IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri R.C. Sharma, Accountant Member
and Shri Sandeep Gosain, Judicial Member

ITA No. 6961/Mum/2014
(Assessment Year: 2004-05)

M/s. Siti Cable Network Ltd. *(Partly mrged with Dish TV India Ltd.)* 135,Continental Building Dr. Annie Besant Road Worli, Mumbai 400018	Vs.	ACIT, Range -11(1) Room No. 439, 4th Floor Aayakar Bhavan, M.K. Road Mumbai 400020

PAN – AAACA5478M

Appellant **Respondent**

Appellant by: Shri Vijay Mehta
Respondent by: Shri Ashish Kumar

Date of Hearing: 25.07.2018
Date of Pronouncement: 26.09.2018

<u>O R D E R</u>

Per Sandeep Gosain, JM

This appeal filed by Revenue is directed against the order of the CIT(A)-3, Mumbai dated 15.09.2014 and it relates to A.Y. 2005-05.

2. The brief facts of the case are that the assessee is engaged in the business of rendering cable network services (called Multi System Operator) to cable operators, subscribers, franchisee and affiliates, etc. The original return of income was filed by the assessee on 31.10.2004 showing loss of `83,73,94,340/-. The assessment was completed under Section 143(3) vide order dated 22.12.2006 assessing the total income at `249,53,53,900/- by adding subscription income of `356,32,58,864/- and disallowing write off of loan and advances of `5,09,64,244/- and write of off inventories of Band Width charges of `2,23,59,985/-. The learned CIT(A), vide order dated 23.03.2007 and his order under Section 154 dated 15.06.2007 deleted the addition of subscription income and inventories

written off and confirmed the other disallowances. The assessee as well as the Revenue filed appeals before the Tribunal and the Tribunal, vide its order dated 12.08.2011 upheld the order of the CIT(A) on all issues except restored back two issues to the file of the AO for denovo adjudication, i.e. loans and advanced written off and Band Width charges.

3. The AO again disallowed the claim of the assessee regarding which an appeal was filed before the CIT(A) and the CIT(A), after considering the case of both the parties, dismissed the appeal filed by the assessee, against which assessee is in further appeal before us on the grounds mentioned below: -

*"**1. Loans and Advances written off - Rs. 5,09,64,244/-***

a) The Ld. CIT(A) erred in laws and facts in upholding disallowance of Rs. 5,09,64,244/- being bad debts of Rs.2,32,83,242/- and advances of Rs. 2,76,81,002/- given to management companies (Distributors) and written off during the year being irrecoverable. The reasons given by Ld. CIT (A) for doing so are wrong, contrary to the facts of the case and against the provisions of law.

b) Without prejudice to the above, the Ld. CIT (A) erred in law and facts in upholding disallowance of bad debts of Rs.2,32,83,242/- written off in the books which are fully allowable as per provisions of Section 36(1)(vii) of the Income Tax Act, 1961 .

2. The Ld. CIT(A) erred in laws and facts in upholding disallowance of Rs.2,23,59,985/-out of Band width charges on account of non-deduction of TDS on payment made to non-resident Company relying on retrospective introduction of Explanation 6 to Section 9(1)(vi). The reasons given by Ld. CIT(A) for doing so are wrong, contrary to the facts of the case and against the provisions of law.

3. The above grounds /sub-grounds are without prejudice to each other."

4. The first ground raised by the assessee relates to challenging the order of the CIT(A) in upholding the disallowance of `5,09,64,244/- being bad debts of `2,32,83,242/- and advances of `2,76,81,002/- given to management companies (Distributors) and written off during the year being irrecoverable.

5. The learned A.R. before us submitted that the reasons given by the learned CIT(A) for doing so are wrong, contrary to the facts of the case and against the provisions of law. It is also argued by the learned A.R. that without prejudice the learned CIT(A) has erred in law and facts in upholding the disallowance of bad debts of `2,32,83,242/- written off in the books which are fully allowable as per provisions of Section 36(1)(vii) of the Income Tax Act, 1961 (hereinafter "the Act"). The learned A.R. also reiterated the same arguments as were raised before the CIT(A) and submitted that the assessee's business is run through franchisees/ management companies/distributors at local level with local partners and they are the backbone of assessee's business. The ground level network is looked after by these companies. These companies are running in losses as they are not in a position to meet the ends due to under declaration by Cable Operators (last mile connectivity). Hence to keep these companies afloat and continue to manage its network the assessee has given advances to the Distributors (business associates) from time to time over the years, who are managing the Network of the Company. During the year, the assessee has written off advances of `2,76,81,002/- over the years given to the management companies and also bad debts of `2,32,83,242/-, totalling to `5 09,64.2447- due to heavy losses suffered by these management companies, and these dues became irrecoverable. The advances written off are incidental and inextricably linked to the normal business of the assessee and are on revenue account and hence allowable under Section 36(1)(vii)/37(1) of the Act. In support as directed by Hon'ble ITAT the assessee submitted sample copies of agreements entered with Amritsar and Jalandhar management companies, wherein it was clearly mentioned that all capital investments are made by the assessee and these management companies are only authorised to run the business. It was also contended that `2,32,83,242/- pertains to bad debts which are written off hence, without prejudice to the entire claim of `5,09,64,244/-, the bad

debts written off in the books of account as allowable under Section 36(l)(vii). However, The AO failed to construe the typical facts of the business of the assessee and disallowed claim of the assessee on the ground that it is not found, that these are given in the normal course of trade. The learned CIT (A) upheld the order of AO on the ground that the advances have been given on capital account as held in assessment order under Section 143 (3) of the Act dated 22.12.2006.

6. We have heard the rival contentions, perused the material placed on record and the judgements cited by the parties. Before deciding the merits of the case it is necessary to evaluate the order passed by the CIT(A) leading to this ground. The learned CIT(A) has dealt with this ground in para 1.6 of his order, which is extracted below: -

> *"1.6. I have perused the documents filed by the appellant. The management agreement very clearly stipulates in section B that the ownership of the Cable TV Network would belong to SITI. The obligations of the distributor have been specified in section 4 of the agreement. I have perused the same and do not find any reference therein to any advances or loans. Hence, from the perusal of the agreement it is not clear as to for what purpose the loans/advances were given. Unfortunately the appellant has also not filed any copy of account or document from which the purpose of the advance/loan can be gathered. On the other hand, the 143(3) order, dated 22.12.2006, very clearly mentions that the resolution passed by the Board states that the advances were provided to develop infrastructure and to meet their fund requirements. I have perused the assessment record. The Board resolution, stating the above, has been filed vide submission dated 08-11-2006. A copy of the resolution is attached as Annexure A. Unfortunately the appellant has not found it convenient to file this resolution in the course of appellate proceedings. In fact the resolution dated 24-07-2004, filed alongwith the written submissions was never filed during the course of original assessment proceedings. In fact this resolution was also never filed in the proceedings u/s. 254. Therefore, this resolution constitutes additional evidence and cannot be considered in the circumstances. I am in agreement with the AO that the advances have been given on capital account and in any case have not been given in the regular course of business. Moreover, the assessee has not brought on record any documentary evidence to show apart from its own Board resolution that these advances are in fact irrecoverable or that the management companies are beyond redemption. Unlike section 36(2), for a claim of bad debt u/s. 37(1) the onus to provide that the debt has gone bad, lies on the assessee. In this regard reliance is placed on the third member*

decision of the Delhi Tribunal in the case of Pasupathi Newtech Ltd. 7 SOT 107. This ground of appeal is therefore ***dismissed****."*

7. After having gone through the orders passed by the Revenue authorities and after hearing the arguments at length we find that the learned CIT(A) has dismissed this ground by holding that the assessee has failed to prove the purpose for which the loans/advances were given and apart from that the assessee has also not filed any copy of accounts or document from which the purpose of the advances/loans can be gathered. Whereas in the contrary our attention was drawn towards the order of assessment at para 8 wherein it has been categorically mentioned that the assessee had made a claim on account of bad debts, loans and advances and inventories written off and the details have already been mentioned. Further it has been mentioned that the justification of claim of loans and advances written off by the assessee has been mentioned that the loans and advances are recoverable from management companies, managing the network of the company, hence related to the business of the assessee company. These companies have been incurring losses, hence these amounts are not recoverable. These expenses are incurred wholly and exclusively for the business of the company and hence allowable under Section 37 of the Act. The inventories are written off on account of damaged, shortage and realisable value. Hence, it is expenses wholly and exclusively for the purpose of the company's business allowable under Section 37 of the Act. Apart from the above the assessee has also submitted break up of loans and advances along with copy of the resolution passed by the Board of Directors in respect of the loans written off. The resolution passed by the Board of Directors states that the advances were provided to the managing companies to develop infrastructure and to meet their fund requirements. We have also considered the judgement cit4ed by the parties, more particularly in the case of CIT vs. DSP Merrill Lynch in ITA No. 1286 of 2008 dated 10.12.2008 wherein the Hon'ble Bombay High Court has held as under: -

