

CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

SKYCELL COMMUNICATIONS LTD. & ANR. vs. DEPUTY COMMISSIONER OF INCOME TAX & ORS.

HIGH COURT OF MADRAS

R. Jayasimha Babu, J.

Writ Petn. Nos. 9946 & 9947 of 1998

23rd February, 2001

(2001) 170 CTR (Mad) 238 : (2001) 251 ITR 53 (Mad) : (2001) 119 TAXMAN 496 (Mad)

Legislation referred to

Sections 9(1)(vii), Explan. 2, 194J, ART. 226,

Case pertains to

Asst. Year -

Decision in favour of

Assessee

TDS—Fees for technical services under s. 194J—Payment for providing cellular mobile telephone service—‘Technical service’ referred to in s. 194J r/w s. 9(1)(vii), Explan. 2 contemplates rendering of a "service" to the payer of the fee—Mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it does not amount to fee for technical services—When a person subscribes to a cellular telephone service he does not contract to receive a technical service—Fact that the telephone service provider has installed sophisticated technical equipments in the exchange, does not on that score, make it provision of a technical service to the subscriber for the purpose of s. 194J—Firms and companies subscribing to the petitioners’ network not to deduct tax at source from payments made by them to the petitioners

Held

When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of s. 194J. Any construction of the provisions of the Act must be in the background of the realities of day-to-day life in which the products of technology play an important role in making life smoother and more convenient. Sec. 194J, as also Explan. 2 in s. 9(1)(vii) were not intended to

cover the charges paid by the average householder or consumer for utilising the products of modern technology, such as, use of the telephone fixed or mobile, the cable T.V., the internet, the automobile, the railway, the aeroplane, consumption of electrical energy, etc. such facilities which when used by individuals are not capable of being regarded as technical service cannot become so when used by firms and companies. The facility remains the same whoever the subscriber may be—individual, firm or company. "Technical service" referred in s. 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services.

(Paras 6, 8 & 9)

Conclusion

Provision of cellular mobile telephone service to the subscribers does not come within the definition of "technical services" in s. 194J r/w s. 9(1)(vii), Expln. 2 and the firms and companies subscribing to the network are not required to deduct tax at source on the payments made by them for use of such facility.

Decision in favour of

Assessee

Writ—Alternate remedy—Grossly unreasonable construction of statutory provision—Direction given by Chief CIT to his subordinates to treat the payments made to petitioners by the subscribers of cellular mobile telephone facility as "fees for technical services" for the purpose of s. 194J and to require the firms and companies to deduct tax at source from payments made to petitioners—Question raised here is one of pure construction of a provision of the Act which on the face of it, has been grossly unreasonably construed—Petitioners very much affected by the direction—Relief sought is not to be refused on the ground that the concerned subscribers could raise the issue in their assessment proceedings

Held

Though the Court will not normally entertain any writ petition with regard to the tax liability of the assessee unless the statutory remedies are first availed of, as the question raised here is one of a pure construction of a provision of the Act which on the face of it, has been grossly unreasonably construed and jurisdiction is sought to be asserted by the Revenue on the basis of such erroneous construction, the relief sought, is not to be refused on the ground that the concerned subscribers should raise the issue in the assessment proceedings relating to them. The petitioner is very much affected by the direction that has been issued by the Revenue inasmuch as part of the Revenue realisable by the assessee is required to be diverted by the subscriber to the Revenue by reason of the impugned order even when the law does not impose such a requirement. The writ petitions are, therefore, allowed.

(Para 10)

Conclusion

Since the direction given by Chief CIT to his subordinates to treat the payments made to petitioners by the subscribers of cellular mobile telephone facility as "fees for technical services" for the purpose of s. 194J and to require the firms and companies to deduct tax at source from payments made to petitioners is based on grossly unreasonable construction of said provision,

relief sought by the petitioners is not to be refused on the ground that the concerned subscribers could raise the issue in their assessment proceedings.

Decision in favour of

Assessee

Counsel appeared

V. Ramachandran & K. Mani, for the Petitioners : Mrs. Chitra Venkataraman, for the Respondents

Judgment

R. JAYASIMHA BABU, J. :

The petitioners are engaged in the business of providing cellular mobile telephone facility to subscribers, having been authorised to do so under the licences granted by the Department of Telecommunications, Government of India. They are aggrieved by the direction given by the Chief CIT to his subordinates to treat the payments made to them by their subscribers as coming within the definition of "fees for technical services" in s. 194J r/w s. 9(1)(vii), Expln. 2 of the IT Act and require the firms and companies subscribing to the petitioners' network to deduct tax at source on the payments made by them to the petitioners.

2. The petitioners have averred that they have established the necessary infrastructure for the mobile communication network consisting of mobile switching centre which is an electronic exchange where switching function and call routing takes place; visitor location register which provides total storage for the variables and functions needed to handle calls to and from mobile subscribers in the service area. Home location register which provides permanent storage facility for all the subscriber related data; short message service centre which enables sending short messages between the control room to mobile and from one mobile to another mobile, voice mail service centre which stores incoming voice messages which can be retrieved by accessing the subscribers' mail box; authentication centre which maintains subscriber identity related security information; equipment identity register which maintains the mobile equipment identity related security information; base station controller which controls and monitors all the base stations in the network, interfaces with the mobile switching centre and also performs handover functions whenever mobile subscriber crosses from one base station to another; transcoder which changes the data rate from 64 kbps to 16 kbps in the down link direction and from 16 to 64 kbps in the up link direction; base transceiver station which is a transmitter-cum-receiver and performs air interface function and talks to mobile stations; mobile station which is a subscriber terminal through which the subscribers access the network; operation and maintenance centre which performs supervision and control functions of all the sub-systems in the network; microwave backbone network which is used to link cell sites with the base station controller and public switched telephone network through which local/STD/ISD calls are routed.

