also make available to foreign enterprise technical and professional services expertise of which it possesses for earning foreign exchange for the country."

7.2. (c) Goa Carbon Ltd. Vs. V.M.Muthuramalinga [(2003) 126

Taxmann 313 (Bom)] : Interpretation of the term 'technical service'.

7. As we discussed earlier, the entire amount of 183,000 Canadian dollars will fall under the definition of "royalty" as meant under Explanation 2 to Section 9 of the Income Tax Act. Learned counsel for the Department, however, has strongly contended that the 20 per cent, rate is only applicable to technical engineering consultancy charges amounting to 12,000 Canadian dollars because, according to him, royalty for transfer of drawings and designs alone attracts tax at the rate of 20 per cent. All other two heads, namely, for transfer of technology and technical engineering consulting charges will come under technical services. As indicated above, the Explanation to Clause (vii) of Explanation 2 to Section 9 of the Income Tax Act has clearly defined what is "technical services". "Technical services" have been defined as managerial, technical or consultancy services including the provision of services of technical or other personnel. But the agreement in question does not provide initial services in India by the foreign



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company. Therefore, it is very difficult to accept the argument of learned counsel for the Department. Barring the royalty for transfer of drawings and designs, what has been provided in the contract is technical services. As we indicated earlier, what are the services to be rendered by the company in India is only sending two persons for 15 days just to start the machinery and go. In the light of the express provisions made in the agreement, it is difficult to accept the contention of counsel for the Department that royalty for technical engineering consulting charges is for technical services. As we read the agreement in toto, we cannot ascribe to such an interpretation as was attempted to be made out by counsel for the Department. In the light of the aforesaid discussion, we have no hesitation to hold that what is covered by the agreement is only royalty for technology or transfer of technology by the foreign company to the petitioner and what is stipulated to be paid is the consideration for the transfer done and not as fee for technical services. As a consequence of that, that payment attracts Income Tax only at the rate of 20 per cent. Since no issue has been raised before us for the refund, we are not passing any order on that prayer clause."

7.3. Requirement of Human Element in Technical Services:

7.3 (a) Commissioner of Income Tax Vs. Bharti Cellular Ltd. [(2008) 175 Taxmann 573 (Delhi)] : Human intervention is necessary to categorize technical services as FTS.

7.3. (b) Commissioner of Income Tax Vs. Bharti Cellular Ltd. [(2010) 193 Taxmann 997 (SC)] : The extent of human intervention must be determined before applying the 'human intervention' test postulated by the Delhi High Court.

7.3. (c) Commissioner of Income Tax, TDS, Bangalore Vs. Vodafone South Ltd. [(2016) 72 Taxmann.com 347 (Karnataka)] : Human



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intervention is essential to tax payment as fees for technical service.

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8. *Per contra*, the learned counsel appearing for the respondent submits that during the pendency of the appeals, certain developments have taken place regarding the status of the respondent-Company. He states that the respondent was undergoing Corporate Insolvency Resolution Process (CIRP) under the provisions of the Insolvency and Bankruptcy Code, 2016. Mr.Vijaykumar V.Iyer had been appointed as the Resolution Professional of the Company. Furthermore, he submits that pursuant to the common order passed by the National Company Law Tribunal, Mumbai Bench on 09.06.2020, the resolution plan submitted by M/s.UV Asset Reconstruction Company has been approved. This plan has been published and uploaded on the website of NCLT on 18.06.2020, and the CIRP stands concluded. He further submits that the implementation of the resolution plan, as sanctioned by the NCLT, Mumbai, is subject to certain conditions precedent. He points out that the present proceedings arose from the demand raised by the Commissioner of Income Tax, Chennai, pertaining to the period before the insolvency commencement date (i.e., 19.03.2018) of the Company. Additionally, he states that purported dues towards the appellant would have been in the nature of operational debt under the provisions of the code, being dues arising under income tax laws and payable to a Government authority. As per the provisions of the Code, all creditors of the Company are required to



