IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "L", MUMBAI

BEFORE SHRI R.S.SYAL (A.M) & SHRI N.V.VASUDEVAN(J.M)

ITA NO. 2210/MUM/2000(A.Y. 1998-99)
ITA NO.2211/MUM/2000(A.Y. 1998-99)
ITA NO.2212/MUM/2000(A.Y. 1998-99)

Crompton Creaves Ltd., C.G. House, Taxation Dept., Dr. annie Besant Road, Prabhadevi, Mumbai – 400 030 PAN: (Appellant)	Vs.	The DCIT (TDS), Cir. 1(1), Aaykar Bhavan, MK Road, Mumbai – 20. (Respondent)

Appellant by : Shri Jahangir D. Mistri
Respondent by : Shri Mahesh Kumar

Date of hearing : 14/02/2012
Date of pronouncement : 24/02/2012

ORDER

PER N.V.VASUDEVAN, J.M,

These are appeals field by the assessee against three orders of CIT(A) XXV Mumbai all dated 22/2/2000 relating to A.Y 1998-99.

2. The assessee is a Public Limited Company. The assessee issued quity and equity related instruments to international investors in the form of Global Depository Receipts(GDR). GDRs are essentially US $ denominated GDR in respect of a specified number of shares of the issuer issued for subscription to international investors at a fixed price. The assessee appointed Lead Managers who were responsible to assist in obtaining all relevant permissions, advice on the issue structuring, timing and price of issue, advice on appointment of other advisors to the issue responsibility for co-ordination of the issue, preparation of the Offering Circular for the assessees and all necessary offer documentation to be distributed to potential investors, preparation of road shows, presentation, formulating the marketing strategy, marking and distributing the issue, arranging

for listing in the London stock exchange. The issue was led by Jardine Fleming Intl. Inc. (Lead Manager) and Citibank Intl. plc. ,Merrill Lynch Intl. Ltd., Morgan Stanley & Co. (Co-Leads) and Kotak Mahindra (UK) Ltd. (Manager) (herein after referred to as Manager's to the issue.) For the marketing and distribution and preparation of the documentation to potential investors, the assessee by way of a Subscription Agreement dt. 21st July, 1996, entered into with the Managers' to the issue agreed to pay 3% comprising of Management and Underwriting Commission 1% and Selling Commission 2% to be shared between themselves as mutually agreed by them and to reimburse the Lead Manager for its out of pocket expenses incurred on the aforesaid issue subject to a ceiling of US$ 3,30,000.

3. The Subscription Agreement envisaged issue of 6,220,000 GDRs (firm GDRs) and an option to issue additional 393750 GDRs (optional GDRs). The assessee had a successful GDR issue with nine times over subscription and allotted 6,613,750 GDRs inclusive of firm and optional GDRs being the maximum issue possible at a rate of US$ 7.56 per GDR. Two master GDRs were issued on 10th July 1996, one evidencing the international master GDR and the other the American master GDR in favour of the depository (Bank of New York) to be held on behalf of the beneficial investors. The underlying shares to the GDRs were kept with the custodian in India (ICICI). The work involved in the issuance of GDRs to international investors was carried out outside India and as indicated above, the distribution and marketing as also approaching target international investors all necessarily had to be done outside India. The issue proceeds were collected by the Lead Manager in his account outside India and the net proceeds after deducting commissions and out of pocket expenses were deposited into the assessee's account opened for this purpose in New York. The net proceeds were remitted into India in two tranches on July11, and July 12, 1996. The remittance into India was translated into Rupees and the amount so received as was equivalent to the par value of shares comprised in the issue was credited to Share Capital Account and the balance forming part of the Share Premium Account.

3. The AO passed an order u/s. 195 of the Income Tax Act, 1961 (the Act) on 30/3/1995 holding that the payments made by the assessee to the non-resident Lead Manager's was in the nature of fees for Technical Services rendered and therefore, the assessee ought to have deducted tax at source on the payments so made. Consequent to the order passed under section 195 of the Act holding that the assessee was bound to deduct tax at source on the payments made to the International Lead Managers, the AO passed order under section 201(1) and 201(1A) on 30.3.1995 holding that the assessee was to be treated as an assessee in default in respect of the taxes that ought to have been deducted at source and also interest thereon.

4. The AO worked out the quantum of tax in respect of which the Assessee was to be treated as Assessee in default and the quantum of interest payable on tax not deducted at source as follows. The total payment including reimbursement of expenses, fess to the Lead Managers and others that was made on 10/7/96(closing date) was a sum of Rs. 7,68,62,058/-. TDS on this payment/ credit of Rs. 7,68,62,058/- with applicable grossing up, worked out to Rs.3,29,40,882/-. From the closing date till March, 1999 there were 31 completed months. This tax was payable on 10/7/1996 but remained unpaid till date. Accordingly, interest u/s. 201(1A) was worked out at a sum of Rs. 1,27,6,4,692/-. The Assessee was accordingly directed to pay Rs. 4,57,05,474/- .

5. All the orders i.e. order u/s.195 and order u/s. 201(1) and the order u/s. 201(1A) were all passed on 30/3/1999. The assessee preferred three appeals before the CIT(A) namely Appeal No.73/99-2000 against the order u/s. 195 of the I.T. Act dated 30/3/1999. Appeal No.74& 75/99-2000 were preferred against the order u/s. 201(1) & 201(1A) of the I.T. Act dt. 30.3.1995. The issue involved in all the orders was identical. The CIT(A) passed a common order

dated 22/2/2000, which is the order impugned in all these three appeals. The CIT(A) framed the following points for consideration.

1. Maintainability of appeal under section 201;
2. Accrual of Income;
3. No payment So no TDS;
4. It is a direct sale and hence nothing is taxable;
5. Are these services rendered Technical, Managerial, Consultancy in nature;
6. Re-imbursement of expenses is not taxable;
7. Applicability of the judgement of Transmission Corpn. Of A.P.(supra) and validity of order u/s 195;
8. Applicability of DTAA,

6. On the question of maintainability of appeal against an order u/s.201 the CIT(A) held that appeal by the assessee is maintainable against an order passed u/s. 201(1) and 201(1A) of the Act. On the issue of whether there was actual of income the CIT(A) held that irrespective of the place where services is rendered the amount should be deemed to have accrued or arisen in India because the services were utilized by the assessee in business which was carried on by it in India. With regard to the arguments that since the Lead Managers appropriated their commission out of the issue proceeds of the GDR and the assessee did not make to Lead Managers and, therefore, the question of deducting tax at source does not arise for consideration, the CIT(A) held that in effect it was a constructive payment by the assessee and, therefore, there was an obligation on the part of the assessee to deduct tax at source while making payments. On the argument that the GDRs were directly sold and that it was only part of the purchase consideration that was paid to the Lead Managers, the CIT(A) held that the payment was for services rendered and that the amount paid to them could not be said to be part of the consideration received for GDRs. On the question

whether the services rendered were technical, managerial, consultancy etc. in nature, the CIT(A) held that the services rendered by the Lead Managers that the same were technical and managerial services. On the question of taxing reimbursement of expenses it was held that reimbursement was integral part of the fees paid to the Lead Managers and was, therefore, taxable as being part and parcel of the total fees paid. On the question of applicability of the judgment of the Hon'ble Supreme Court in the case of Transmission Corporation of A.P & Others vs. CIT, 239 ITR 587 (SC), the CIT(A) held that it was a statutory obligation of the persons responsible for paying to a non-resident to deduct tax at source. It was also held that if for whatever reasons the payer feels that the amount was not taxable under the Act, he should file an application before the AO and assessee cannot decide on his own whether the income is chargeable to tax or not. On the question of applicability of DTAA, the CIT(A) held that since the assessee did not deduct tax at source u/s. 195 of the Act the question of examining the issue from the DTAA angle did not arise for consideration. For all the above reasons the orders passed by the AO were upheld by the CIT(A), giving rise the present appeals by the assessee before the Tribunal.

7. In the original grounds of appeal the assessee has challenged the applicability of the payments made by it to the Lead Managers or non-resident on the ground that the same was not in the nature of fees for technical services either under the Act or under the DTAA and, therefore, there was no obligation to deduct tax at source on the payments made to the Lead Managers. The assessee has also filed an application for admission of the following additional ground of appeal in all the threeappeals.

> " As no action has been taken by the Department against the payees and time for taking such action has expired, no order under sections 195, 201(1) or 201(1A) can be passed."

8. In the application for admission of the additional ground of appeal the assessee has submitted that the Special Bench of the Mumbai Tribunal in the case of Mahindra & Mahindra Ltd., 313 ITR 263 (Mum) (SB) (AT) has held that no order u/s. 195, 201(1) or 201(1A) of the Act can be passed where revenue has not taken any action against the payee for making assessment of the receipt in the hands of the payee within the time limit for passing order u/s. 147 of the Act and where the time limit for initiating such proceedings u/s. 147 of the Act has also expired. It has also been mentioned in the application that admittedly no action was taken against the payee and that the time for taking such action against the payee under the Act has also expired. It has also been submitted that the question of limitation in whatever manner it arises is a question of law and goes to the root of the appeal and jurisdiction of the Tribunal. In this regard reference has also made to the decision of the Hon'ble Supreme Court in the case of Union of India Ltd. vs. British Corporation Ltd., 268 ITR 481. The assessee has, therefore, prayed for admission of the additional ground of appeal.

9. Before proceeding further it would be useful to refer to the decision of the Special Bench of the Tribunal in the case of Mahindra & Mahindra (supra). The issue that arose for consideration in the aforesaid case was that as to the requirement of tax deduction at source on payments made to non-residents being Lead Managers to the issue on account of marketing, under writing and selling commission in respect of GDR issue outside India. For the purpose of deciding additional ground of appeal raised by the assessee the following conclusion drawn by the Special Bench are relevant.

> " We sum up the conclusions as under:
>
> (i)Any party can raise additional ground on the question of limitation before the Tribunal for the first time, as it is a legal ground not requiring the investigation of the fresh facts.
>
> (ii) Section 195 (1) casts duty on the person responsible for paying or crediting to the account of a non resident any sum chargeable to tax under this Act for deducting tax at source. On failure to deduct or pay to the

Government after deducting, the person responsible is treated as the assessee in default under section 201(1).

(iii) "Any such person" referred to in section 201(1) extends not only the person deducting and failing to deposit the tax but also the person failing to deduct the tax at source.

(iv) Where no time limit is prescribed for taking an action under the statute, the action can be taken only within a reasonable time by harmoniously considering the scheme of the Act.

(v) Tax recovery proceedings are initiated only after the passing of order under section 201(1) and that too if the person responsible fails to comply with notice of demand under section 156.
(vi) The order under section 201(1) is akin to the assessment order, "Assessment" includes reassessment.

(vii) The time limit for initiating the proceedings under section 201(1) cannot be the same as that for the passing of order under this sub-section. Time for initiation is always prior to the time for completing the proceedings.

(viii) The reasonable time for initiating and completing the proceedings under section 201(1) has to be at par with the time limit available for initiating and completing the reassessment as the assessment includes reassessment.

(ix) The maximum time limit for initiating the proceedings under section 201(1) or (IA) is the same as prescribed under section 149 i.e. four years or six years from the end of the relevant assessment year, as the case may be depending upon the amount of income in respect of which the person responsible is sought to be treated as the assessee in default.

(x) The maximum time limit for passing the order under section 201(1) or (1A) is the same as prescribed under section 153(2), being one year from the end of the financial year in which proceedings under section 201(1) are initiated.

(xi) Any order passed under section 201(1) or (1A) cannot be held as barred by limitation if it is not passed within four years from the end of the relevant financial year.

(xii) The person responsible cannot be treated as the assessee in default in respect of tax under section 201(1) if the payee has paid the tax directly. In

such a situation the other consequences shall follow such as liability to interest under section 201(1A).

(xiii) No order under section 201(l) or (1A) can be passed where the Revenue has not taken any action against the payee and further the time limit for taking action against the payee under section 147 has also expired.

(xiv) "Payment" to or crediting the account of non-resident under section 195(1) also covers retention of the, amount by non-resident where only net amount is remitted to the Indian party.

(xv) Fees for technical services under section 9(1) (vii) read with Explanation 2 covers management commission and selling commission allowed to the non-resident in respect of the GDR issue. Underwriting commission does not fall within the definition of "fees for technical services" under section 9(1)(vii). Reimbursement of expenses does not have the income element and hence cannot assume the character of income deemed to accrue or arise in India.

(xvi) If a particular amount is not taxable as per the provisions of the Double Taxation Avoidance Agreement, such income cannot be taxed in the hands of the non-resident notwithstanding the fact that the same is taxable under the regular provisions of the Income-tax Act, 1961.

(xvii) Where the technical services are not made available to the Indian party though used by the non-resident for its benefit, the amount of management and selling commission cannot be held to be taxable as per the first DTAA with the U.K.

As can be seen from the decision of the Special Bench referred to above, the question of limitation is a legal ground and does not require investigation of fresh facts and therefore can be admitted for adjudication by the Tribunal, even if raised before the Tribunal for the first time.

10. The ld. D.R has however objected to the admission of the addition ground of appeal. It was pointed out by the ld. D.R that the Hon'ble Karnataka High Court in the case of Sumsung Electronic Co. Ltd., 185 Taxaman 313 (Kar) has taken the view that in proceedings u/s. 195 the determination of the tax liability of a non-resident cannot be gone into and, therefore, the additional ground would

not arise for consideration at all. On this argument it is noticed that the Hon'ble Supreme Court in the case of G.E. India Technology Center Pvt. Ltd., vs. CIT 327 ITR 456 (SC) has since reversed the decision of the Hon'ble Karnataka High Court. Resultantly, the question whether the payments made to the non-resident were taxable or not can be decided in the proceedings u/s. 195 as well as 201(1) and 201(1A) of the Act.

11. As far as the additional ground of appeal raised by the assessee is concerned we find that Hon'ble Special Bench of ITAT in the case of Mahindra & Mahindra (supra) has held that an order under section 201(1) or 201(1A) cannot be passed where the revenue has not taken any action against the payee and further the time limit for taking action against the payee under section 147 of the Act has also expired. The ld. D.R has not been able to satisfy the Bench as to whether any action has been taken against the payee within the time as contemplated by the decision of the Hon'ble Special Bench. In the submission dated 21/2/2010 filed by the ld. D.R it has been submitted as follows:

> "So, if the above implications of the special bench decision are applied to the facts of the case of present assessee then it may be seen that the default to deduct the TDS was made on 10/7/96 and the amount of default was 3,29,40,882/ therefore as per the decision of special bench the proceedings u/s 195 r/w 201 could be initiated upto 4 years from the end of relevant AY i.e upto 3 1/3/2002 and the same could be completed upto 3 1/3/2003, whereas in the instant case the order u/s 195,201(1) & 201(IA) were initiated on 26/11/98 and completed by passing orders on 30/3/99 itself which is much before the limitation date of 3 1/3/2003 treating the assessee in default u/s 201(1) for an amount of Rs 3.29 Crores and u/s 201(lA) for an amount of Rs 1.27 crores Hence the time limits prescribed by the special bench in Mahindra & Mahindra have been duly adhered and support the case of revenue that the orders are not barred by limitation".

From the above submission of the ld. D.R it is clear that no action has been taken against the payee within the time contemplated by the Hon'ble Hon'ble Special Bench. We must also make it clear that D.R's submission that the Special Bench

contemplates passing of an order u/s. 201(1) and 201(1A) within certain time limit is not correct. The Special Bench contemplates taking of action in the hands of the payee within a particular time. We also find that no assessment has been made in the hands of the payee in respect of the sums received from the assessee in respect of GDR issues. Similarly no proceedings have been taken against it till date for assessing such income. We further find that the time limit for issuing notice under section 148 has obviously come to an end since the assessment year under consideration is 1998-99. As the time limit for taking action against the payee under section 147 is also not available, and there is no course left to the Revenue for making the assessment of the non-resident, ex-consequenti, no lawful order can be passed against the assessee either under section 201(1) or (1A). We therefore hold that in the facts and circumstances of the present case, the order passed under section 195 read with section 201(1) or (1A) of the Income-tax Act,1961, is invalid.

12. We also find that the Hon'ble Delhi High Court in the case of CIT vs. N H K Japan Broadcasting Corporation, 305 ITR 137(Del) considered the following question of law viz., Whether the Income-tax Appellate Tribunal was correct in law in holding that the orders passed under section 201(1) and 201(1A) of the Income-tax Act, 1961, are invalid and barred by time having been passed beyond a reasonable period ? The Hon'ble Court noticed that section 201 of the Act does not prescribe any limitation period for the assessee being declared as an assessee in default. The Hon'ble Court agreed with the conclusions of the Tribunal that the initiation of proceeding against the assessee in treating it as in default, were required to be initated within a reasonable period. The Hon'ble Court held that a duty is cast upon the person liable to deduct tax at source but if he fails to do so, it does not wash away the liability of the person liable to pay as the primary liability to pay tax is on the person who earns the income. The liability of the person liable to deduct tax is a vicarious liability and, therefore, he cannot be put in a situation which would prejudice him to such an extent that

the liability would remain hanging on his head for all time to come in the event the Income-tax Department decides not to take any action to recover the tax either by passing an order under section 201 of the Income-tax Act, 1961, or through making an assessment of the income of the person liable to pay tax. The Hon'ble Court thereafter found that a period of three years for competing assessment u/s.153 of the Act would be a reasonable period, but took note of the fact that Income-tax Appellate Tribunal has, in a series of decisions, taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed. The Hon'ble Court observed that the rationale for holding so was that if there is a time limit for completing the assessment, then the time limit for initiating the proceedings must be the same, if not less. Nevertheless, the Tribunal had given a greater period for commencement or initiation of proceedings, the Hon'ble Court felt that it would not disturb the time limit of four years prescribed by the Tribunal and expressed the view that in terms of the decision of the Supreme Court in Bhatinda District Co-op. Milk Producers Union Ltd. [2007] 9 RC 637 ; 11 SCC 363 action must be initiated by the competent authority under the Income-tax Act, where no limitation is prescribed as in section 201 of the Act within that period of four years. In Van Oord ACZ India (P) Ltd. v. Commissioner of Income-tax 323 ITR 130 (Del), the Hon'ble Delhi High Court had approved the view expressed by the Special Bench in the case of Mahindra & Mahindra Ltd. (supra).

13. The learned D.R. however placed reliance on the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT vs. HMT Ltd., ITA No.524 of 2009 dated 17/7/2011 wherein the Hon'ble Court has taken the view that no period of limitation can be read into the provisions if there is no period of limitation specified in the Act for taking action u/s. 201(1) or 201(1A) then no time limit can be read into those provisions. Similar view has also been expressed by the Hon'ble Calcutta High Court in the case of Bhura Exports Pvt. Ltd. vs. ITO, 202 Taxaman 88(Cal). We are of the view that the decision of the

Hon'ble Delhi High Court has to be accepted as the view expressed therein is in favour of the assessee. In the light of the above we hold that the orders under section 195, 201(1)& 201(1A) of the Act cannot be sustained. Accordingly we hold that the order passed under section 195 r.w.s. 201(1) and 201(1A) is invalid and all the orders are set aside. Appeals of the assessee are accordingly allowed. In view of the above decision we do not wish to deal with the question as to whether the amount in question was in the nature of Fees for Technical Services which can be brought to tax and the other submissions on the provisions of the relevant DTAAs.

