IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14TH DAY OF JULY, 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE RAMACHANDRA D. HUDDAR

ITA NO. 160 OF 2015
C/W
ITA NO. 161 OF 2015, ITA NO. 162 OF 2015
ITA NO. 163 OF 2015, ITA NO. 164 OF 2015
ITA NO. 64 OF 2020, ITA NO. 65 OF 2020 ITA NO.66 OF 2020

IN ITA NO. 160 OF 2015

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(FORMERLY KNOWN AS
M/S VODAFONE MOBILE SERVICES LTD.)
SUMAN TOWER, PLOT NO.18 SECTOR-11,
GANDHINAGAR GUJARAT – 382 011.
INDIA
REP. BY ITS AUTHORIZED SIGNATORY
SRI. ROHIT AGARWAL ….APPELLANT
(BY SHRI. PERCY PARDIWALA, SENIOR ADVOCATE FOR

SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

2 AND:

1. DEPUTY DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), NO.14/3A
6TH FLOOR, RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001

2. THE DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001 …RESPONDENTS

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:30/12/2014 PASSED IN ITA NO.449/BANG/2013 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO. 47/INTL.TAXN.,/2012-13, DATED:25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED:28/01/2013, FOR THE ASSESSMENT YEAR 2008-09 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN ITA NO.449/BANG/2013 DATED: 30/12/2014 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO.47/INTL., TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED

BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2008-09.

IN ITA NO. 161 OF 2015

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(FORMERLY KNOWN AS
M/s. VODAFONE MOBILE SERVICES LTD.,)
SUMAN TOWER, PLOT NO.18 SECTOR-11,
GANDHINAGAR GUJARAT – 382 011.
INDIA
REP.BY ITS AUTHORIZED SIGNATORY
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CIRCLE-1(1), NO.14/3A
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NRUPATHUNGA ROAD
BENGALURU – 560 001.

2. THE DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION RASHTROTHANA
BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001. …RESPONDENTS

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 30/12/2014 PASSED IN ITA NO.450/BANG/2013 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO. 48/INTL.TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR

OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2009-10 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN ITA NO.450/BANG/2013 DATED: 30/12/2014 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO.48/INTL., TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2009-10.

IN ITA NO. 162 OF 2015

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(FORMERLY KNOWN AS
M/s. VODAFONE MOBILE SERVICES LTD.,)
SUMAN TOWER, PLOT NO.18 SECTOR-11,
GANDHINAGAR GUJARAT – 382 011.
INDIA
REP.BY ITS AUTHORIZED SIGNATORY
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NRUPATHUNGA ROAD
BENGALURU – 560 001.

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INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001. …RESPONDENTS

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 30/12/2014 PASSED IN ITA NO.451/BANG/2013 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO. 49/INTL.TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2010-11 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN ITA NO.451/BANG/2013 DATED: 30/12/2014 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO.49/INTL., TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED

BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2010-11.

IN ITA NO. 163 OF 2015

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(FORMERLY KNOWN AS
M/s. VODAFONE MOBILE SERVICES LTD.,)
SUMAN TOWER, PLOT NO.18 SECTOR-11,
GANDHINAGAR GUJARAT – 382 011.
INDIA

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REP.BY ITS AUTHORIZED SIGNATORY
SRI. ROHIT AGARWAL ….APPELLANT

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SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

AND:

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INTERNATIONAL TAXATION
CIRCLE-1(1), NO.14/3A
6TH FLOOR, RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001.

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INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001. …RESPONDENTS

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 30/12/2014 PASSED IN ITA NO.452/BANG/2013 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO. 50/INTL.TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2011-12 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN ITA NO.452/BANG/2013 DATED: 30/12/2014 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO.50/INTL., TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL.,

TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2011-12.

IN ITA NO. 164 OF 2015

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(FORMERLY KNOWN AS
M/s. VODAFONE MOBILE SERVICES LTD.,)
SUMAN TOWER, PLOT NO.18 SECTOR-11,
GANDHINAGAR GUJARAT – 382 011.
INDIA
REP.BY ITS AUTHORIZED SIGNATORY
SRI. ROHIT AGARWAL ….APPELLANT

(BY SHRI. PERCY PARDIWALA, SENIOR ADVOCATE FOR
SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

AND:

1. DEPUTY DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), NO.14/3A
6TH FLOOR, RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001.

2. THE DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BENGALURU – 560 001. …RESPONDENTS

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 30/12/2014 PASSED IN ITA NO.453/BANG/2013 AND THE ORDER OF THE APPELLATE

COMMISSIONER IN ITA NO. 51/INTL.TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2012-13 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDERS PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN ITA NO.453/BANG/2013 DATED: 30/12/2014 AND THE ORDER OF THE APPELLATE COMMISSIONER IN ITA NO.51/INTL., TAXN.,/2012-13, DATED: 25/03/2013 AND THE ORDER PASSED BY THE DEPUTY DIRECTOR OF INCOME TAX, (INTL., TAXN.,) CIRCLE-I(1), BENGALURU DATED: 28/01/2013, FOR THE ASSESSMENT YEAR 2012-13.

IN ITA NO. 64 OF 2020

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(EARLIER KNOWN AS
'VODAFONE SOUTH LIMITED'
WHICH NOW STANDS MERGED
WITH 'IDEA CELLULAR LTD'.)
MARUTIINFOTECH CENTRE
NO.11/1, 12/1, KORAMANGALA
AMAR JYOTI LAYOUT BENGALURU
– 560 071.
PAN: AABCB 5847L
REP. BY ITS VICE PRESIDENT-TAXATION
MR. VAIBHAV MANGAL ….APPELLANT

(BY SHRI. PERCY PARDIWALA, SENIOR ADVOCATE FOR
SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

AND:

THE DEPUTY COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION)
CIRCLE-2(1), 4TH FLOOR
BMTC BUILDING

6TH BLOCK, KORAMANGALA BENGALURU
– 560 095.
(EARLIER DEPUTY DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), BANGALORE) …RESPONDENT

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 28/11/2019 PASSED IN IT(IT)A NO.1161/BANG/2015, FOR THE ASSESSMENT YEAR 20142015 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDER PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN IT(IT)A NO.1161/BANG/2015 (ANNEXURE-R) DATED: 28/11/2019 FOR THE ASSESSMENT YEAR 2014-2015, TO THE EXTENT IT IS CHALLENGED BEFORE THIS HON'BLE COURT AND ETC.

IN ITA NO. 65 OF 2020

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(EARLIER KNOWN AS
'VODAFONE SOUTH LIMITED'
WHICH NOW STANDS MERGED WITH
'IDEA CELLULAR LTD'.)
MARUTI INFOTECH CENTRE
NO.11/1, 12/1
KORAMANGALA
AMAR JYOTI LAYOUT BENGALURU
– 560 071.
PAN: AABCB 5847L

REP. BY ITS VICE PRESIDENT-TAXATION
MR. VAIBHAV MANGAL ….APPELLANT

(BY SHRI. PERCY PARDIWALA, SENIOR ADVOCATE FOR
SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

AND:

THE DEPUTY COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION)
CIRCLE-2(1), 4TH FLOOR
BMTC BUILDING 6TH BLOCK,
KORAMANGALA
BENGALURU – 560 095.
(EARLIER DEPUTY DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), BANGALORE) …RESPONDENT

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 28/11/2019 PASSED IN IT(IT)A NO.2818/BANG/2017, FOR THE ASSESSMENT YEAR 20152016 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDER PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN IT(IT)A NO.2818/BANG/2017 (ANNEXURE-P) DATED: 28/11/2019 FOR THE ASSESSMENT YEAR 2015-2016, TO THE EXTENT IT IS CHALLENGED BEFORE THIS HON'BLE COURT AND ETC.

IN ITA NO. 66 OF 2020

BETWEEN:

M/s. VODAFONE IDEA LIMITED
(EARLIER KNOWN AS

VODAFONE SOUTH LTD.
WHICH NOW STANDS MERGED
WITH 'IDEA CELLULAR LTD'.)