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submit claims regarding dues against the company for the period before the insolvency commencement date. The learned counsel further states that paragraph No.6.7.1 of the Approval Order deals with the reliefs and confessions, and the following relief has been granted by the NCLT under the resolution plan "subject to the condition that these shall pertain to any inquiries, investigations, proceedings, suits, claims, disputes, etc., only in relation to the period prior to the approval date and not thereafter." Upon approval of the resolution plan, all the proceedings and claims that pertain to the period before the NCLT approval date shall stand withdrawn and dismissed, and liabilities thereunder extinguished. Accordingly, the current proceedings and the underlying demand/claim of the appellant have become infructuous and should stand dismissed in terms of the approval order. In support of his contentions, the learned counsel cites the following judgments:

(i) In the case of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*** [Civil Appeal No.8766-67 of 2019], the Apex Court held that in terms of Section 31 of the Code, once a resolution plan is approved, it is binding on all stakeholders to allow the resolution applicant to run the company with a fresh slate. The Apex Court recognized that a resolution applicant cannot be saddled with new claims after the resolution plan has been approved, as the resolution applicant cannot begin the operations of the corporate debtor with a fresh slate. Therefore, the demand/claim subject matter



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of the present appeals cannot survive in the light of the aforementioned developments.

(ii) In the light of Section 238 of the Code, which stipulates that the provisions of the Code shall have an overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. In this regard, the learned counsel referred to the judgment of the Apex Court in the case of ***P.R. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd.,*** (SLP No.6483 of 2018, dated 10.08.2018). The Apex Court held that having regard to Section 238 of the Code, the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act, 1961.

9. The learned counsel appearing for the respondent, on facts, reiterating the submissions made before the Tribunal, would state that roaming is a service provided by cellular providers that allows customers to automatically connect and receive voice calls without human intervention when travelling to different telecom circles or outside the country. The roaming service enables subscribers to make and receive voice calls, access data, and other services seamlessly in different geographical areas without manual intervention. The roaming agreements between telecom operators facilitate automatic connectivity for subscribers when they travel outside their home network area. He would further



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submit that the Expert opinion from a Sub-Divisional Engineer of BSNL clarifies that roaming services do not require continuous human intervention once the necessary configurations are set up. Human intervention is primarily needed for system configurations and maintenance, not for connecting calls during roaming, as the system automatically handles the connections. The learned counsel would highlight that roaming charges are payments made by the assessee to other telecom service providers for technical services, which are then utilized by subscribers during roaming. The argument is made that the roaming charges should not be categorized as fees for technical services, as the service is provided without continuous human intervention once the initial configurations are in place. He would further argue that the roaming charges should not be considered technical services, as the automatic connectivity provided during roaming does not require ongoing human intervention for call connections. In support of his contentions, the learned counsel has relied upon the following judgments:

(i) Godfrey Phillips India Ltd., Vs. State of U.P. [(2005) 2 SCC 515]

(ii) Commissioner of Income Tax Mumbai Vs. Kotak Securities Ltd., [(2016) 11 SCC 424]

(iii) Director of Income Tax Vs. A.P.Moller Maersk SA [(2017) 5 SCC 651]

(iv) Commissioner of Income Tax Vs. Dakshin Haryana Bijli Vitran Nigam [(2015) SCC Online P&H 18645)]



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(v) Commissioner of Income Tax, Kolkata Vs. Media World Wide Pvt. Ltd., [I.T.A.No.23 of 2015, dated 08.01.2020 (Calcutta High Court)]

(vi) Skycell Communication Ltd. Vs. DCIT [(2001) 251 ITR 53 (Mad)]

(vii) GVK Industries Ltd., V. Income Tax Officer [2015) 11 SCC 734]

(viii) DCIT Vs. Vodafone India Ltd., [(I.T.A.No.6158/Mum/2018)
Judgment dated 27.05.2020 (ITAT, Mumbai)]

(ix) iGATE Computer Systems Ltd., Vs. DCIT [(2015) 67 SOT 296
(Pune), ITAT, Pune]

