

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4386/Del./2016
(ASSESSMENT YEAR : 2009-10)**

ACIT,
Central Circle 25,
New Delhi.

vs. M/s. Microwave Communication Ltd.
1st Floor, 8, Masjid Moth,
Greater Kailash Part – II,
New Delhi – 110 048.

(PAN : AAACM3430B)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : None

REVENUE BY : Shri N.K. Bansal, Senior DR

Date of Hearing : 03.06.2019

Date of Order : 10.06.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, ACIT, Central Circle 25, New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeal sought to set aside the impugned order dated 04.05.2016 passed by the Commissioner of Income-tax (Appeals)-I, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the interest payment of Rs. 1,75,49,816/- made by the AO on account of delayed payment of license fee to Department of Telecommunications without appreciating the fact that the

license fee is a capital expenditure and any payment of license fee including the interest fall within the purview of Section 35ABB.

2. That on the facts and in the circumstances of the case, the Ld. CIT (A) erred in law and on facts in deleting the interest of Rs.1,75,49,816/- made by AO on account of delayed payment of license fee to Department of Telecommunications without appreciating the fact that the Hon'ble Delhi High Court has remanded the matter back to the AO vide its order dated 23.03.2015(ITA No. 1738/2010, 1739/2010 and 799/2014) by holding that if payment was related to license fee payable period prior to 31st July 1999 then it would be capitalized and if payment was related to the subsequent period then it was revenue in nature.

3. That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.

4. That the grounds of appeal are without prejudice to each other.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : assessee is into the business of providing radio paging services, call centre services and also trading in pagers and accessories. Assessee's major clients are M/s. Bharti Airtel Ltd., HDFC Bank, Mother Dairy, Delhi and Tata Teleservices in Delhi. Assessing Officer noticed that the assessee has debited an amount of Rs.1,75,49,816/- on account of interest on licence fess and others having been debited to profit & loss account because there is a delay in payment of licence fee paid to Department of Telecommunication (DoT), which falls within the purview of provision contained under section 35ABB of the Income-tax Act, 1961 (for short 'the Act'). AO called upon the

assessee to explain as to why licence fee expenditure is not treated as capital expenditure. Declining the contentions raised by the assessee, AO proceeded to hold that interest paid in acquiring licenses to operate telecommunication services is a part of cost of capital assets for acquiring the right and same is not allowable u/s 36(1) and 37 (1) of the Act and thereby made additions thereof to the total income of the assessee.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the addition by partly allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. Assessee has not preferred to put in appearance despite issuance of the notice and consequently, we proceeded to decide the present appeal with the assistance of the Id. Senior DR as well as on the basis of documents available on the file.

5. We have heard the Id. Sr. Departmental Representative for the revenue to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. At the very outset, Id. DR for the Revenue has brought to our notice *order dated 23.03.2015 passed by the Hon'ble Delhi High Court in assessee's own case bearing ITA 1738/2010 & ITA*

1739/2010 for earlier years whereby identical issue as to whether payment of interest on licence fees is to be treated as revenue or capital in nature has been remanded back to the Assessing Officer to pass appropriate order in the light of the directions issued by Hon'ble High Court by returning following findings :-

“4. The revenue urges that the interest on payment qua the license fee, could not be amortised in view of Section 35ABB of the Income Tax Act. In other words, the question is whether the licence fee payable by telecom service providers to the Department of Telecommunications is to be treated as capital or revenue expenditure. It is not disputed that this issue was considered by Division Bench of this Court in judgment reported as Commissioner of Income Tax V. Bharti Hexacom (2014) 221 Taxman 323 (Del.). The findings of the said judgment and the operative directions are in the following terms :

“47. In view of the aforesaid findings, the substantial question mentioned above in item Nos.1 to 9 is answered in the following manner:

- (i) The expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable upto 31st July, 1999 should be treated as capital expenditure and licence fee on revenue sharing basis after 1st August, 1999 should be treated as revenue expenditure.*
- (ii) Capital expenditure will qualify for deduction as per Section 35ABB of the Act.*