MARUTI INFOTECH CENTRE
NO.11/1, 12/1, KORAMANGALA
AMAR JYOTI LAYOUT BENGALURU
– 560 071.
PAN: AABCB 5847L
REP. BY ITS VICE PRESIDENT-TAXATION
MR. VAIBHAV MANGAL ….APPELLANT

(BY SHRI. PERCY PARDIWALA, SENIOR ADVOCATE FOR
SHRI. ANKUR PAI DHUNGAT, ADVOCATE)

AND:

THE DEPUTY COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION)
CIRCLE-2(1), 4TH FLOOR
BMTC BUILDING 6TH BLOCK,
KORAMANGALA
BENGALURU – 560 095.
(EARLIER DEPUTY DIRECTOR OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), BENGALURU) …RESPONDENT

(BY SHRI. G.C. SRIVATSAVA, SPECIAL COUNSEL FOR
SHRI. K.V. ARAVIND, SENIOR STANDING COUNSEL AND
SHRI. M. DILIP, STANDING COUNSEL)

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 28/11/2019 PASSED IN IT(IT)A NO.1160/BANG/2015, FOR THE ASSESSMENT YEAR 20132014 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED THEREIN AND ANSWER THESE QUESTIONS IN FAVOUR OF THE APPELLANT AND AGAINST THE REVENUE AND ALLOW THE APPEAL, SET ASIDE THE ORDER PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU IN IT(IT)A NO.1160/BANG/2015 (ANNEXURE-R) DATED: 28/11/2019 FOR THE ASSESSMENT YEAR 2013-2014, TO THE EXTENT IT IS CHALLENGED BEFORE THIS HON'BLE COURT AND ETC.

THESE ITAs, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 16.06.2023 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, P.S. DINESH KUMAR, J., PRONOUNCED THE FOLLOWING:-

JUDGMENT

These appeals are filed by the assessee. ITA Nos.160/2015, 161/2015, 162/2015, 163/2015 and 164/2015 are directed against the common order dated December 30, 2014 in IT(IT)A Nos. 1814 to 1818 & 734/Bang/2013 for A.Y[1]. 2008-09 to 2012-13 and ITA Nos. 64/2020, 65/2020, 66/2020 are directed against the common order dated November 28, 2019 in IT(IT)A Nos. 1160-1161/Bang/2015 and 2818/Bang/2017 for A.Y[2]. 2013-14 to 2015-16 passed by the ITAT[3], have been admitted to consider following questions of law:

[1] Assessment Years
[2] Assessment Years
[3] Income Tax Appellate Tribunal

1. Whether the Income-Tax Appellate Tribunal (ITAT) was correct in holding that the application of the Double Taxation Avoidance Agreement (DTAA) cannot be considered in proceedings under Section 201 of the Act and that it is not open to the payer to take benefit of the DTAA when he is making payment to a non-resident?

2. Whether the ITAT was correct in holding that amendment to provisions of royalty under Section 9(1)(vi) by inserting Explanation 5 and 6 under the Income-tax Act (hereinafter referred to as the 'Act') will also result in amendment of the DTAAS?

3. Whether ITAT was correct in holding that payments made to non-resident telecom operators for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty in view of the inclusion of the terms "right" & "process" in the clarificatory Explanation 2, 5 and 6 of Section 9(1)(vi) of the Act, and consequently, appellant was bound to deduct tax at source thereon under Section 195 of the Act?

4. Whether the income tax authorities in India have jurisdiction to bring to tax income arising from extra-territorial source, that is outside India, in respect of business carried on by foreign companies outside India just because Indian residents use and pay for the facilities provided by these foreign companies contrary to the Constitution of India, International Law and Treaties and law declared by the Apex Court?

5. Whether the first respondent was correct in holding that for the current assessment year the withholding tax liability should be levied at a higher rate at 20% in accordance with section 206AA of the Act?

6. Whether the Hon'ble Tribunal was right in repelling the contention of the Appellant to the effect that, as a deductor, it

cannot be held liable for non-reduction of tax at source for payments made for the Assessment Year 2008-09 to Assessment Year 2012-13 on the basis of a subsequent amendment to Section 9(1)(vi) whereby Explanation 5 and 6 were introduced?

2. Heard Shri. Percy Pardiwala, learned Senior Advocate for the Assessee and Shri. G.C. Shrivastsava, Special Counsel for the Revenue.

3. Briefly stated the facts of the case are, Assessee holds an ILD[4] License and provides telecommunication services. It is responsible to provide connectivity to calls originating or terminating outside India. In order to provide ILD

[4] International Long-Distance

services, assessee avails certain services offered by NTOs [5] to provide seamless connectivity to its customers. Assessee had entered into agreements with NTOs for international carriage and connectivity services. As per the agreement, assessee has to pay inter-connectivity charges to NTOs.

