IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : C : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA Nos.2343 to 2345/Del/2014
Assessment Years : 2005-06 to 2007-08

Hughes Communication India Ltd., 1, Shivaji Marg, Westend Greens, NH-8, New Delhi. PAN: AAACH0765L	Vs.	DCIT, Circle-12(1), New Delhi.

ITA Nos.2270 to 2272/Del/2014
Assessment Years : 2005-06 to 2007-08

DCIT, Circle-12(1), New Delhi.	Vs.	Hughes Communication India Ltd., 1, Shivaji Marg, Westend Greens, NH-8, New Delhi. PAN: AAACH0765L
(Appellant)		(Respondent)

Assessee By	:	Shri Ajay Vohra, Sr. Advocate, Shri Neeraj Jain, Advocate, Shri Anshul Sachar, CA & Shri Karan Jain, CA
Department By	:	Shri F.R. Meena, Sr. DR

Date of Hearing : 27.09.2018
Date of Pronouncement : 27.09.2018

ORDER

PER R.S. SYAL, VP:

This batch of six appeals having two appeals each by the assessee and the Revenue relating to the assessment years 2005-06, 2006-07 and 2007-08 involves some common issues. We are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

Assessment Year 2005-06

2. The first ground raised by the assessee in its appeal is against the confirmation of disallowance of Rs.6,13,176/- being 'Provision for impairment of stocks'.

3. Briefly stated, the facts of the case are that the assessee is engaged in the business of marketing of Very Small Apperture Terminals (VSATs) and providing satellite communication services through its HUB Earth station at Gurgaon. The assessee also provides broadband, internet and other tele-communication services. On perusal of Schedule-G of the assessee's balance sheet, the Assessing Officer observed that the assessee declared

inventories, after adjustment of Rs.6,13,176/- on account of stock impaired during the year. On being called upon to explain the reasons for such reduction, the assessee stated that the stock was claimed at realizable value. It was further stated that the inventory consisted of old/used stock which was categorized as defective, but, repairable stock and demo stock. These stocks were valued at their net realizable value. The defective, but, repairable stocks were stated to be valued on the basis of estimate provided by the Technical Department, while the demo stock was valued by making a small reduction in its value on account of their use every year. The Assessing Officer observed that similar issue arose in the case of the assessee for the immediately preceding assessment year i.e., 2004-05. Following his view, he disallowed the adjustment of Rs.6,13,176/- made by the assessee to its inventory valuation. The ld. CIT(A) upheld the assessment order on this point, against which the assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and perused the relevant material on record. The immediately preceding assessment year i.e., 2004-05, as referred to in the assessment order, came up for consideration before

the Tribunal. Vide order dated 26.12.2011, the Tribunal in ITA No.4493/Del/2010, copy placed on page 18 onwards of the paper book, approved the assessee's method of valuation of the old/used stock and stock meant for demo purpose. The Tribunal noticed that the assessee was following this method of valuing closing stock consistently. This led to the vindication of the assessee's stand. The Revenue assailed this order before the Hon'ble Delhi High Court. The Hon'ble jurisdictional High Court in its judgment in *CIT vs. Hughes Communication India Ltd. (2013) 215 taxmann.com 136 (Del),* has approved the view taken by the Tribunal on this issue. Since the facts and circumstances of the instant ground are *mutatis mutandis* similar to those of the immediately preceding year, respectfully following the precedent, we order to delete the addition of Rs.6,13,176/- sustained in the first appeal.

5. The alternate prayer made through ground No.1.3 for increasing the value of the opening stock of the relevant assessment year by Rs.90,35,298/- is dismissed as similar ground of the assessee for preceding year, reducing the value of closing stock to this extent, has been accepted by the Tribunal.

6. Ground No.2 of the assessee's appeal is against the confirmation of addition of Rs.28,36,293/-, being credit balance of sundry creditors which were static for the last three years or more. The Assessing Officer noticed that six sundry creditors totaling Rs.28,36,293/- remained static for the past three years. He, therefore, opined that there was no contractual obligation left on the part of the assessee to repay these amounts. As a consequence thereof, he made an addition for the said sum. The ld. CIT(A) sustained the addition.