(x) Asst. Commissioner of Income Tax v. Torry Harris Business Solutions Pvt. Ltd., [(2015 SCC Online ITAT 2986) - ITAT, Bangalore]

(xi) CIT, Delhi V. Bharti cellular [(2008) 175 Taxman 573 (Delhi)]

(xii) CIT, Delhi V. Bharti Cellular [(2010) 193 Taxman 97(SC)]

(xiii) Commissioner of Income Tax (TDS) Vs. Vodafone South Ltd.,
[(2016) 241 Taxman 497 (Kar)]

10. Heard the learned counsel on either side and perused the materials available on record.

11. On 07.08.2020, when the tax case appeals were taken up for hearing,



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the following order came to be passed:

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"The Court was held by Video Conference, as per the Resolution of the Full Court dated 3 July 2020, by Judges at their respective residences and the counsel, staff of the Court appearing from their respective residences.

2. The questions involved in the present set of Appeals are as to whether the Roaming Charges paid by the Respondent/Assessee company to other Companies whose server was used to provide Roaming Mobile facility to the customers amounts to payment under the Head 'Fees for Managerial, Technical, Consultancy Services (MTCS) or not and if so, whether on such payments made by the Respondent/Assessee Company, the Tax Deducted at Source (TDS) was required under Section 194J of the Act or not and in the absence of such TDS made by the Respondent Company, whether the same would be taxable in the hands of the Assessee Company by virtue of Section 201 of the Act or not.

3. As a fact, it was brought to our notice by Mr. Vishnu Mohan, learned counsel for the Respondent/Assessee that the company is subject matter of Insolvency Proceedings under the provisions of IBC Code 2016 and NCLT has recently approved the Resolution of the Committee of Creditors in which the drastic cut for payments to be made to various Creditors, including the Tax Department, has been approved by the NCLT. A copy of that order may be placed on the record of this court.

4. However, we are, prima facie of the opinion that pendency of the proceedings before the NCLT or approval of any such Scheme of Resolution of Insolvency may not affect the answering of the substantial questions of law arising in the present Appeals under Section 260A of the Act, as such Insolvency Resolution may only affect the final recovery part of taxes depending upon the answers to the questions raised in the present Appeals, by the High Court under Section 260A of the Act.

5. According to the learned counsels, after the decision of the Delhi High Court in the year 2008 on the said question, the Hon'ble Supreme Court, in the



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case of CIT v. Bharti Cellular Ltd. [(2010) 193 Taxman 97 (SC)], has made some observations on the decision of the Delhi High Court. According to the information available with the learned counsels, as of now, no other High Court has decided the said questions though such questions might have arisen in the case of various Companies which provide these Mobile Services of connectivity to the Customers.

6. Therefore, prima facie, we are of the opinion that the questions of law involved in the present case are open to debate and answered by the High Court under Section 260A of the Act in the present set of Appeals, irrespective of the approval of Resolution of Insolvency Proceedings by the NCLT.

7. Therefore, both the learned counsels are requested to prepare their case for arguments before this court on merits and they may file a brief synopsis, list of dates and events, etc. and compilation of case laws in both soft and hard copy within 3 weeks from today and on the next date of hearing, the learned counsels may address their arguments on the merits of the case. The Appeals may be disposed of even at the admission stage itself by this court.

8. Put up on 15.9.2020.'

12. The prime contention of the learned counsel for the respondent is that during the pendency of these appeals, the respondent underwent Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016, and a resolution plan submitted by M/s.UV Asset Reconstruction Company (UVARC) has been approved by the National Company Law Tribunal, Mumbai Bench. It is argued that upon approval of the resolution plan, all proceedings and claims pertaining to the period before the NCLT approval date stand withdrawn, dismissed, and the liabilities extinguished, rendering the present Tax Case



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Appeals infructuous.

13. However, this Court is not persuaded by the respondent's contention regarding the resolution plan and the consequent claim of the Tax Case Appeals being infructuous. The present proceedings relate to the respondent's statutory tax liability and the obligation to deduct tax at source under the Income Tax Act, 1961. There is no quarrel with the judgments cited by the respondent, such as Committee of Creditors of ***Essar Steel India Limited v. Satish Kumar Gupta & Ors. and P.R. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd.,*** deal with the overriding effect of the Insolvency and Bankruptcy Code and other laws in specific contexts. However, in the recent judgement, the Hon'ble Apex Court in the case of ***State Tax Officer V Rainbow Papers Limited*** (2022 Livelaw (SC) 743:2023 (9) SCC 545), affirmed again by dismissal of the review petition in ***Sanjay Agarwal V.State Tax Officer*** (2023 Livelaw (SC) 939: 2024 (2) SCC 362), has clearly laid down that the state by operation of law is also a secured creditor when statutory taxes remain unpaid, the claims cannot be ignored while following the Waterfall Mechanism under Section 53 of the IBC in the Resolution Plan and should rank equally with other specified debts. Though lengthy, we feel it necessary to extract relevant portion of the order in ***Rainbow Papers Limited Case*** (*Supra*), which is as under:

"22. Prior to amendment by Notification No. IBBI/2018-2019/GN/REG013 dated 3-7-2018, with effect from 4-7-2018, sub-regulation (1) of Regulation 12 read with sub-regulation (2) provided that a creditor shall submit proof of claim



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on or before the last date mentioned in the public announcement. Sub-regulation (2) was amended with effect from 4-7-2018 and now reads "a creditor shall submit claim with proof on or before the last date mentioned in the public announcement".

23. The Regulations have to be read as a whole and not in a truncated manner and interpreted in the light of the statutory provisions of IBC, as interpreted by this Court. This Court has time and again held that the timelines stipulated in IBC even for completion of proceedings are directory and not mandatory.

24. In this case, claims were invited well before 5-10-2017 which was the last date for submission of claims. Under the unamended provisions of Regulation 12(1), the appellant was not required to file any claim. Read with Regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for. The time stipulations are not mandatory as is obvious from sub-regulation (2) of Regulation 14 which enables the interim resolution professional or the resolution professional, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1) of the said Regulation as soon as might be practicable, when he came across additional information warranting such revision.

25. In this case, at the cost of repetition, it may be noted that there was no obligation on the part of the State to lodge a claim in respect of dues which are statutory dues for which recovery proceedings have also been initiated. The appellants were never called upon to produce materials in connection with the claim raised by the appellants towards statutory dues. The adjudicating authority as well as the appellate authority/Nclat misconstrued the Regulations.

.....

28. The learned Solicitor General of India submitted that a reading of Sections 3(30) and 3(31) IBC makes it clear that the finding of Nclat that the State is not a secured creditor is erroneous and contrary to the clear definition of "secured creditor" under IBC.

29. As argued by the learned Solicitor General, the term "secured creditor" as defined under IBC is comprehensive and wide enough to cover all types of security interests, namely, the right, title, interest or a claim to property,



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created in favour of, or provided for a secured creditor by a transaction, which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.

30. The learned Solicitor General rightly argued that in view of the statutory charge in terms of Section 48 of the GVAT Act, the claim of the Tax Department of the State, squarely falls within the definition of "security interest" under Section 3(31) IBC and the State becomes a secured creditor under Section 3(30) of the Code.

31. Mr Nataraj, Additional Solicitor General submitted that the appellate authority, Nclat has held that the Tax Department of the State does not fall within the meaning of "secured creditor". Nclat has, according to Mr Nataraj, come to such a conclusion on the erroneous premise that Section 48 of the GVAT Act, 2003, cannot prevail over Section 53 IBC.

32. The learned ASG argued that, it was not the case of the appellant that Section 48 of the GVAT Act prevails over Section 53 IBC. It was the case of the appellant that the State falls within the purview of "secured creditor".

.....

48. A resolution plan which does not meet the requirements of sub-section (2) of Section 30 IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a corporate debtor.

51. If the established facts and circumstances require discretion to be exercised in a particular way, discretion has to be exercised in that way. If a resolution plan is ex facie not in conformity with law and/or the provisions of IBC and/or the Rules and Regulations framed thereunder, the Resolution would have to be rejected. It is also a well-settled principle of interpretation that the expression "may", if circumstances so demand can be construed as "shall".

52. If the resolution plan ignores the statutory demands payable to any State Government or a legal authority, altogether, the adjudicating authority is



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bound to reject the resolution plan.

53. In other words, if a company is unable to pay its debts, which should include its statutory dues to the Government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 IBC.

54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

55. In our considered view, Nclat clearly erred in its observation that Section 53 IBC overrides Section 48 of the GVAT Act. Section 53 IBC begins with a non obstante clause which reads:

"53. Distribution of assets.—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority...."

56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date.

57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) IBC defines "secured creditor" to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of "secured creditor" in IBC does not exclude any Government or Governmental Authority.

58. We are constrained to hold that the appellate authority (Nclat) and the adjudicating authority erred in law in rejecting the application/appeal of the



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appellant. As observed above, delay in filing a claim cannot be the sole ground for rejecting the claim.

59. The appeals are allowed. The impugned orders [Tourism Finance Corpn. of India Ltd. v. Rainbow Papers Ltd., 2019 SCC OnLine NCLAT 910] v. [STC v. Chandra Prakash Jain, 2020 SCC OnLine NCLAT 536] are set aside. The resolution plan approved by the CoC is also set aside. The resolution professional may consider a fresh resolution plan in the light of the observations made above. However, this judgment and order will not prevent the resolution applicant from submitting a plan in the light of the observations made above, making provisions for the dues of the statutory creditors like the appellant.”

From the above judgment, it is clear that the statutory dues cannot be ignored and if ignored, the same would not be binding on the authorities and the resolution plan cannot survive. It would also be appropriate to point out at this stage that the respondents had unsuccessfully challenged the proceedings under the IT Act for the Assessment years 2011-12 and 2012-13 citing the pendency of the resolution proceedings and the moratorium period in W.P Nos. 34668 of 2023 batch and the Learned Single Judge by his order dated 17.06.2022 rejected their contention. That apart, in the present case, the order of the Tribunal is dated 20.07.2015 and the resolution plan was admitted only on 19.03.2018. In any case, as held by the Apex Court in **Rainbow Papers Ltd Case (Supra)**, *prima facie*, the pre-amendment provisions would be applicable to the present case and the period of operation of the order of the Tribunal is to be treated only as a period of eclipse. That apart, the substantial question of law that has arose



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cannot be left undecided. Therefore, the respondent's contention regarding the resolution plan and the consequential claim of the Tax Case Appeals being infructuous is untenable and cannot be accepted. Further, another important factor that requires to be noticed is that the application for Corporate Insolvency Resolution Process was a voluntary application by the respondent and since both the parties have not placed all the materials before this Court, it is not clear as to whether the respondent had disclosed the pendency of the dispute by way of the Tax Cases in his application. Therefore, the issue of recovery is left open and both the parties are at liberty to take all the stands available to them before the appropriate forum.

14. The core issue or the substantial question of law that is to be decided in these appeals is whether the roaming charges paid by the respondent-assessee to other telecom operators for facilitating roaming services to its subscribers would be classified as "fees for technical services" under Section 194J of the Income Tax Act, 1961 (the Act), thereby mandating the deduction of tax at source. For the purpose of deciding the issue, it is necessary to determine whether the roaming service provided by the respondent in collaboration with the other service providers would constitute "technical services" for the purpose of deduction of tax at source.



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15. The respondent-assessee is a major telecom company providing cellular and data services across India through its vast network. To ensure seamless connectivity for its subscribers traveling outside the home network area, including abroad, the respondent enters into roaming agreements with other telecom service providers.