"2. Perused the judgement and order of the Tribunal dated 3rd May, 2007. The Tribunal. The Tribunal gave its finding as under-

"2.4 The intial expenses directly incurred for raising capital are in nature and cannot be allowed by way of deduction as revenue expenditure. But the proposition would apply in a case where the expenditure incurred and the capital raised is by one and the same assessee. In the assessee's case, the expenses have been incurred by the assessee himself but the capital raised was not for the assessee but for the mutual funds, which are independent entities. As far as the assessee is concerned, its capital structure does not get increased by the capital, as the same was raised for the mutual funds.

2.5 The nature of the expenses is to be seen in the context of the business of the assessee. The assessee is the business of asset management. The asset management business, inter alia, governed by the Securities & Exchange Board of India (in short SEBI). There is nothing on record to suggest out that the assessee had in any manner violated the Rules and Regulations set out by the said Regulatory Authority. For the purposes of conducting its business, there was no bar on the assessee to incur expenses, otherwise than the expenses incurred were not in dispute. The expenses incurred were the assessee's own expenditure and it was a part and parcel of the profit-making activity of the assessee. The expenditure had a direct nexus with the assessee's own business of asset management. There was no valid basis to treat the expenses in question as capital in character, as incurring of such expenditure did not result in any creation of any capital asset. No benefit of long and enduring nature had been derived by incurring the said expenditure. The Schemes under reference, and the business of the assessee is independent activities of each other. The expenses incurred by the assessee was an independent entity for conducting its own business of asset management could not be disallowed as capital expenses by linking them with the raising of funds for the Schemes of Mutual Funds, which are again independent entities."

3. In view of the above findings and fact, we do not find any substantial question of law involved in the appeal, which is accordingly dismissed."

In the order in ITA No. 129/Mum/2014 the Coordinate Bench of the Tribunal relied upon the following judgements wherein it was held us under: -

"b. Chenab Forest Co. V CIT [1974] 96 ITR 568 (J&K)

Assessee, a forest lessee advanced money to sub-contractors appointed to exploit forest - Advances were adjusted against ultimate payment due to them - Due to non-extension of lease in favour of assessee some of advances could not be recovered from such contractors which were originally claimed as bad debts but was rejected as not fulfilling condition under section 36(2) - Assessee then claimed that amount in question should be allowed as business

expenditure under section 37(1) - Whether in view of fact that nature of business and system of working of assessee being such that it was necessary to make advances to carry on business, it could be concluded that advances were paid in ordinary course of business and therefore, assessee was entitled to deduction under section 37(1) - Held, yes"

c. CIT v Pure Beverages Ltd. [1994] 209 ITR 131 (GUJ.)

Section 37(1) of the Income-tax Act,1961 - Business expenditure - Allowability of - Assessment year 1975-76 - Assessee-company, a dealer in soft drinks, made arrangement with a bank to make advances to its dealers for purchase of electronic coolers which were necessary for chilling soft drinks - Assessee reimbursed to bank losses on account of non-recovery of amounts from dealers - Whether liability to bank was incurred in course of carrying on assessee's business and was in nature of allowable revenue expenditure - Held, yes"

8. We have also considered the judgement of the Hon'ble Supreme Court in the case of Goodlass Nerolac Paints Ltd. 118 ITR 187 wherein it was held as under: -

"(ii) that the amount lying to the credit of the assessee with the Chartered Bank, Karachi, represented sale proceeds of the assessee's stock-in-trade which had become bad. When two facts are proved, namely, that the debt is a trade debt and that it had become bad, the court should not interfere with the decision of the assessee in writing off the amount in a particular year unless there is anything patently wrong with the assessee's decision. Accordingly, the Tribunal was right in law in holding that the amount of Rs.51,451/- was a trading loss of the assessee which arose in the previous year relevant to the assessment year 1970-71 and that the same was deductible."

9. Apart from this we have also gone through the judgement of the Tribunal in the case of Jindal Iron & Steel Company Ltd. vs. DCIT (2013) 33 taxmann.com 96 wherein it was held as under: -

"The Calcutta High Court also in the case of Union Bank of India (supra), has held that the resolution approving and accepting the recommendation relating to the treatment of certain items must relate back to the date upto which the accounts are finalised and such determination or approval must be treated as being effective from that date. By being retrospective effect, the nature and character of the entries have not been changed. From the proposition laid down by the aforesaid decisions, we hold that even the board resolution was passed in May 2002, with regard to the approval of writing-off the

amount as irrecoverable in the accounts, it will relate back to that previous year in which it is being treated as irrecoverable and written off in the accounts of the assessee. There is no such condition in the said clause i.e., clause (vii) of sub-section (1) of section 36 that the decision for treating debt as bad or irrecoverable should be taken in the previous year itself. If the books of account are not closed and completed, it is permissible to make adjustments before being finally adopted. Thus, we do not find any merit in such a conclusion drawn by the learned Commissioner (Appeals)."

10. Therefore, keeping in view the agreement as filed by the assessee wherein it is clearly mentioned that all the capital investments are made by the assessee in these management companies are only authorised to run business. Even otherwise the bad debt written off in the books of account are also allowable under Section 36(1)9vii) of the Act. Therefore, keeping in view our above observations we delete the disallowance made by the AO.

11. Next Ground raised by the assessee relates to challenging the order of the CIT(A) in upholding the disallowance of `2,23,59,985/- out of Bandwidth charges on account of non-deduction of TDS on payments made to non-resident company relying on retrospective introduction of Explanation 6 to Section 9(1)(vi) of the Act.

12. The learned A.R. again reiterated the same arguments as raised by him before the learned CIT(A). The assessee requires Bandwidth for its business of providing Internet on Cable to its subscribers. The assessee has taken Bandwidth from a USA based company and paid for it without deducting tax at source as the income does not accrue and is not taxable in India. The assessee submitted the copy of agreement with New Skies Satellites in support of its claim, as was directed by Hon'ble ITAT. The payment made for bandwidth charges is not disputed by the predecessor AO or learned CIT(A). The AO agreed that the payment is for Bandwidth Charges, however, disallowed the same under Section 40(a)(i) of the Act for non-deduction of tax at source based on the premise that payment made is covered under Explanation 6 to section 9(1)(vi) of the Act, treating the same as payment made for royalty. Thus, the learned CIT(A) erred in

upholding the order of AO relying on retrospective introduction of Explanation 6 to Section 9(1)(vi) of the Act.

13. On the other hand, the learned D.R. relied upon the orders passed by the Revenue Authorities.

14. We have heard the rival contentions, perused the material placed on record and the judgements cited by the parties. Before deciding the merits of the case it is necessary to evaluate the order passed by the CIT(A) leading to this ground. The learned CIT(A) has dealt with this ground in paras 2.1 and 2.2 of his order, which is reproduced as under: -

> *"2.2 I have examined the fact on record and the submission of the appellant. On page 48-50 of the paper book dated 06-06-2014, the appellant has placed on record the agreement with News Skies Satellite. A copy of the agreement is attached at Annexure 8 of this order. As it is quite apparent, this agreement is absolutely illegible. I have also tired to peruse the copy filed with the AO. The same is also illegible. This was pointed out to the AR. As noted in the order sheet entry on 03-09-2014, the AR has accepted that a clear copy was not available. The directions of the Tribunal are quite clear, in as much as, that a decision has to be taken after examining the agreement in question. The onus to file a clear and legible copy of the agreement would be on the assessee, in the absence of such a copy the issue cannot be examined.*
>
> *2.3 Regarding the retrospective introduction of Explanation 6 to section 9(1)(vi), satellite up-linking fee has not been included in the definition of 'process' for the purposes of 'royalty'. The appellant* has contended that this amendment cannot be implemented retrospectively and that the provisions of DTAA with Netherlands would override. As far as the question of DTAA with Netherlands is concerned I find that the appellant had never relied upon the DTAA either before the Tribunal or the AO. Moreover, in the absence of a legible copy of the agreement even this issue cannot be decided. As regards the applicable of the retrospective amendment I find that the Delhi High Court in the case of TVtoday Network Ltd., 41 taxman.com 192 has clearly held that the retrospective amendment would make the decision of the Asia Satellite Communication Ltd. obsolete and the disallowance made u/s. 40(a)(ia) was upheld."