7. We have heard both the sides and gone through the relevant material on record. Section 41(1) of the Income-tax Act, 1961 (hereinafter also called `the Act') provides that where any allowance or deduction has been made in the assessment for any year in respect of any loss, expenditure or trading liability incurred by the assessee and, subsequently, during any previous year, there is a remission or cessation of trading liability, such an amount shall be deemed to be income chargeable to tax. Explanation 1 to section 41(1) deals with a situation in which an assessee unilaterally writes off such a liability in his account, which shall also be deemed to be 'remission or cessation of any liability.' It implies that if an amount is

otherwise payable by an assessee, even beyond a period of three years, which has not been written back, there can be no question of that amount of credit becoming income of the assessee. The Ld. AR supplied a chart showing that a sum of Rs.2,32,743/- payable to its vendor, namely, Noisecon, was paid on 17.06.2008 and the remaining amounts were written back as its income in the accounts for the year ending 31.03.2009. On a pertinent query, the details of such write back in the accounts of the next year could not be pointed out by the ld. AR to demonstrate that such a sum was actually offered for taxation in the year of write back. We, therefore, direct the AO to verify the assessee's claim in respect of writing back of the amount in a later year and ensure that such an amount gets offered to taxation in terms of Explanation to section 41(1) of the Act.

8. Ground No.3 is against the confirmation of disallowance of 'Regulatory expenses' of Rs.39,58,543/-.

9. The facts apropos this ground are that the assessee claimed deduction of Rs.39.58 lac as 'Regulatory expenses.' On being called upon to explain as to why such amount should not be capitalized, the assessee submitted

that this amount was in the nature of clearance fee paid to Standing Advisory Committee for Radio Frequency Allocation (SACFA), a Division of Department of Telecommunications. The AO held such expenditure to be capital in nature. After allowing depreciation @ 25%, he made an addition of Rs.29,68,907/-. The ld. CIT(A) did not allow any further relief on this issue, against which the assessee has come up in appeal before the Tribunal.

10. We have heard the rival submissions and perused the relevant material on record. In support of the contention that the amount is a recurring expenditure and hence deductible in the year of incurring, the ld. AR placed on record a copy of the Office Memorandum dated 28.5.2003 issued by the Ministry of Communications and Information Technology, which states that a sum of Rs.1000/- will be payable per ID as earnest money towards filing of sitting applications for fixed stations in respect of all categories of sites, which will be adjusted against the WPC spectrum charges/licence fee subsequently in respect of sites, which are commissioned within one year from the date of issue of the site clearance letter. On going through the above Memorandum, we fail to appreciate as to

how such a payment is an annual charge. *Prima facie*, it appears to be a onetime fee, payable by the assessee, in respect of each site. The ld. AR was required to draw our attention towards some further literature or material to indicate the nature of payment, which he could not readily point out. In the given circumstances, we are of the considered opinion that the ends of justice would meet adequately if the impugned order on this score is set aside and the matter is remitted to the AO. We order accordingly and direct him to examine the precise nature of such payment. If it is in the nature of an annual charge, payable year after year, then the same should be allowed as deduction. If on the other hand, it is in the nature of onetime payment for acquiring a right to earn regular income, then it should be capitalized. The assessee will be allowed an opportunity of hearing before reaching any conclusion.

11. Ground No. 4 of the assessee's appeal is against disallowance of 'Software expenses' amounting to Rs.31,25,979/- by holding the same to be capital in nature. The AO observed from the details furnished by the assessee that a sum of Rs.43,25,979/- was claimed as 'Software expenses' deductible in full. On a perusal of such details, the AO observed that a sum

of Rs.12 lac was in the nature of AMC of SAP software. He held such expenditure of Rs.12 lac to be of revenue nature. The remaining amount of Rs.31,25,979/- was capitalized. After allowing depreciation @ 60%, he made disallowance of Rs.12,50,392/-. The ld. CIT(A) affirmed the action of the AO. The assessee is aggrieved by such a decision.

12. Having heard both the sides and gone through the relevant material on record, it is seen that the Hon'ble Delhi High Court in *CIT vs. Amway India Enterprises (2012) 346 ITR 341 (Del),* has held that expenditure incurred on purchase of application software is allowable as revenue expenditure. Similar view has been taken in *CIT vs. Asahi India Safety Glass Ltd. (2012) 346 ITR 329 (Del)* by holding that the expenditure incurred by the assessee on software is allowable as revenue expenditure, more so, when it is towards purchase of an application software. When we consider the detail of software expenses incurred by the assessee, it becomes manifest that the same is liable to be treated as a revenue expenditure and not a capital expenditure. We, therefore, overturn the impugned order on this issue. Depreciation, if any, allowed on such a capitalized portion of software in succeeding years, should be withdrawn in respective assessments.

13. Ground No.5 was not pressed by the ld. AR. The same is, therefore, dismissed as such.

14. Ground No.6 regarding charging of interest is consequential and the same is disposed off accordingly.

15. The only issue raised by the Revenue in its appeal is against deletion of addition of Rs.4,29,57,800/- on account of licence fee which was held by the AO to be capital in nature.

16. The assessee claimed licence fee expense of Rs.5,72,27,706/- during the year. The AO treated the same as a capital expenditure. After allowing depreciation @ 25%, he made an addition of Rs.4,29,57,800/-. The assessee assailed the assessment order before the ld. CIT(A) on this score. The ld. first appellate authority considered the judgment of the Hon'ble Delhi High Court in *CIT vs. Bharti Hexacom Ltd. (2014) 265 CTR 130 (Del)* and directed the AO on the following lines:-

> "The Assessing Officer is therefore directed to verify
>
> - Whether payment is being made as per 1994 agreement or 1999 agreement.
> - Whether the payment includes any interest on delayed payment of license fee payable for period prior to July 1999.

- Whether the 1999 agreement in the case of the appellant is comprehensive or limited.
- Whether the payment includes any penalty levied by DOT for wrong computation of licence fees.
- Whether the licence under the New Agreement has been given on Long Term basis or year to year basis and whether the licence fee is for setting up the service or for maintaining and operating the services.
- Whether there is any audit statement furnished by the appellant for computation of licence fee payable as per the 1999 Telecom Policy.

In case the payment has been made by the appellant as per 1994 agreement or 1999 agreement with renewal of licence fee on Long Term Basis and not year to year basis, then in accordance with the decision of the Hon'ble High Court, the same is capital in nature. However, if the payment has been made after amending the 1994 agreement in 1999 in accordance with the Telecom Policy of the Govt. of India and there is irrefutable documentary evidence showing computation of licence fee and a certificate from the Auditor certifying that the computation is as per 1999 policy, and the licence is only for maintaining and operating the services then the Licence Fee would be revenue in nature. However any payment of penalty would be disallowed and any payment on account of interest on licence fee for the period prior to 1999 would also be capitalized. The ground of appeal is accordingly disposed of."

17. The Revenue is aggrieved against the above direction given by the ld. CIT(A) on the ground that firstly, he was not competent to restore the matter to the file of the AO in giving such directions and further that such a payment is a capital expenditure.

18. After considering the rival submissions and perusing the relevant material on record, we find that the ld. CIT(A) has, in fact, restored the

matter to the file of AO by giving certain directions. Technically, he has no power to remit the matter to the AO for a fresh decision. However, on merits, we find that the direction given by him is in substance germane to the issue and decisive in appreciating the deductibility or otherwise of the amount. We, therefore, set aside the impugned order in so far as the restoration of the matter is concerned. However, adopting the direction, we require the AO to verify the assessee's claim in the hue of the portion extracted above from the impugned order.

19. In the result, the appeal of the assessee is partly allowed and that of the Revenue is also allowed for statistical purposes.

Assessment Year 2006-07

20. Ground No.1 was not pressed by the ld. AR. The same is, therefore, dismissed as not pressed.

21. Ground No.2 of the assessee's appeal is against the confirmation of disallowance of Rs.1,00,37,008/- out of WPC charges of Rs.1,33,82,678/- paid to DOT for obtaining the frequency/spectrum from Wireless Planning Commission in terms of licence agreement with DOT.

22. Succinctly, the assessee claimed royalty WPC expenses amounting to Rs.1.33 crore and odd. On being called upon to furnish the details of the basis of the royalty expenses, the assessee submitted that in terms of licence agreement with DOT, it had to obtain the frequency/spectrum from WPC and in consideration of the allotment of spectrum/frequency, it was under an obligation to pay these charges. The AO held that the royalty was paid in order to get the right to use the spectrum and was, therefore, in the nature of an intangible asset liable for capitalization. After allowing depreciation @ 25%, he disallowed the remaining amount of Rs.1.00 crore and odd. No relief was allowed in the first appeal.

23. After considering the rival submissions and perusing the relevant material on record, it is noticed that the assessee made a claim before the AO that a sum of Rs.1.33 crore and odd was paid as royalty to WPC for obtaining frequency/spectrum. The ld. AR stated that the payment was a recurring cost payable on the basis of use on year to year basis. On a pertinent query, the precise nature and necessary details of such payment could not be provided. In the given circumstances, we set aside the impugned order and remit the matter to the file of the AO for examining the

nature of such payment. If, the amount paid is in the nature of a recurring payment based on the assessee's revenue, then it should be allowed as deduction to that extent. If on the other hand, the payment is for acquiring some right, then it should be capitalized. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in this regard.

24. Ground No.3 is against capitalization of 'Regulatory expenses.' The assessee claimed deduction of Rs.73,67,512/- as 'Regulatory expenses.' The AO held such amount to be capital in nature. After allowing depreciation @ 25%, he made a disallowance of Rs.55,25,634/-. No relief was allowed in the first appeal.

25. Having heard both the sides and gone through the relevant material on record, it is noticed that this ground is similar to ground No.3 of the assessee's appeal for the immediately preceding assessment year. Following the view taken hereinabove, we hold accordingly and remit the matter to the file of the AO for deciding it afresh in the light of our above directions.

26. Ground No.4 of the assessee's appeal is against not allowing deduction of Rs.39,53,944 in respect of foreign exchange loss arising due to restatement of outstanding liabilities. Ground No.3 of the Revenue's appeal is against not confirming the foreign exchange fluctuation loss of Rs.39.53 lac as a notional loss.

27. The assessee claimed deduction of foreign exchange loss of Rs.39,53,944/- due to restatement of its accounts as on 31.03.2006. The AO treated such amount as a notional and unrealized loss and, hence, not deductible. The assessee submitted before the ld. CIT(A) that the said loss represented the reinstatement of liability accruing to sundry creditors towards the imports of raw material, on the exchange rate prevailing as on 31.03.2006. Following the judgment of the Hon'ble Delhi High Court in *CIT vs. Woodward Governor India (P) Ltd., 102 taxmann 60,* the ld. CIT(A) directed the AO to apply the tests laid down in the case of *Woodward Governor (supra)* and then decide the issue accordingly.

28. We have gone through the relevant material on record. The Hon'ble Supreme Court in *CIT vs. Woodward Governor India (P) Ltd. (2009) 312*

ITR 254 (SC), has held that the loss suffered by the assessee in respect of revenue liability on account of exchange difference as on the date of balance sheet is an item of expenditure liable for deduction u/s 37(1) in the year of accrual. In this view of the matter, the direction given by the ld. CIT(A) to the AO for allowing deduction if the restatement of liability is on revenue account and not allowing the same, if it is on capital account, does not warrant any interference as the same accords with the proposition laid down by the Hon'ble Supreme Court in the aforenoted case of *Woodward Governor India (P) Ltd. (supra).* Although, technically, the direction given by the CIT(A) is not possible in view of his limit on the power to restore an issue to the AO, but, we adopt the same as our direction to the AO for consideration and decision on the issue raised in these grounds.

29. Ground No.5 of the assessee's appeal is against the addition on account of valuation of closing stock due to irreparable stock and dummy stock.

30. Both the sides are in agreement that the facts and circumstances of this ground are similar to ground No.1 of the assessee's appeal for the

immediately preceding year. Following the view taken hereinabove, we delete the addition sustained by the ld. CIT(A). The alternate prayer made through ground No.5.3 for increasing the opening stock of the relevant assessment year by Rs.6,13,176/- is dismissed as similar ground of the assessee for preceding year, reducing the value of closing stock to this extent, has been accepted.

31. Ground No.6 of the assessee's appeal is against confirmation of addition of Rs.39,05,837/-, being credit balance of sundry creditors which were pending for last three years. Here, again, we find that the facts and circumstances of this ground are similar to Ground No.2 of the assessee's appeal for the A.Y. 2005-06. Following the view taken hereinabove, we allow this ground of appeal with a direction to the AO to ensure that the amount written back in later years gets taxed in terms of the Explanation to section 41(1) of the Act.

32. Ground No.7 is against the confirmation of addition of Rs.8,50,938/- holding that the stock was not reconciled. The factual matrix of this ground is that the AO, on perusal of audit report, found that the figures of finished

goods etc. of the preceding year were not properly reconciling with the figures of the current year. The assessee furnished some reconciliation, with which the AO was not satisfied. Translating the quantitative difference in monetary terms equivalent to Rs.8,50,938/-, being the value of stock, the AO made an addition. No relief was allowed in the first appeal.

33. Having heard both the sides and perused the relevant material on record, it is observed from the annual report of the assessee for the year under consideration that there is no difference in the value of last year's closing stock becoming as opening stock for this year. The difference is only in certain quantities. The auditors have mentioned that: "It is not practicable to furnish quantitative information in view of the considerable number of items diverse in size and nature." Such a note has been given while giving the figures of purchases, turnover and stocks. In view of the note of the auditor, it is clear that quantitative information was neither complete nor precise. As, admittedly, there is no difference in the value of last year's closing stock becoming opening stock of this year, there can be no rationale in making any addition on account of difference in quantities because of the admitted position stated by the auditor that there are

considerable number of items diverse in size and nature. We, therefore, order to delete the addition of Rs.8,50,938/- sustained in the first appeal.

34. The last ground about the charging of interest is consequential.

35. The first ground of the Revenue's appeal is against not confirming the addition of Rs.5,54,73,710/- on account of licence fee which was held by the AO to be capital in nature.

36. The assessee claimed a deduction of Rs.5,88,46,453/- as revenue share of licence fee debited to the Profit & Loss Account. Apart from that, the assessee also claimed deduction of Rs.20,83,333/- as amortization of licence fee u/s 35ABB. The assessee claimed that the expenditure on account of licence fee was revenue. Not convinced, the AO aggregated the assessee's share of licence fee amounting to Rs.5.88 crore and amortization of licence fee amounting to Rs.20.83 lac. Applying the provisions of section 35ABB on such aggregated amount, he made an addition of Rs.5,54,73,710/- . The ld. CIT(A), relying on the judgment of the Hon'ble jurisdictional High Court in *Bharti Hexacom (supra),* set aside the

assessment order and directed the AO to verify the issue afresh in the light of the similar directions given by him for the AY 2005-06.

37. After considering the rival submissions and perusing the relevant material on record, we find that this issue is similar to the one raised by the Revenue in its appeal for the immediately preceding assessment year. Following the view taken hereinabove, we direct the AO to decide the issue afresh in the light of the directions given by the ld. CIT(A).

38. In the result, the appeal of the assessee is partly allowed and that of the Revenue is also allowed for statistical purposes.

Assessment Year 2007-08

39. The first ground of the assessee's appeal was not pressed by the ld. AR. The same, therefore, stands dismissed.

40. Ground No.2 is against the confirmation of disallowance of 'Provision for impairment of stock' amounting to Rs.80 lac. Both the sides are in agreement that the facts and circumstances of this ground are *mutatis mutandis* similar to ground No.1 of the assessee's appeal for the assessment year 2005-06. Following the view taken hereinabove, we delete the

addition. Ground No.2.3, which is without prejudice to the main ground No.2, is aimed at increasing the value of opening stock by Rs.32,86,824/-, being similar amount disallowed by the A.O. for the preceding year. In view of our decision in accepting such ground for the preceding year, this ground has been rendered infructuous.

41. Vide Ground No.3, the assessee seeks increase in the value of opening stock by Rs.8,50,938/- on account of reconciliation difference arising from the preceding year. While disposing off the assessee's appeal for the A.Y. 2006-07, we have accepted the assessee's claim. In that view of the matter, this ground is also dismissed as infructuous.

42. Ground No.4 against charging of interest u/s 234B is consequential and disposed off accordingly.

43. The only issue raised by the Revenue in its appeal is against not confirming the addition of Rs.4,91,37,817/- on account of licence fee which was held by the A.O. to be a capital expenditure. The A.O. capitalized licence fee amounting to Rs.6,55,17,089/- paid by the assessee to the Government of India, Department of Telecommunications in consideration

of grant of licence and, after allowing depreciation @ 25%, made an addition of Rs.4,91,37,817/-. The ld. CIT(A), following his view taken for earlier years, restored the matter to the file of A.O. by giving certain directions which are similar to those given for the assessment year 2005-06 that have been reproduced above. Following the view taken by us for the assessment year 2005-06, we set aside the impugned order in so far as the restoration of the matter is concerned. At the same time, we adopt the view taken by the ld. CIT(A) in restoring the matter and, accordingly, direct the A.O. to verify the assessee's claim in that light.

44. In the result, the appeal of the assessee is partly allowed and that of the Revenue is allowed for statistical purposes.

The order pronounced in the open court on 27.09.2018.

Sd/-	Sd/-
[BEENA A. PILLAI]	[R.S. SYAL]
JUDICIAL MEMBER	VICE PRESIDENT

Dated, 27th September, 2018.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.