4. Assessee entered into a CTA[6] with MIS Belgacom International Carrier Services S.A. [7] to acquire bandwidth capacity on EIG[8] which works through a submarine cable system and M/s. Omantel

Telecommunications Company[9], a member of consortium which owns the EIG system. The agreement allows each party to transfer to other telecommunication entity the whole or a part of its total allocated capacity

[5] Non-resident Telecom Operators
[6] Capacity Transfer Agreement
[7] 'Belgacom' for short
[8] Europe-India Gateway
[9] 'the Omantel' for short

in the EIG Cable system without any restrictions by way of an IRU[10]. In pursuance to the EIG agreement, Omantel had

transferred certain portion of its capacity in the EIG cable system to Belgacom and in turn, Belgacom had transferred a portion of its capacity to the assessee for consideration.

5. The AO[11] issued a notice stating that the payments made by assessee to NTOs and Belgacom for the A.Y. 2008-09 to 2015-16 were made without

deducting TDS[12] under Section 195 of the Income Tax Act 1961[13] and assessee was liable to be treated as 'defaulter' under Section 201 of the Act. Assessee sent its reply explaining that the NTOs are located outside India and they provide telecom services outside India. Hence, it was not necessary to deduct TDS in India.

[10] Indefeasible Right to Use
[11] Assessing Officer
[12] Tax Deducted at Source
[13] 'the Act' for short

6. The AO passed an assessment order dated January 28, 2013 holding assessee as 'defaulter' for failure to deduct TDS while making payments to the NTOs and Belgacom. The AO also held that payments made to

NTOs for provision of bandwidth and IUC[14] are taxable

under the head 'other income' and treated the same as Royalty/FTS[15].

7. Assessee challenged AO's order before the CIT(A)[16]. The CIT(A) vide order dated March 25, 2013, dismissed assessee's appeal holding that payments made to NTOs are chargeable to tax in India under Section 195 of the Act as Royalty. He held that the IUC payments could not

[14] Inter- connectivity Usage Charges
[15] Fee for Technical Services
[16] Commissioner of Income Tax(Appeals)

be taxed under the head ‘other income’. The issue regarding FTS was not adjudicated.

8. On further appeal, the ITAT has partly-allowed assessee’s appeal and confirmed the findings recorded by the CIT(A). Hence, this appeal.

9. Shri. Percy Pardiwala, for the Assessee,

praying to allow the appeal, submitted:

Re: Question No. 1 as follows:

- the payments made by assessee cannot be characterised as royalty or FTS or business profits, as no part of the activity was admittedly carried out in India;

- in GE India Technology Centre Private Limited Vs. CIT[17], the Apex Court has held that apart from Section 9(1), Sections 4, 5, 9, 90 and 91 of the Act, the provisions of the DTAA are relevant while applying the provisions of deduction of

  TDS.

Re: Question No. 2 as follows:

- that the payments made by assessee to the NTOs[18] could not be characterised as royalty, as payment is made to use the process or an equipment;

- that this question of law is covered in assessee's favour in Engineering Analysis Centre of Excellence Private Limited Vs. CIT [19] (Hereinafter referred to as 'Engineering Analysis'), reiterated by the Bombay High Court in CIT Vs. Reliance

[17] [2010] 327 ITR 456 (SC)
[18] Overseas Telecom Operators
[19] (2021) 125 taxmann.com 42 (SC)

Infocom Limited[20].

Re: Question No. 3 as follows:

- the Amendments made in the Act cannot be incorporated while construing the scope of the definition of the term 'royalty' in the relevant Article of the DTAA [21] and the payments made by assessee cannot be characterised as "royalty" as defined in the relevant Article of DTAA;

- in Viacom 18 Media Limited Vs. ADIT[22] rendered by ITAT Mumbai and relied upon by the ITAT for the A.Ys. 2009-10 to 2011-12, the ITAT has held

that TDS was deductable at source. However, for subsequent years in assessee's own cases[22], the ITAT has taken a different view and

[20] ITA No. 1395/2016
[21] Double Taxation Avoidance Agreements. [22] WP. No.36/2018
[22] 194 ITD 263 and 134 taxmann.com 234 (Mum-Trib.)

held that the definition in the DTAA could not be enlarged by relying upon the provisions of Explanations 5 and 6;

- that, for a payment to be characterised as one for use of, or for the right to use certain intellectual property, firstly, the grantor of that right should be denuded from that property and it should vest completely with the recipient and secondly, the possession, dominion and control over such property should be fully granted to the user. The amendment brought by the Finance Act, 2012 by insertion of Explanation 5 seeks to do away with the second condition but the first condition remains unchanged;

- the NTOs have not denuded themselves of utilising the process. The payment made by assessee to the NTOs is not the payment for the use or the right to use process or the equipment as alleged by the Revenue, as held by the

judgment of the Delhi High Court in Asia Satellite Telecommunications Company Limited Vs. Director of Income Tax[23] and Director of Income

Tax Vs. New Skies Satellite BV[24].

Re: Question No. 4 as follows:

- the NTOs have no presence of any nature in India. The AO has observed that no part of the telecom network of the NTOs is located in India. Hence in the absence of any permanent

establishment of NTOs in the country, the income is not taxable in India.

22 Re:

Question No. 5 as follows:

- that this issue is covered by CIT v/s. Wipro

Limited[25] followed in the Appellant's own case in

[23] [2011] 238 CTR 0233
[24] [2016] 133 DTR 0185 (Del)
[25] ITA No. 181/2019 dated 29 November 2022

CIT vs. Vodafone India Ltd[26];

Re: Question No. 6 as follows:

- in Engineering Analysis, the Apex Court has answered the question of law in favour of the assessee affirming the view taken by the Bombay

  High Court in CIT Vs. NGC Networks (India) Private Limited[27] wherein it is held that Explanation 6 to Section 9(1)(vi) to the Act could not have been invoked by the Revenue while passing an order under the Section 201 of the Act treating the assessee in default of its obligation to deduct TDS under Section 194C of the Act;

- the burden is always on the Revenue to establish that a receipt falls within the taxing provision of the Act;

[26] ITA No. 120/2020 dated January 17, 2023
[27] ITA No. 397 of 2015

- there is a difference between 'grant of rights' and 'transfer of rights'. What is provided to assessee is ‘grant of right’ and not ‘transfer of right’; as assessee merely avails these services;

- the term used in Article 12 of the DTAA is ‘Royalty’. This term is defined both in the Act (in Explanation 2) and in the DTAA (in para 3 of Article 12). In order to determine whether a particular payment can be characterised as royalty, it has to be first determined whether it falls within the scope and ambit of the definition of the term in the DTAA.

10. Opposing the appeal, Shri. Shrivastsava, for the Revenue, submitted:

Re: Question No. 1 as follows;

- Section 195 of the Act mandates that the tax has to be deducted at source if the payment represents a sum chargeable to tax. If the payer does not think that tax is deductible or requires to be deducted at a lower rate, he could approach the AO under Sections 195(2), 195(3), 197 of the Act, for a nil deduction/lower deduction certificate;

- if the payer chooses not to deduct tax without obtaining certificates under Sections 195(2), 195(3), 197, the onus would lie upon him to establish. If he fails to do so, the consequences of Section 201(1)/201(1A) or Section 40(a)(i) of the Act would follow;

- the ITAT has rightly examined the question of onus and held that assessee had failed to establish that tax was not deducted at source;

- the agreements between the payee and assessee do not disclose or establish that the income is not chargeable to tax;

- the characterisation of a certain receipt,

whether it is in the nature of Royalty or not, is a mixed question of law and fact and the onus in this regard cannot be discharged by placing reliance on authorities.

Re: Question No. 2:

- the payments made by assessee to the NTOs for international carriage and connectivity as well as to Belgacom for utilization of under-sea cable system, qualify as royalty under Clauses (i), (ii) and (iii) of Explanation 2 to Section 9(i)(vi) of the Act. This proposition gets

reinforced by the clarificatory amendment made retrospectively by insertion of Explanation 6 to Section 9(1)(vi)of the Act. However, with or without this amendment, the payments of this nature are always qualified as Royalty;

- the authorities below have recorded a concurrent finding that the payments were chargeable to tax in India as Royalty. This

finding is based on agreements between assessee and payees, opinion of experts in the field of telecommunication and provisions governing Royalty in the Act and the DTAA;

- the definition of royalty under the DTAA entered into with various countries is in consonance with the Act;

- assessee's contention that in Belgium DTAA, the definition of 'equipment royalty' is missing, is untenable because in this proceeding, the issue

involved is not 'equipment royalty' but 'process royalty';

- the agreements between assessee and the NTOs are with regard to complex process involving several steps for the transmission of voice data from one end to the other.

It involves the NTOs giving access to assessee's transmission system and allowing assessee to use their system seamlessly for transmission of data;

- the agreements that assessee has with the NTOs, have a confidentiality clause wherein the receiving party has to use confidential information including the know-how, ideas, concept, technology drawings, discussions, papers etc;

- the agreements between assessee and the

NTOs grant access to assessee to the network

and process running on those telecom networks belonging to NTOs. Therefore, this interconnect constitutes an activity which can be carried out only by the use of the systems comprising highly complex technical 'process'.

Re: Question No. 3:

- the AO has recorded the statement of a telecommunication Expert as per the direction of the Hon'ble Supreme Court[28]. He has stated that this is not a standard facility and there is no

[28] CIT, Delhi v. Bharti Cellular, C.A. No. 6691/2010

material on record to justify any departure from the views of the Expert;

- where a consideration is paid for the transfer of all or any rights in respect of a process or for the use of process, such consideration is brought within the ambit and scope of definition of 'Royalty' provided under the Act and the

DTAA. Therefore, when a right to use a process is given, there should be no doubt that the consideration paid would tantamount to royalty. This proposition is applicable even without the amended Explanation 6;

- notwithstanding the amendment, the consideration in a transaction of this nature must be construed as having been paid for the use or right to use the process;

- Explanation 6 does not enlarge the scope of the definition of Royalty either under the Act or under the DTAA. It only clarifies what was already embedded in the definition;

- the decision in Engineering Analysis is under review in the Hon'ble Supreme Court in CIT Vs. ZTE Corporation[29]. The reasoning of the case would not apply to the case on hand because

retrospective amendments to Section 9 of the Act by insertion of Explanation 6 does not affect the definition of Royalty;

- Engineering Analysis was rendered in the context of Section 14 of the Copyright Act, 1957 whereas the submarine cable system and the telecom network falls under the Patents Act, 1970;

- assessee's contention with regard to impossibility of performance to deduct tax, is untenable for more than one reason. Firstly because even without the clarificatory amendment, the transaction was taxable as Royalty. Secondly because the show cause notice[30] was issued

[29] Dy. No. 22013 of 2022
[30] September 2011

by the AO prior to the amendment coming into force. Thirdly, there are judicial precedents prior to the amendment

which lay down that such transactions amounted to Royalty and chargeable to tax in India both under the domestic law and Treaty.

11. In support of his contentions, Shri. Shrivastsava has placed reliance upon following authorities:

- Verizone Communications Singapore Pte. Ltd. Vs. Income Tax Officer, International Taxation-1[31];
- CIT, Delhi Vs. Bharti Cellular [32].

[31] 2013 SCC Online Mad 3316 (para no. 100)
[32] C.A. No. 6691/2010

12. We have carefully considered the rival contentions and perused the records.

13. Undisputed fact of the case are, Assessee is an ILD license holder and responsible for providing connectivity to calls originating/terminating outside India. Assessee has entered into an agreement with NTOs for

international carriage and connectivity services. According to the assessee, payment made to NTOs is towards interconnectivity charges.

14. Assessee has also entered into a CTA with a Belgium entity Belgacom. Belgacom had certain arrangement with the Omantel for utilisation of bandwidth. Omantel transferred certain portion of its capacity to Belgacom and Belgacom had in turn transferred a portion of its capacity to the assessee.

15. Admittedly the equipments and the submarine cables are situated overseas. To provide ILD calls, assessee had availed certain services from NTOs. It is also not in dispute that Belgacom, a Belgium entity with whom assessee has entered into an agreement does not have any 'permanent establishment' in India.

16. Shri. Pardiwala contended that the payments made by assessee cannot be treated as either Royalty or FTS[33] or business profits as no part of the activity was carried out in India. Revenue's reply to his contention is that, the income belongs to the payee. If, in the opinion of assessee, tax was not deductible, he ought to have approached the AO for the nil deduction certificate. It is also the further case of the Revenue that the agreement between assessee and the payee did not specify that income was not taxable.

