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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 1417/2018

COMMISSIONER OF INCOME TAX (TDS) -2 Appellant

Through: Mr.Zoheb Hossain, senior standing
counsel for the Revenue with
Mr.Vipul Agrawal and Mr.Parth
Semwal, Advocates.

versus

M/S TATA TELESERVICES LTD. Respondent

Through: Mr.Kamal Sawhney with Mr.Prashant
Meharchandani and Mr.Nikhil
Agarwal, Mr.Arun Bhadauria and
Mr.Nishank Vashista, Advocates.

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Date of Decision: 30th May, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present appeal has been filed raising the following question of law:-

“Whether the ITAT was correct in holding that no TDS under Section 194J of the Income Tax Act was required to be deducted by the assessee on payment of interconnect user charges as it could not be categorized as fee for technical services?”

2. Admittedly the Karnataka High Court in *Commissioner of Income Tax, TDS, Bangalore vs. Vodafone South Ltd., 2016 (72) taxmann.com*

347 (Karnataka) has decided the aforesaid issue in favour of the respondent-assessee. However, learned counsel for the appellant-revenue states that the Bombay High Court has admitted the similar question of law for consideration.

3. Learned predecessor Division Bench vide order dated 22nd March, 2021 had opined that as no Special Leave Petition has been filed against the judgment of the Karnataka High Court, the said view would be binding on the appellant-revenue. Learned predecessor Division Bench had directed the counsel for the appellant-revenue to obtain necessary instructions from the CBDT as to the way forward.

4. Mr. Zoheb Hossain, learned standing counsel for the revenue has handed over a letter dated 21st April, 2022 written by JDIT(OSD)(L&R), New Delhi addressed to the Commissioner of the Income Tax, High Court Cell (Judicial), New Delhi. The said letter is taken on record. The said letter reads as under :-

*“To,
The Commissioner of Income Tax (Judicial),
High Court Cell, Delhi*

Respected Sir,

Sub: Urgent Instructions required in the case of Commissioner of Income Tax (TDS-2) vs M/s Tata Teleservices Ltd. [ITA No. 1417/2018]- regarding.

Kindly refer to your e-mail dated 11th April 2022 on the above-mentioned subject.

In this regard, I am directed to convey that SLP in the case of CIT (TDS), Bangalore vs. Vodafone South Ltd. (2016) 72 Taxmann.com 347 (Kar) has not been approved by Board for the following reason:

"As it has been repeatedly established in various cases, involving the issue of liability of deduction of TDS us 194J for payments to other telecom companies for interconnect charges/access/port charges for roaming and data link that no human intervention was involved in the interconnect whether it was for data link or roaming, the charges paid could not be held to be in the nature of fees for technical services for the purposes of section 9(1) and section 194J of the Act."

In view of above, SLP in the case of CIT (TDS), Bangalore vs. Vodafone South Ltd. (2016) was not filed. This is for your kind information and the needful."

5. Learned counsel for the respondent emphasises that JDIT(OSD)(L&R) functions under the Directorate, L&R, CBDT. Therefore, he contends that the decision to accept the decision of the Karnataka High court in *Vodafone South Ltd.* (supra) was taken at the highest level of the appellant-revenue. He further states that the Bombay High Court was not aware of the aforesaid judgment of the Karnataka High court when it admitted the questions of law as alleged by learned counsel for the appellant.

6. Learned counsel for the respondent further contends that the appellant-revenue having taken a conscious decision to accept the judgment of the Karnataka High Court cannot be permitted to take the opposite stand in the present case. In support of his submission, he relies upon the following judgments:-

A. *Birla Corporation Ltd. vs. Commissioner of Central Excise, (2005) 6 SCC 95*

"5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving

identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd.(supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary.”

B. Commissioner of Central Excise, Navi Mumbai vs. Amar Bitumen & Allied Products Private Limited & Ors., (2010) 13 SCC 76

“5. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept the judgment/order on the same question in the case of one assessee and question its correctness in the case of some other assesseees. Revenue cannot pick and choose.....”

7. Admittedly, the Karnataka High Court and various Tax Tribunals have taken the view that there is no human intervention involved in providing the interconnect services whether it be for data link or roaming.

8. The Supreme Court in **Berger Paints India Ltd. vs. Commissioner of Income Tax, (2004) 135 Taxman 586** has held that if the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correctness in the case of other assessee without just cause.

9. Keeping in view the aforesaid mandate of law and the letter dated 21st April, 2022, this Court is of the view that the appellant-revenue has consciously elected not to challenge the aforesaid judgment of the Karnataka High Court, which hold that no TDS is required to be deducted by the assessee on payment of interconnect user charges as it cannot be categorized as fee for technical services.

10. Consequently, this Court is of the view that it is not open to the revenue to challenge the correctness of the finding rendered by the Karnataka High Court in *Vodafone South Ltd.* (supra) in the case of other assesseees without just cause. Accordingly, no substantial question of law arises for consideration in the present appeal and the same is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

MAY 30, 2022
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