48. The appeal ITA No. 417/2013 by the Revenue in the case of Hutchison Essar Pvt. Ltd., pertains to the assessment year 1999-2000i.e. year ending 31st March, 1999. It is for the period prior to the period 31st July, 1999. As per the discussion above, the licence fee payable on or before 31st July, 1999 should be treated as capital expenditure and the licence fee payable thereafter should be treated as revenue expenditure. In view of the aforesaid position, the question of law admitted for hearing in this appeal as recorded in the order dated 21st August, 2013, has to be answered in favour of the revenue and against the respondent assessee.

49. *In ITA Nos.893/2010 and 1333/2010, an additional issue arises for consideration. This additional issue relates to interest on delayed payment of license fee and whether the same was capital or revenue expenditure. By order dated 18th September 2012, the following substantial question of law was admitted for hearing and disposal:-*

Whether the Tribunal fall into error in holding that the interest on the delayed payment of license fee also partook of the same nature as license fee and was deductible as revenue expenditure?

50. *We are inclined to pass an order of remand on this question as we find that the facts on the said aspect are not lucid and clear. In the assessment-year 2000-01, the assessment year subject matters of ITA 893/2010 and 1333/2010 in the case of Bharti Cellular Ltd. and Bharti Telenet Ltd. now known as Bharti Infotel Ltd., the assessee had paid interest of Rs.1.75 crores and Rs.2.24 crores to the Department of Telecommunication for delayed payment of license fee. The Assessing Officer disallowed the said payments observing that these were on capital account. The assessment order records that no details had been furnished and the expenses pertained to prior period. The payment was considered to be capital in nature because the license fee was also capital expenditure.*

51. *Commissioner (Appeals) in the case of Bharti Cellular Ltd.(ITA 893/2010) held that interest paid was capital expenditure because license fee itself was capital in nature. The said opinion was followed by Commissioner (Appeals) in the case of Bharti Telenet Ltd., now known as Bharti Infotel Ltd. The answer to the question would depend upon the finding whether payment related to license fee payable period prior to 31st July, 1999 or was for the subsequent period. If interest paid was in respect of license fee payable for the period prior to 31st July, 1999, it will have to be capitalised. Similarly, if the interest was payable on license fee for the period post 31st July, 1999, it should be treated as revenue in nature/character. The contention that it was a prior period expense does not appeal to us and has to be rejected, as the interest was paid during the year in question.*

52. *Learned counsel for the assesseees has submitted that there cannot be any factual dispute that this interest was paid to the Department of Telecommunication on delayed payment of license fee under the 1999 policy and not on account of license fee payable for period prior to 31st July, 1999. We cannot from the facts on record, decipher the exact details as this aspect has not been examined by the*

tribunal. The tribunal has held that interest paid was revenue in nature because the license fee payable itself was revenue in nature, irrespective of fee payable prior to 31st July, 1999. We have held to the contrary. The said question of law, therefore, is answered in favour of the Revenue and against the respondent-assessee but with an order of remand to decide the controversy afresh keeping in view the observations made above.”

5. The questions of law urged by the revenue are therefore covered in terms of the above judgment which the Court follows. The matter is accordingly remitted to AO, who shall pass appropriate orders in the light of the directions contained in para 51 and 52 (extracted above). The question of law is decided in favour of the revenue. The appeals are partly allowed.”

7. Keeping in view the fact that identical issue as to whether making payment of licence fee including interest is a capital expenditure falling within the purview of section 35ABB has already been remanded back by the Hon'ble High Court in assessee's own case to AO to decide afresh in view of the directions made therein, the same issue qua AY 2009-10 is also remanded back to the AO to decide in view of the directions issued by Hon'ble Delhi High Court in assessee's own case (supra), after providing an opportunity of being heard to the assessee. Consequently, appeal filed by the Revenue is hereby allowed for statistical purposes.

Order pronounced in open court on this 10th day of June, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 10th day of June, 2019/TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-I, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.