

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE VICE PRESIDENT
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-3819/Del/2010
(Assessment Year: 2002-03)**

DCIT Circle 2(1), Room No. 398D, C.R. Building, New Delhi.	vs	Bharti Mobile Ltd. (Now Bharti Airtel Ltd.) Plot No. 16, Udyog Vihar, Phase IV, Gurgaon. AAACJ4139Q
Assessee by		Sh. Amit Bhalla, CA Sh. Gaurav Wadhwa, CA
Revenue by		Sh. Ravi Jain, CIT DR

Date of Hearing	21.09.2016
Date of Pronouncement	27.09.2016

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

This appeal has been preferred by the Department against the order dated 04/05/2010 passed by the Ld. CIT (A) – V, New Delhi for A.Y. 2002-03.

2. The assessee is involved in the business of providing cellular mobile telephone services. During the year under consideration, the return of income was filed declaring a total

loss of Rs. 820,672,218/-. Subsequent to the filing of the original return, a revised return was filed declaring total loss of Rs. 2,628,860,522/-. The total turnover for the year was Rs. 444.30 crores. During the course of assessment proceedings, the AO observed that the auditor had shown an amount of Rs. 598,786/- as provision for gratuity for the Punjab Circle and the AO was of the opinion that this provision had not been disallowed by the assessee in its computation of income. The AO accordingly, disallowed this amount. Further, the AO also observed that the assessee had filed the revised return of income claiming deduction of Rs. 69,340,434/- being Wireless Planning Commission (WPC) charges and liquidated damages paid to the Department of Telecommunication vide their demand note and a sum of Rs. 1,922,296,536/- as interest paid to Department of Telecommunication. The AO observed that these two amounts were not debited to the audited profit and loss account of the assessee and were included in the revised return only on the basis of the demand note raised by the Department of Telecommunication. It was the assessee's

claim before the AO that the Department of telecommunication had raised a demand of Rs. 2,278,940,996/- as interest and the amount was paid on 19th September, 2001. The assessee also submitted that an amount of Rs. 856,644,460/- was refunded to the assessee by the Department of Telecommunication and, therefore, the net amount of Rs. 1,922,296,536/- was claimed as interest. The assessee had further submitted before the AO that both these claims by the Department of Telecommunication have been challenged in the Court of Law and pending the final decision, these deductions have been claimed in the computation of total loss. The AO was of the opinion that the liquidated damages were result of violation of some terms of the contract agreement by the assessee with the Departmental Telecommunication and the assessee would be entitled to claim the deduction only when the contractual liability was crystallized and ascertained. The AO further observed that since the assessee had not accepted the liability and had not debited the same to the profit and loss account and the matter was pending in the Court, the amounts were not

deductible in the Assessment Year under consideration and accordingly, these two amounts were also disallowed and the assessment was completed at a total loss of Rs. 636,624,766/-.

2.2 The assessee preferred an appeal before the First Appellate Authority and the Ld. CIT (A), on the issue of provision of gratuity, gave a specific finding that the assessee had not claimed the amount of Rs. 598,786/- as a deduction in its return of income as alleged by the AO and the AO was directed to delete the addition. On the issue of WPC charges and liquidated damages, the Ld. CIT (A) held that the amount claimed in the computation of income had become due and was hence allowable respective of the fact that no entries were passed in the books of accounts. These two disallowances were also deleted.

3. Aggrieved, the Department has now approached the ITAT and raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law, the order of the ld. CIT (A) is wrong, perverse, illegal and against the provisions of law which is*

liable to be set aside.

2. *The ld. CIT(A) has erred in law and on facts in deleting addition of Rs. 5,98,786/- on account of disallowance of provision for gratuity ignoring the fact that the assessee wrote back excess provision of Rs. 10,78,000/- instead of 16,77,000/- as per Schedule 12 of the P&L account thereby claimed excess provision for gratuity of Rs. 5,98,786/-.*

3. *The ld. CIT(A) has erred in law and on facts in deleting additions of Rs. 1,92,22,96,536/- and Rs. 6,93,40,434/- on account of payment made to DOT in respect of interest & WPC charges & liquidated damages, respectively ignoring the fact that liability in respect of interest & WPC charges & liquidated damages arising out of contract with DOT had not crystallized or ascertained during the previous year relevant to this assessment year as the assessee disputed the liability arising out of contract.*

4. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

4. The Ld. CIT DR, on the issue of provision of gratuity, relied on the assessment order and submitted that the

calculations made by the AO were correct. On the issue of WPC charges and liquidated damages, the Ld. CIT DR submitted that the provisions of Rule 46A were not followed by the Ld. CIT (A) while allowing the assessee's claim. He drew attention to the Paper Book filed by the assessee in regard to the evidences which were filed before the Ld. CIT (A) (and available in the assessee's paper book) in support of its claim and submitted that item nos. 6, 7, 8, 9 and 10 were never produced before the AO but were considered by the Ld. CIT (A) while adjudicating the issue and as such the AO did not have any opportunity to examine these documents. The Ld. CIT DR submitted that this action of the Ld. CIT (A) was not legally tenable.

