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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 604/2018 & CM APPL. 35078/2019 (Cross Objection) By
Fresh Appl.CM APPL. 55653/2024 (Permission to Amend
Proposed Substantial Question Of Law) By Appl.

PR. COMMISSIONER OF INCOME TAX, DELHI -2

.....Appellant
Through: Mr. Shlok Chandra, Sr.
Standing Counsel with Ms.
Naincy Jain, JSC, Ms. Madhavi
Shukla, JSC and Mr. Sushant
Pandey, Adv.

versus

M/S. BHARAT SANCHAR NIGAM LTD.Respondent
Through: Mr. Mayank Nagi, Advocate.

24.

+ ITA 565/2023

PR COMMISSIONER OF INCOME TAX, DELHI-1

.....Appellant
Through: Mr. Vipul Agrawal, SSC. With
Mr. Gibran Naushad, Ms.
Sakshi Shairwal Advs.

versus

M/S BHARAT SANCHAR NIGAM LIMITEDRespondent
Through: Mr. Mayank Nagi, Advocate.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER
23.09.2024

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1. Having heard learned counsels for the parties and on going
through the additional questions which were proposed for our



consideration, we find that insofar as the aspect of discount provided to distributors and franchisees is concerned, the same stands answered against the appellant in light of the judgment rendered by the Supreme Court in **Bharti Cellular Limited (Now Bharti Airtel Limited) vs. Assistant Commissioner of Income Tax, Circle 57, Kolkata and Another¹**. This aspect had also been taken due note of by us in our order of 15 April 2024.

2. Insofar as interconnect charges is concerned, we bear in consideration a detailed judgment rendered by the Karnataka High Court in **Vodafone Idea Ltd. vs. Deputy Director of Income-tax (International Taxation) and Another²** where it was ultimately held as under:

“13. Undisputed facts of the case are, the assessee is an ILD license holder and responsible for providing connectivity to calls originating/terminating outside India. The assessee has entered into an agreement with NTOs for international carriage and connectivity services. According to the assessee, payment made to NTOs is towards inter-connectivity charges.

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17. The first question is whether the Income-tax Appellate Tribunal was correct in holding that Double Taxation Avoidance Agreement cannot be considered under section 201 of the Act. It was argued by Shri Percy Pardiwala that this issue is covered by the decision in GE Technology. We may record that a Double Taxation Avoidance Agreement is a sovereign document between two countries. In GE Technology, the apex court has held as follows (page 461 of 327 ITR):

“While deciding the scope of section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of section 195. Hence, apart from section 9(1), sections 4, 5, 9, 90, 91 as well as the provisions of Double Taxation Avoidance are also relevant, while applying tax deduction provisions.”
(emphasis)

18. The above passage has been noted and extracted in Engineering

¹ 2024 SCC OnLine SC 198

² 2023 SCC OnLine Kar 107



Analysis. Thus it is clear that an assessee is entitled to take the benefit under a Double Taxation Avoidance Agreement between two countries. Hence, the Income-tax Appellate Tribunal's view that Double Taxation Avoidance Agreement cannot be considered in proceedings under section 201 of the Act is untenable.

19. The second question for consideration is whether the Income-tax Appellate Tribunal was correct in holding that the amendment to provisions of section 9(1)(vi) inserting the Explanations will result in amendment of Double Taxation Avoidance Agreement. The answer to this question must be in the negative because in Engineering Analysis, the apex court has held that Explanation 4 to section 9(1)(vi) of the Act is not clarificatory of the position as on June 1, 1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012.

20. Explanations 5 and 6 to section 9(1)(vi) of the Act has been inserted with effect from June 1, 1976. This aspect has also been considered in Engineering Analysis holding that the question has been answered by two Latin Maxims, *lex no cogit ad impossibilia*, i.e., the law does not demand the impossible, and *impotentia excusat legem*, i. e., when there is disability that makes it impossible to obey the law, the alleged disobedience of law is excused and it is held in Engineering Analysis as follows (page 558 of 432 ITR):

“It is thus clear that the “person” mentioned in section 195 of the Income-tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of “royalty” inserted by Explanation 4 to section 9(1)(vi) of the Income-tax Act, for the assessment years in question, at a time when such Explanation was not actually and factually in the statute.....

Also, any ruling on the more expansive language contained in the Explanations to section 9(1)(vi) of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the Double Taxation Avoidance Agreement, as per section 90(2) of the Income-tax Act read with Explanation 4 thereof, and article 3(2) of the Double Taxation Avoidance Agreement.”

21. The third question is, whether the payments made to NTOS for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty. It was argued by Shri Pardiwala, that for subsequent years in the assessee’s own case, the Income-tax Appellate Tribunal has held that tax is not deductible when payment is made to non-resident telecom operator. This factual aspect is not refuted. Thus the Revenue has reviewed its earlier stand for the subsequent assessment years placing reliance on Viacom, etc., W. P. No. 36 of 2018, rendered by the Income-tax Appellate Tribunal. In that view of the matter this question also



needs to be answered against the Revenue.

22. The fourth question is whether the Income-tax authorities have jurisdiction to bring to tax income arising from extra-territorial source. Admittedly, the NTOs have no presence in India. The assessee's contract is with Belgacom, a Belgium entity which had made certain arrangement with Omantel for utilisation of bandwidth. In substance, Belgacom has permitted utilisation of a portion of the bandwidth which it has acquired from Omantel. It is also not in dispute that the facilities are situated outside India and the agreement is with a Belgium entity which does not have any presence in India. Therefore, the tax authorities in India shall have no jurisdiction to bring to tax the income arising from extra-territorial source.

23. The fifth question is whether the Revenue is right in holding that withholding tax liability should be levied at a higher rate. It was contended by Shri Pardiwala that this issue is covered in the assessee's favour in CIT v. Wipro Ltd. [2023] 22 ITR-OL 371 (Karn); I. T. A. No. 181 of 2019 dated November 29, 2022 and the same is not disputed. Hence, this question also needs to be answered against the Revenue.

24. The sixth question is whether the assessee can be held liable for non-deduction of tax at source for payments made for the assessment years on the basis of amendment to section 9(1)(vi) of the Act. This aspect has been considered by us while answering question No. 2. It is held in Engineering Analysis that an assessee is not obliged to do the impossible. Admittedly, the assessment years under consideration are 2008-09 to 2012-13 and the Explanation has been inserted by the Finance Act, 2012. In addition, we have also held that the assessee is entitled for the benefits under the Double Taxation Avoidance Agreement”

3. Mr. Nagi, learned counsel for the respondent draws our attention to the order passed by Supreme Court on the Special Leave Petition in **Deputy Director of Income Tax & Anr. v. M/s Vodafone Idea Ltd.**³ which was taken against the said decision and which too has come to be dismissed on 26 July 2024.

4. We are thus of the considered opinion that these appeals fail to raise any substantial questions of law and shall consequently stand dismissed.

5. The cross objections which sought to raise the issue of Section

³ SLP(C) Diary No(s). 24154/2024



194H would stand disposed of in light of our finding that the questions posited do not survive in light of the decision in **Commissioner of Income-tax v. Idea Cellular Ltd.**⁴ having been overruled by the Supreme Court in *Bharti Cellular Limited*.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 23, 2024/ib

⁴ 2010 SCC OnLine Del 757