14. In the result, all these appeals of the assessee are allowed.

Order pronounced in the open court on the 24th day of Feb.2012

Sd/- Sd/-

(R.S.SYAL) (N.V.VASUDEVAN)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai, Dated. 24th Feb. 2012

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"D" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

	Details	Date	Initials	Designation
1	Draft dictated on	17/2/2012		Sr.PS/PS
2	Draft Placed before author	20/2/2012		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'F', MUMBAI

BEFORE SHRI R V EASWAR, PRESIDENT AND
SHRI S V MEHROTRA, ACCOUNTANT MEMBER

I T A No: 6058/Mum/2009, 6059/Mum/2009 and 6060/Mum/2009
(Assessment Year: 2007-08, 2008-09 and 2009-10)

Vodafone Essar Limited, Mumbai (PAN: AAACU5332B)	…	Appellant
Vs		
Deputy Commissioner of Income Tax (TDS) Range 3(1), Mumbai	…	Respondent

Appellant by: Mr Soli Dastur
Respondent by: Mr A P Singh

O R D E R

R V EASWAR, PRESIDENT:

These are three appeals filed by the assessee involving common issues. Since they arise out of common facts and were heard together, they are disposed of by a single order for the sake of convenience.

2. The appeals relate to the assessment years 2007-08, 2008-09 and 2009-10. The assessee is a Public Limited Company engaged in the business of providing mobile telephone services. On the basis of a survey conducted under section 133A of the Income Tax Act, 1961, on its premises, the Assessing Officer noticed that the assessee had failed to deduct tax at source on payments made by the assessee company to other mobile service providers towards "national roaming costs". This was brought to the notice of the Assessing Officer, who took the view that payment of national roaming costs made to other cellular service providers for

allowing use of their network would amount to payment made for technical services within the meaning of section 194J and the assessee ought to have deducted tax from such payments. In the alternative, the Assessing Officer held that the payment should be treated as being in the nature of hiring of plant and machinery and, therefore, section 194-I would apply, under which any payment of rent for the use of land, building, plant and machinery or equipment or furniture was subject to deduction of tax at source. In this view of the matter, he passed orders under section 201 of the Income Tax Act, 1961, for all the three years on 19th February 2009, holding the assessee to be in default in not deducting the tax, which amounted to the following: -

Financial Year 2006-07 (Assessment Year: 2007-08)	₹12,23,66,850/-
Financial Year 2007-08 (Assessment Year: 2008-09)	₹15,32,34,470/-
Financial Year 2008-09 (up to December 2008) (Assessment Year: 2009-10)	₹12,85,63,030/-

The total amount of tax deducted at source amounted to ₹40,41,64,350/-. Towards the end of the order the Assessing Officer observed that since the assessee did not furnish all the details called for, another order will be passed in respect of various defaults noticed during the survey, as also orders charging interest under section 201(1A) of the Act. The orders passed by the Assessing Officer were thus only in respect of the TDS default, directing the assessee to pay the TDS amounts.

3. The assessee filed an appeal to the CIT(A), who passed identical orders for all the three years. In the orders passed under section 201 of the Act, there were other payments also on which the assessee was asked to pay tax, but we are not concerned in these appeals with those payments because they were decided by the CIT(A) in favour of the assessee against which separate appeals have been filed by the Department in ITA Nos: 155 to 157/Mum/2010. These appeals were also tagged along with the present appeals filed by the assessee but by consent of the parties they were delinked to be heard separately since the issues in those appeals were in no way connected to the issue that arises in the assessee's appeals. Further, the appeals filed by the assessee are stay granted cases and were therefore given priority of hearing. Be that as it may, the CIT(A) while examining the assessee's appeals in respect of the national roaming charges and the stand taken by the Assessing Officer that the assessee ought to have deducted tax therefrom under section 194J or section 194-I, held that section 194-I was applicable to the case and the national roaming charges paid by the assessee to other cellular service providers under the agreements with them should be treated as payment of rent for the use of the equipment of the other cellular service providers. So far as section 194J is concerned, there is a controversy as to what decision was taken by the CIT(A), to which we shall refer to and discuss at the appropriate juncture in this order. Eventually, at page 25 of the impugned orders, the Ground No.1.c) taken by the

assessee before the CIT(A) was decided against the appellant by the CIT(A). Ground No.1 before the CIT(A) was as under: -

> "Based on the facts, circumstances of the case and in law, the Appellant respectfully submits that the learned TDS officer has erred in:
>
> 1. Determining the tax liability of ₹194,730,954, excluding interest under Section 201(1A) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), by treating the Appellant to be an 'assessee in default' alleging the following:
>
> a) Lower deduction of tax at source on payments made to agencies / contractors for supply of manpower under Section 194C of the Act, instead of Section 194J of the Act;
>
> b) Lower deduction of tax at source on payments made towards outsourced call centre services under Section 194C of the Act, instead of Section 194J of the Act; and
>
> c) Non-deduction of tax at source on payments made to telecom service providers towards national roaming charges under Section 194J or 194-I of the Act."

4. So far as the section 194-I is concerned, the assessee took up the contention before the CIT(A) that the national roaming facility is a standard facility which cannot be termed as rent for the use of any plant and machinery as defined in Appendix-I to the Income Tax Rules, 1962. This contention did not find favour with the CIT(A), who held as follows: -

> (a) The word "rent" has been given a wide meaning in section 194-I and, therefore, includes any payment by whatever name called. Thus though the payment is

called “national roaming charges”, it is actually rent for the use of the equipment belonging to the other cellular service providers.

(b) It is not necessary that the payer of the roaming charges or the rent should be in exclusive domain and control of the asset as held by the Delhi High Court in the case of United Airlines vs. CIT (2006) 287 ITR 281 (Del).

(c) The predominant intention of the agreement between the assessee and the other cellular service providers is the use of the plant and machinery or equipment and, therefore, the payment of national roaming charges amounts to payment of rent.

(d) There is no requirement of a regular rental or hiring agreement and even an arrangement between the parties is sufficient to attract the definition of “rent”. From 13.07.2006 an amendment was made to the definition of “rent” in section 194-I to include “any arrangement” under which the payment is made irrespective of whether the assets are owned by the payee or not.

(e) Even if there is no human element involved in the provision of the facility and the entire facility is completely automatic, it would make no difference to

the position so long as the payment is made for the use of the machine or equipment.

In this view of the matter, the CIT(A) held that the national roaming charges were in the nature of rent and accordingly the assessee was liable to deduct tax under section 194-I of the Act. He thus upheld the order under section 201 on this issue for all the three years.

5. The assessee is in further appeal before the Tribunal for all the three years and in the first ground has challenged the correctness of the decision of the CIT(A) regarding the applicability of section 194-I. Section 194-I, which was inserted by the Finance Act, 1994, with effect from 01.06.1994, provided for deduction of tax by the person paying rent at the prescribed rates. The section does not apply to an individual or a HUF. Even in respect of the others to whom the section applies, there is no liability to deduct tax if the aggregate payment of rent during the financial year does not exceed rupees one hundred twenty thousand. There is an Explanation to the section, which defines the word "rent" as follows:-

A. Definition of "rent" as it existed before the amendment made by the Taxation Laws (Amendment) Act, 2006, with effect from 13.07.2006:

"*Explanation* – For the purposes of this section,--

(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land

or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee;"

B. Definition of "rent" after the amendment by the aforesaid Act:

"*Explanation* – For the purposes of this section,--

(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any, --
(a) land; or
(b) building (including factory building); or
(c) land appurtenant to a building (including factory building); or
(d) machinery; or
(e) plant; or
(f) equipment; or
(g) furniture; or
(h) fittings,
whether or not any or all of the above are owned by the payee;".

A careful perusal of the definition of the word "rent" shows several features. Firstly, any payment which in substance is rent, but is given another name by the parties to the agreement, will also be considered to be rent and the name given to the payment by the parties will be discarded. This is the import of the expression "by whatever name called". Secondly, the payment should be under any lease, sub-lease, tenancy or any other agreement or arrangement. Cases of lease, sub-lease and tenancy involve the transfer of an interest in the property. The argument of the assessee before us was that the meaning of the words "or any

other agreement or arrangement" is that such other agreement or arrangement should also be of the same or similar nature as a lease, sub-lease or tenancy and it should involve a transfer of interest in the asset. The basis of this argument is the rule of *ejusdem generis* which simply means that the meaning of a general word should be restricted to things or matters of the same genus as the preceding particular words. However, in order to attract this principle, it is essential that a distinct genus or category must be discernible in the words under examination. A lucid illustration from Salmond on Jurisprudence, Twelfth Edition, Page 135, may be quoted with advantage: -

> "This, (i.e., the rule of *ejusdem generis*) however, is only the application of a common sense rule of language: If a man tells his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term 'anything else she needs' a new hat or an item of furniture".

The words used together should be understood as deriving colour and sense from each other. This rule has been employed in several decisions under the Income Tax Act and it is not necessary to refer to them. The point made is that under the agreement entered into between the assessee and other cellular service providers in respect of the payment of national roaming charges, there is no transfer of any interest in the plant or equipment owned by the other service providers in favour of the assessee company and, therefore, the payment cannot be considered as rent, applying the rule of *ejusdem generis*.

6. We are unable to agree with the assessee that the rule of *ejusdem generis* should be invoked in interpreting the Explanation (i) below section 194-I. The language or context does not permit the use of the rule. Under the Explanation "rent" means any payment by whatever name called under any lease, sub-lease or tenancy or "any other agreement or arrangement for the use of….." the assets mentioned therein. We think that the emphasis of the provision is upon the "use" of the asset and so long as this condition is satisfied, any agreement or arrangement, whether it is similar or not in nature to a lease, sub-lease or tenancy is taken in by the Explanation (i). It seems to us that a transfer of interest in the property is not required to be shown before the payment is subjected to tax deducted at source. The applicability of the rule of *ejusdem generis* is subject to the language employed by the statute. Where the intention manifested by the language of the statute is clear, the rule has no application. It appears to us to be the intention of the statute that so long as any of the assets mentioned in clause (a) of Explanation (i) is used by the payer of the amount, whatever be the arrangement or agreement between him and the payee, the consideration for the use is to be treated as "rent" and tax has to be deducted from the same. In CGT vs. Getti Chettiar (1971) 82 ITR 599 (SC) cited on behalf of the assessee the question arose as to whether an unequal partition of joint family property can give rise to a taxable gift. In general law a partition is not a transfer of property as held by the Supreme Court in CIT vs.

M K Stremann (1965) 56 ITR 62 (SC). Reliance however was placed by the revenue on the wide definition of "transfer of property" in section 2(xxiv) of the Gift Tax Act which included a disposition, conveyance, settlement etc. and "other alienation" of property which included, inter alia, "any transaction entered into by any person with intention to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person". The Supreme Court held, rejecting the plea of the revenue, that merely because a word is widely defined it does not lose its ordinary, natural and popular meaning and it only enables the word to be applied to things to which it would not normally be applicable, there being nothing in the subject matter or in the context to the contrary. It was further held that the words "any transaction" must take their colour from the main provision viz., that it must be a transfer of property in some way. It must be remembered that the words "any transaction…." were controlled by the earlier words "other alienation" which in turn were controlled by the words "transfer of property", with the result that it was essential that there was a transfer or alienation of property in the first place before it can be examined whether there was a diminishment of the value of the property of one person and corresponding increase in the value of the property of others. We are in the present case concerned with a provision with a significant difference in the phraseology. The Explanation (i) seeks to define "rent" and immediately clarifies that any payment which is in substance rent

but termed differently by the parties would also be included in the definition. The intention appears to be rope in payments under a lease, sub-lease, or tenancy all of which involve a transfer of interest in the property even if such payments are termed differently by the parties. There can be no dispute that the three types of transfer of interest mentioned above do involve the use of the property by the transferee. However, there may be other arrangements or agreements which may not involve a transfer of interest in the property but may still contemplate use of the property. A common example is that of an agreement for leave and licence where the licencee does not enjoy any interest in the property except that he is permitted to use the property in consideration for which he pays licence fees. Since use of the property, albeit without transfer of any interest therein, is involved in such an arrangement, the payment, though called licence fee, is deemed to be rent. There may thus be cases which involve transfer of an interest in the property and cases which do not involve a transfer of interest in the property. In both cases, the payment made, if it is for the use of the property, is to be treated as rent and tax has to be deducted therefrom. Thus, in our humble opinion, the words “any other agreement or arrangement” have been advisedly employed to include transactions involving use of the property without involving any transfer of interest therein, as in the cases of lease, sub-lease or tenancy. That is why we observed that the emphasis of Explanation (i) is on the “use” of the property, rather

than on the question whether there is a transfer or not of any interest in the property. In this view of the matter, we are of the opinion that it is not necessary that there should be a transfer of interest in the equipment owned by IDEA or Airtel in favour of the assessee herein before the payment of roaming charges is termed as "rent" within the meaning of Explanation (i) of section 194-I of the Act.

7. The reference to the Explanation 3(b) below section 32 by the learned CIT (DR) appeals to us to be apposite. It contains a definition of what "intangible assets" are for the purpose of allowing depreciation. It says intangible assets are know-how, patents, copyrights, trade-marks, licences or franchises "or any other business or commercial rights of similar nature". Here, the words "of similar nature" clearly make room for the application of the rule of *ejusdem generis* in the sense that the other business or commercial rights must be of the same nature as those listed in the earlier part of the provision (viz., patents, copyrights, trade-marks etc.). Such restrictive words are not present in Explanation (i) below section 194-I. We are not however to be understood that only where such restrictive words are used can there be scope for the application of the rule of *ejusdem generis*. The rule must be applied where the context or language also permits it but where either the language or the context does not permit, the temptation to apply the rule in a mechanical manner has to be avoided. Further, the object of the statute and the mischief sought to be avoided have

also to be kept in view. The object of Explanation (i) below section 194-I appears to us to be to make all payments for the use of any of the assets mentioned in clause (a) subject to tax deduction at source. In this context, it may be incongruous to hold that even where use of the assets is involved the payment therefor cannot be held to be subject to tax deduction at source merely because the agreement or arrangement between the parties was such that it did not involve a transfer of interest in the property in favour of the person paying for the use of the property.

8. Having held that the rule of *ejusdem generis* does not apply to the interpretation of Explanation (i) of section 194-I and that it is not necessary that there should be a transfer of interest in the assets mentioned in clause (a) thereof in favour of the assessee herein, we may proceed to examine the agreement or arrangement between the parties to find out if there is any "use" of the equipment owned by IDEA or Airtel or any other service provider with whom the assessee has an agreement or arrangement in respect of granting roaming facility to its subscriber, and if so, by whom. We take up for consideration the "National GSM Roaming Agreement" entered into between IDEA Cellular Limited and Aditya Birla Telecom Limited on the one hand, both of which are collectively referred to as "IDEA" and Vodafone Essar Limited, the assessee herein on the other. The agreement is dated 12th May 2008 and a copy thereof is placed at pages 81 to 114 of the assessee's Paper Book filed on 18th February 2010. The general terms and

conditions for GSM National Roaming consist of 21 clauses running into 19 pages (pages 86 to 114). The introduction to the agreement (clause 2) says that the agreement provides for the establishment of national roaming services whereby a subscriber provided with services in one cellular circle by one of the network operators can also gain access to the services of any other network operators in their respective licensed area. Some of the important definitions may be noticed first. Clause 3.2 defines "Roaming Subscriber" to mean a person or entity with valid subscription for national use issued by one of the parties to the agreement and using a GSM Subscriber Identity Module (SIM) who seeks GSM service in a geographic area outside the area served by the Home Party Location Mobile Network (HPLMN). Clause 3.6 defines "HPLMN Operator" to mean a party who is providing GSM service to its subscribers in a geographic area where it holds a license or has a right to establish and operate a GSM network. The other party is known as the Visiting Party Location Mobile Network (VPLMN) and clause 3.7 defines a "VPLMN Operator" as a party which allows roaming subscribers to use its GSM network. Clause 6.2 provides for "Services". The service provided by each party to the agreement is listed in Annexure 1.2. It further says that the GSM services made available to individual roaming subscribers shall only be those for which the roaming subscribers have valid subscriptions in their HPLMN. It further provides that each VPLMN Operator shall offer the same GSM services to roaming subscribers of all other

GSM Operators. Clause 8 provides for "Charging, Billing and Accounting". It says that the parties agree that when a roaming subscriber uses the services of the VPLMN Operator, the roaming subscriber's HPLMN Operator shall be responsible for payment of the charges for the services so used in accordance with the tariff of the VPLMN Operator. The clause further provides that the HPLMN Operator shall not be so liable in respect of services provided by VPLMN Operator without Subscriber Identity Authentication as defined in the terms and conditions. The clause also provides for the change of tariff by either party. There are several other terms and conditions which were not referred to before us and which may not be relevant for our purpose.

9. The assessee has submitted before us an $1^{1}/_{2}$ page note describing the methodology involved in a roaming call. This document is titled "Roaming Call Methodology". It explains how a roaming call is made, in the following manner: -

"*Roaming service*

- Vodafone subscriber in Mumbai travelling to Delhi switches on his mobile device after reaching Delhi (in case of air travel). Where the subscriber travels by land he automatically receives a message requesting for selection of the roaming network on visiting another telecom circle.

- The subscriber has a choice of manual network selection or automatic network selection.
  - Under automatic network selection, the services of the most preferred roaming partner of subscriber's home network will be selected.

- Under the manual selection, the subscriber can choose the roaming partner whose services he would like to use out of the ones which are available in that area (subscriber can only choose the roaming partner with whom Vodafone has tie up).

- Visiting network (eg. IDEA) locates mobile device and identifies that it is not registered with its system i.e. VLR.

- Visiting network contacts home network of Vodafone subscriber i.e. HLR and requests service information about roaming device using IMSI number – IMSI number is a unique subscriber identity number granted to the customer at the time of subscription.

- Visiting network maintains temporary subscriber record for said mobile device and provides an internal temporary phone number to the mobile device.

- Home network also updates its register to indicate that the mobile is on visitor network so that information sent to that device is correctly routed.

- The entire process above is automatic and does not involve any human intervention at any stage.

- A caller from Mumbai makes a call to Vodafone subscriber which is routed to the Home network of Vodafone subscriber in Mumbai.

- Home network then forwards all incoming calls to the temporary phone number which terminates at the device of roaming subscriber (in Delhi) who is now using the services of the Visiting network (i.e. IDEA).

- The entire process above is automatic and does not involve any human intervention at any stage.

Billing process

- Usage of roaming subscriber in visited network is captured in a file called TAP i.e. Transferred Account Procedure for GSM / CIBER i.e. Cellular Inter-carrier Billing Exchange Record for CDMA.
  - TAP file contains details of calls made by subscriber viz. location, calling party, time of call and duration etc.
  - TAP / CIBER files are rated as per tariffs charged by Visiting network operator.
- Such TAP / CIBER file is transferred to Home network of subscriber (i.e. to Vodafone).
- Home network (i.e. Vodafone) then bills these calls to the Vodafone subscriber and pays roaming charges based on the TAP to the visited network operator (i.e. IDEA). The roaming operator charges as per the roaming agreement with Vodafone, whereas the subscriber is billed as per the tariff subscribed".

10. The question is whether the payment made by the assessee as national roaming charges to the other service providers is for the use of such equipment. We may refer to an analogous situation. Let us take for example a lathe. If a person takes a piece of steel rod for turning or grinding by a lathe, he would approach the owner of the lathe to carry out the work. It is the owner of the lathe who, while carrying out the turning or grinding job, would use the lathe and the person who requires the lathe owner to do the job is not the person who can be described as the user of the lathe. The service of turning or grinding the steel rod is rendered by the lathe owner by using the lathe for which charges are paid by the person who wanted the steel rod to be turned or ground. It is not possible to say that it is this person who "used" the lathe. All that he paid for

was for the service rendered by the lathe owner. A similar situation arises in a very common example of the "atta chakki". The person who brings the wheat cannot be said to be the person who used the chakki. What he paid to the owner of the chakki was for the service of grinding the wheat into atta. These may be common place examples but they do not put the point less effectively for that reason. The subscriber of the assessee who is entitled to use the roaming service merely obtains a service from the other service provider; say IDEA or Airtel, with whom the assessee has a GSM Roaming Agreement. He has neither seen the equipment nor has any direct contact with the same. All that he knows is that because he has the roaming facility in his cell phone, he can make a call from Delhi to any other place even though he is registered with the assessee only in Mumbai. He is the person who is entitled to the roaming service which is provided by the other service provider with whom the assessee has a working arrangement and for that reason he cannot be said to use the equipment involved in providing the roaming facility. Even if we assume for the sake of argument that the subscriber is the person who makes use of the equipment, the liability to deduct tax would be on him and not on the assessee.

11. The real question now to be considered is whether it is possible to say that it is the assessee who has used the equipment and has paid the roaming charges to the other service provider with whom it has entered into a National GSM Roaming Agreement. In our opinion, it is not possible to say so because if at all anyone can

be said to have used the equipment it can only be the assessee's subscriber, but not the assessee. The assessee has collected the roaming charges from its subscriber who has the roaming facility, but as the roaming call methodology described above shows, thereafter the assessee has little role to play and everything is left to the subscriber. If anything the assessee is placed in a position of a mere facilitator between its subscriber and the other service provider, facilitating a roaming call to be made by the subscriber. The assessee cannot be said to have used the equipment which is involved in providing the roaming facility. The assessee collects the roaming charges from its subscriber and passes it on to the other service provider.

12. The assessee has submitted a specimen copy of the invoice raised by Airtel on the assessee on 8th February 2010. This is for the period 01.01.2010 to 31.01.2010. The value in Indian Rupees is ₹3,84,18,831/- to which Service Tax of ₹39,57,140/- has been added. The assessee has also drawn our attention to section 65 of the Finance Act, 1994, which contains a series of definitions for the purpose of levying Service Tax. Clause 105 of the section defines "taxable service" to mean any service provided or to be provided and this clause read with its sub-clause (zzzx), includes any service provided or to be provided to any person by the telegraph authority in relation to telecommunication service. Clause 109a of section 65 defines "telecommunication service" to mean service of any description provided by means of any transmission, emission or

reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885 and includes in clause (iii) thereof "cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations". The provisions of section 65 of the Finance Act, 1994, referred to above show that the Legislature itself has looked upon the provision of cellular telephony as a service and this includes inbound and outbound roaming service both to and from national and international destinations. This explains why Service Tax was charged by Airtel in the invoice raised on the assessee. It is also fortified by the terms of the agreement dated 27th November 1994 entered into between the Government of India (Ministry of Telecommunications) and the assessee, who at the relevant time was known as Hutchison Max Telecom. A copy of the agreement was filed on behalf of the assessee and our attention was drawn to certain terms therein which show that cellular mobile telephony was always looked upon as a service and not as use of any equipment. Clause 1 of the agreement describes the licence as one to

establish, maintain and operate "Cellular Mobile Telephone Service". In Schedule "A" the various areas to which the licence applies have been mentioned as "Schedule of Area of Service". Schedule "C" contains definitions, interpretations and transitional provisions. Clause 1(a)(i) defines "Service Area" as denoting the "geographical limits within which the licensee may operate and offer the services". Clause 1(l) defines "Cellular Mobile Telephone Service" as meaning a "telecommunication service provided by means of a telecommunication system for the conveyance of messages through the agency of wireless telegraphy where every message that is conveyed thereby has been, or is to be, conveyed by means of a telecommunication system which is designed or adapted to be capable of being used while in motion". In several other places in the licence agreement the word "service" has been used. It would therefore appear to us that the roaming facility is actually a facility or service provided to the subscriber either by the service provider with whom the subscriber is registered or by another service provider with whom it has an agreement or arrangement for the provision of the roaming facility. The Notification dated 24th January 2003 issued by the Telecom Regulatory Authority of India (TRAI) also uses the words "service, service operators and service providers". An Explanatory Memorandum was issued to "The Telecommunication Interconnection Usage Charges (Tenth Amendment) Regulations, 2009", a copy of which is placed at pages 38 to 49 of the Paper

Book filed by the Department. Under the heading "IUC reconciles conflicting objectives" in paragraph 2 of the Memorandum it has been stated that an important objective of IUC is to make available the widest range of telecommunication services to the consumers at reasonable cost and also these services should be provided in the most economically efficient manner. It has further been stated that the benefits of liberalization should be distributed as quickly as possible to the largest section of the society with consumers able to access the full range of services in the market and not just that offered by the access providers to whose network they are connected. In this Memorandum also the reference is to services and service providers which also fortifies the claim that what the subscriber gets is a service and the payment therefor cannot be considered as rent.

13. The clarification issued by the CBDT in Circular No.715 dated 8th August 1995 (pages 50 to 55 of the Department's Paper Book) is also revealing. The clarifications are in the form of Questions and Answers. Question No.20 is whether payments made to a hotel for rooms hired during the year would be of the nature of rent, so that there is a liability to deduct tax under section 194-I. The answer was that payments made by persons, other than individuals and HUFs for hotel accommodation taken on regular basis will be in the nature of rent subject to TDS under the section. A clarification was later issued on 30th July 2002 by way of Circular No.5/2002. The need for clarification arose because certain doubts

were expressed as to what would constitute “hotel accommodation taken on regular basis”. The Circular went on to explain that where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on ‘regular basis’. It was further clarified that where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement, the position would be the same. It was however clarified that where the intention of entering into agreements with the hotels is to fix the room tariffs at lower rates, they would be in the nature of rate-contracts for providing specified types of hotel rooms at pre-determined rates during an agreed period. It was therefore clarified that a rate-contract cannot be said to be for accommodation ‘taken on regular basis’ and there would be no obligation on the part of a hotel to provide a room or specified set of rooms. Thus it was stated that section 194-I would not apply to rate-contract agreements. The argument on behalf of the assessee, relying on the clarification is that the Board itself has recognized that rent is something which is paid for earmarked premises, and in the case of roaming charges, a subscriber does not get any earmarked service provider and the assessee also does not commit itself to the subscriber to provide for any particular service provider. The choice of the service provider who will provide the roaming facility to the subscriber is left to the subscriber. He usually finds a message delivered to him when he

moves to a different place from where he is registered, say from Mumbai to Delhi. The message which is flashed on his cell phone gives the names of the service providers which have a roaming agreement with the service provider with whom he is registered and he can choose any of them during the period of his stay in Delhi and be connected through the cell phone. Very often he may, while using the roaming facility, be given the message that the call could not be put through. This is because of the lack of availability of space in the network of the service provider whom he has chosen. He may have to change to another service provider and if there is none, he has to try again through the same service provider till space is made available. This only shows that there is no commitment either by the assessee or by the other service provider with whom it has entered into a roaming agreement, to make the space available to the subscriber whenever demanded. In other words, no space in the network equipment is reserved or committed for the subscriber. If the payment is to be called rent, the subscriber, as of right, should be able to get the space which is earmarked for him. This is one more reason why the payment made by the subscriber through the assessee as roaming charges cannot be considered to be rent.

14. We may now refer to a few authorities cited by both the sides. From the assessee's side reference was made to the decision of the AAR in Dell International Services India (P) Ltd., In Re (2008) 305 ITR 37. This decision seems to suggest that the

user of any equipment should have some right over the equipment and further that there should be some dedicated machinery or equipment instead of a common infrastructure which can be used by various operators to provide services. It was also observed that there should be a right to exclusive possession or custody of the equipment and enjoyment thereof over a stipulated period of time in order that a payment can be said to be rent. But the more important observation in this order is as to the meaning and import of the word "*use*". It was held that the word "*use*" in relation to any equipment is not to be understood in the broad sense of availing of the benefit of an equipment, but it indicated that there must be some positive act of utilization, application or employment of the equipment for the desired purpose. It was held that if an advantage was taken from sophisticated equipment installed and provided by another, it could not be said that the customer used the equipment; it would be a case of a customer merely making use of the facility without himself using the equipment. It was necessary, according to the decision, that the customer came face to face with the equipment, operated it or controlled its functions in some manner. But if the customer did nothing to or with the equipment and did not exercise any possessory rights in relation thereto, it can only be said that he made use of the facility created by the service provider who was the owner of the entire network and related equipment. In this case the AAR was dealing with a private company registered in India which was mainly engaged in the business of providing call

centre, data processing and information technology support services to the Dell group of companies. A non-resident company known as BT, which was registered in the USA, provided the assessee with two-way transmission of voice and data through telecom bandwidth. The assessee had to pay fixed monthly recurring charges for the circuit between USA and Ireland and Ireland to India net of Indian taxes. There was no equipment of BT in the assessee's premises and the assessee had no right over any equipment held by BT for providing the bandwidth. The fiber link cables and other equipment were used for all customers of BT including the assessee. The bandwidth was provided through a huge network of optical fiber cables laid under seas across several countries of which BT used only a small fraction. The question arose as to the nature of the monthly recurring charges paid by the assessee to BT. The Department's case was that the payment fell under section 9(1)(vi) of the Income Tax Act and was to be treated as royalty. The word "*royalty*" was defined in Explanation 2 below the section and clause (iva) of the Explanation stipulated that any consideration for the "use or right to use" any industrial, commercial or scientific equipment would be considered as royalty. The question which the AAR was required to consider was whether the assessee could be said to have paid the monthly recurring charges to BT for the "use" of any such equipment. It was in this context that the AAR opined that it cannot be called as a use of the equipment. The case of the assessee before us is probably

stronger because of the more stringent language used in section 194-I even if the rule of ejusdem generis is considered rightly applicable.

15. The learned CIT Departmental Representative had however drawn our attention to the judgment of the Andhra Pradesh High Court in Krishna Oberoi vs. Union of India (2002) 123 Taxman 709 (AP) in an attempt to show that the word "rent" has been defined in the Explanation below section 194-I in a wide sense to include not only consideration paid under a lease or sub-lease or tenancy but also the consideration paid under "any other agreement or arrangement" for the use of any of the assets mentioned therein. A careful perusal of paragraph 9 of the judgment shows that however wide may be the construction placed on the Explanation, the payment in question under the agreement or arrangement with the customers should be for the "use" of the equipment. The judgment is not an authority for the proposition as to what constitutes "*use*" of the equipment. In that case it was an admitted position that the customer of the hotel used or occupied the room and the argument put forward before the High Court was that the customer was not a lessee or tenant but a mere licensee and, therefore, the payment to the hotel cannot be considered as rent. This argument was not accepted by the High Court. The decision of the High Court may take care of the assessee's argument before us that it may not be necessary that there should be a transfer of interest in the asset before the payment is considered as rent within the meaning of the

Explanation, but as regards the question whether there is any use of the asset and as to what are the conditions necessary before the person making the payment can be considered to have used the asset, the decision does not touch the point. The other judgment referred to by Mr Singh, appearing for the Department, is that of the Delhi High Court in the case of United Airlines vs. CIT [(2006) 152 Taxman 516 (Del) = (2006) 287 ITR 281 (Del)]. That was a case of an airlines having to pay landing and parking charges for its aircraft and the question was whether such charges amounted to rent for the use of the airstrip for the purpose of the Explanation below section 194-I. There also it was held that the word "*rent*" in the Explanation has a wider meaning than the meaning attributed to it in common parlance. Nevertheless it was held that any agreement or arrangement between the parties should be for the use of the land. It was held that when the wheels of an aircraft coming into an airport touch the surface of the air-field, use of the land of the airport begins. The parking of the aircraft in the airport also involves use of the land. It was thus held that the payments of landing and parking fee were subject to tax deducted at source. This is a case where the user of the asset directly came into contact with the asset and actually used the asset, namely, the land belonging to the Airport Authority both for taxiing and for parking. It cannot be denied that use of the asset was clearly involved. The argument, however, was that even control of technology from a distant place would amount to use in the modern world. It was

pointed out that the Home Location Register (HLR) is always activated in case of roaming facility and there is hardware involved in abundance when a roaming facility is provided. This argument has been fully answered by the decision of the AAR in the case of Dell International Services India (P) Ltd. (supra).

16. Another judgment referred to on behalf of the Department was that of the Hon'ble Bombay High Court in the case of CIT vs. Kotak Mahindra Finance Ltd. [(2010) 191 Taxman 280 (Bom) = (2009) 317 ITR 236 (Bom)]. That was a decision which arose under section 32 of the Income Tax Act, which provided for depreciation allowance. The question was whether an asset given on lease by an assessee engaged in the business of leasing, before the end of the accounting period, can be said to have "*used*" the equipment for the purpose of his business and whether it is necessary to examine the further question as to whether the lessee also had put the asset taken on lease to use within the said period. It was held that it was not necessary that the lessee also should have put the leased equipment to use before the end of the accounting period and it was sufficient for the purpose of section 32 that the lessor had leased out the asset to the lessee within the accounting period so that he can be said to have used the asset for the purpose of his business, which was that of leasing. This decision seems to us to be not relevant for the controversy before us. The point for consideration before the Hon'ble High Court was not whether there was any use of the leased equipment for business purposes, the

question being that whether it was also necessary that the lessee should also have used the leased asset before the accounting period. This decision, with respect, is not of assistance to the revenue in the present case.

17. Reference was then made by the Department to the order of the Special Bench (Delhi) of the Tribunal in the case of New Skies Satellites N.V. vs. Assistant Director of Income-tax, International Taxation (2009) 121 ITD 1 (Del) (SB). This was a case where clause (iii) of Explanation 2 below section 9(1)(vi) was considered by the Special Bench. This clause provided that any payment made for the use of any patent, invention, etc. will be considered as royalty. While interpreting the word "*use*" in the clause, the Special Bench laid down the following propositions: -

(a) the context has to be kept in mind;
(b) the word has to be construed as understood in the trade circles of that particular business activity; and
(c) the development in the field of technology has to be taken into account.

Relying on this order of the Special Bench, the revenue contended that when roaming facility is activated, the assessee controls the same through the equipment involved in the network, which would amount to use by the assessee of equipment within the meaning of the Explanation below section 194-I. We have taken note of the context in which the word "use" of the asset is employed in the Explanation. The payment has to be for the use of the asset if it is to be subjected to tax deduction at source. The parties in the agreement for roaming services have repeatedly used the word

"service" to denote the roaming facility to be offered by the service provider. The TRAI regulations also repeatedly coin the expression "service" or "service provider". The development of technology has to be certainly taken note of. As technology develops, it will certainly be possible to enjoy more facilities by a person sitting in remote places just by clicking a button. That can only be because of the technological development which makes available the facility or service instantaneously through sophisticated equipment. In every such case it cannot be considered to be a "use" of the equipment by the person enjoying the facility or service. In most such cases, the person enjoying the service or the facility may not have even the faintest idea of what he is using or what is the technology involved which enables him to use the facility or service. To say, in such circumstances, that he is using the equipment would be a travesty of reality. Our attention was then drawn to the National GSM Roaming Agreement where definition clause 3.7 defines a VPLMN Operator to mean a party who allows roaming subscribers to use (underlining ours) its GSM network. When we look at this definition closely, we find that the VPLMN Operator in question in the present case will be IDEA or Airtel and it is either IDEA or Airtel which allows the roaming subscriber to use its GSM network, which means that the GSM network of IDEA or Airtel is being used by the roaming subscriber and not the assessee. Therefore, this definition is not of much use to the revenue in the present case because reliance cannot be placed on the same to

contend that it is the assessee which uses the GSM network of the VPLMN Operator.

18. We may now refer to the judgment of the Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another vs. Union of India and Others (2006) 282 ITR 273 (SC) cited by Mr Dastur. This judgment arose under the Service Tax and Sales Tax. One of the questions which arose for consideration was whether there was any transfer of a right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber. Referring to section 4 of the Telegraph Act, 1885, which gives exclusive privilege in respect of telecommunication and the power to grant licenses to the Central Government, it was contended by the service providers that they provided only a service by the utilization of telegraph licensed to them for the benefit of the subscribers. The Supreme Court proceeded on the assumption that incorporeal rights may be goods for the purpose of levying Sales Tax and posed to itself the question whether the electromagnetic waves through which the signals are transmitted can fulfill the criteria for being described as "*goods*". The Court held that the electromagnetic waves cannot be called goods. They were held to be merely the medium of communication; the waves are neither abstracted nor consumed, they are not delivered, stored or possessed, nor are they marketable. What was transmitted is not an electromagnetic wave but the signal through such means. The Supreme Court thereafter gave a more basic reason to hold that the

electromagnetic waves cannot be considered as goods and it is this reason which is relevant for our purpose. At page 302 of the report it was held as under: -

> "A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc……..As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection".

These observations give a clue to the solution in the present case. It is noteworthy that the Supreme Court was dealing with mobile phone connections provided by Bharat Sanchar Nigam Ltd. and the principal question was whether it was a sale or a service or both. The observations were rendered in that context. Again at page 306 of the report it was observed that providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. All these observations may have been made in the context of the question whether the electromagnetic waves were goods or not but one of the important strands underlining the reasoning of the Court was that the subscriber to the mobile telephone does not intend to use any portion of the equipment that is used in providing the service. Another basic observation that was made by the Court in the context of the question as to whether providing mobile telephoning to the subscriber was a service was based on the

Service Tax provisions introduced by Chapter V of the Finance Act, 1994. One of the provisions stipulated that a person to whom any service of a telephone connection has been provided by a telegraph authority would be a subscriber and a service to a subscriber by the telephone authority was defined to be a taxable service. After noticing these provisions the Supreme Court at page 308 held that a telephone service is nothing but a service.

19. The argument of the Department was that the aforesaid judgment of the Supreme Court was not relevant in all contexts. If the underlying position is that a mobile telephony is a service, it would be difficult to consider the roaming facility given to a subscriber as part of the service as something which would involve payment of rent for use of the assets belonging to another service provider who provides the facility to the subscriber under an agreement or understanding. It is to this extent that the judgment of the Supreme Court is relevant.

20. Mr Dastur referred to a judgment of the Supreme Court in the case of State of Andhra Pradesh and Another vs. Rashtriya Ispat Nigam Ltd. (2002) 126 STC 114 (SC). There the question arose as to whether the hire charges received by a dealer for hiring out machinery to contractors for use in a project are chargeable to Sales Tax under the Andhra Pradesh General Sales Tax Act, 1957. Section 5-E of the said Act provided that every dealer who transfers the right to use any goods for any purpose, whatsoever, is liable to pay Sales Tax at the prescribed rate. In the case before the

Supreme Court the owner of the machinery hired out the same to contractors to be used in the project which was allotted to the owner by the State Government. The contractors were not free to use the machinery for any work other than the project work nor they were permitted to move out the machinery during the period when it was in use. In these circumstances a question arose as to whether the owner of the machinery had transferred the right to use the machinery to the contractors. The Supreme Court held that the effective control of the machinery, even while it was being used by the contractor, was with the owner of the machinery and further the contractor could not use the machinery for any work other than the project work or move it out during the period it was in use. The Supreme Court on these facts held that there was no transfer of the right to use the machinery and no Sales Tax was payable on the hire charges received. It was so notwithstanding that the contractor was responsible for the custody of the machinery while it remained in the project site. The contention based on this decision is that if the ratio of the judgment is applied to the present case, it will be seen that the effective control and possession of the equipment which provided the roaming facility was with the service provider and not with the assessee and, therefore, there was no question of the assessee using the equipment so that the payment can be called rent. Even the National GSM Roaming Agreement between the assessee and IDEA does not provide for any transfer of control of the equipment involved in the roaming facility to the assessee. In

fact the definition of a "Roaming Subscriber" in clause 3.2 of the agreement says that it shall mean a person or entity with valid subscription for national use issued by one of the parties and using a GSM Subscriber Identity Module (SIM) and who seeks GSM service in a geographic area outside the area served by his HPLMN Operator. The agreement between the parties is merely to the effect that if the assessee's subscriber wants a roaming facility when he is outside the geographical area served by the assessee, he can enjoy such facility because of the agreement or arrangement entered into between the assessee and the other service provider (IDEA). There is no term in the roaming agreement which shows that the effective control or possession of the network of IDEA would be transferred to the assessee during the period for which the subscribers of the assessee may use the roaming facility.

21. Two other decisions cited on behalf of the assessee are the decisions of the AAR in Isro Satellite Centre (ISAC), *In re* (2008) 307 ITR 59 (AAR) and Cable and Wireless Networks India P. Ltd., *In re* (2009) 315 ITR 72 (AAR). In the first of these decisions the AAR was considering the words "*use*" and "*right to use*" appearing in Explanation 2(iii) below section 9(1)(vi) of the Income Tax Act. Following its earlier decision in the case of Dell International Service (P) Ltd. (supra), it was held that the lease amount paid by Isro to the non-resident for gaining access to the navigation transponder facility provided by the non-resident cannot be

considered as royalty paid for the use or right to use any equipment. The argument of the revenue in this case was that in substance there was use of the transponder by Isro because the exclusive capacity of the transponder was kept entirely at the disposal of Isro and the use of the transponder was ensured when it responded to the directions sent through the ground station. The analogy of operating a TV by remote control apparatus was put forth by the revenue. The AAR found it difficult to accept the revenue's contention. It held that the fact that the transponder automatically responded to the data commands sent from the ground station network and retransmitted the same over a wider footprint area covered by the satellite did not mean that the control and operation of the transponder was with the Isro. It was held that Isro did not operate the transponder but got access to the navigation transponder through its own network or apparatus. According to the AAR, in essence, it amounted to the provision of a communication or navigational link through a facility owned by the non-resident company and exclusively operated / controlled by it. The operation and regulation of the transponder was always with the owner of the transponder which was the non-resident. The analogy of TV operations by means of a remote control suggested by the revenue was held not appropriate because the remote control device was an accessory to the TV itself and the possessor of the TV himself operates the TV by means of the remote control. It was also observed that the assessee before the AAR was one of

the many customers who derived the benefit of the capacity of the transponder and the reservation of a particular capacity or bandwidth for the purpose of providing the augmentation to global satellite navigation system is only a facility offered by the non-resident company out of the satellite infrastructure it possessed. If these observations are applied to the facts of the present case, it may be seen that the network or equipment owned by IDEA is merely accessed by the assessee's subscriber by the press of a button in the mobile handset which is owned by the subscriber. It cannot be likened to a remote control device by which a TV is operated because the network or the equipment is not owned or possessed by the subscriber nor by the assessee. As observed by the AAR, with which we respectfully agree, it amounts to the provision of the roaming facility through the network or equipment owned by IDEA and operated and controlled by it, of course after proper verification of the network of the assessee for the purpose of finding out whether the subscriber demanding the roaming facility is registered with the assessee.

22. The decision of the AAR in Cable and Wireless Networks India P. Ltd., *In re* (supra) does not require separate consideration as the reasoning and the conclusion is the same as in the case of Isro Satellite Centre (ISAC), *In re* (supra) and Dell International Service (P) Ltd. (supra).

23. Our conclusion with regard to section 194-I is that the payment of roaming charges by the assessee to the other service

providers cannot be considered as rent within the meaning of the Explanation below section 194-I. Therefore, there was no liability on the part of the assessee to deduct tax from the same under that section.

24. So far as the other question as to whether the assessee is liable to deduct tax under section 194J is concerned, we have heard elaborate arguments from both the sides. The contention of the revenue is that the assessee ought to have deducted tax on the footing that the payment of roaming charges amounts to fees for technical services within the meaning of section 194J read with Explanation (b) below the said section, which refers to the definition of the expression "fees for technical services" in Explanation 2 below section 9(1)(vii) of the Income Tax Act. The definition of "fees for technical services" in that section is that it means any consideration (including lumpsum consideration) for the rendering of any managerial, technical or consultancy services, including the provision of services of technical or other personnel. We are not concerned with the other part of the definition which excludes certain types of consideration from the definition. The question really is whether the assessee paid the roaming charges in consideration for the rendering of any technical services by the other service provider.

25. Before we proceed to examine the question, a preliminary point needs to be settled. In Ground No.2 the assessee has questioned the applicability of section 194J and has contended that

the CIT(A) "erred in not giving any finding on non-applicability of section 194J of the Act on payments towards national roaming charges even after considering appellant's submissions and indirectly accepting that provisions of section 194J are not applicable". A perusal of the grounds of appeal filed before the CIT(A) shows that in Ground No.1(c) the assessee has challenged the action of the Assessing Officer in treating the assessee as a defaulter for "non deduction of tax at source on payments made to telecom service providers towards national roaming charges under section 194J or 194-I of the Act". Before the CIT(A) the assessee put forth elaborate submissions both with regard to section 194-I and section 194J. Ground No. 1(c) raised by the assessee before the CIT(A) has been considered by him in paragraphs 9 and 10 of his order. The assessee's contentions with regard to section 194J are noted in paragraphs 9.4 to 9.7. The contentions with regard to section 194-I are noted in paragraphs 9.8 to 9.13 of the order. The conclusion of the CIT(A) is in paragraph 10, which covers about $3^{1}/_{2}$ pages (from page 22 to page 25 of his order). However, the discussion in paragraph 10 is confined to the assessee's contentions under section 194-I, namely, whether the payment of national roaming charges can be regarded as rent. There is no discussion with regard to the assessee's contentions vis-à-vis section 194J. Ultimately the operative portion of his decision at the end of page 25 of his order says that "so far as 1(c) is concerned the same is decided against the appellant".

26. Now there are different ways of looking at the decision of the CIT(A). One way is to go merely by the operative portion of his order and hold that both with regard to section 194-I and section 194J, the matter has been decided against the assessee. The other way in which it can be understood is to take the view that the CIT(A), though he has stated that Ground No.1(c) is decided against the assessee, cannot be really said to have done so because there is no discussion or consideration of the assessee's arguments with regard to the applicability of section 194J and consequently there is no finding recorded by him regarding the applicability of the section. If we go by the Ground of Appeal No.2 before us by the assessee in the Memorandum of Appeal, it appears to us that even the assessee has understood the decision of the CIT(A) that way. However, that is only partly so because though the assessee has stated in the ground that the CIT(A) has erred in not giving any finding with regard to section 194J, in the later part of the ground it has been stated that the CIT(A) has thereby indirectly accepted that section 194J is not attracted. Initially the revenue objected to any arguments being advanced by the assessee with regard to section 194J because there was no finding by the CIT(A). The contention of the assessee, however, was that the matter can be argued because of the operative portion of the order of the CIT(A) deciding the entire Ground No.1(c) against the assessee. However, Mr Dastur also had to reckon with the later part of Ground No.2 taken before us where it was stated

that the CIT(A) has indirectly accepted that section 194J was not applicable. If we understand the decision of the CIT(A), reading his order as a whole, that he has indirectly accepted that section 194J was not applicable to the case, that would create a difficulty in the sense that the revenue has not taken any ground in its appeals to the effect that the CIT(A) was wrong in indirectly holding that section 194J was not applicable. Apart from this difficulty the real question will be whether we can understand the order of the CIT(A) as indirectly accepting the assessee's contention that section 194J is not attracted. Mr Dastur submitted that the assessee had put forth its contentions before the CIT(A) both in regard to section 194J and section 194-I and the CIT(A) has agreed with the Assessing Officer that section 194-I is applicable, which means that he has accepted the assessee's argument that section 194J is not applicable. Though it is theoretically possible to understand the decision of the CIT(A) this way, we would hesitate to do so considering the importance of the issue regarding the applicability of section 194J to the payment of national roaming charges. We would prefer to understand the decision of the CIT(A) as not giving a finding with regard to the assessee's claim that section 194J is also not attracted. In fact there is no discussion of the assessee's contentions vis-à-vis section 194J and ultimately the Ground No.1(c) taken before the CIT(A), which refers to both section 194J and section 194-I, has been dismissed. Taking all these into consideration, it would appear to us that the better course would be

to hold that the issue regarding section 194J, though it is stated by the CIT(A) to have been decided against the assessee, it has been done so without applying his mind to the contentions put forth by the assessee questioning the applicability of that section. It may be an inadvertence on the part of the CIT(A).

27. While the contention of the assessee is that there was no rendering of any technical services by the other service providers and thus section 194J was not attracted and what was rendered was merely a service (but not technical service) or a facility, the contention of the revenue was that the payment was for technical services. Several authorities were cited by both the sides. On behalf of the assessee the judgment of the Delhi High Court in CIT vs. Bharti Cellular Ltd. (2009) 319 ITR 139 (Del) was strongly relied upon. It was contended that this is a direct decision on the point where it was held that the payment is not for technical services, though the payment was not for national roaming charges but for interconnection charges. Suppose a call takes place between Delhi and Nainital. BSNL has no network in Nainital whereas it has a network in Delhi. The interconnect agreement between BSNL and Bharti Cellular enables the former to access the network of Bharti Cellular in Nainital and vice versa. Mr Dastur also fairly brought to our notice the judgment of the Supreme Court rendered on 12.08.2010 on appeal by the CIT against the Delhi High Court judgment (supra) in CIT, Delhi vs. Bharti Cellular Ltd. in Civil Appeal No.6691 of 2010 (arising out of SLP(C) No.16452 of 2009). The

Delhi High Court decision proceeded on the basis that there was no human intervention or interface involved in connection with providing interconnection facility by service providers. Before the Supreme Court the key issue which arose for determination was "whether manual intervention is involved in the technical operations by which a cellular service provider, like M/s Bharti Cellular Limited, is given the facility by BSNL / MTNL for interconnection?". The Supreme Court had to examine the meaning of the words "fees for technical services" under section 194J. The court opined that it is necessary to find out if human intervention is involved in any stage, including the stage when the existing capacity is exhausted and additional capacity is urgently required. Noting the absence of expert evidence from the side of the Department to show how human intervention takes place during the process when the calls take place (in the above example, from Delhi to Nainital and vice versa), the court restored the case to the AO (TDS) to examine a technical expert from the side of the department and to decide the matter within a period of four months. It further directed that the technical expert will be examined and cross-examined. The assessee was also free to examine its expert and to adduce any other evidence. The following directions are noteworthy:

> "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 the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when 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".