16. During the relevant assessment years 2007-08 to 2011-12, the respondent made substantial payments as roaming charges to these other operators without deducting any tax at source under Section 194J. According to the respondent, the roaming services are automated processes without human intervention as the words "managerial and consulting services is used" in the provision, and hence, the roaming charges do not qualify as fees for technical services. The further contention on behalf of the respondent is that the automated services is general and applicable to all and not customer specific and hence cannot be classified as "technical services". All the judgments relied upon by the Learned Counsel for the respondent drive home the above principles. Much emphasis has been made on the judgment of this Hon'ble Court in Skycell Communications Ltd case (supra) with regard to the claim of "technical service". The judgment according to us may not be of any assistance to the respondent in view of the Judgment of the Hon'ble Apex Court in ***Bharati Cellular Ltd Case (Supra)*** and that apart, the facts of the case are completely different as it was a



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case of deduction of TDS on payment by the subscriber to the service provider and not *inter se* between the host and home service providers.

17. However, the counsel for the Revenue has contested this position, by citing crucial factors establishing the applicability of Section 194J:-

(i) The roaming charges represent consideration paid for highly technical telecommunication services provided to the respondent's subscribers outside the home network area, forming an integral part of the respondent's business operations.

(ii) Seamless carriage of calls and data during roaming requires constant monitoring and human intervention by technical experts to ensure uninterrupted services without faults or disruptions.

(iii) The respondent's own National GSM Roaming Agreement explicitly acknowledges the need for human intervention in various aspects of roaming services.

18. While the respondent relied on an expert opinion suggesting that no human intervention is required for connecting individual roaming calls once configurations are completed. It is to be noted that the Tribunals and the Hon'ble Courts have interpreted "technical services" broadly to include professional



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services under Section 9(1)(vii) of the Act as human intervention has been recognized as an essential element for categorizing payments as fees for technical services. It would be relevant to consider Section 9 (1) (vii) of the Income Tax Act, which reads as under:

Section 9(1)(vii) of the Income Tax Act:-

Section 9(1) (vii) income by way of fees technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1. - For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2. - For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include



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consideration for any construction, assembly, mining or life project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries".

Before adverting further into the scope of "Technical Service", it would be necessary to point out that the CIT (A) has held that human intervention is not necessary to fall within the definition of "technical service" or in other words, automation is irrelevant. Both sides have relied upon the judgment of the Hon'ble Apex Court in *Bharati Cellular Ltd* Case accepting the presence of human intervention, the operative portion of the Apex Court judgment is extracted 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



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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 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 1 to examine its expert and to adduce any other evidence.

11. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of



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the BRIC countries and with the technological advancement, matters such as the present one will keep on recurring and hence time has come when the Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the appellate forums, including this Court, to decide legal issues based on the factual foundation. We do not know the constraints of the Department but time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the tribunals and courts to decide matters expeditiously based on factual foundation. The learned Attorney General, who is present in Court, has assured us that our directions to CBDT would be carried out at the earliest.

The above case arose from the Judgment of the Delhi High Court, wherein it was held that to constitute “technical Service” human intervention is necessary by placing reliance upon the principle of “noscitur a socius”. The Hon’ble Apex Court, after factually finding that the aspect of human intervention was not the subject matter before the authorities, remanded back the matter by leaving it open to the assessing authority to seek expert opinion, collect technical evidence provide opportunity for cross examination, consider the terms and condition between the parties and the extent of human intervention at every stage. It is to be noted that though the Hon’ble Apex Court recognized the necessity of human intervention, did not hold that without human intervention, the service cannot be classified as “technical service”. A perusal of the provision discloses that consideration must be paid for “managerial, technical or consultancy services”. In our opinion, the provision contemplates three different services which are mutually inclusive. The



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use of the punctuation mark "comma" in the provision after the first category of "managerial" is to separate it from the second category of "technical" and the use of "or" after the second category of "technical" is to classify a separate category of "consultancy". It is to be noted that the technical service can be automated and also with human intervention at various stages which can be either managerial or consultancy or both.

19. In the present case, the undisputed facts and the respondent's own National GSM Roaming Agreement clearly establish that human intervention and technical expertise are integral and indispensable components for the smooth, efficient, and uninterrupted operation of roaming services as a whole. The Roaming Agreement explicitly acknowledges the need for human intervention in various critical aspects of roaming services, such as discussing impacts and taking necessary actions upon any change in the system or network, providing customer care support, addressing network faults through coordination between customer care and technical teams, handling issues related to lost/stolen SIM cards or mobile equipment, and resolving billing inquiries or disputes. The Tribunal also accepted the presence of human intervention, however holding that for connecting a roaming call, human intervention is not required. We wish to point out few situations, which in our opinion the Tribunal has not considered. Two such situations, as it existed then and also now, is the option to manually select a



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network when one goes out of the home network at the subscribers' end or to activate international roaming. When the subscriber selects another network when the service is either down or when the service provider does not provide any service in any particular area or country and when there are glitches or connectivity issues, it is only through human intervention, it can be resolved. Similarly, the activation of international roaming is also another situation which requires human intervention.

20. It is evident from the above that human intervention by skilled technical personnel is an integral and unavoidable part of the roaming services provided by the host telecom operators to the respondent-assessee. In our opinion, the "roaming service" to be provided is not mere connection but a seamless service throughout the period, when the subscriber is outside the home geographical area. These services cannot be rendered effectively or efficiently without continuous human monitoring, coordination, troubleshooting, and expertise. Therefore, this Court is of the firm view that the roaming services provided by the respondent-assessee to other telecom operators undoubtedly involve human intervention and technical expertise at various levels, thereby the charges paid would constitute "fees for technical services" under Section 194J of the Income Tax Act, 1961 as the provision lucidly spells out that the consideration can also be in one lump sum.



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21. The Apex Court in ***Bharati Cellular Ltd*** case, which in our opinion is the only case directly on the point, issued certain directions. Nothing has been placed on record to show that at what stage the expert opinion was obtained, whether the expert was subjected to cross-examination by the parties, whether the technical evidence was collected, consideration of the agreements between the parties, the extent of human intervention in the contingencies like travelling out of home network including the period when one is travelling abroad and basis of fixation of “capacity” and even if it is accepted that human intervention is necessary, would it not suffice if such intervention is at some stage are all the factors that ought to have been considered by the Tribunal, which in our opinion failed and misconstrued the judgment of the Hon’ble Apex Court in *Bharati Cellular* Case. The Tribunal unfortunately restricted itself to the question of connection at the initial stage when the subscriber leaves the home territory or in other words when he is in “roaming” and has not postulated a situation and rendered findings on the entirety of the period of roaming.

22. In view of the above findings, the substantial questions of law raised in these appeals are answered in favour of the appellant-Revenue and against the respondent-assessee. The impugned common order dated 20.07.2015 passed by the Income Tax Appellate Tribunal, which erroneously held that the respondent-



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assessee was not liable to deduct tax at source on the roaming charges paid, is set aside and the matter is remanded back to the Tribunal for fresh consideration.

23. In the result, the tax case appeals preferred by the Revenue are allowed and the matter is remanded back to the Tribunal for fresh consideration. There is no order as to costs.

[R.M.D, J.] [M.S.Q, J.]
17.05.2024

Index: Yes / No.

Speaking order/ Non-speaking order

Neutral Citation: Yes / No.

To

- 1.The Deputy Commissioner of Income Tax,
TDS Circle I,
R.No.711, 7th Floor,
Wanaparthi Block, Aayakar Bhavan,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 34.
2. The Commissioner of Income Tax,
Chennai.
3. The Income Tax Appellate Tribunal,



Tax Case Appeal Nos.831, 832, 833, 836 and 838 of 2016

Madras 'D' Bench, Chennai.

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Tax Case Appeal Nos.831, 832, 833, 836 and 838 of 2016

R. MAHADEVAN, J.

AND

MOHAMMED SHAFFIQ, J.

r n s

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836 and 838 of 2016

17.05.2024