Tenet Tax & Legal Private Limited

Tenet Tax Daily
October 02, 2015

Provision made by Telecom operator for dismantling towers after termination of lease wasn't liable to TDS

Summary – The Chennai ITAT in a recent case of Dishnet Wireless Ltd., (the Assessee) held that while making provision for dismantling signal towers and restoration of site after termination of lease period, a telecom operator was not required to deduct tax at source

Facts

- The assessee-company was engaged in the business of providing telecommunication services, namely, cellular services, data access services, *etc.* in various telecom circles in the country.
- In course of assessment the Assessing Officer passed an order under section 201(1) and 201(1A), holding that the assessee defaulted in deduction of tax in respect of (1) Provision for site restoration expenses, (2) Year-end provisions and (3) Roaming charges.
- The Commissioner (Appeals) upheld the orders of the Assessing Officer.
- On second appeal:

Held

- The assessee made the provision for dismantling the towers and restoration of site to its original position after termination of the lease period. The lease period is normally 20 years and above.
- The assessee by placing reliance on the Accounting Standard-29 claims that a provision would be made in respect of an obligation. In other words, the assessee had an obligation to incur the expenditure after termination of the lease period. Revenue, however, contends that due to misconception and ignorance of law and with an intention to circumvent the statutory provisions, the assessee made the provision.
- The fact remains that the payment was not made to anyone and it is not credited to the account of any party or individual. The account does not disclose the person to whom the amount is to be paid. The contractor who is supposed to be engaged for dismantling the tower and restore the site in its original position is not identified. As contended by the assessee, the assessee by itself engaging its own labourers may dismantle the towers and restore the site to its original position. In such a case, the question of deducting tax at source does not arise. The assessee has to pay only the salary to the respective employees.
- Suppose the work is entrusted to a contractor, then definitely the assessee has to deduct tax. In this case, the contractor would be identified after the expiry of lease period. Therefore, even if the assessee deducts tax, it cannot be paid to the credit of any individual. The assessee has to issue Form 16A prescribed under rule 31(1)(b) of the Income-tax Rules, 1962 for the tax deducted at source. The assessee has to necessarily give the details of name and address of deductee, the PAN of deductee and amount credited.

- In this case, the assessee could not identify the name and address of deductee and his PAN. The assessee also may not be in a position to quantify the amount required for incurring the expenditure for dismantling and restoration of site to its original position. In such circumstances, the provision which requires deduction of tax at source fails. Hence, the assessee cannot be faulted for non-deduction of tax at source while making a provision. Accordingly, the orders of the lower authorities are set aside and this ground of appeal is allowed.
- Coming to the issue of year-end provisions, the contention of the assessee is that it is engaged in various services like address verifications, credit certification, content development *etc.* The assessee claims that provisions are made on estimation basis and it is not identifiable as to what amount has to be paid to the service providers. In case of new service connections, the assessee has to necessarily verify the customers' address and identification. The claim of the assessee is that in the last month of the financial year, it is not known how many customer verifications have been completed and the exact amount required to be paid.
- However, on the basis of the past experience, the assessee is making an overall provision for incurring this expenditure. From the order of the Commissioner (Appeals) it appears that apart from identification and address verification, the assessee has also made provision towards ICU charges and lease line expenses, *etc.* From the order of the Commissioner (Appeals) it appears that apart from identification and address verification, the assessee has also various other service providers for providing value added service to its subscribers like daily horoscopes, astrology, songs, wall paper downloads, cricket scores, *etc.*
- Admittedly, the assessee made arrangement with other service providers for providing these kind of value added services. There may be justification with regard to the expenditure for availing the services of identification and verification for the last month of financial year, since the assessee may not have the exact details on verification done by the concerned persons and the amount required to be paid. However, in respect of the downloads and value added service, *etc.* the entire details may be available in the system. Therefore, wherever the particulars and details available and amount payable could be quantified, the assessee had to necessarily deduct tax.
- In respect of value added services like daily horoscopes, astrology, customer acquisition forms are all from specific service providers and these value added services are monitored by system. Therefore, even on the last day of financial year, the assessee could very well ascertain the actual quantification of the amount payable and the identity of the payee to whom the amount has to be paid. To that extent, the contention of the assessee that the payee may not be identified is not justified. The exact facts need to be examined. In other words, the Assessing Officer has to examine whether the payment to the party/payee is identifiable on the last day of financial year and whether the amount payable by the assessee is also quantified on the last date of financial year.
- In case, the Assessing Officer finds that the payee could not be identified on the last day of financial year and the amount payable also could not be ascertained, the assessee may not require to deduct tax in respect of that provision. However, in case the payee is identified and quantum is also

ascertainable on the last day of the financial year, the assessee has to necessarily deduct tax at source. Since the details are not available on record, the orders of the lower authorities are set aside and the issue of year-end provision is remitted back to the file of the Assessing Officer.

- Coming to roaming charges, the contention of the assessee is that human intervention is not required for providing roaming facility, therefore, it cannot be considered to be a technical service. In the judgment of *CIT* v. *Bharti Cellular Ltd.* [2011] 330 ITR 239/[2010] 193 Taxman 97, the Apex Court after examining the provisions of section 9(1)(vii) of the Act, found that whenever there was a human intervention, it had to be considered as technical service. In the light of the above judgment of the Apex Court, the department obtained an expert opinion from the Sub-Divisional Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required, as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical service.
- It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place.
- In view of the above, once configuration was made, no human intervention is required for connecting the roaming calls. The subscriber can make and receive calls, access and receive data and other service without any human intervention. Like any other machinery, whenever the system break-down, to set right the same, human intervention is required. However, for connecting roaming call, no human intervention is required except initial configuration in system. Human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls.
- Therefore, as held by the Apex Court in *Bharti Cellular Ltd.* (*supra*), the roaming connections were provided without any human intervention and therefore, no technical service was availed by the assessee; it was not required to deduct TDS in respect of roaming charges paid to the other service providers. Accordingly, the orders of the lower authorities are set aside in respect of provision for site restoration expenditure and roaming charges. However, in respect of year-end provision, the issue is remitted back to the file of the Assessing Officer.
- In the result, appeal of the assessee is allowed for statistical purposes.