[33] Fees for Technical Services

17. The first question is whether the ITAT was correct in holding that DTAA cannot be considered under

Section 201 of the Act. It was argued by Shri. Percy

Pardiwala that this issue is covered by the decision in GE Technolgy. We may record that a DTAA is a sovereign document between two countries. In GE Technology, the

Apex Court has held as follows:

> "7. …While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions."
>
> (Emphasis supplied)

18. The above passage has been noted and

extracted in Engineering Analysis. Thus it is clear that an assessee is entitled to take the benefit under a DTAA between two countries. Hence, the ITAT's

view that DTAA cannot be considered in proceedings under Section 201 of the Act is tenable.

19. The second question for consideration is whether the ITAT was correct in holding that the amendment to provisions of Section 9(1)(vi) inserting the Explanations will result in amendment of DTAA. The answer to this question must be in the negative because

in Engineering Analysis, the Apex Court has held that Explanation 4 to Section 9(1)(vi) of the Act is not clarificatory of the position as on 01.06.1976 and in fact expands that position to include what is stated therein vide Finance Act, 2012.

20. The Explanation 5 and 6 to Section 9(1)(vi) of the Act has been inserted with effect from 01.06.1976. This aspect has also been considered in Engineering Analysis holding that the question has been answered by two Latin Maxims, lex no cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is disability that

makes it impossible to obey the law, the alleged disobedience of law is excused and it is held in Engineering Analysis as follows:

> "85. It is thus clear that the "person" mentioned in section 195 of the income Tax Act cannot be expected to do the impossible, namely, to apply the expanded
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>
> definition of "royalty" inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute."

> "100. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and
>
> Article 3(2) of the DTAA……."

21. The third question is, whether the payments made to NTOS for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty. It was argued by Shri. Pardiwala, that for subsequent years in assessee's own case, the ITAT has held that tax is not deductable when payment is made to non-resident telecom operator. This

factual aspect is not refuted. Thus the Revenue has reviewed its earlier stand for the subsequent assessment years placing reliance on

Viacom etc[34], rendered by the ITAT. In that view of the matter this question also needs to be answered against the Revenue.

22. The fourth question is whether the Income Tax Authorities have jurisdiction to bring to tax income arising from extra-territorial source. Admittedly, the NTOs have no presence in India. Assessee's contract is with Belgacom, a Belgium entity which had made certain arrangement with Omantel for utilisation of bandwidth. In substance, Belgacom has permitted utilisation of a portion of the bandwidth which it has acquired from Omantel. It is also not in dispute that the facilities are situated outside India and the agreement is with a Belgium entity which does not have any presence in India. Therefore, the Tax authorities in India shall have no jurisdiction to bring to tax the income arising from extra-territorial source.

[34] WP. No.36/2018

23. The fifth question is whether the Revenue is right in holding that withholding tax liability should be

levied at a higher rate. It was contended by

Shri. Pardiwala that this issue is covered in assessee's favour in CIT Vs. M/s. Wipro[35] and the same is not disputed. Hence, this question also needs to be answered against the Revenue.

24. The sixth question is whether assessee can be held liable for non-reduction of tax at source for payments made for the A.Ys. on the basis of amendment to Section 9(1)(vi) of the Act. This aspect has been considered by us while answering question No.2. It is held in Engineering Analysis that an assessee is not obliged to do the impossible. Admittedly, the A.Y.s under consideration are 2008-09 to 2012-13 and the Explanation has been inserted by Finance Act, 2012. In addition, we have also held that assessee is entitled for the benefits under DTAA.

[35] ITA No. 181/2019 dated 29 November 2022

25. In view of the above discussion, the following:

ORDER

i) Appeals are allowed.

ii) The questions of law are answered in favour of the assessee and against the Revenue. iii) Common order dated December 30, 2014 in IT(IT)A Nos. 1814 to 1818 & 734/Bang/2013 passed by the ITAT is set-aside.

iv) Common order dated November 28, 2019 in IT(IT)A Nos. 1160-1161/Bang/2015 and 2818/Bang/2017 passed by the ITAT is set-

aside.

No costs.

Sd/-
JUDGE

Sd/-
JUDGE

SPS