In fairness to both the sides we must however admit that we requested them to argue the question of applicability of section 194J also, which they have done with great ability and assiduity if we may say so with respect. At that time we had not made up our mind as to how the decision of the CIT(A) should be interpreted and in order to avoid delaying the proceedings we had heard arguments on the merits of the applicability of section 194J also. However, we now find that the proper course will be, as noted earlier, to hold that the CIT(A) has not in fact decided the issue of applicability of section 194J. We acknowledge that it might have caused some inconvenience to both the sides who took great pains to argue the matter before us on merits but the overriding consideration for our decision is that the matter in all its ramifications should be properly dealt with by the income tax authorities, especially in the light of the observations of the Supreme Court in the case of CIT vs. Bharti Cellular Ltd. (supra). We are therefore of the view that the matter should receive fresh consideration at the hands of the Assessing Officer also in the light of the above directions of the Supreme

Court. The Assessing Officer will take a fresh decision on the applicability of section 194J to the payment of national roaming charges in accordance with law and in the light of the above observations and in the light of the observations of the Supreme Court in CIT vs. Bharti Cellular Ltd. (supra). The assessee shall be given adequate opportunity of putting forth its case before any decision is taken. Ground No.2 is disposed of accordingly.

28. The assessee has filed an additional ground of appeal (Ground No.2A) to the effect that "without prejudice to Ground No.2 above the CIT(A) ought to have held that section 194J of the Act was not applicable to national roaming charges". In the light of what has been stated in the preceding paragraphs, the additional ground becomes infructuous and is therefore not decided.

29. Ground No.3 is to the effect that in any case the taxes cannot be recovered from the assessee since the payees have already paid the tax on the national roaming charges. Reference is made in the grounds to the judgment of the Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd. vs. CIT (2007) 293 ITR 226 (SC) and the order of the Special Bench (Mumbai) of the Tribunal in the case of Mahindra and Mahindra vs. DCIT (2010) 313 ITR (AT) 263 (Mum). It is further stated in the ground that the assessee was wrongly treated by the Assessing Officer as an assessee in default since the taxes have already been paid by the payees either by way of advance tax or by way of self-assessment tax at the time of filing the return of income. It is pointed out in the

ground that the action of the Assessing Officer amounts to recovering the tax twice in relation to the same income. It is also pointed out in the ground that the CIT(A) erred in ignoring the declarations from various vendors / telecom operators stating that income tax was paid by them, on the ground that the declarations were not verified by the Assessing Officer. It is stated that they were also filed before the Assessing Officer.

30. Our attention was drawn to pages 115 to 124 of the assessee's Paper Book, which contain the confirmation letters written by eight service providers to the assessee stating that the national roaming charges for providing roaming connectivity services during the financial years 2006-07, 2007-08 and 2008-09 have been considered by them in the calculation of their taxable income and has been appropriately included in their tax returns. The Permanent Account Numbers were also given by the payees in their letters as well as the place and office where they were assessed. At page 123 is a letter written by the assessee to the CIT (TDS) on 24th April 2009, in which the Permanent Account Numbers of nineteen parties to whom the assessee made payment of roaming charges were furnished. It was pointed out that the assessee has rightly deducted taxes under section 194C of the Act and the details were being furnished without prejudice to the claim and they were being furnished in answer to the Assessing Officer's action proposing to treat the assessee as a defaulter and recover tax from it on that basis. In the letter the assessee has also stated

that recovery of taxes from the assessee would tantamount to recovering the tax twice in relation to the same income. A copy of this letter has been marked to the Assessing Officer. It is submitted that the confirmations letters filed by the assessee as above were from 63.53% of the payees.

31. This issue has been considered by the CIT(A) in page 26 of his order in paragraph 11. He has made two points against the assessee. The first is that the declarations from the payees have been filed only before him and, therefore, could not have been verified by the Assessing Officer. Secondly, he has held that the onus was on the assessee as a tax deductor to satisfy the Assessing Officer that the payees have paid the taxes on the national roaming charges received by them and it was not for the Assessing Officer to make enquiries himself and give the benefit of the credit to the assessee. According to the CIT(A), even as per the order of the Special Bench in the case of Mahindra & Mahindra (supra), the onus was not on the Assessing Officer to make enquiries as to whether the deductees have paid the tax on the income received from the assessee. In this view of the matter he rejected the assessee's plea.

32. The contention of Mr Dastur, appearing for the assessee, before us is that the CIT(A) has placed an impossible burden on the assessee. It was pointed out that the Permanent Account Numbers of nineteen parties were furnished to the Assessing Officer in April 2009 and thereafter he could have verified the assessee's claim

even though the orders had been passed in February 2009 under section 201. He also pointed out that no attempt was made by the Assessing Officer to verify the assessee's claim even after the Tribunal granted stay of recovery of taxes in the month of December 2009. He could have verified the details submitted by the assessee from the respective officers assessing the payee companies and presented the factual position before the Tribunal for which sufficient time was available to him even after the Tribunal granted the stay. Strong reliance was placed on the judgment of the Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd. (supra). Other decisions which were relied upon were the following: -

(1) Nathu Ram Premchand vs. CIT (1963) 49 ITR 561 (All)
(2) CIT vs. Ponnuswamy Naidu (1995) 214 ITR 185 (Mad)
(3) CIT vs. S P Bhatt (1974) 97 ITR 440 (Guj)

33. The argument of the Department is that the issue was raised only before the CIT(A) and not before the Assessing Officer and the onus was on the assessee and not the Assessing Officer to verify the payments. It was further contended that the self-declarations by the payees to the effect that they had paid the taxes cannot be relied upon and the final position in the payees' hands has to be seen. It was further submitted that out of the total of the nineteen parties in respect of whom Permanent Account Numbers were filed before the CIT (TDS) in April 2009, only eight certificates were given before the CIT(A). Relying on Circular No.8 of 2009 dated 24th November 2009, it was pointed out that it was essential that the

payee should furnish an audit certificate to the effect that the tax and interest due has been paid for the assessment year concerned.

34. We have carefully considered the rival points of view. After the judgment of the Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd. (supra), there is no merit in the contention that taxes can be recovered from the deductor even though taxes were paid by the deductees. It is pertinent to note that at page 229 of the Report, the Supreme Court has noticed that the Department in that case conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. The Income Tax Department being an All India Body cannot take a different position and contend that even though the taxes were paid by the payees including the taxes on the payment in dispute, it was still open to it to recover the taxes from the payer / deductor. However, the question is whether as a fact it has been established that the payees have included the income in their returns and paid taxes thereon. This requires factual verification. We are however unable to share the view of the CIT(A) that the onus is entirely on the assessee to prove that the taxes have been paid by the payees. It is true that the onus is initially on the assessee who takes up the plea but when sufficient details which would enable the Assessing Officer to verify the factual position have been filed before the Assessing Officer it was for the Assessing Officer, with his vast

powers, to invoke them and have the details furnished by the assessee verified. In the present case the assessee has furnished the Permanent Account Numbers of nineteen parties and letters of confirmation have been filed from eight of them before the CIT(A). The Permanent Account Numbers would facilitate an enquiry to be made by the Assessing Officer from the Assessing Officers assessing the payees. It is also to be noted that from eight out of the nineteen parties the assessee has also furnished letters of confirmation. The assessee would appear to have done what it could under the circumstances and it would be a somewhat extreme position to take if it is argued that the burden is entirely upon the assessee. The assessee, it must be remembered, is dealing with its competitors, i.e. the other service providers, who may not be willing to part with their accounts and the details regarding their tax payments or returns of income to the assessee except confirming that the taxes have been paid. But when their Permanent Account Numbers are made available to the Assessing Officer, it would not be unreasonable on the part of the assessee to ask the Assessing Officer to have the payments verified from the records of the Assessing Officers within whose jurisdiction the payees are assessed. We are therefore unable to appreciate or uphold the decision of the CIT(A) placing the onus entirely on the assessee and in refusing to accept the plea that the taxes cannot be recovered twice in respect of the same income on the ground of inadequate evidence. In our view, the CIT(A) ought to have

directed the Assessing Officer to invoke his powers under the Act and have the payment of taxes by the payees verified from the respective Assessing Officers assessing the payees with the help of the Permanent Account Numbers of the payees made available by the assessee. We direct the Assessing Officer to do so. If upon verification it is found that the taxes have been paid by the payees fully in respect of the roaming charges received by them from the assessee, nothing survives. In such an event no taxes can be recovered from the assessee and the assessee cannot be treated to be in default. The issue is accordingly restored to the Assessing Officer with the above directions.

35. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the Open Court on 22nd December 2010.

Sd/- Sd/-

(S V Mehrotra) (R V Easwar)
Accountant Member President

Mumbai, Dated 22nd December 2010
saldanha

copy to:

1. Vodafone Essar Limited
   Peninsula Corporate Park, Ganpatrao Kadam Marg
   Lower Parel, Mumbai 400 013
2. DCIT (TDS) Range 3(1)
3. CIT-(TDS) 4.CIT(A)-14 5.DR "F" Bench

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ASSTT. REGISTRAR, ITAT, MUMBAI