The manner in which outgoing and incoming calls from or to the network subscriber's mobile telephone takes place is described by the petitioners thus :

Outgoing calls: Whenever a subscriber goes off the hook, R.F. channel from the nearest base station is allotted to the subscriber by base station controller. Depending on the number dialled by the subscriber the mobile switching centre routes the call either to another mobile or to the public switched telephone network. Communication takes place when there is response from the called number. As the subscriber moves from one cell to another, the call is handed over to the other cell without any interruption.

Incoming calls : The base transreceiver station periodically sends paging messages to all mobile subscribers and registers the subscriber locations in the visitor location register. Whenever the mobile switching centre receives an incoming call either from public switching telephone network or another mobile station, the call is routed through the nearest base transreceiver station. The subscriber is given an audio signal to indicate that there is an incoming call. The subscriber then goes off-hook to communicate with the caller.

Cellular phone facility is thus based on dividing the network area into smaller divisions known as cells, and erecting base stations in those cells to manage transmission and reception within each cell. The base stations are unmanned. The base stations are supported by a central facility. The equipment employed is highly sophisticated, and once installed the facility is provided automatically.

3. The customers who subscribes to the network pays for the air-time used by him or her. The payment so made by the customer, according to the Chief CIT, constitutes a fee paid by the customer for technical services attracting s. 194J which, inter alia, requires persons not being individuals or HUF who are responsible for paying to a resident any sum by way of technical services, to deduct an amount equal to five per cent of such sum as income-tax on income comprised therein, if the aggregate of the amount so paid exceeds Rs. 20,000 in any financial year. That view of the Chief CIT is set out in his letter dt. 18th March, 1998, addressed to the petitioner. Pursuant to that letter the Dy. CIT TDS range on 20th March, 1998, has instructed the ITO TDS to ensure compliance with s. 194J by such of the subscribers of the petitioners as are firms or companies.

4. "Fees for technical service" is not defined in s. 194J. Expln. (b) in that section provides that expression shall have the same meaning as in Expln. 2 to cl. (vii) of sub-s. (1) of s. 9.

That Expln. 2 in s. 9(1)(vii) reads thus :

"For the purposes of this clause, 'fees for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'."

This definition shows that consideration paid for the rendering of any managerial, technical or consultancy service, as also the consideration paid for the provision of services of technical or other personnel, would be regarded as fees paid for "technical services". The definition excludes from its ambit consideration paid for construction, assembly, or mining or like project undertaken by the recipient, as also consideration which would constitute income of the recipient chargeable under the head "Salaries".

Thus while stating that "technical service" would include managerial and consultancy service, the legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques; technical terms (especially of a book or article) requiring special knowledge to be understood : a technical report, 2. of involving, or concerned with applied and industrial sciences : an important technical achievement, 3. resulting from mechanical failure : a technical fault, 4. according to a strict application or interpretation of the law or the rules : the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is

"involving or concerning applied and industrial science".

5. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.

When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure that consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue.

Satellite television has become ubiquitous, and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the payments made to the cable operator.

Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision to technical service to the customers for a fee.

6. When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. That fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of s. 194J of the Act.

7. The use of the internet and the world wide web is increasing by leaps and bounds, and there are hundreds of thousands, if not millions, of subscribers to that facility. The internet is very much a product of technology, and without the sophisticated equipment installed by the internet service providers and the use of the telephone fixed or mobile through which the connection is established, the service cannot be provided. However, on that score, every subscriber of the internet service provider cannot be regarded as having entered into a contract for availing of technical services from the provider of the internet service, and such subscriber regarded as being obliged to deduct tax at source on the payment made to the internet service provider.

8. At the time the IT Act was enacted in the year 1961, as also at the time when Expln. 2 to s. 9(1)(vii) was introduced by the Finance (No. 2) Act, w.e.f. 1st April, 1977, the products of technology had not been in such wide use as they are today. Any construction of the provisions of the Act must be in the background of the realities of day-to-day life in which the products of technology play an important role in making life smoother and more convenient. Sec. 194J, as also Expln. 2 in s. 9(1)(vii) of the Act were not intended to cover the charges paid by the average house-holder or consumer for utilising the products of modern technology, such as, use of the telephone fixed or mobile, the cable T.V., the internet, the automobile, the railway, the aeroplane, consumption of electrical energy, etc. such facilities which when used by individuals are not capable of being regarded as technical service cannot become so when used by firms and companies. The facility remains the same whoever the subscriber may be—individual, firm or company.

9. "Technical service" referred in s. 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a "fee" for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services.

10. Though this Court will not normally entertain any writ petition with regard to the tax liability of the assesseees unless the statutory remedies are first availed of, as the question raised here is one of a pure construction of a provision of the Act which on the face of it, has been grossly unreasonable construed and jurisdiction is sought to be asserted by the Revenue on the basis of such erroneous construction, the relief sought, is not to be refused on the ground that the concerned subscribers should raise the issue in the assessment proceedings relating to them. The petitioner is very much affected by the direction that has been issued by the Revenue inasmuch as part of the revenue realisable by the assessee is required to be diverted by the subscriber to the Revenue by reason of the impugned order even when the law does not impose such a requirement. The writ petitions are, therefore, allowed with costs in the sum of Rs. 2,000 in each of the petitions.

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