

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: 2842/CHNY/2019
निर्धारण वर्ष / Assessment Year: 2017-18

**M/s. Infonet Comm
Enterprises Pvt. Ltd.,**
468/10, Balaji Nagar,
Tiruchengode Road,
Namakkal – 637 003.

The Income Tax Officer,
v. TDS Ward,
Salem.

PAN: AACCM 8749D

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Shri T.S. Lakshmi Narayanan, FCA
: Shri G. Suresh Periasamy, JCIT

सुनवाई की तारीख/Date of Hearing : 19.07.2021
घोषणा की तारीख/Date of Pronouncement : 28.07.2021

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against order of learned Commissioner of Income Tax (Appeals), Salem dated 25.06.2019 and pertains to assessment year 2017-18.

2. The assessee has raised the following grounds of appeal:-

1. The order of the Learned CIT(Appeals) in sustaining the action of the Assessing Officer to the effect that there is short deduction of TDS by the appellant company to the extent of Rs.1266827/- u/s 201 of the Act and Consequential interest charged u/s 201(1A) Rs.1,19,530/- in respect of IIIrd and IVth Quarter in the Financial year 2016-17, is against the facts of the case.

2. The Appellant company is engaged in the business of providing High speed wireless internet access to its customers without any human intervention. In view of this appellant liability for tax deduction comes within the ambit of Sec.194C and not u/s 194J of the Income tax Act as adopted by the AO and upheld by the first appellate authority.

3. It has been judicially settled by the decisions of the Apex Court, various High Courts and tribunals that the services rendered by the appellant company without human intervention is coming within the ambit of 194C only and not under 194J.

4. The nature of services rendered by the appellant has not been taken in its correct perspective by the AO and the First appellate authority.

5. In view of the above grounds and other submissions to be made at the time of appeal hearing the order of the AO sustained by the CIT(A) may be deleted and justice rendered.

3. The Id.AR for the assessee at the time of hearing submitted that there is a delay of 1 day in filing appeal before the Tribunal for which necessary petition for condonation of appeal along with affidavit has been filed explaining the reason for delay in filing the appeal. The Id.AR further submitted that

the delay in filing the said appeal was neither willful nor deliberate but due to circumstances beyond the control of the assessee. Having heard both sides, we are of the considered view that reason given by the assessee for not filing the appeal within the time allowed under the Act comes under reasonable cause as provided under the Act for condonation of delay and hence, delay in filing of above appeal is condoned and appeal filed by the assessee is admitted for adjudication.

4. The brief facts of the case are that the assessee M/s.Infonet Comm Enterprises Pvt. Ltd., is engaged in the business of service provider for bandwidth communication sold by M/s. Bharti Airtel Ltd and M/s. Reliance Communications Ltd. The assessee has entered into a Co-location Service Agreement with M/s. Bharti Airtel Ltd and M/s. Reliance Communications Ltd for providing business supply services in connection with high speed wireless internet access to its customers. The assessee purchased bulk bandwidth data from internet service providers namely M/s. Bharti Airtel Ltd., and M/s. Reliance Communications Ltd., and supplies to various

households through network of towers installed at various sub-stations. As per the agreement entered into between the assessee and M/s. Bharti Airtel Ltd., the nature of services provided by the supplier is to provide customer with a specific bandwidth of network activity. The assessee has made payments for purchase of bulk bandwidth data from M/s. Bharti Airtel Ltd., and M/s. Reliance Communications Ltd., and has deducted TDS as per section 194C of the Income Tax Act, 1961 (hereinafter the 'Act'). There was an inspection conducted by TDS ward, Salem in the premises of assessee on 30.08.2017. During the course of inspection, the AO has alleged that there is a default u/s.201(1) and 201(1A) r.w.s. 194J of the Act as to short deduction of tax at source, because applicable rate of TDS for the nature of payments made by the assessee is 10% as per section 194J of the Act, whereas, the assessee has deducted TDS at the rate of 2% as per section 194C of the Act. Therefore, the AO has passed an order u/s.201(1) and 201(1A) of the Act and computed short deduction of TDS and interest. The assessee carried the matter in appeal before the CIT(A) but could not succeed. The CIT(A) for the reasons stated in his

appellate order dated 25.06.2019 confirmed additions made by the AO on the ground that services rendered by the service providers does not fall u/s.194C of the Act but, was in the nature of fees for technical services which attracts TDS as per provisions of section 194J of the Act. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

5. The Id.AR for the assessee submitted that the Id.CIT(A) has erred in sustaining the action of the AO to compute short deduction of TDS and related interest u/s.201(1) & 201(1A) of the Act, without appreciating the fact that the assessee company is engaged in the business of providing high speed wireless internet access to its customers without any human intervention and hence, said services cannot be called as fees for technical services, as defined u/s.9(1) of the Act, which attracts provisions of section 194J of the Act. He, further submitted that the issue is now fully covered in favour of the assessee by the decision of various High Courts and Tribunals, as per which, the services rendered in connection with sale of high speed internet bandwidth without human intervention is

not coming u/s.194J of the Act. In this regard, he relied upon the decision of ITAT, Delhi Bench in the case of ITO vs. M/s. Primenet Global Ltd., ITA No.4061/Del/2011.

6. The Id.DR on the other hand strongly supporting order of the Id.CIT(A) submitted that, if we go through the nature of services rendered by the service providers to the assessee, one can easily say that they are in the nature of fees for technical services which attracts provisions of section 194J of the Act. The AO as well as the Id.CIT(A) have brought out clear facts to the effect that payment comes under the provisions of section 194J of the Act and hence, there is no error in the findings recorded by the authorities below to hold assessee as assessee in default u/s.201(1) & 201(1A) of the Act.

7. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We have also gone through Equipment Housing (Co-location) Master Service Agreement between assessee and M/s. Bharti Airtel Ltd., and M/s. Reliance Communications Ltd., and

ascertained the fact that, as per agreement between parties, the nature of services provided by the supplier to the assessee is to provide customers with a specified bandwidth of network connectivity. We, further noted that the assessee has purchased bulk bandwidth data from M/s. Bharti Airtel Ltd., and M/s. Reliance Communications Ltd., and supplied said internet connection to various households, enterprises according to their plan and tariff they chose, which is being controlled by software and regulating the supply of data. We, therefore noted that in the process of purchase and distribution of signals, there is no human intervention and is fully automated. From the above, it is clear that the services rendered by M/s. Bharti Airtel Ltd., and M/s. Reliance Communications Ltd., to the assessee without human intervention, cannot be considered as services in nature of managerial, consultancy, technical services which comes under the definition of fees for technical services as defined u/s.9(1) of the Act, which attracts TDS provisions as per section 194J of the Act. We, further noted that the ITAT, Delhi Bench in the case of M/s. Primenet Global Ltd., *supra*, has considered an

identical issue and after analyzing the nature of services as per the agreement between the parties has clearly held that provision of bandwidth does not require human intervention and hence, services provided in connection with use of bandwidth and payments cannot be considered to be in the nature of fees for technical services to invoke provisions of section 194J of the Act. The Tribunal while dealing with the issue had considered various decisions of High Courts including the decision of Hon'ble Delhi High Court in the case of CIT vs. Estel Communications P. Ltd., 217 CTR 102, where the Hon'ble Delhi High Court held that mere payment by the assessee for internet bandwidth did not mean that technical services were rendered by the supplier to the assessee and therefore, provisions of section 194J of the Act did apply. A similar view has been taken by the Hon'ble Madras High Court in the case of Skycell Communications Ltd., vs. DCIT, [2001] 251 ITR 53.

8. In this view of matter and considering facts and circumstances of this case, we are of the considered view that payments made by the assessee for bulk purchase of bandwidth from service providers like M/s. Bharti Airtel Ltd.,

and M/s. Reliance Communications Ltd., cannot be considered as fees for technical services because such services have been provided through optical fiber cable without any human intervention. Further, as per terms of agreement and nature of services between parties, it is clearly in the nature of works contract which comes u/s.194C of the Act. Hence, we are of the considered view that the AO as well as the Id.CIT(A) has erred in holding the assessee as an assessee in default u/s.201(1) / 201(1A) of the Act to compute short deduction of TDS and interest thereon. Accordingly, we set aside the order of the Id.CIT(A) and direct the AO to delete additions made towards short deduction of TDS and interest u/s.201(1) / 201(1A) of the Act.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the court on 28th July, 2021 at Chennai.

Sd/-

(वी दुर्गा राव)

(V. Durga Rao)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 28th July, 2021

Sd/-

(जी. मंजुनाथ)

(G. Manjunatha)

लेखा सदस्य /Accountant Member

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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