IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. AMIT SHUKLA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No.7297/Del/2017, 6509/Del/2019 & 2234/Del/2019
Assessment Year: 2013-14, 2015-16 & 2010-11

Verizon Communications India Pvt. Ltd. A-wing, 3rd Floor, Radisson Commercial Plaza, NH-8, New Delhi-110037 PAN No AAACW3738L	**Vs**	**Addl. CIT Special Range-9, New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. S. K. Aggarwal, CA Sh. Alok Kumar Sinha, CA
Respondent by	Sh. Gangadhar Panda, CIT

Date of hearing:	11/10/2021
Date of Pronouncement:	20/10/2021

ORDER

PER N. K. BILLAIYA, AM:

1. ITA No.2234/Del/2019 is the appeal by the assessee preferred against the order of the CIT(A)-15, Delhi dated 28.12.2018 pertaining to A.Y.2010-11.

2. ITA No.7297/Del/2017 is the appeal by the assessee preferred against the order dated 06.10.2017 framed u/s. 143 (3)

r.w.s. 144 C (13) of the Act and ITA No.6509/Del/2019 is the appeal by the assessee preferred against the order dated 14.06.2019 framed u/s. 143 (3) r.w.s 144 C of the Act pertaining to A.Y.2015-16.

3. Since common grievances are involved in the above mentioned appeals they were heard together and are disposed of by this common order for the sake of convenience and brevity.

4. The first common grievance relates to the proportionate disallowance of deduction claimed u/s.80 IA of the Act.

5. The underlying facts in the issue are that the assessee commenced providing telecommunication services from May, 2002. A deduction u/s. 80 IA of the Act was claimed by the assessee on profits derived from telecommunication services. A.Y.2007-08 was taken as the first of the 10 years out of a block of 15 years as stipulated under the provisions of section 80 IA of the Act. Accordingly the assessee claimed the deduction u/s. 80 IA for the first time in A.Y.2007-08. The claim was allowed by the AO.

6. In January 2008, the assessee also obtained NLD and ILD licenses from the DoT and continued to provide telecommunication services with enhanced quality. The assessee claimed deduction under section 80-IA of the Act on profits

derived from telecommunication services including the services rendered pursuant to these licenses for the assessment years under consideration.

7. The AO was of the opinion that the services provided pursuant to ILD/ NLD license constitute a new and independent undertaking and since the license was received in 2008, according to the AO the assessee has not complied with the condition requiring that the telecommunication services should commence prior to 1, April 2005. Since the assessee did not provide any segmental income expenditure for NLD and ILD services, proportionate disallowance is made on the basis of revenue.

8. The proportionate disallowance for the year under consideration is as under :-

Proportionate disallowance of Section 80-IA claim by Ld. AO in the assessment order

4. The Ld. AO made the following proportionate disallowances for the subject years under appeal:

S. No.	Assessment Year	Amount of deduction claimed under section 80-IA of the Act	Amount of proportionate disallowance of section 80-IA claim
1.	2010-11	INR 21,02,98,950	INR 11,14,74,058
2.	2013-14	INR 7,22,99,439	INR 7,04,26,915
3.	2015-16	INR 4,99,00,321	INR 4,93,69,369

9. Assessee carried the matter before the CIT(A) but without any success.

10. Before us the Counsel for the assessee drew our attention to the decision of this Tribunal in assesee's own case for A.Y.2011-12 and pointed out the relevant findings of this Tribunal claiming that the issue has been decided by the Tribunal in favour of the assessee.

11. Per contra the DR did not bring any distinguishing decision in favour of the revenue.

12. We have carefully considered the orders of the authorities below and have carefully perused the decision of this Tribunal in assessee's own case for A.Y.2011-12.

13. We find force in the contention of the counsel. This Tribunal in A.Y.2011-12 has resolved this quarrel in favour of the assessee. The relevant findings read as under :-

".....The Revenue's case hinges upon the presumption that the services provided under the new licenses tantamount to acquiring of a new undertaking which has come into existence with additional infrastructure and these new services are not possible without new undertaking coming into existence post cut-off date of 31st March, 2005 prescribed in Section 80IA (iv)(ii) of the Act. This presumption is nowhere backed by any material or any evidence or any kind of inquiry that whether any separate undertaking has been established to provide services in the light of second license obtained by the assessee. The main conditions for eligibility of deduction u/s.801A is that, firstly, it is available to an undertaking or an enterprise carrying on eligible business which here in this case is telecommunication services; secondly, undertaking must have started rendering the telecommunication services on or after 1st April, 1995 but before 31st March, 2005 and lastly undertaking is not formed by splitting up or reconstruction of business already in existence or form of a transfer to a new business or a machinery or plant previously used for any purpose. ***The assessee was in the business of transmission of data or provision of internet services which it qualified for deduction within the ambit and scope of Section 80IA(iv).*** *After obtaining ISP license in May, 2002 it has been carrying on such services and reporting the revenue from the provision of telecommunication services. The main issue here is, if the assessee has got a license in January, 2008 under NLD / ILD license from DOT whereby it has enhanced its existing services in a much secured form, then whether it tantamount to setting up new undertaking.* ***Now in our opinion both the authorities erred in equating a license obtained under the DoT regulations with the concept of undertaking in terms of Section 801A, which is an independent of the license regime or any other regulation of the Dot.*** *The* ***only requirement for the undertaking to claim deduction is that such an undertaking start providing telecommunication services prior to 1st April, 2005.*** *The Act does not stipulate that the services undertaken under a separate license to provide better services will constitute a new undertaking, and therefore, benefit u/s.80IA is to be denied.* ***The service rendered under NLD/ ILD license is not separate undistinguishable from the ISP licenses carried out earlier.*** *The license regime of Indian telecom Industry keeps on changing and it cannot be held that the services rendered under the second license was entirely a new line of business albeit it is a conversion between various service, network platform, technologies with the objective to provide secure, reliable, affordable and high quality converged telecommunication services. It has been informed by the Id. counsel that Government of India from August, 2013 has dispensed with separate license policy and introduced the regime of Unified License for all the telecommunication services and also facilitates the migration of existing licenses to unified license. Thus,* ***it cannot be held that if the assessee who was otherwise eligible for tax holiday for a period of ten years and the suddenly one regime of Unified License has been introduced, then all the existing telecom industry will lose the benefit provided under the Act.*** *As pointed out by the Id. counsel, the* ***assessee continued to use the same operational, technical, marketing and administrative support to provide data transmission services under internet and continues to use the same and certain additional bandwidth under the existing arrangement entered with telecom companies for provision of services.*** *It is in fact continuity of services except that the assessee is providing private internet service with more secure form of data transmission between the close user group and it is not entirely a new kind of business. Thus, the* ***reasoning given by the Assessing Officer and Ld. CIT (A) for making proportionate disallowance of deduction cannot be sustained*** *and same is directed to be deleted."*

14. Since the factual matrix and the arguments are identical. Facts consider in A.Y.2011-12, respectfully following the decision of the coordinate bench (supra) we direct the AO to delete the proportionate disallowances.

15. Ground No.2 to 6 of A.Y.2010-11, ground 2 to 2.5 for A.Y.2013-14 and ground No.2 to 7 for A.Y.2015-16 are allowed.

16. The second common grievance relates to the disallowance of telecommunications expenses paid to Foreign Telecom Operators.

17. The underlying facts in this issue are that the assessee contracts with its customers for providing data transmission services in India and overseas in a safe and secure manner. While the assessee possesses the requisite licenses and infrastructure to render the telecommunication services in India, it is not able to do so outside India. The assessee has entered into an agreement with MCI Communication Services Inc. (MCICS) and MCI International Inc. for providing telecommunication services outside India. This is a quid pro quo arrangement wherein the assessee provides similar telecommunication services to the Foreign Telecom Operators (FTOs) within India as and when they require. In consideration to the services received from FTO the assessee has made payments to the FTOs. The assessee separately received payments from the FTOs for the telecommunication services provided by it within India.

18. The AO disallowed the payments so made u/s. 40 (a) (i) of the IT Act, 1961 for non-withholding of taxes.

19. When the matter was agitated before the CIT(A) it was strongly contended that no such withholding of taxes was required in terms of the provisions of section 195 of the Act since the subject payments were not chargeable to tax in India under the provisions of the Act and India-US Double Taxation Avoidance Agreement ('DTAA').

20. The CIT(A) was not convinced with the contention of the assessee and confirmed the disallowance.

21. Before us the counsel for the assessee drew our attention to the decision of this Tribunal in assessee' s own case for A.Y.2011-12 and pointed out that the Tribunal has decided the issue in favour of the assessee.

22. Per contra the DR though supported the findings of the lower authorities, but could not bring any distinguishing decision in favour of the revenue.

23. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contention of the Counsel that this issue was considered by this Tribunal in

assessee's own case for A.Y.2011-12 and has decided in favour of the assessee. The relevant findings read as under ;-

5. At the outset, it is submitted that this issue is covered by the judgment of this Hon'ble Tribunal in Appellant's own case in AY 2011-12. While ruling in favor of the Appellant, the Hon'ble Tribunal held as follows:

*"15. As pointed out by the ld. counsel that this issue is no longer in debate in the jurisdiction of Hon'ble Delhi High Court in the case of **DIT vs New Skies Satellites BV (supra)**. The Hon'ble Delhi High Court has discussed this issue threadbare and have also distinguished the judgment of Hon'ble Madras High Court in the case of **Verizon Communication Singapore (supra)**. The Hon'ble Delhi High Court after analyzing the provisions of section 9(1)(vi) read with Explanation -2 have observed that debate regarding data transmission services falls within the ambit of royalty now stands settled by the judgment of Hon'ble Delhi High Court in the case of **Asia Satellite Telecommunications Co. Ltd. (supra)** wherein it has been held that data transmission services could not qualify as royalty in order to be taxed under the Act. Their Lordships have further held that the amendment brought in the Act with retrospective effect or prospective cannot be read into the DTAA. Thus, even if there is an amendment brought in the statute, the same cannot be read into the treaty with respective countries where foreign telecom operators are providing data transmission services outside India. The ratio and principle laid down by the Hon'ble jurisdictional High Court will squarely apply as the payment has been made to the foreign telecom operators for data transmission services. Thus, this issue stands covered in favour of the assessee. Accordingly, the disallowance made by the Assessing Officer is deleted. The assessee was not required to deduct TDS on such payment as it does not fall within the ambit of royalty, within the relevant Article of DTAA."*

24. On finding parity of facts with the facts of A.Y.2011-12, respectfully following the findings of this Tribunal (supra) we direct the AO to delete the disallowance.

25. Ground No. 7 to 10 in A.Y.2010-11, ground No.3 to 3.6 in A.Y.2013-14 and ground No.8 to 11 in A.Y. 2015-16 are allowed.

26. The next grievance relates to the disallowances of telecommunication expense of Rs.30,08,982/- paid to Domestic Telecom Operators in A.Y.2010-11.

27. The underlying facts in this issue are that though the assessee possesses the requisite licenses and permissions to render the telecommunication services in India but it is not in a position to provide the same services outside India. Also, in some cases the assessee does not possess the requisite infrastructure to provide telecommunication services in a few parts of India. Therefore, in order to serve its customers all over India, the assessee procured telecom connectivity services from Indian telecom operators.

28. The AO disallowed the payments made for these telecom connectivity services. The AO was of the firm belief that the telecom charges paid to Indian Companies are eligible for withholding of tax u/s. 194J of the Act and since the assessee has not withheld the taxes the AO disallowed the entire payment u/s. 40 (a) (ia) of the Act.

29. The assessee agitated the matter before the CIT(A) but without any success.

30. Before us the counsel for the assessee vehemently stated that payment for telecommunication services to DTO do not qualify as royalty interms of section 9 (1) (vi) of the Act. It is the say of the Counsel that as per the agreement between the

assessee, Bharti Airtel and Reliance each party was responsible for its own network and for the provision of services related to it.

31. Strong reliance was placed on the decision of this Tribunal in the case of Bharti Airtel Limited 178 ETJ 708.

32. Per contra the DR strongly supported the findings of the AO.

33. We have given a thoughtful consideration to the orders of the authorities below. It is true that the agreement between the assessee, Bharti Airtel and Reliance clearly show that each party was responsible for its network and for the provisions of services related to it. We are of the considered view that the telecom operators provided connecting, transit and termination services to each other on a reciprocal basis and neither of the parties had any rights in the equipments or in the network of the other parties. The FTOs do not grant any possession or control of any equipment or in the network deployed by them to the assessee.

34. We have carefully perused the decision of this Tribunal in the case of Bharti Airtel (supra). The relevant findings of the coordinate bench read as under :-

> *"6. The fact patterns of the Appellant's case is similar to the fact patters in the order passed by jurisdictional Hon'ble Delhi Tribunal in case of Bharti Airtel (supra), being a DTO in Appellant's case. The Hon'ble Delhi Tribunal examined the taxability of telecom payments*

to foreign telecom operators in detail and held that there is a clear distinction between service rendering agreements and Royalty agreements and a payment for a 'service' cannot be treated as Royalty for the 'use of a process/ equipment' either under the Act or under the tax treaty. Relevant extract of this Hon'ble Tribunal's order is as under:

"A perusal of these agreements demonstrate that, each party under the agreement remains responsible for its ' own network and for the provision of services related to it. The Telecom Operator provide connecting, transit and termination services to each other on a reciprocal basis and neither of the parties shall have any rights in the equipments or in the network of other parties The agreement are not for renting, hiring, letting or leasing out of any of the network elements or resources to the other parties or for rendering telecommunication services on a reciprocal basis ....The Assessee is nowhere concerned with the route, equipment, process or network elements used by the FTO in the course of rendering such sendees. "

"In the case of telecom industry. all the telecom operators have similar infrastructure and telecom networks in place, for rendition of telecommunication services. The process embedded in the networks of all telecom operators is the same. The equipments, resources etc. employed in the execution of the process may be different in physical terms i.e. in terms of ownership and physical presence, but the process embedded in the execution of a telecom infrastructure is the same and commonly available with all the telecom operators. The 'royalty' in respect of use of a 'process' would imply that the grantor of the right has an exclusive right over such 'process' and allows the 'use' thereof to the grantee in return for a 'royalty'. It is necessary that guarantee must 'use' the 'process' on its own and bear the risk of exploitation. The 'process ' of runnings the networks in the case of all the telecom operators is essentially the same and

they do not have any exclusive right over such 'process' so as to be in a position to charge a 'royalty'. For allowing the use of such process, the term 'use' in context of royalty connotes use by the grantee and not by the grantor. A 'process' which has been in public domain for some time and is widely used by everyone in the field cannot constitute an item of intellectual property for the purpose of charge of 'royalty'. Any compensation or consideration, if at all received for allowing the use of any such 'process' which is publically available and not exclusively owned by the gi-antor constitutes business income and not royalty. ”

‘'The telecom operator merely render Telecommunications Services to the subscribers, as well as interconnecting telecom operators with the aid of their network and the process embedded therein. This is a standard facility which is used by the FTP itself. Thus the insertion of Explanation 6 to Section 9(l)(vi) does not alter the decision taken by us on this issue.”

“56. Is far as the insertion of Explanation 5 to Section 9(l)(vi) is concerned, we hold that this Explanation comes into play only in case of Royalty falling within the ambit of Section 2 of Section 9(1)(vi). When a process is widely available in the public domain and is not exclusively owned by anyone the it cannot constitute an item of intellectual property for the purpose of charge of ‘Royalty’ under clauses (i), (ii) and (iii) of Explanation 2 to Section 9(l)(vi). Hence, the criteria of possession, control, location indirect use etc., as explained by Explanation 5 has no effect in the case in hand. ”

“The Hon'ble Delhi High Court in the case of Bharati Cellular Ltd. (supra) has given a finding that the facility in question provided to the assessee is a "service" and in a broader sense a "communication service"..... Thus the factual finding of the Jurisdictional High Court in this very facts and circumstances is that "technical services " is

being provided by the FTO's to the assessee but that such "Technical Service" is not FTS as defined u/s. 9(l)(vii) of the Act as there is no human intervention Under such circumstances, the question of taking a contrary view that it is not a "technical services", but a case where the FTP had granted the assesse a right to use a process and the payment is for 'royalty' cannot be countenanced. Applying the binding decision of the Hon'ble Jurisdictional High Court we have to hold that the payment cannot be termed as covered by Explanation 2 read with Section 9(l)(vi) of the Act."

35. On finding parity with the facts, respectfully following the decision of the coordinate Bench (supra) we direct the AO to delete the disallowance ground No.11 to 14 in A.Y.2010-11 are allowed.

36. The next grievance relates short grant of credit for Taxes Deducted at Source ('TDS') in A.Y. 2013-14 and 2015-16.

37. We find that on short grant of TDS given by the AO, the assessee has moved a rectification application which has not been disposed of till date. We direct the AO to consider the claim of the credit of TDS as per the provisions of the law and decide the rectification application expeditiously.

38. Ground No.5 of A.Y.2013-14 and ground No. 12 of A.Y.2015-16 are accordingly disposed of.

39. Ground No.15 and 16 for A.Y.2010-11 are not pressed and same are disposed of as not pressed.

40. In the result, the appeal No.2234/Del/2019 is partly allowed and ITA No.7297/Del/2017 and 6509/Del/2019 are allowed.

Order pronounced in the open court on 20.10.2021.

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA
Date:-20.10.2021
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	20.10.2021
Date on which the typed draft is placed before the dictating Member	20.10.2021
Date on which the typed draft is placed before the Other member	20.10.2021
Date on which the approved draft comes to the Sr.PS/PS	20.10.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	20.10.2021
Date on which the fair order comes back to the Sr. PS/ PS	20.10.2021
Date on which the final order is uploaded on the website of ITAT	20.10.2021
Date on which the file goes to the Bench Clerk	20.10.2021
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	