IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI

BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM

ITA No. 3047/Mum/2018
(**Assessment Year :2012-13**)

M/s. Hathway Cable & Datacom Limited Rahejas, 1st Floor Corners of Main Avenue & V.P.Road, Santa Cruz (West) Mumbai – 400 054	Vs.	The Assistant Commissioner of Income Tax, Circle-12(2)(2) Mumbai
PAN/GIR No. AAACC6814B		
(**Appellant**)	..	(**Respondent**)

ITA No.2733/Mum/2018
(**Assessment Year :2012-13**)

The Deputy Commissioner of Income- Tax Circle-12(2)(2), Room No.145, 1st Floor, Aayakar Bhavan M.K.Road Mumbai-400 020	Vs.	M/s. Hathway Cable and Datacom Limited Rahejas, 4th Floor Corners of Main Avenue & V.P.Road Santacruz (W) Mumbai – 400054
PAN/GIR No.AAACC6814B		
(**Appellant**)	..	(**Respondent**)

Assessee by	Shri Nitesh Joshi & Shri Manoj C. Dixit
Revenue by	Shri Manoj Kumar Singh
Date of Hearing	**15/07/2019**
Date of Pronouncement	**17/07/2019**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.3047/Mum/2018 for A.Y.2012-13 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-20,

Mumbai in appeal No.CIT(A)-20/ACIT-12(2)(2)/IT-11105/2015-16 dated 20/12/2017 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2015 by the ld. ACIT-12(2)(2), Mumbai (hereinafter referred to as ld. AO). Since identical issues are involved in these appeals, they were heard together and are being disposed off by this consolidate order, for the sake of convenience.

2. Let us take up the assessee appeal first. The first issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in upholding the disallowance made towards software expenses by treating the same as capital expenditure and granting depreciation thereon as against the claim of revenue expenditure of the assessee in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is engaged in the business of cable network services and internet service provider. The return of income for the A.Y.2012-13 was filed by the assessee on 29/09/2012 declaring total loss of Rs.33,50,55,968/-. The ld. AO observed that during the year under consideration, the assessee has debited expenditure under the head 'software and programming cost' amounting to Rs.1,76,91,592/-. Out of total expenditure, the ld. AO on verification of the details sought to disallow a sum of Rs.84,04,076/- paid by the assessee to Hathway Visual For Channel Maintenance cost treating it as capital expenditure and thereby allowing depreciation claim on it @60%

of Rs.50,42,446/- and disallowed the balance amount of Rs.33,61,630/- in the assessment. The assessee submitted that the said expenditure incurred are in the nature of maintaining its local channel which shows various programmes like movies, news, local events etc. The assessee submitted that the 'software and programming cost' is the nomenclature used for describing expenditure. However, the said expenditure are not at all capital expenditure. The assessee submitted that it has shown daily content in their local cable channel which includes movies, news, live event, local events recording etc . It has no material value after telecasting of the same is over. The Hathway Visual is providing the facility like providing movies, editing programs, cassette converted into CD etc. The assessee is in cable business and is showing separate channels which have various programs, movies etc. The assessee needs to prepare prerecorded program CD of around 20-22 hours containing various recorded programs, movie etc. This work is done by Hathway Visual Network Pvt. Ltd. on behalf of the assessee. These charges are cost incurred to maintain the local channel. It was pleaded that the software could also undergo changes if there are changes suggested by TRAI, changes in classification of channels etc. The assessee submitted that no new asset was created by incurring the expenditure. The assessee submitted that it is in the business of cable network service and it is part of that it has shown their contents for their viewers. The assessee

therefore, submitted that it has incurred the expenditure wholly and exclusively for the purpose of business and not in the nature of capital expenditure. The assessee submitted that though nomenclature has been used in accounts for the said expenses i.e. software and programming cost, it does not include any expense for purchase of software program or development of software as has been erroneously conceived by the ld AO.

3.1. The ld. CIT(A) observed that assessee has booked the expenditure under the head 'software and programming charges'. He observed that the ld.AO had given a finding that the said expenditure represented cost of software purchased by the assessee and accordingly upheld the action of the ld. AO in treating the same as capital expenditure and granting depreciation thereon.

4. Aggrieved, the assessee is in appeal before us.

5. We have heard rival submissions. At the outset, we find that assessee is engaged in the business of cable network operations wherein it is bound to show lot of content in the form of movies, news, live events, local events, recording etc., in the normal course of this cable TV operations to its subscribing customers. The assessee had pleaded before the lower authorities that the content in the form of news, live events, local events does not have any value once the same is telecasted / exhibited once in the cable TV. Thereafter, the value of the said content

practically becomes Nil and there is no enduring benefit to the assessee from the same. We find that assessee had also pleaded that in respect of pre-recorded movies, the said work is done by Hathway Visual Network Pvt. Ltd., which is a different entity, on bahalf of the assessee. Hence, this goes to prove that even the contents in the form of movies are not held by the assessee. Hence, there is no question of any enduring benefit that is being derived by the assessee in the capital field warranting capitalization of such expenditure. Hence, this is a clear case of assessee deriving enduring benefit in the revenue field which is in the form of repeated telecast of the same content like movies / repeated reality shows etc. There is no dispute that the said expenditure is incurred for business purposes and what is disputed before us is as to whether the same has to be treated as capital or revenue expenditure. In view of the aforesaid observations, we hold that the said expenditure incurred by the assessee is only revenue in nature. Accordingly, the original ground raised by the assessee is allowed.

6. We find that the assessee had also raised an additional ground with regard to disallowance made u/s.14A of the Act together with a separate application for admission of the said additional ground. We find from the said petition that assessee had pleaded that it had not earned any exempt income during the year under consideration and accordingly, no disallowance u/s.14A of the Act would apply on the same. We also find

that there is a categorical finding by the ld. CIT(A) in his order to this effect in para 5.4.1. at page 7 of his order. Hence, we deem it fit to admit this additional ground of appeal raised by the assessee with regard to the disallowance u/s.14A of the Act as it goes to the root of the matter and does not involve any fresh verification of facts. We find that the Hon'ble Supreme Court in the case of Maxopp Investment reported in 402 ITR 640 had already held that when there is no exempt income, no disallowance u/s.14A of the Act could be made in the hands of the assessee. At the same time, in the instant case, the assessee had voluntarily made suomoto disallowance of Rs.65,54,786/- u/s.14A of the Act, to which extent, the ld. CIT(A) had confirmed the disallowance u/s.14A of the Act. In other words, the ld. CIT(A) restricted the disallowance u/s.14A of the Act to the sum of Rs.65,54,786/- as against the disallowance made by the ld. AO in the sum of Rs.6,37,16,226/- under the second and third limb of Rule 8D(2) of the rules.

6.1. We find that on this issue u/s.14A of the Act, both assessee as well as the revenue is in appeal before us. With regard to the objection raised by the ld. DR that even though there is no exempt income in the facts and circumstances of the instant case, disallowance u/s.14A in the sum of Rs.65,54,786/- should be made as the same was voluntarily made by the assessee in the return of income, we find that when there is no exempt income claimed by the assessee, the disallowance u/s.14A of the Act

would not come into operation at all. It is well settled that there is no estoppel against the statute. The revenue cannot take advantage of the suomoto disallowance inadvertently / erroneously made by the assessee in the return of income. We find that the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., reported in 349 ITR 336(BOM) wherein it was held as under:-

> *"An assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion to permit such additional claims to be raised. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words "could not have been raised"* D *must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts.*
>
> Held, *dismissing the appeal, that the orders of the Commissioner (Appeals) and the Tribunal clearly indicated that both the appellate authorities had exercised their jurisdiction to consider the additional claim. The conclusion that the error in not claiming the deduction in the return of income was inadvertent could not be faulted for more than one reason. It was a finding of fact which could not be termed perverse. There was nothing on record that militated against the finding. The Revenue had not suggested much less established that the omission was deliberate or mala fide. Both the appellate authorities had themselves considered the additional claim and allowed it. They had not remanded the matter to the Assessing Officer to consider it. Both the orders expressly directed the Assessing Officer to allow the deduction of Rs. 40 lakhs under section 43B of the Income-tax Act, 1961. The Assessing Officer had, therefore, now only to compute the assessee's tax liability which he must do in accordance with the orders allowing the assessee a deduction of Rs. 40 lakhs tinder-section 43B"*

6.2. Respectfully following the same, we direct the ld. AO to delete the disallowance made in the sum of Rs.65,54,786/- u/s.14A of the Act in the

peculiar facts and circumstances of the case. Accordingly, the additional ground raised by the assessee is allowed and grounds raised by the revenue are dismissed.

6. In the result, appeal of the assessee is allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on this 17/07/2019

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 17/07/2019

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai