

SUPREME COURT OF INDIA

C.I.T.,Delhi

Vs.

Bharti Cellular Ltd.

C.A.No.6691 of 2010

(S.H. Kapadia CJI. and K.S. Radhakrishnan JJ.)

12.08.2010

ORDER

1. Delay condoned.

2. Leave granted.

3. In this batch of cases, the key issue which arises for determination is, whether manual intervention is involved in the technical operations by which a cellular service provider, like M/s. Bharti Cellular Limited, is given the facility by BSNL/MTNL for interconnection? Facts in the lead case of Bharti Cellular Limited Respondent No.1 is a cellular service provider. It has Interconnect Agreement with BSNL/MTNL. Under such agreement, Respondent No.1 pays interconnect/access/port charges to BSNL/MTNL. Bharti Cellular, BSNL, MTNL, Hutchison are all service providers. All are governed by National Standards of CCS No.7 issued by Telecom Engineering Centre.

4. Under the National Standards M/s. Bharti Cellular Limited is required to connect its network with the network of BSNL (the service provider) and similar concomitant agreement is provided for under which BSNL is required to interconnect its network with M/s. Bharti Cellular Limited.

5. The question basically involved in the lead case is: whether TDS was deductible by M/s. Bharti Cellular Limited when it paid interconnect charges/access/port charges to BSNL? For that purpose, we are required to examine the meaning of the words "fees for technical services" under Section 194J read with clause (b) of the Explanation to Section 194J of the Income Tax Act, 1961, ['Act', for short] which, inter alia, states that "fees for technical services" shall have the same meaning as contained in Explanation 2 to clause (vii) of Section 9(1) of the Act. Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical

services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

6. The problem which arises in these cases is that there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place, let us say, from Delhi to Nainital and vice versa. If, let us say, BSNL has no network in Nainital whereas it has a network in Delhi, the Interconnect Agreement enables M/s. Bharti Cellular Limited to access the network of BSNL in Nainital and the same situation can arise vice versa in a given case. During the traffic of such calls whether there is any manual intervention, is one of the points which requires expert evidence. Similarly, on what basis is the "capacity" of each service provider fixed when Interconnect Agreements are arrived at? For example, we are informed that each service provider is allotted a certain "capacity". On what basis such "capacity" is allotted and what happens if a situation arises where a service provider's "allotted capacity" gets exhausted and it wants, on an urgent basis, "additional capacity"? Whether at that stage, any human intervention is involved is required to be examined, which again needs a technical data. We are only highlighting these facts to emphasise that these types of matters cannot be decided without any technical assistance available on record.

7. There is one more aspect that requires to be gone into. It is the contention of Respondent No.1 herein that Interconnect Agreement between, let us say, M/s. Bharti Cellular Limited and BSNL in these cases is based on obligations and counter obligations, which is called a "revenue sharing contract". According to Respondent No.1, Section 194J of the Act is not attracted in the case of "revenue sharing contract". According to Respondent No.1, in such contracts there is only sharing of revenue and, therefore, payments by revenue sharing cannot constitute "fees" under Section 194J of the Act. This submission is not accepted by the Department. We leave it there because this submission has not been examined by the Tribunal.

8. In short, the above aspects need reconsideration by the Assessing Officer. We make it clear that the assessee(s) is not at fault in these cases for the simple reason that the question of human intervention was never raised by the Department before the CIT. It was not raised even before the Tribunal; it is not raised even in these civil appeals.

9. However, keeping in mind the larger interest and the ramification of the issues, which is likely to recur, particularly, in matters of contracts between Indian Companies and Multinational Corporations, we are of the view that the cases herein are required to be remitted to the Assessing Officer (TDS).

10. Accordingly, we are directing the Assessing Officer (TDS) in each of these cases to examine a technical expert from the side of the Department and to decide the matter within a period of four months. Such expert(s) will be examined (including cross-examined) within a period of four weeks from the date of receipt of the order of this Court.

11. Liberty is also given to Respondent No.1 to examine its expert and to adduce any other evidence.

12. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the Appellate Forums, including this Court, to decide legal issues based on the factual foundation. We do not know the constraints of the Department but time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the Tribunals and Courts to decide matters expeditiously based on factual foundation. The learned Attorney General, who is present in Court, has assured us that our directions to CBDT would be carried out at the earliest.

13. The next question which arises in this batch of cases is whether the Department is entitled to levy interest under Section 201(1A) of the Act or impose penalty for non-deduction of TDS. We are of the view, that in the facts and circumstances of the case, it would not be justified for the following reasons: Firstly, there is no loss of revenue. It is no doubt true that TDS has not been deducted by the payee but the tax has been paid by the recipient. Secondly, the question involved in the present cases is the moot question of law, which is yet to be decided. Basically, we would have closed the file because these cases are only with regard to levy of interest but we are remitting these cases, as stated above, to the Assessing Officer (TDS) only because we are of the view that this issue is a live issue and it needs to be settled at the earliest. Once the issue gets settled, the Department would be entitled to levy both penalty and interest but, as far as the facts and circumstances of the present cases are concerned, we are of the view that the interest is not justified at this stage. Consequently, there will be no levy of penal interest prior to the date of fresh adjudication order.

14. Accordingly, the civil appeals are disposed of.

15. No order as to costs.