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Discount given to Sim card distributors on prepaid cards and payment for roaming charges not liable for TDS

Issue no: GBTA/25/2015

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Synopsis

The Income Tax Appellate Tribunal – Jaipur, in the case of M/s Bharti Hexacom Limited (“assessee”), has held that discount given to Sim card distributors on sale of prepaid card does not attract TDS under section 194H of the Income Tax Act, 1961 (“The Act”).

The Tribunal also held that roaming charges paid by assessee to other mobile operators are not covered under fees for technical services, as Data link transfer does not require any human intervention. Accordingly, no TDS is required to be deducted under section 194J of the Act.

Facts

- The assessee is a telecom service provider and is engaged in the business of providing cellular mobile telephone services in Rajasthan under the brand name “AIRTEL”.

Distribution of SIM cards

- The assessee had marketed its product through the distributor network under two categories namely post-paid products and prepaid products.
- In the case of prepaid products, the distributors distribute Airtel’s retail package products like prepaid Sim cards, recharge coupons and mobile products. The Sim cards are sold by the assessee to the Sim card distributors below market price.
- The Assessing officer (“AO”) considered the difference of market price and dealer price as commission and noted that there was principal agent relationship between the assessee and the distributors. Accordingly, the AO held that the assessee was liable to deduct TDS under section 194H of the Act and consequentially raised demand under section 201(1) / 201(1A) of the Act. The Commissioner of Income Tax (Appeal) (“CIT(A)”) upheld the order of AO.

Roaming charges

- The assessee is also providing GSM mobile services to its subscribers. The subscribers have been given facilities of getting connected/ avail of telecom facility, when they are not in the area being covered by the assessee, through

other mobile operators. For this facilities, assessee pays roaming charges to other mobile operators.

- No TDS has been deducted by assessee on payment of such roaming charges to other mobile operators.
- The AO held that the roaming facilities are covered under section 194J as fees for technical services and consequentially raised demand under section 201(1)/201(1A) of the Act. The CIT(A) upheld the order of AO.

Issue before the Tribunal

- Whether the discount given to the sim card distributors would be considered as commission and attract TDS under provisions of Section 194H of the Act?
- Whether the roaming charges paid to mobile operators could be considered to be in nature of fees for technical services and thus, liable for TDS under Section 194J of the Act?

Ruling of the Tribunal

TDS on payment for distribution of SIM card

- The Tribunal has observed the fact that the assessee was issuing the bill on net amount on MRP has been fixed on prepaid card sold. The assessee has not transferred any income to the distributor but the distributor was allowed to avail the airtime to the extent of MRP price. In the books of account, the assessee had credited these receipts on net basis.
- Further, the Tribunal relied on its own decision in case of Tata Tele Services¹, which is identical to the assessee's case, wherein it was held that:-
 - the relationship between assessee and distributors qua the sale of impugned products is on principal to principal basis
 - As the transaction being of sale/ purchase and relationship being of principal to principal does not amount to commission in terms of section 194H of the Act.

¹ M/s Tata Tele Services Limited ITA No. 309/JP/2012, 502, 503, 504 & 505/JP/2011

Therefore, the assessee cannot be held in default.

- Accordingly, the Tribunal held that provisions of 194H would not be applicable in the present case.

TDS on payment of roaming charges

- The Tribunal relied on the various materials/ records/ Judicial precedents² and observed that for installation/ setting up/ repairing/ servicing/ maintenance/ capacity augmentation require human intervention but after completing this process, mere interconnection between the operators is automatic and does not require any human intervention.
- The Tribunal also considered the judicial precedents³ and held that Data Link transfer does not require any human intervention and charges received or paid on account of this is not fees for technical services as envisaged in section 194J read with section 9(1)(vii) read with Explanation-2 of the Act.
- Relying on various judicial precedents discussed above, the Tribunal held that payment for roaming charges, i.e. Inter Connecting User Charges ('IUC') charges to various operators are not for rendering any technical services as envisaged in section 194J of the Act.

² Technical experts by the ACIT TDS, New Delhi in the case of Bharti Cellular Ltd, opinion of Hon'ble the then Chief Justice of India Mr. S.H. Kapadia dated 03/09/2013, judgment given by ITAT Ahmadabad Bench in the case of Canara Bank Vs. ITO (305 ITR (AT) 189) on MICR and Pune Bench decision on Data Link Services.

³ Hon'ble Supreme Court decision in the case of Bharti Cellular Ltd, iGATE Computer Systems Ltd. Vs. DCIT in ITA No. 1301 to 1303 & 1616/PN/2013

Comments

This is a welcome ruling of the Tribunal amid the contrary rulings on the issue of applicability of TDS on payments made to distributors for distribution of SIM cards and for availing roaming services for customers.

The ruling also lays an important principle that for any services to be qualified as fees for technical services, there has to be an element of human intervention.

Source: ITAT Jaipur in the case of M/s Bharti Hexacom Limited Vs. Income Tax Officer (TDS) –II (ITA No. 656/JP/2010)

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