5. The Ld. AR relied on the findings of the Ld. CIT (A) on the issue of provision for gratuity. As regards the submission of the Ld. CIT DR on the issue of not calling for a remand report from the AO on evidences as appearing at sl. nos. 6, 7, 8, 9 and 10, the Ld. AR submitted that evidence at sl. no. 6 was already before the AO, whereas evidences at sl. nos. 7, 8, 9

and 10 were produced before the Ld. CIT (A) on being specifically asked by the Ld. CIT (A) to do so and as such it was not the assessee who had sought to file additional evidences, but it was under the instructions of the Ld. CIT (A) that these documents were filed and as such provisions of Rule 46A will not apply on the facts of the present case.

6. We have heard the rival submissions and perused the material on record. It is seen that a provision for gratuity has been dealt in the computation of income filed by the assessee (reproduced at page no. 40 of the Paper Book filed by the assessee) as under:

<i>BHARTI MOBILE LIMITED</i>	<i><u>Annexure 3</u></i>
<i>AASSESSMENT YEAR 2002-03</i>	
<i>Gratuity 40A (7)</i>	<i><u>Amount (Rs.)</u></i>
<i>Opening balance</i>	<i>5,112,000</i>
<i>Add: Provision provided at Punjab circle</i>	<i><u>599,000</u></i>
	<i>5,711,000</i>
<i>Written back as excess provision</i>	
<i>Less: (Refer Schedule 12 of P&L A/c)</i>	<i><u>1,677,000</u></i>
<i>Amount paid at AP & KK</i>	<i>4,034,000</i>
<i>which has not been routed through P&L A/c</i>	
<i>but now it is allowable exp.</i>	
<i>Schedule 12 of audited accounts</i>	
<i>written back</i>	<i>1,677,000</i>
<i>Punjab provision</i>	<i><u>599,000</u></i>
<i>As per Profit & Loss Account</i>	<i><u>1,078,000</u></i>

6.1 The figures in the computation produced above also tally with the computation chart provided at page 38 of the Paper Book and a perusal of the same shows that the impugned amount of Rs. 598,786/- (rounded off to Rs. 599,000/-) has not been claimed by the assessee as a deduction. It is seen that the claim of gratuity of Rs. 4,034,000/- has been made by the assessee on payment basis. It is further seen that the excess provision amounting to Rs. 1,677,000/-, which has been written back to the profit and loss account, had not been claimed in the earlier years and hence, cannot be taxable in the year under consideration. It is further seen that the assessee has reduced only Rs. 1,078,000/- instead of Rs. 1,677,000/- in its computation of income and thus, the amount of Rs. 599,000/- has in effect not been claimed as a deduction. Therefore, we have no reason to interfere with the findings of Ld. CIT (A) on this issue. This ground of Department's appeal is dismissed.

6.2 As far as the Department's ground relating to payment of WPC charges and liquidated damages is concerned, it is seen

that the Ld. CIT (A) has considered the following evidences furnished by the assessee while adjudicating in favour of the assessee –

- i. Copy of migration of old mobile telephony license to new telecom policy – 99 placed at sl. no. 6 of the Paper Book at pages 133 to 135.
- ii. Copy of letter of Department of Communication for outstanding dues, due to NTP – 99 placed at sl. no. 7 of the Paper Book at pages 136 to 137.
- iii. Copy of details of License Fee paid and outstanding placed at sl. no. 8 of the Paper Book at pages 138 to 139.
- iv. Copy of the order of the arbitration matter passed by the Hon'ble High Court of Delhi in the case of Bharti Mobile Ltd. placed at sl. no. 9 of the Paper Book at pages 140 to 399.
- v. Copy of letters to Department of Telecommunication for restoration of terminated Cellular Circle License and simultaneous migration to NTP – 99 placed at sl. no. 10 of the Paper Book at pages 400 to 405.

6.3 It is the Department's contention that these evidences were filed for the first time before the Ld. CIT (A) and that the AO was not afforded an opportunity to examine these documents. The certificate furnished by the assessee in the Paper Book also supports the Department stand that the above mentioned evidences were not before the AO at any stage of the proceedings. Although it is the assessee's contention that the evidences were furnished in response to a requisition by the Ld. CIT (A), the same is not discernable from the impugned order. Hence, in the light of these facts, it is our considered opinion that the interest of justice would be served, if the issue is restored to the file of Ld. CIT (A) for re-adjudication after inviting the comments of the AO on all these evidences in the form of a remand report. Needless to say, the assessee shall also be given an opportunity to submit its rejoinder on the remand report so obtained. This ground of the Department is allowed for statistical purposes.

7. In the final result, the appeal of the Department is partly allowed.

Order is pronounced in the open court on 27.09.2016

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

Dated: 27.09.2016

**Kavita Arora*

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI