आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.320, 321, 322, 323, 324, 325, 326, 327, 328 & 329/Mds/2014**

&

S.P. Nos.324, 325, 326, 327, 328, 329, 330, 331, 332 & 333/Mds/2015

(in I.T.A. Nos.320 to 329/Mds/2014)

निर्धारण वर्ष / Assessment Years : 2007-08 to 2011-12

M/s Dishnet Wireless Limited, Spencer Plaza, 5th floor, 769, Anna Salai, Chennai - 600 002.	v.	The Deputy Commissioner of Income Tax, TDS Circle – 1, Chennai - 600 034.
PAN : AAACD 5767 E (अपीलार्थी/Appellant & प्रार्थक/Petitioner)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Sh. N. Venkataraman,
Sr. counsel
for Sh. R. Vijayaraghavan,
Advocate
Sh. Prabhat Lath, CA
Sh. Deepankur Gandhi, CA

प्रत्यर्थी की ओर से/Respondent by : Dr. S. Moharana, CIT

सुनवाई की तारीख/Date of Hearing : 21.05.2015

घोषणा की तारीख/Date of Pronouncement : 20.07.2015

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आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the appeals and stay petitions of the assessee are directed against the common order passed by the Commissioner of Income Tax (Appeals)-VII, Chennai, dated 30.12.2013 and pertain to assessment years 2007-08 to 2011-12. Therefore, we heard all the appeals together and disposing the same by this common order.

2. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, submitted that the assessee-company is engaged itself in the business of providing telecommunication services, namely, cellular services, data access services, etc. in various telecom circles in the country. A survey was conducted under Section 133A of the Income-tax Act, 1961 (in short 'the Act') at the Registered Office of the assessee during the financial year 2012-2013. Subsequently, the Assessing Officer passed an order under Section 201(1) and 201(1A) of the Act for the assessment years 2007-08 to 2011-12, holding that the assessee defaulted in deduction of tax in the following account:-

(1) Provision for site restoration expenses
(2) Year-end provisions

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(3) Roaming charges

3. The assessee challenged the correctness of the orders passed by the Assessing Officer treating the assessee as assessee in default for non-deduction of tax before the CIT(Appeals). However, the CIT(Appeals) upheld the orders of the Assessing Officer. Hence, the assessee preferred appeals before this Tribunal.

4. According to the Ld. Sr. counsel, the assessee was deducting tax regularly and filing quarterly statement within the time prescribed. Referring to the provision for site restoration expenses, the Ld. Sr. counsel pointed out that the nature of the business of the assessee requires to take premises from other landlords on long term lease for installing telecom equipment such as towers, etc. Generally the assessee would enter into long term lease for 20 years with various landlords. As per the terms of the lease deed, the assessee was required to restore the leased premises on “as is” basis upon expiry of the lease period. The Ld. Sr. counsel further clarified that on termination of lease agreement, the assessee was required to restore the property to the lessor in the same position as it was existing at the time when the lease was entered into. Referring to certain lease agreements, a copy of each are available

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at paper-book, the Ld. Sr. counsel pointed out that under para 5 “Licensor Covenants”, it is specifically mentioned that the said agreement is for a period of 20 years and under para 6, it was specifically mentioned that upon termination of the license, the licensee shall leave the premises after restoring the same “as is where is” basis. In fact, according to the Ld. Sr. counsel, copies of this agreement were also submitted that before the CIT(Appeals) and Assessing Officer.

5. Shri N. Venkataraman, the Ld. Sr. counsel, further submitted that the revenue authorities disallowed the claim of the assessee on the ground that once an expenditure was kept under provision, the same would fall within the ambit of Section 194C of the Act. The revenue authorities found that it is to be presumed that the work had to be carried out by a contractor and the payment for that work had been deferred to a future date falling outside the relevant accounting year. According to the Ld. Sr. counsel, Accounting Standard – 29 issued by Institute of Chartered Accountants of India, enables the assessee to make a provision in the books of account, on an estimate basis, with respect to an expenditure like site restoration expenses. The Ld. Sr. counsel invited our attention to Accounting Standard - 29 issued by Institute of Chartered

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Accountants of India, more particularly para 14 and submitted that the Accounting Standard clearly recognizes a provision when an enterprise has a present obligation as a result of past event. It also recognizes a reliable estimate can be made of the amount of the obligation. According to the Ld. Sr. counsel, in fact, the assessee made a provision with regard to site restoration expenses in the light of the Accounting Standard - 29 issued by the Institute of Chartered Accountants of India. According to the Ld. Sr. counsel, the site restoration expenses creates an asset in the books of account in the name of "asset retirement obligation" and simultaneously a provision is created of the same amount. The Ld. Sr. counsel further pointed out that the said asset forms part of depreciation schedule as per the books of account.

6. The Ld. Sr. counsel for the assessee further submitted that the assessee at the time of preparation of return of income adds back the book depreciation, including the depreciation charged on "asset retirement obligation" debited to Profit & Loss account. The Ld. Sr. counsel further clarified that "asset retirement obligation" does not form part of block of asset. Therefore, the assessee does not claim any tax deduction for site restoration expenses / asset

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retirement obligation in its return of income either through depreciation chart or otherwise.

7. Shri N. Venkataraman, the Ld. Sr. counsel, further submitted that the expenditure on site restoration will be incurred only upon the expiry of the lease term and it is only at that point of time the various parties / contractors would be engaged for dismantling the towers installed and restored the building to its original position. According to the Ld. Sr. counsel, the assessee may also set up its own department to undertake the work of dismantling and restoration work. Therefore, according to the Ld. Sr. counsel, at the time of provision in the books of account, no service has been received by the assessee. Accordingly, there was no liability towards any party for making payments. According to the Ld. Sr. counsel, when the expenses actually incurred and the payments were made to the respective contractors, if any, the tax will be deducted and paid to the Government. However, when the provision was made in the books of account, the place, point of time at which the expenses will be actually incurred are not known. Moreover, it is also not known who will be the contractor and what will be the amount required to be paid for restoration. In fact, according to the Ld. Sr. counsel, the expenses required to be

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incurred only after the expiry of lease period which would normally be about 20 years. Therefore, the assessee is not within its knowledge the contractor who is likely to be engaged after 20 years and how much amount is likely to be paid to the contractor. The Ld. Sr. counsel further pointed out that after making provision, majority of the site restoration expenses was reversed in the financial year 2010-11 and the details of such reversals were furnished before the CIT(Appeals). Even before this Tribunal, according to the Ld. Sr. counsel, such details are available at page 181 of the assessee's paper-book.

8. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, further submitted that since the assessee could not identify the contractor and could not quantify the amount to be paid to the contractor for demolition of tower and restore the site, the entire mechanism for deduction of tax at source would fail. In other words, according to the Ld. Sr. counsel, the assessee could not identify the contractor and the amount of expenses that would be incurred after 20 years. Therefore, a provision made in the books of account by following the Accounting Standard - 29 does not require the assessee to deduct tax in respect of site restoration expenses.

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9. Shri N. Venkataraman, the Ld. Sr. counsel, further submitted that Sections 194C and 194J of the Act require to deduct tax in case any amount is credited to a suspense account in the books of a person liable to pay such amount. The primary intent of introducing Explanation to Section 194C was to nullify the practice prevailing at that point of time wherein the TDS provisions were being circumvented by the payers by adopting a device of crediting the sum payable to payee or any other account. The Ld. Sr. counsel further pointed out that even after introduction of Explanation to Section 194C of the Act, tax was required to be deducted only in such cases where there is a constructive credit to the account of the payee of a specified amount calculated in accordance with the terms and conditions of the arrangements entered into with the payee. Referring to the circular dated 8.11.1978 issued by CBDT, the highest administrative body under the Income-tax Act, the Ld. Sr. counsel pointed out that tax would be deducted at source in respect of the provision created under mercantile system of accounting only when the payee is identified and the sum payable is also ascertained. The credit should be a constructive credit to the account of the payee. In the case before us, according to the Ld. Sr. counsel, the payee is not identified and it is not known which contractor would be engaged by the assessee for demolition of the

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tower and restoration of the cite. The sum payable to the contractor is also not ascertained. In those circumstances, according to the Ld. Sr. counsel, the assessee is not liable to deduct tax in respect of the provision made for site restoration expenses. Since the assessee is not aware of the payee, there is no question of deduction of tax.

10. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, invited out attention to Form 16A framed by CBDT under Rule 31(1)(b) of the Income-tax Rules, 1962 and submitted that Form 16A specifically requires the assessee to indicate name and address of the deductee and the PAN of the deductee. It also requires the assessee to specify the amount paid or credited. Apart from this, the assessee is also required to mention the date on which the payment was made. In this case, according to the Ld. Sr. counsel, the assessee has not identified the contractor sofar, therefore, the assessee could not disclose in Form 16A the name and address of the deductee. Similarly, the PAN of deductee could not also be informed to the Department. Since the amount payable to the contractor is not ascertainable, the assessee may not be in a position to declare the amount paid/credited to the Department. Apart from them, the date of payment/credit also could not be

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informed since no payment was made and amount was not credited in favour of any particular individual/person. Therefore, according to the Ld. Sr. counsel, the entire machinery for TDS would fail in respect of the provision made by the assessee for site restoration expenses.

11. Similarly, the Ld. Sr. counsel submitted that in respect of year-end provisions, the assessee could not identify the payee and could not ascertain the sum payable. Therefore, the assessee is not expected to deduct tax at the time of making provision. The Ld. Sr. counsel placed his reliance on the judgment of Delhi High Court in UCO Bank v. Union of India & Others in WP(C) 3563/2012 and submitted that in the case before the Delhi High Court, certain deposits were made with a bank in the name of Registrar General of High Court, in terms of directions issued by the High Court. The issue arose before the Delhi High Court was whether the banks are required to deduct tax at source and issue certificates in the name of Registrar General. The Delhi High Court found that no TDS is required to be deducted as the ultimate beneficiary or payee is not identifiable. The Ld. Sr. counsel filed a copy of the judgment of the Delhi High Court.

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12. Shri N. Venkataraman, the Ld. Sr. counsel, invited our attention to Section 194A of the Act and submitted that the expression “payee” under Section 194A of the Act would only mean the recipient of the income whose account is maintained by the person paying the interest. In the present case, according to the Ld. Sr. counsel, although the FD is made in the name of the Registrar General, the account represents funds, which are in custody of the Court and the Registrar General is neither the recipient of the amount credited to that account nor the interest accruing thereon. Therefore, the Delhi High Court found that the Registrar General cannot be considered as a payee for the purpose of Section 194A of the Act. The credit by the petitioner bank in the name of Registrar General would not attract the provisions of Section 194A of the Act. The Ld. Sr. counsel further pointed out that there is no assessee to whom interest income from the deposits in question can be paid, no person can file a return claiming the interest payable by the petitioner as income. Therefore, the Delhi High Court found that the TDS is not be deducted. In this case also, according to the Ld. Sr. counsel, the payee is not identified and no person could claim the amount payable by the assessee by filing return of income as found by the Delhi High Court. The Ld. Sr. counsel submitted that a situation would be created for recovery of tax without corresponding

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income being assessed in the hands of any person. The Ld. Sr. counsel also placed his reliance on the decision of Mumbai Bench of this Tribunal in Industrial Development Bank of India v. ITO (2007) 293 ITR (AT) 267. The Ld. Sr. counsel also placed reliance on the decision of Bangalore Bench of this Tribunal in DCIT v. Telco Construction Equipment Co. Limited in I.T.A. No.478/Bang/2012, a copy of which is filed by the Ld. Sr. counsel.

13. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, further pointed out that the provisions of Sections 194A and 194H of the Act are *pari materia* to Explanation in Section 194C and 194J of the Act. Therefore, the ratio of the above decision would apply to the assessee also.

14. Now coming to the year-end provisions, Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, submitted that the assessee engages various service providers for rendering services like address verification, credit certification, content development, etc. At the year end, to close the books of account, the assessee estimates the amount of expenditure incurred in the month of March with respect to various services rendered by the service providers for which invoices are yet to be received by the assessee. According to the Ld. Sr. counsel, the provisions are

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made on estimate basis as it is not identifiable what amount is to be paid to such service providers. In other words, according to the Ld. Sr. counsel, the payee is not identified and the amount to be paid is also not ascertainable. Therefore, according to the Ld. Sr. counsel, the assessee is not liable to deduct tax in respect of provision made for year-end expenditure. The Ld. Sr. counsel further pointed out that when the new connections are offered throughout India in the month of March and the service providers would conduct customer verifications. At the year end, the assessee would know how many number of connections are offered in the month of March. However, the assessee would not know as to how many customer verifications have been done with each service provider engaged by the assessee. Therefore, the assessee would not know the exact amount payable to the above said service providers. Therefore, the assessee by an overall basis, estimates the customer verifications expenditure in relation to expenditure incurred in the past and make necessary provision in the account. The Ld. Sr. counsel further clarified that the amount is not paid or credited in any particular account, only a provision was made in the account. According to the Ld. Sr. counsel, since the name of the payee and that the name of service providers are not identifiable in the month of March, the assessee was unable to deduct tax at source in the month of March.

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However, as and when the service providers raise an invoice, the assessee duly deducts the TDS at source and discharges the obligation cast upon it.

15. Now coming to roaming charges, Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, submitted that roaming is a facility provided by the cellular provider to its customers automatically to connect and receive voice calls. The Ld. Sr. counsel clarified that when a customer of one circle visits another telecom circle, he would be automatically connected with other service provider in the visiting circle and he can make and receive voice calls and access data and other services without any human intervention. Similarly, when a customer travels outside the geographical area, even outside India, he can have the services without any human intervention automatically. The Ld. Sr. counsel further pointed out that when a subscriber of a mobile phone in the State of Assam goes to Ahmedabad, such subscriber will be automatically able to make and receive voice calls, send and receive data or access other services with the help of telecom service provider at telecom circle in Ahmedabad with which the assessee has already entered into a bilateral roaming agreement. The assessee has also entered

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into same agreement with various other telecom provides like Bharti Airtel, Vodafone, TATA, Idea, etc.

16. Referring to the judgment of the Apex Court in CIT v. Bharti Cellular Limited (330 ITR 239), the Ld. Sr. counsel for the assessee submitted that the word “technical” is preceded by the word “managerial” and succeeded by the word “consultancy”. Therefore, Section 9(1)(vii) of the Act has to be interpreted by the expression from the surrounding word, i.e. from the context. According to the Ld. Sr. counsel, the word “technical” would take its colour from the word “managerial” and “consultancy”. Managerial services and technical services can be given by human only and not by means of any equipment. Therefore, the word “technical” has to be construed in the same sense involving direct human involvement without which the technical services cannot be held to have been rendered. The Ld. Sr. counsel invited our attention to an observation made by the Apex Court and submitted that whenever the services rendered without direct human involvement, it cannot be construed to be a technical service. The Ld. Sr. counsel has placed his reliance on the judgment of Madras High Court in Skycell Communication Limited v. CIT (119 Taxman 496) and submitted that the telecom services are not in the nature of technical services.

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17. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, further submitted that in the case before Apex Court in Bharti Cellular Limited (supra), the revenue authorities obtained expert opinion from Sub-Divisional Engineer of BSNL in respect of the nature of service rendered by the telecom service providers. The Sub-Divisional Engineer of BSNL categorically stated that no human intervention is required while rendering roaming services. He clarified that human intervention is required for doing necessary configurations for providing roaming services. Once configuration is completed, it is not required. In view of the above clarification of an expert in the field, according to the Ld. Sr. counsel, since the roaming services are provided without human intervention, it cannot be considered for technical service. The human intervention is required, according to the Ld. Sr. counsel, whenever customers are facing problems during roaming. The Ld. Sr. counsel further pointed out there are millions of calls which flow from one network to another network every minute and connecting them manually is beyond human capability. According to the Ld. Sr. counsel, human intervention is required only at the time of maintenance or at the time certain technical defect that might have come into telecom

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network/equipments. According to the Ld. Sr. counsel, the customers pay for roaming charges and not for human intervention.

18. Placing reliance on the decision of Pune Bench of the Tribunal in iGate Computer Systems Limited v. DCIT in I.T.A. Nos. 1301 to 1303 and 1616/PN/2013, the Ld. Sr. counsel submitted that Merely because human intervention is required for maintenance that cannot lead to the conclusion that the services rendered are technical services within the meaning of Section 194J of the Act. According to the Ld. Sr. counsel, while providing roaming facility to its customers, the assessee in fact utilizing the standard facilities provided by the other telecom service provider which connects automatically once the necessary configurations were made in the system. Apart from that, the recipients of the amount also confirms that they have included the amount received towards roaming charges in their total income and filed return before the respective Assessing Officers. In fact, the assessee has filed as many as 100 certificates before the lower authorities. Placing reliance on the judgment of the Apex Court in Hindustan Coca cola Beverages v. CIT (293 ITR 226), the Ld. Sr. counsel submitted that once the recipients paid the tax by including the amount in the total income, there cannot be any reason to treat the assessee as assessee in

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default. The Ld. Sr. counsel further submitted that it is also an obligation of the TDS officer to verify whether the recipient has paid the taxes as required under the Income-tax Act. The Ld. Sr. counsel placed his reliance on Special Bench decision of this Tribunal in Mahindra & Mahindra Limited v. DCIT (2009) (313 ITR (AT) 263) and judgment of Allahabad High Court in Jagran Prakashan Limited v. DCIT (345 ITR 288) and judgment of Karnataka High Court in Ramco (Bhel) House Building Co-operative Society Limited v. ITO in W.P. No.17037-43/2014. Therefore, according to the Ld. Sr. counsel, the roaming charges cannot be categorized as fee for technical services and hence, the assessee is not liable to deduct tax.

19. Shri N. Venkataraman, the Ld. Sr. counsel for the assessee, further submitted that orders for the first three years and three quarters of the fourth year are barred by limitation. According to the Ld. Sr. counsel, under Section 201(3)(i) of the Act, the Assessing Officer is expected to pass an order within two years from the end of the financial year in which quarterly statement was filed. Apart from that, Section 201(3)(ii) of the Act further provides that no order can be passed beyond six years from the end of the financial year in which the payment is made or credit is given, in any other case.

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According to the Ld. Sr. counsel, all the quarterly statements have been filed by the assessee within the time limit, hence, the first three years and three quarters of the fourth year, the orders passed by the TDS officer, in the month of March, 2003, are beyond prescribed time limit. Therefore, it is barred by time limit. The Ld. Sr. counsel further submitted that for the first two years, the orders are passed beyond the stipulated time limit of March, 201(1). Therefore, it was also barred by limitation. Referring to the amendment brought in by Finance Act, 2014, the Ld. Sr. counsel submitted that limitations for passing the order under Sections 201(1) and 201(1A) of the Act have been extended to seven years from the end of the financial year in which payment is made or credit is given. This provision is applicable prospectively with effect from 1.10.2014. Therefore, the amended provisions of Sections 201(1) and 201(1A) cannot be made applicable for the assessment years under consideration.

20. On the contrary, Dr. S. Moharana, the Ld. Departmental Representative, submitted that the assessee defaulted to deduct tax in respect of provision for site restoration expenses, year-end provisions and roaming charges. Therefore, the Assessing Officer treated the assessee as assessee in default under Sections 201(1)

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and 201(1A) of the Act. According to the Ld. D.R., in respect of site restoration, the assessee due to misconception of Accounting Standard/principle to circumvent the statutory obligation, failed to deduct tax on the provisions made in site restoration expenses. According to the Ld. D.R., no Accounting Standard has been created to override the specific provisions of Income-tax Act. Even otherwise, according to the Ld. D.R., Accounting Standard cannot override the specific provisions of the Act. The Ld. D.R. further submitted that provision can be made in the books of account only when actual liability of expenditure has accrued but could not be spent within the relevant accounting year for bonafide reasons. However, the expenditure kept in provision should be spent immediately in the ensuing days of succeeding financial year. In case the expenditure is indefinitely kept under provision, then the purpose of accounting system would be defeated. Therefore, according to the Ld. D.R., once an expenditure is kept under provision, the same would fall within the ambit of Section 194C of the Act. In other words, it has to be presumed that the work had to be carried out by a contractor and the payment for that work has to be deferred to a future date falling outside the period of relevant accounting year. Referring to Section 194C(2) of the Act, the Ld. D.R. submitted that clause (iv) of Section 194C(2) takes care of this

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kind of situation. By virtue of these provisions, it is crystal clear that if any amount of liability payable to the contractors is credited to any account, by whatever name it is called, then the assessee is liable to deduct tax as required under Section 194C of the Act. Therefore, according to the Ld. D.R., the contention of the assessee that it is only an provision is not justified. The Ld. D.R. placed his reliance on the judgment of the Allahabad High Court in CIT v. British India Corporation (P.) Ltd. (1973) 92 ITR 38 and also on the judgment of Madras High Court in CWT v. Crompton Engineering Co. (Madras) Ltd. (1983) 140 ITR 320.

21. Referring to the issue of year-end of provisions, the Ld. D.R. pointed out the assessee made provision for address verifications, credit certification charges, ICU charges and lease line expenses. The contention of the assessee is that the payees are not identifiable. The Ld. D.R. pointed out that the assessee engaged services from outsource service providers. Therefore, the contention of the assessee that the service providers are not identifiable is not acceptable.

22. Referring to the roaming charges, the Ld. D.R. pointed out that the assessee had arrangement with other cellular service providers outside the home network. In case the subscriber of the

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service provider travels outside the jurisdiction of the home network operator, the subscriber would get service from both the host-operator and home-operator. The host-operator charges the home-operator for providing telecom service to the latter. Roaming facility is made available to subscribers by the host-operator by virtue of roaming arrangement entered into between the home-operator and host-operator. Therefore, according to the Ld. D.R., the roaming charges are nothing but the payments made by the assessee to other telecom service provider for rendering technical services to the assessee which would in turn be used by the subscribers of the assessee during roaming. Referring to the expert opinion said to be obtained from the Sub-Divisional Engineer of BSNL, the Ld. D.R. pointed out that regarding interconnectivity, initially human intervention is required for establishing the physical connectivity and also for doing the required configuration. Therefore, it cannot be correct to say that human intervention is not required for connecting the subscribers' call during their visit to other service provider's area. Referring to the judgment of the Madras High Court in Skycell Communications Ltd. (supra), the Ld. D.R. pointed out that the case before Madras High Court was for use of service by a mobile subscriber. In the case before us, one of the operators provided technical service to another operator. Therefore, the judgment of

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the Madras High Court in Skycell Communications Ltd. (supra) may not be applicable to the facts of the case. Referring to the decision of Authority For Advance Rulings in Ajmer Vidyut Vitran Nigam Ltd. (2012) 24 taxmann.com 300, the Ld. D.R. submitted that the Electricity Transmission Corporation made payment to another company to ensure constant voltage at distribution point. The Authority For Advance Rulings found that the amount paid was for technical services, therefore, TDS has to be made. Referring to the issue of limitation, the Ld. D.R. pointed out that under sub-section (3) of Section 201, the limitation of two years is provided and it is applicable only where the statement under Section 200 was filed. Otherwise, the limitation is either four years or six years, as the case may be, from the end of the financial year in which the payment is made or credit is given. In the instant case, the quarterly TDS returns were filed by the assessee which do not contain the transactions which were disputed by the assessee. Therefore, the provisions of sub-section (3) of clause (ii) is not applicable at all. Therefore, the orders passed by the TDS officers are within the period of limitation. Hence, the contention of the assessee that the orders are barred by limitation has no leg to stand.

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23. We have considered the rival submissions on either side and perused the relevant material on record. Admittedly, the assessee, a telecom operator, made provision for site restoration expenses, however, TDS was not made. The purpose for which the provision was made is not in dispute. In other words, the admitted case of both the parties is that the assessee made the provision for dismantling the towers and restoration of site to its original position after termination of the lease period. The lease period is normally 20 years and above. The assessee by placing reliance on the Accounting Standard - 29 claims that a provision would be made in respect of an obligation. In other words, the assessee had an obligation to incur the expenditure after termination of the lease period. Revenue, however, contends that due to misconception and ignorance of law and with an intention to circumvent the statutory provisions, the assessee made the provision. The fact remains that the payment was not made to anyone and it is not credited to the account of any party or individual. The account does not disclose the person to whom the amount is to be paid. The contractor who is supposed to be engaged for dismantling the tower and restore the site in its original position is not identified. As contended by the assessee, the assessee by itself engaging its own labourers may dismantle the towers and restore the site to its original position. In

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such a case, the question of deducting tax at source does not arise. The assessee has to pay only the salary to the respective employees. Suppose the work is entrusted to a contractor, then definitely the assessee has to deduct tax. In this case, the contractor would be identified after the expiry of lease period. Therefore, even if the assessee deducts tax, it cannot be paid to the credit of any individual as rightly pointed out by the Ld. Sr. counsel. The assessee has to issue Form 16A prescribed under Rule 31(1)(b) of the Income-tax Rules, 1962 for the tax deducted at source. The assessee has to necessarily give the details of name and address of deductee, the PAN of deductee and amount or credited. In this case, the assessee could not identify the name and address of deductee and and his PAN. The assessee also may not be in a position to quantify the amount required for incurring the expenditure for dismantling and restoration of site to its original position. In those circumstances, this Tribunal is of the considered opinion that the provision which requires deduction of tax at source fails. Hence, the assessee cannot be faulted for non-deduction of tax at source while making a provision. Therefore, we are unable to accept the contention of the Ld. D.R. Accordingly, the orders of the lower authorities are set aside and this ground of appeal is allowed.

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24. Now coming to the issue of year-end provisions, the contention of the assessee is that it is engaged in various services like address verifications, credit certification, content development etc. The assessee claims that provisions are made on estimation basis since it is not identifiable as to what amount has to be paid to the service providers. In case of new service connections, the assessee has to necessarily verify the customers' address and identification. The claim of the assessee is that in the last month of the financial year, it is not known how many customer verifications have been completed and the exact amount required to be paid. However, on the basis of the past experience, the assessee is making an overall provision for incurring this expenditure. From the order of the CIT(Appeals) it appears that apart from identification and address verification, the assessee has also made provision towards ICU charges and lease line expenses, etc. From the order of the CIT(Appeals) it appears that the assessee also has to pay the various other service providers for providing value added service to its subscribers like daily horoscopes, astrology, songs, wall paper downloads, cricket scores, etc. Admittedly, the assessee made arrangement with other service provides for providing these kind of value added services. There may be justification with regard to the expenditure for availing the services of identification and verification

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for the last month of financial year, since the assessee may not have the exact details on verification done by the concerned persons and the amount required to be paid. However, in respect of the downloads and value added service, etc. the entire details may be available in the system. Therefore, this Tribunal is of the considered opinion that wherever the particulars and details available and amount payable could be quantified, the assessee has to necessarily deduct tax. In respect of value added services like daily horoscopes, astrology, customer acquisition forms are all from specific service providers and these value added services are monitored by system. Therefore, even on the last day of financial year, the assessee could very well ascertain the actual quantification of the amount payable and the identity of the payee to whom the amount has to be paid. To that extent, the contention of the assessee that the payee may not be identified may not be justified. The exact facts need to be examined. However, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer. In other words, the Assessing Officer has to examine whether the payment to the party /payee is identifiable on the last day of financial year and whether the quantum payable by the assessee is also quantified on the last date of financial year. In case, the Assessing Officer finds that the

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payee could not be identified on the last day of financial year and the amount payable also could not be ascertained, the assessee may not require to deduct tax in respect of that provision. However, in case the payee is identified and quantum is also ascertainable on the last day of the financial year, this Tribunal is of the considered opinion that the assessee has to necessarily deduct tax at source. Since the details are not available on record, the orders of the lower authorities are set aside and the issue of year-end provision is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the issue afresh as indicated above and thereafter decide the issue in accordance with law after giving reasonable opportunity to the assessee.

25. Now coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. We have gone through the judgment of Apex Court in Bharti Cellular Limited (supra), The Apex Court after examining the provisions of Section 9(1)(vii) of the Act, found that whenever there was a human intervention, it has to be considered as technical service. In the light of the above judgment of the Apex Court, the Department obtained an expert opinion from the Sub-Divisional

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Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required, as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical service. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. In fact, the Sub-Divisional Engineer of BSNL has explained as follows in response to Question No.23:-

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

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

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

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

Order pronounced on 20th July, 2015 at Chennai.

sd/-	sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A. Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 20th July, 2015.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-VII, Chennai-34
4. आयकर आयुक्त/CIT (TDS), Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.

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