15. After having gone through the order passed by the Revenue Authorities as well as after hearing the parties we found that the Revenue Authorities although agreed that the payment is for Bandwidth charges

but disallowed the same under Section 40(a)(ia) for non-deduction of TDS, The payment is covered under Explanation 6 to Section 9)1)(vi) of the Act treating the same as payment made as royalty.

16. The learned A.R. relied upon the decision of the Coordinate Bench in the case Channel Guide India Ltd. vs. ACIT 139 ITD 49 (Mum) wherein it was held that TDS liability cannot be imposed on the assessee for retrospective change. In this respect, at the very outset, we have gone through the order passed by the Coordinate Bench, wherein it was held as under: -

> *"The issue involved in the instant case, however, was relating to disallowance made under section 40(a)(i) for non-deduction of tax-at-source from the payment made by the assessee to SSA and as held by Ahmedabad Bench of this Tribunal in the case of Sterling* Abrasives Ltd. v ITO *[ITAppeal Nos. 2343 & 2344 of 2008] the assessee could not be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective effect. In the said case,* Explanation *to section 9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1-6-1976 and it was held by the Tribunal that it was impossible for the assessee to deduct tax in the financial year 2003-04 when as per the relevant legal position prevalent in the financial year 2003-04, the obligation to deduct tax was not on the assessee. The Tribunal based its decision on a legal maxim lex non cogit ad impossiblia meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform and relied on the decision of Supreme Court in the case of* Krishnaswamy S. Pd. v. Union of India *[2006] 281 ITR 305/151 Taxman 286 wherein the said legal Maxim was accepted by the Apex Court [Para 25]*
>
> **Payment made by assessee to non-resident not taxable**
>
> *In view of the above discussion, one was of the view that the amount in question paid by the assessee to SSA was not taxable in India in the hands of SSA either under section 9(1)(vi) or 9(1)(vii) as per the legal position prevalent at the relevant time and the assessee therefore was not liable to deduct tax at source from the said amount paid to SSA and there was no question of disallowing the said amount by invoking the provisions of section 40(a)(i). In that view of the matter, the disallowance made by the Assessing Officer under section 40(a)(i) and confirmed by Commissioner (Appeals) was to be deleted and the assessee 's appeal was to be allowed. [Para 26]"*

17. The learned A.R. also relied upon the order passed by the Coordinate Bench in the case of ACIT vs. NGC Networks (I) P. Ltd. (2014) 48 taxmann.com 149 wherein it was held as under: -

> *"Section 9, read with section 194J of the Income-tax Act, 1961, read with article 12 of Model OECD Convention – Income –Deemed to accrue or arise in India (Royalties) – Assessment year 2009-10 – Whether channel placement fee paid by assessee to cable TV operator/DTH provider could not be regarded as royalty in terms of Explanation 2 to section 9(1)(vi) and, thus, assessee was not required to deduct tax at source under section 194J while making payment in question – Held, yes [Para 5] [In favour of assessee]"*

18. This decision of the Coordinate Bench was upheld by the Hon'ble Bombay High Court wherein it was held that a party cannot be called upon to perform an impossible Act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment and the Hon'ble Bombay High Court while reaching to the said conclusion has also consider the view taken by the Court in the case of CIT vs. Cello Plast (2012) 209 Taxmann 617 wherein the court has applied the legal maxim lex non cogit ad impossibilia. Respectfully following the ratio laid down in the above decision, we allow this ground.

19. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 26th September, 2018.

Sd/-	Sd/-
(R.C. Sharma)	**(Sandeep Gosain)**
Accountant Member	**Judicial Member**

Mumbai, Dated: 26 September, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -3, Mumbai*
4. *The CIT - 11, Mumbai*
5. *The DR, "E" Bench, ITAT, Mumbai*

By Order

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