IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri D. Manmohan, Vice President
and Shri R.C. Sharma, Accountant Member

ITA Nos. 4010 to 4013/Mum/2011
(Assessment Years: 2007-08 to 2010-11)

DCIT (TDS) - 3(2) 10th Floor, Smt. K.G. Mittal Ayurvedic Hospital Bldg. Charni Road (W), Mumbai 400002	Vs.	M/s Reliance Communications Infrastructure Ltd. H Block, DAKC, Thane Bealpur Road, Khoparkhairane Navi Mumbai 400710
Appellant		**Respondent**

PAN - AACCS2157H

Appellant by: None
Respondent by: Shri Yogesh Thar &
Shri Deepka Jain

Date of Hearing: 25.05.2015
Date of Pronouncement: 25.05.2015

O R D E R

Per D. Manmohan, V.P.

These four appeals by the Revenue are directed against the orders passed by the CIT(A)-14, Mumbai and they pertain to assessment years 2007-08 to 2010-11. Admittedly, common grounds were urged in all these appeals and therefore they can be disposed of by a combined order.

2. We accordingly proceed to narrate the facts of the case in respect of A.Y. 2007-08 for the purpose of disposal of these appeals. Assessee-company is licence holder for providing broad band and internet services. It provides various data internet and premium content value added services under various brand names. Its parent company, 'RCOM', is a telecom service provider. As per the agreement with the parent company assessee was allowed to access the network of RCOM to provide internet connectivity to those subscribers who have subscribed to voice related services of RCOM. Assessee charges the subscribers for providing the aforesaid services and pays certain amount called as 'access charges' to RCOM for use of their network.

3. According to the AO, though the assessee made payments to RCOM, it has not deducted tax at source on the access charges paid to RCOM. As per the AO the payments are towards technical services falling under the provisions of section 194J of the Act. For failure to deduct tax at source assessee was treated as 'assessee in default' under section 201(1) of the Act to the tune of ₹8,26,01,079/- for A.Y. 2007-08. Similar procedure was followed by the AO for the next three assessment years.

4. Aggrieved, assessee contended before the CIT(A) that "access charges" paid by assessee to RCOM is not liable to TDS under section 9(1)(vii) of the Act, since it was merely a compensation for providing access to telecom network and hence cannot be regarded as fees for technical services. With regard to the alternative stand taken by the AO that the amount payable by assessee to RCOM can be treated in the nature of hiring of plant and machinery on which tax has to be deducted at source under section 194-I of the Act, assessee contends that the amount paid by way of 'access charges' is not in the nature of 'rent' as understood under section 194-I of the Act. Finally it was contended that even if it were to be held that tax ought to have been deducted at source but the fact remains that assessee has already made payment to RCOM which in turn have already paid the tax, in which event provisions of section 201(1) do not get attracted.

5. Learned CIT(A) accepted both the contentions of the assessee, i.e. payment of access charges to RCOM cannot be said to be payment towards 'fees for technical services' or 'rent' and hence the payment need not be subject to TDS under section 194-J or 194-I of the Act.

6. It deserves to be noticed that by the time the learned CIT(A) passed the order assessee had the benefit of an order passed by the AO under section 154 read with section 201(1) of the Act whereby the AO observed that the deductee company, i.e. RCOM had considered access charges as income in its audited books of account and filed returns of income for the years under consideration. In other words, tax was paid by the recipient and hence in the light of the circular of the CBDT dated 29.01.1997 and the decision of the Apex Court in the case of Hindustan Coca Cola Beverage (P) Ltd. vs. CIT 293 ITR 226 the order passed under section 201(1) in respect of

access charges was rectified. In the light of the order dated 08.11.2010 for A.Y. 2007-08 this ground was not pressed by the assessee before the CIT(A) and accordingly the ground was treated as infructuous by the learned CIT(A).

7. However, aggrieved by the reasons given by the CIT(A) while accepting the plea of the assessee that tax is not deductible at source and provisions of section of section 194-J and 194-I are not applicable, Revenue preferred appeals before the Tribunal.

8. At the time of hearing the learned counsel for the assessee placed before us copies of the order passed by the AO under section 154 r.w.s. 201(1) of the Act to highlight that the demand raised under section 201(1) in respect of non-deduction of tax at source was already cancelled by the AO, in which event the appeals filed by the Revenue are of academic importance and therefore deserve to be dismissed without going into the reasons given by the CIT(A). In other words, there is no tax impact in the appeals filed by the Revenue on account of the fact that the AO rectified his earlier order passed under section 201(1) by passing a fresh order under section 154 r.w.s. 201(1) of the Act.

9. The learned CIT-DR, Smt. Madhu Vani, requested for adjournment in all the cases listed for hearing before 'D' Bench on the ground that regular CIT-DR is on leave and several details are required to be submitted for effective representation of the cases. Having regard to the factual matrix of the case we refused to grant adjournment with a direction to the CIT-DR to be ready to present the case on the part of the Department. However, by the time the cases were called upon for hearing the CIT-DR left the court room without informing anybody. She was hardly present in the court for about 30 minutes, i.e. from 10.30 a.m. to 11.00 a.m. only to seek adjournment in all the cases assigned to her on the ground that though she had got the intimation on Friday itself that she has to appear before 'D' Bench but due to intervening holidays she could not prepare the cases. This cannot be a valid reason for seeking adjournment. The DR is duty bound to prepare the cases and only in exceptional circumstances could seek adjournment. It is for the Chief Commissioner to engage some experienced Department

Representatives who are aware of the court procedures. In the recent past, it is noticed that some of the DRs had never had exposure to the functions of the Tribunal except the formal court observation as part of their training programme, which sometimes result in not supporting the stand of the Revenue effectively and in turn may affect a genuine case of the Revenue for want of proper prosecution. We would take this opportunity to suggest that any official, on being assigned the duty of DR, should be made to sit in the court room for observation at least for 15 days so that their services can be used effectively at a later stage. In the instant case it appears that on a temporary basis Department Representatives are posted; only in the previous week the fact of non-availability of DR could be made known to the CCIT who has to make an alternative arrangement and then it is for the nominated DR, who is a 24 hour government servant, to collect the files from the office and go through the records properly to make an effective representation on Monday morning. Here is the situation where the CIT-DR sought adjournment in all the cases assigned to her on the ground that she was asked to represent the matters on Monday, only by sending intimation on Friday. It is for the Revenue to take appropriate steps in this regard for effective representation of the cases and it is not necessary for us to discuss more on this aspect. The fact is that none appeared on behalf of the Revenue. However, we have gone through the record and since the AO passed an order under section 154 of the Act rectifying his earlier order passed under section 201(1) of the Act vis-a-vis access charges, assessee cannot be said to be in default (for non-payment of tax) and hence the issues raised by the Revenue in the appeals are of academic importance and hence deserve to be rejected.

10. In the result, the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 25th May, 2015.

Sd/-	Sd/-
(R.C. Sharma)	**(D. Manmohan)**
Accountant Member	**Vice President**

Mumbai, Dated: 25th May, 2015

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – 14, Mumbai*
4. *The CIT (TDS), Mumbai*
5. *The DR, "D" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.